

**Negotiated Rulemaking - Comment Summary
Docket No. 16-0309-1204**

Comments from 6-20-12 Meeting, Written Comments Submitted Post-Meeting, and Responses

Verbal and written comments were submitted by the following individuals/organizations: DisAbility Rights Idaho; Eileen O’Shea; Idaho Occupational Therapy Association; Idaho Physical Therapy Association; Idaho Speech and Hearing Association; Cindy Levesque; ISB Educational Solutions; Kelly Keele; Trina Balanoff; Phil Schoensee; Cory Makizuru; Jamie Kerner; Debi Gutknecht; Stephanie Carpenter; Melaine Shephard; Deb May; Kevin McDonough; Kaylene Loveday; Clara Allred; Steven Bateman; Sharron Bateman

DOCKET NO. 16-0309-1204: SCHOOL-BASED SERVICES

Topic of Concern	Comments	Responses
850. Definitions		
	<ul style="list-style-type: none"> No comments received for changes to definitions. 	
851. Eligibility		
<p>Eligibility for behavioral intervention excludes academically gifted students whose emotional disorders do not cause aggression</p>	<ul style="list-style-type: none"> Section 851.06.b.iii says that in order to be eligible for behavioral services a child must have “maladaptive behaviors that impede the student’s learning or that of others, and interferes with the student’s ability to access an education.” Section 852.03.b says that “Behavioral Intervention is used to promote the child’s ability to participate in and benefit from educational services”. <p>While both of these conditions are usually true for children with serious emotional disturbance, it is not the only basis for receiving Medicaid behavioral services in a school setting. Academically gifted students whose emotional disorders do not cause aggression may still need Medicaid covered psychological or behavioral services in schools. Students who are withdrawn and depressed and prone to self harming behaviors might be one example.</p>	<ul style="list-style-type: none"> This comment references mental health services, rather than developmental disability services. Behavioral intervention is only designed for children who meet Developmental Disability (DD) eligibility criteria and exhibit behaviors as defined in IDAPA 16.03.10.503. <p>Mental health services such as psychological evaluation, psychotherapy, and psychosocial rehabilitation remain available for children with emotional disorders.</p>
<p>Question: Should sub-scores or index scores be required to determine eligibility for behavioral intervention and consultation?</p>	<ul style="list-style-type: none"> The Scales of Independent Behavior-Revised (SIB-R) should continue to be an option for determining eligibility. There were several suggestions for assessment tools to be considered. The requirement could include clinically significant scores (in one area) or at-risk scores (in two or more areas) An Occupational Therapist (OT) should be involved in the workgroup identifying allowable assessments. 	<ul style="list-style-type: none"> The School-Based Medicaid Committee will continue to develop eligibility assessment and scoring requirements, including recommendations from the psychology association and Idaho Occupational Therapy Association (IOTA).

<p>Educational performance should not be a criterion for receiving services in the school</p>	<ul style="list-style-type: none"> • Whether a student needs treatment, and whether that treatment needs to be available in the school setting is a matter of psychological and behavioral assessment, not educational achievement. A student should not be required to show a learning deficit or an inability to benefit from educational services to qualify for Medicaid services in the school setting. The language in these proposed rules seems to confuse Individuals with Disabilities Education Act (IDEA) requirements with Medicaid requirements. Since Medicaid services are not educational services (Section 850.02) educational performance should not be a criterion for receiving the services in the school. 	<ul style="list-style-type: none"> • The requirement is not to assess the child’s academic achievement, but rather to assess if the child’s behaviors are interfering with their ability to access an education as required under IDEA. <p>While Medicaid and schools have different sets of federal regulations, the intent of Medicaid funding in the schools is to provide assistance to ensure children have access to a free and appropriate education.</p> <p><u>Changes Based on Comments:</u> Added language for clarification:</p> <ul style="list-style-type: none"> ○ 851.06.b.iii - Changed “impedes the student’s learning” to “maladaptive behaviors that interfere with the student’s ability to access an education”. ○ 852.03.b – Added “educational services, as defined in section 850 of these rules” to reference the definition.
<p>Habilitation (skill development) should be reimbursed by Medicaid in the schools</p>	<ul style="list-style-type: none"> • Address what services are appropriate for a student with a substantial functional limitation in cognition, retention, reasoning, visual or aural communications or other learning processes or mechanisms which are impaired to the extent that special (interventions that are beyond those that an individual normally needs to learn) intervention is required for the development of social, self- care, language, academic, or vocational skills? • It is important to allow schools to utilize paraprofessionals in the school setting and to receive Medicaid reimbursements when providing the mandated service to provide safety and skill building for the student. There is a concern that the bulk of the assistance necessary and provided by a paraprofessional will fall under Personal Care Services (PCS) and the nursing staff to address the needs of “cognition, retention, reasoning, and communication” as self- care? Example: Autistic child, non- verbal, passive, disconnected, no social interaction, lacking eye contact, unable to communicate needs, requires full time assistance and monitoring to gain skills and ensure safety now falls under self- care. 	<ul style="list-style-type: none"> • Centers for Medicare and Medicaid Services (CMS) federal regulations do not allow Medicaid reimbursement for habilitation in the school. Health related school services must be linked to a service defined under section 1905(a) of the Social Security Act. <p>Currently, developmental therapy (DT) is defined as a habilitation service. DT is being removed from the State Plan for school and community providers in order to comply with federal regulations.</p> <p>It is estimated that the majority of children currently receiving DT in school will qualify for behavioral intervention or PCS services to continue addressing their medical and behavioral needs.</p> <ul style="list-style-type: none"> • Schools continue to have the ability to receive reimbursement for paraprofessional staff for behavioral intervention, OT, PT, and speech-language pathology services.

