



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

JUL 23 2008

Mr. Joseph Kinney
Kinney Management Services, LLC.
3 Tallow Wood Drive, Suite G
Clifton Park, New York 12065-0803

Dear Mr. Kinney:

This letter responds to your June 16, 2008 and July 3, 2008 letters to our office asking for confirmation of your understanding of statements contained in our May 7, 2008 correspondence to you, as well as some follow-up questions.

Medicaid Issue

The June 16, 2008 letter asked for confirmation of the following statements:

1. Medicaid's financial responsibility must precede that of the local educational agency (LEA) and the state can require the LEAs to put up the money to fund the Medicaid payment. (Medicaid allows both the use of intergovernmental transfers and certified public expenditures).
2. A state can require the LEAs to "bill" Medicaid as a condition for receiving state education aid and can use the LEAs' money to make the Medicaid payment.
3. The State can use the Federal Medicaid reimbursement for any purpose it chooses. It does not have to share it with the LEAs, as it is reimbursement of the "Medicaid" expenditure made by the LEA to itself.
4. Federal Education agrees that although the LEA never gets any financial benefit, this meets the requirement of the Individuals with Disabilities Education Act (IDEA).

You further asked, "when reimbursing the LEAs must the reimbursement be based on the actual cost of the services or can the program set an arbitrary reimbursement rate that is far below cost? (For example, we are aware of a situation where the LEA actually gets far less than 20% of the cost they incur in providing the service)."

Response

OSERS May 7, 2008 letter to you stated that the issues you raised are governed primarily by Medicaid requirements and State law. The IDEA statutory and regulatory requirements regarding the financial responsibility of each noneducational public agency, including the state Medicaid agency was explained. Further, it

explained the requirement for an interagency agreement or other mechanism of interagency coordination between the state educational agency (SEA) and noneducational public agency that includes the conditions, terms, and procedures under which an LEA must be reimbursed by other agencies. We do not have any additional information to offer in response to the subject of Medicaid billing. We suggested in our May 7, 2008 letter that you consider directing questions regarding states' public insurance payment processes to the specific state Medicaid office and Center for Medicare and Medicaid Services of the Department of Health and Human Services. You may also consider contacting Rebecca Cort, your state's Director of Special Education regarding the state's use of Federal Medicaid reimbursement. She can be reached at (518) 474-1711.

IDEA and Consent Issue

Issue 1:

You indicated in your letter that, in 1997, the Department of Education commented that the language in the New York Medicaid application met all of the Family Educational Rights and Privacy Act (FERPA) requirements (regarding consent) and, if so, could be used as a model for other states. You want to know if the Department has changed its position on that application and the basis for the change. Further, you asked if the Department considered the fact that refusal by a parent to allow access to Medicaid raises Medicaid eligibility questions and may result in the loss of Medicaid benefits.

Response

If parental consent is given directly to another agency, such as the State Medicaid agency, the LEA does not have to independently obtain a separate parental consent, as long as the parental consent provided to the other agency meets the requirements of 34 CFR §§300.9 and 300.154(d). The Department's Family Policy Compliance Office (FPCO) administers FERPA. If you want to know whether New York's Medicaid application meets the requirements of FERPA, you would need to contact FPCO directly. Contact information for FPCO can be obtained at <http://www.ed.gov/policy/gen/guid/fpc/index.html>.

Concerning a parent's potential loss of Medicaid benefits for refusal to allow access to Medicaid, our May 7, 2008 correspondence to you indicated that a public agency seeking parental consent to access public benefits or public insurance programs is also obligated, under 34 CFR §300.154(d)(2)(iv)(B), to notify the parent that the parent's refusal to allow access to their public benefits or public insurance does not relieve the public agency of its responsibility to ensure that all required free appropriate public education (FAPE) services are provided at no cost to the parent. We express no views on Medicaid eligibility and refer you to your State's Medicaid office and Center for Medicare and Medicaid Services of the Department of Health and Human Services.

Issue 2:

Your July 3, 2008 letter stated that when consent to bill Medicaid cannot be secured from parents, the New York Education Department does not provide local education agencies an alternative Medicaid payment process. You further said that, since eliminating this source of funding is a violation of the IDEA, the Department should immediately inform the New York State Education Department that, in conjunction with the State's Chief Executive Officer, it must ensure Medicaid and other public insurance funding continues to flow.

Response

The IDEA does not require that states participate in Medicaid, or that state Medicaid programs include any particular array of programs or services. Nor does it require or mandate school-based billing. If a state chooses to permit school-based billing and includes the particular services in its Medicaid plan, an LEA billing for Medicaid-allowable services must also comply with the IDEA consent requirements in 34 CFR §§300.9 and 300.154(d)(2)(iv).

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented. We hope that you find the responses to your questions helpful.

Sincerely,

A handwritten signature in black ink that reads "Tracy R. Justesen". The signature is written in a cursive style with a long horizontal flourish at the end.

Tracy R. Justesen