



The Arc  
2000 Pennsylvania Ave NW, Suite 500  
Washington, DC 20006

T 202 534-3700  
F 202 534-3731  
thearc.org

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Rebecca Walawender  
Director U.S. Department of Education  
400 Maryland Ave. SW, Room 5130  
Potomac Center Plaza  
Washington, DC 20202

RE: Docket ID ED–2023–OSERS–0052: Assistance to States for the Education of Children with Disabilities

Dear Director Walander:

I write on behalf of The Arc of the United States, a national organization dedicated to advocating for the rights and well-being of individuals with intellectual and developmental disabilities (IDD). We appreciate the opportunity to provide comments on the Office of Special Education and Rehabilitative Services, Department of Education’s notice of proposed rulemaking (NPRM) to “amend the Individuals with Disabilities Education Act (IDEA) Part B regulations to remove the requirement for public agencies to obtain parental consent prior to accessing for the first time a child’s public benefits or insurance (e.g., Medicaid, Children’s Health Insurance Program (CHIP)) to provide or pay for required IDEA Part B services.”

The Arc of the United States has nearly 600 state and local chapters across the United States. These chapters provide a wide range of services for people with intellectual and developmental disabilities (IDD), including individual and systems advocacy, public education, family support, systems navigation, support coordination services, employment, housing, support groups, and recreation. The Arc chapters are committed to improving the lives of people with IDD and their families.

The Arc appreciates the efforts of the Department to increase IDEA-eligible students’ access to school-based services and increase funds for schools. The proposed rule and the recent CMS guidance demonstrate the Department’s recognition that many students are not able to fully access all supports and services to which they are entitled under their Individualized Education Plans (IEPs). Additionally, The Arc appreciates the Department’s goal of better aligning the processes for obtaining reimbursement for Medicaid-eligible services for IDEA-eligible students and non-IDEA-eligible students. While recognizing the honorable intentions of the Department in the proposed rule to remove the current requirements to obtain first time parental consent” to bill Medicaid, The Arc asks the Department to:

- work closely with the Centers for Medicare and Medicaid Services (CMS) to improve state implementation of Medicaid for IDEA-eligible students;
- collaborate with the Centers for Medicare and Medicaid Services (CMS) to address the barriers to school districts receiving their Medicaid-reimbursement funds; and,
- submit guidance that increases the information parents are provided about the Medicaid billing process and the potential consequences to outside services they may face, including in plain language.

The Arc has heard from advocates both within our constituency and in the greater disability community that access to services offered outside of schools is directly affected by Medicaid billing in schools. Parents are routinely informed, sometimes even after services in other settings have already been rendered, that the Medicaid agency has deemed them duplicative with school-based services and their coverage is denied. Children receiving extensive services outside of the school often lose this coverage due to the Medicaid agency or MCO determining that they have received those services on the same day or even just because they are the same type of provider offering them. Despite the existence of the “no cost” guardrails at §300.154(d)(2)(i) through (iii) already in place to prevent this type of scenario from occurring, MCOs and/or the state Medicaid agency routinely ignore the requirement to cover services in other settings for Medicaid-enrolled kids whose healthcare services are billed to Medicaid in the school setting. The Arc recognizes that these issues should not occur under current law and there are significant and problematic implementation issues of the 3rd Party billing process. It is critical the Department work with CMS to rectify these issues so that Medicaid pays for the outside services children are entitled to, regardless of the services they receive under IDEA in school. Additionally, we recommend that the Department provide clarity on due process procedures when services are denied outside of the schools based on those offered within them. Parents need to know that if they provide consent for the in-school service and they are getting a non-duplicative out-of-school service, that the Medicaid agency or MCO has no right to cut or deny that out-of-school service. Parents must have the right to appeal the cut to benefits and to receive continuing services while the appeal is being adjudicated (aid paid pending) so long as they appeal within 10 days.

The Arc recognizes the financial constraints that school districts are under—exacerbated by Congress’ failure to live up to its promise of providing 40% of the excess cost of educating students with disabilities. Schools should be able to access reimbursements for Medicaid-eligible services and utilize those funds to increase services for IDEA-eligible students. However, we know that not all school districts receive the funds for which they are billing Medicaid. During a stakeholder webinar between the Centers for Medicare and Medicaid Services (CMS) and the Department of Education regarding this NPRM and the new Medicaid claiming guide for the schools, CMS staff publicly stated that they cannot compel state Medicaid agencies to ensure that the funds generated by schools billing Medicaid will return to them. They “encourage” agencies to do so, but ultimately rely on agencies and sometimes school districts to make sure the dollars generated become dollars received. This CMS encouragement is simply not a strong enough incentive for agencies to direct funding to schools. Thus, it is imperative that the Department work directly with CMS to address the known and ongoing problems which plague districts from receiving reimbursements via Medicaid. The Department should convey a stronger message that billable Medicaid funds must be used for IDEA-specific services.

Parental consent has been a critical component of IDEA since its inception—highlighted in both statute and regulation. IDEA has made it clear through multiple iterations that parents and students should be at the heart of every decision throughout the IEP process. Consent is a bedrock principle to ensure the provision of civil rights, due process protections, and ensuring equitable provision of services for students. Unfortunately, consent does not always equate with understanding. We have heard from constituents that they are often asked to sign documents that are not explained to them, or explained without important context or implications. Parents should be informed that, while not allowed, cuts to Medicaid services because of school-based billing is something that can happen—and in some states happens regularly. While the “no cost” provisions are helpful in theory, schools cannot guarantee that accessing a student’s public benefits will not cause issues for the student accessing out-of-school benefits in the future. We recommend that the federal rule must require schools to provide information

to parents regarding what specific benefits have been accessed by the school. We recommend adding to the “no cost” provisions a requirement that schools have the responsibility to ensure that parents do not incur any costs as the school bills for services and that no negative impact on lifetime coverage or access to services outside of school exist.

Furthermore, we urge the Department to submit guidance which encourages school districts to have materials asking for consent and providing critical information to families about the rights of their children under IDEA to be written in plain language. A person can face one or many different barriers to reading and/or understanding written or spoken language, including but not limited to: lack of access to an equal education; having one or more cognitive, communication, learning, mental, physical, sensory or other disabilities; having a primary language other than English; multiple and intersecting forms of prejudice and discrimination; and societal inequalities perpetuated by racism, ableism, and other oppressions. While using plain language will not eliminate all the information barriers millions face, it is a major step in the right direction.

Funding for services provided under IDEA is a critical issue, highlighted recently by the global pandemic and the critical educator shortage our nation is facing. The Arc is supportive of schools accessing Medicaid funds for eligible-services under IDEA. However, the proposed rule leaves us concerned about the impact on students who rely on outside services, and the potential for families to receive less information about their rights. We want children with disabilities to receive the best possible services across school and outside settings and want families to remain active participants in their child’s education.

If you have any questions or need any further information, please contact Robyn Linscott ([linscott@thearc.org](mailto:linscott@thearc.org)).

Sincerely,

Robyn Linscott  
Director of Education and Family Policy  
The Arc of the United States