

DrummondWoodsum

MEMORANDUM

TO: Joint Standing Committee on Education and Cultural Affairs

FROM: Robert P. Nadeau

RE: LD 1003/Questions Regarding the Repeal of Sections 41 and 104 of the
MaineCare Benefits Manual

DATE: January 9, 2012

Rob O Time reschedule - audit this month
2 Rob Question DHHS response
2011 yr.

Like 104

1. Provided that the current audit by the Federal Office of the Inspector General of the New Hampshire school-based program has no findings that question the acceptability of New Hampshire's school-based program, can Maine implement a NH-type program to serve Maine's schools? If not, can State DHHS cite specific federal authority that makes clear that the NH program is incompatible with federal regulations?

Can we have school based program to get fed dollars

2. a. The clinicians who hold the Department of Education Certificate 293 designation are not certified by the American Speech and Hearing Association, but why are these Certificate 293 clinicians when properly supervised no longer permitted to seek MaineCare reimbursement when the federal rule provides that speech therapy may be billed provided the services are "provided by or under the direction of a speech pathologist or audiologist..."? 42 C.F.R. § 440.110(c)(1).

Texas program

- b. If the issue is one of comparability, would the institution of a school-based program similar to the New Hampshire program solve the comparability issue? If the establishment of a NH-type program would not solve the comparability problem, can State DHHS provide specific citations to federal regulations to support the conclusion that a school-based program is incompatible with federal law?

3. The Maine legislature has enacted Title 22 M.R.S.A. § 3174-Q(2) to restrict the authority of DHHS to make changes to its rules or to promulgate new rules that would have the effect of eliminating certain services even though such changes were routine and technical. That provision currently states as follows:

Beginning August 1, 1996, the department shall obtain authorization from the Legislature before implementing changes in benefit structures and eligibility levels in the Medicaid program that could cause the following changes: (...)

(2) Elimination of services covered under the program on August 1, 1996, except when immediately necessary to comply with federal law. The department may not eliminate a service if modification of that service can achieve compliance with federal law. Any modification may be made only to the extent necessary to achieve compliance with federal law. Any elimination or modification made under this subsection must be done

through rulemaking under the Maine Administrative Procedure Act. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Many of the covered services eliminated by the repeal of Sections 104 and 41 were part of the Maine Care program on August 1, 1996 (Indeed all of Section 41 was adopted by January 4, 1996). Was authorization by the legislature necessary to eliminate or modify rule sections 41 and 104? Would modification (not elimination) of these rules and more specifically modification of the bundled rate reimbursement method have been sufficient to comply with federal law? What federal authority is cited to support the response?

4. Given the May 21, 1999 letter from CMS Director Richardson, we understand the argument that changes needed to be made to the Maine program in order to end the “bundled rate” reimbursement method. In an email dated February 12, 2011, State DHHS advised Maine schools to bill at “the published rate” regardless of whether a school’s actual costs were lower than the published rates. To those schools concerned about billing for more than actual costs incurred, this email advised “Do not worry that your costs may seem lower, if you factor in all of the costs that are allowed for consideration in rate setting, they likely are not.” In fact, for schools to bill at the higher, published rate would lead to schools receiving much higher reimbursements for services than the actual costs the school incurred. According to one district, if the district billed at the published rate, reimbursement would be \$1,500,000 higher per year than the school’s actual costs. Does this advice concerning billing at the published rate regardless of the actual cost contradict the same federal guidance warning of issues with using bundled rates? Can State DHHS cite federal advice that allows schools to bill at the published rate and “not worry that [the school’s actual] costs may seem lower...than the published rate?”
5. Recently DHHS has taken the position that schools cannot bill MaineCare for any contracted service. In the DHHS response to comments regarding this rule change, DHHS stated, “If the OT being utilized by the school is contracted staff, the OT must enroll as a MaineCare provider and bill MaineCare directly for the services provided in the public school setting.” A number of questions arise as a result of this policy change:
 - a. Can DHHS provide a citation to a federal rule or authority that prohibits schools from billing Medicaid directly for a contracted service provider?
 - b. Will schools be at a disadvantage in finding suitable service providers when a service provider may be unwilling to accept the Medicaid cap for services given higher market rates? Would it be likely that service providers will simply not seek Medicaid reimbursement and shift the higher market cost back to the school unit?
 - c. While under the former school-based program no state share was required in order for schools to receive Medicaid reimbursement provided that schools provided “seed money,” will the requirement that contracted providers bill Medicaid directly have an impact on the state budget?

- d. If contracted staff, and not the school, are responsible for billing MaineCare directly, will there be a way for schools to ensure that appropriate billing codes are used so that the services do not count against a student's lifetime cap? If not, how can schools ensure that the above situation, which would be a denial of FAPE under the IDEA, does not occur?
6. Apart from the New Hampshire program, the State of Texas also has a school-based medical services reimbursement program that was audited by the Federal Office of the Inspector General in December of 2005, and the audit is available at oig.hhs.gov/oas/reports/region6/602000.pdf. Provided that the OIG recommendations to the State of Texas may be implemented, would the Texas program be a useful model for a school-based program in Maine? If not, can citations to federal regulations be provided explaining why the Texas program is not an acceptable model for Maine?
7. Given that the State of Ohio has reinstated its school-based program, would the Ohio state program be a useful model of a school-based program in Maine? If not, can citations to federal regulations be provided explaining why the Ohio program is not an acceptable model for Maine?
8. What specific federal rules or authority required that the former sections 41 and 104 of the Maine Care benefits manual be repealed? What specific federal rules or authority required that these rules be repealed in their entirety rather than maintaining the rules and altering the method of bundled rate reimbursement?
9. Are schools in Maine expected to provide documentation supporting Medicaid services in addition to the IEP? What federal authority requires documentation in addition to the IEP? Does New Hampshire require more than an IEP? Does the statement by federal authorities that "Reflection of a service in the IEP satisfies the need for a medical necessity determination if the practitioner on the IEP team prescribing or recommending the service is qualified to do so within his or her scope of practice" clarify that only the IEP is necessary? See, 2010 National Alliance for Medicaid in Education Conference, CMS Panel Questions and Answers.
10. While federal guidance issued in 1997 requires comparability for school-based services with regard to amount, duration and scope of services, does the language in the same guidance that reads that the Medicaid program is available to pay for health related services required in an IEP with the understanding that "...the services must be included in the state's Medicaid plan or available through the EPSDT benefit" provide the opportunity for Maine to bill for services for students as an Early and Periodic, Screening, Diagnostic and Treatment ("EPSDT") benefit?
11. Does a Maine school unit's reliance on the definition of 'medical necessity' found in the Medical Necessity Decision Tree create a comparability issue when all other providers are relying on the definition of 'medical necessity' found in Chapter 1 of the MaineCare Benefits Manual? See, MaineCare Benefits Manual, Chapter 1, section 1.02-4(D).