<p>Physician referral requirement for school-based services</p>	<ul style="list-style-type: none"> • The IDEA states that Individualized Educational Program (IEP) services are determined by the IEP team, not by an outside physician. • Potentially six (6) referrals will be required for one student in special education – 1. Evaluation, 2. IEP ordered services, 3. Amendments to IEP, 4. Mandated re-evaluations, 5. Durable medical equipment if needed, 6. Student changes school districts. The number of referrals should be reduced to streamline the process and eliminate redundant paperwork. • With referrals, we would like to be able to streamline the referral process by sending and receiving them electronically. In doing so we would like to be able to accept an electronic signature as approval for these services. We are in an electronic age and many governmental functions are done through electronic signature. Extending it to school-based services would be very helpful. • 852.02.a – Recommend a rewrite to better represent the intent of the rule: <i>A school district or charter school may not seek reimbursement for services provided prior to receiving a signed and dated recommendation or referral.</i> • If the Department wants this verbiage to prevent self-referrals, it is important to note, in the majority of the school districts, the manner of compensation paid to professionals would <u>not</u> facilitate any benefit from self-referral. Services are not ordered by any practitioner but rather the IEP team as a whole. The districts are not claiming “payment for service” the claims are a partial reimbursement for services mandated by federal law and paid in advance by the district. • Over the last ten years school districts have been unable to recover millions of dollars in federal Medicaid reimbursement because physicians neglect to not sign referrals or have not done so in a timely manner. Reasons vary from- concern over their liability if they sign a referral- they do not have time to process referrals- they have not seen the student, they do not understand why schools need a referral. • Change the proposed rule to require physicians to sign referrals the same day they are received by them. Otherwise physicians are denying schools the right to seek reimbursement for services provided in accordance with Title 19.c.3 of the Social security Act. • Change the proposed rule to read that health related services as determined by the IEP team may be claimed for Medicaid reimbursement. CMS has stated that they accept the IEP as the prescriptive order. The state of Montana has adopted this language to streamline the process and be consistent with federal law in the least restrictive manner. • Change the proposed rule to allow a sixty day window from the time the services are rendered to the signature date of the referral giving understanding that the paperwork process flow takes time to complete. A physician cannot repeal an evaluation or health services provided at a school when it is done in accordance 	<ul style="list-style-type: none"> • While the Department understands obtaining a physician’s order timely is sometimes challenging, it is and has always been a requirement for providers seeking Medicaid reimbursement. <p>Federal requirements under the Social Security Act, Section 1905(a) require services be ordered by a physician.</p> <ul style="list-style-type: none"> • It is important to note, requiring a physician’s referral prior to services is not a new requirement for Medicaid school-based services. It is only since the Medicaid Program Integrity Unit began reviewing school providers that it was discovered schools have been out of compliance with this requirement. <p>The physician referral language is being added to provide further clarification for schools.</p> <ul style="list-style-type: none"> • It should be noted that a new physician’s referral would not be required for every amendment, such as a change in service hours. Additional guidelines will be added to the provider handbook. • The Department agrees that schools should look to new processes for obtaining referrals, including electronically. <p>The Department currently allows for electronic referrals. Please see the electronic signature policy on the Health and Welfare website, Medicaid Provider home page at http://www.healthandwelfare.idaho.gov/Providers/MedicaidProviders/tabid/214/Default.aspx</p> <p><u><i>Changes Based on Comments:</i></u> Used recommended language:</p> <ul style="list-style-type: none"> ○ 852.02.a and 03 – Changed to: “A school district or charter school may not seek reimbursement for services provided prior to receiving a signed and dated recommendation or referral.”
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with IDEA rules.

- The services that are written on an IEP are determined by the IEP team. Services written into the IEP are necessary services for a student to make progress. