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August 1, 2023

Dr. Miguel A. Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202-7100

Ms. Katherine Neas
Deputy Assistant Secretary
Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202-7100

RE: Docket ID ED-2023-OSERS-0052; RIN 1820-AB82

Dear Secretary Cardona and Deputy Assistant Secretary Neas,

Children should not face unnecessary burdens in receiving the health care that they need. First Focus on Children, a bipartisan advocacy organization dedicated to making children and families the priority in federal budget and policy decisions, writes to provide our support for the proposed revisions to 34 CFR 300.154(d)(2). We believe these changes will, most importantly, result in fewer barriers to accessing health care services for children with disabilities. The changes would also streamline and reduce administrative burdens for schools and school districts as physical and behavioral health providers in the schools strive to meet the health care needs of students.

Background

Medicaid and CHIP cover over 42.1 million children.¹ They are essential programs for meeting the physical and behavioral health needs of children. This is especially true for children with disabilities, including those receiving services under the Individuals with Disabilities Education Act (IDEA). Many children with disabilities receiving services under IDEA are also enrolled in Medicaid due to their disability status and/or based on their household's income. By the Department of Education's own estimation nearly 300,000, or 56%, of children with disabilities are covered by Medicaid or CHIP.

Medicaid provides an array of health services and benefits that are necessary for children with disabilities to benefit from a free appropriate public education. Specifically, the most relevant benefit for purposes of IDEA is the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) benefit. This benefit provides screening and preventive care to children enrolled in Medicaid under the age of

¹ Centers for Medicare & Medicaid Services (CMS), Medicaid and CHIP Enrollment Trend Snapshot (March 2023), <https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/downloads/march-2023-medicaid-chip-enrollment-trend-snapshot.pdf>.

21, as well as services necessary to correct health problems identified through screening. In addition to EPSDT, Medicaid's relevance to IDEA children is its coverage of durable medical equipment such as wheelchairs, ventilators, and prosthetic devices. Medicaid also covers therapy services for children with orthopedic impairments and speech disorders; vision-related screening and diagnostic services and eyeglasses for children with visual impairments; and audiology services and hearing aids. For children with developmental disabilities, services like psychosocial rehabilitation and personal care services may be covered under special Medicaid waiver programs.

Beyond the direct benefits provided to children, Medicaid also serves as a critical source of funding for student health services, providing significant, sustainable funding for physical and behavioral health services. In FY 2021, over \$4 billion of school-based services were funded by Medicaid.² In that same fiscal year, an additional \$1.7 billion of school-based administration costs were also reimbursed by Medicaid.³

Overall, Medicaid's support is essential for filling gaps in funding, providing comprehensive healthcare coverage, and offering additional services that can enhance the educational experience and overall quality of life for children with disabilities who are eligible for IDEA Part B services.

Comments

The proposed rule eliminates an additional barrier to health care services for children with disabilities that is not faced by their peers without disabilities. Currently, Medicaid regulations do not require Medicaid agencies or providers to obtain consent prior to exchanging an individual's personally identifiable information (PII) for a purpose directly connected to the administration of the Medicaid state plan, which includes billing Medicaid for providing services to enrollees. Enrollment in the program is sufficient for such purposes. However, the Family Educational Rights and Privacy Act (FERPA) and the IDEA require parental consent before disclosing PII, the transfer of which is often necessary to bill Medicaid, 34 CFR 99.30 (FERPA) and 34 CFR 300.622 (IDEA). In addition to the FERPA/IDEA PII transfer consent requirement, parents of Medicaid-enrolled children with disabilities are required to give consent before a school can access their child's Medicaid for the first time to provide or pay for required services under IDEA Part B. Such additional requirement does not exist for accessing services provided to Medicaid-enrolled children without disabilities. This added layer of consent for Medicaid-enrolled students with disabilities is unfair, unnecessary, duplicative, and only serves as a barrier for children with disabilities receiving health-related services in their schools. We support its elimination as proposed.

Even with eliminating the consent requirement under 34 CFR 300.154(d)(2)(iv), children's privacy and benefits will still be protected by federal regulation. First, parental consent will still be required, under FERPA and IDEA, to release a child's PII for Medicaid billing purposes. Second, the proposed rule, as currently drafted, would maintain the requirement for an annual written notification to parents that includes the notice of the "no cost" provisions in 34 CFR 300.154(d)(2)(i) through (iii), which provide several protections: 1) that a child is not required to enroll in Medicaid to receive a free, appropriate public education (FAPE); 2) the child's family is not required to pay for certain out-of-pocket costs; and 3) a child's Medicaid benefits cannot be used if the use would decrease lifetime coverage or cause other financial consequences. We are happy to see these protections remain in regulation and would

² CMS, Medicaid Financial Management Report (FY 2021), *available at* <https://www.medicaid.gov/medicaid/financial-management/state-expenditure-reporting-for-medicaid-chip/expenditure-reports-mbescbes/index.html>

³ *Ibid.*

recommend that the rule be finalized so that the “no cost” provisions continue to be included in written notification prior to accessing a child’s benefits or insurance for the first time and annually thereafter.

Conclusion

First Focus on Children thanks you for the opportunity to comment on this issue. This proposed rule is a commonsense change that will align public benefits consent requirements regardless of a child’s disability status, greatly improving access to needed health care services for children with disabilities enrolled in Medicaid. Quite simply, if you were to ask kids impacted by this change how they felt about it, we think they would say, “It sounds good to us!”.

Should you have any questions regarding our comments, please contact Abuko D. Estrada, Vice President for Medicaid and Child Health Policy, at abukoe@firstfocus.org.

Respectfully,



Bruce Lesley
President, First Focus on Children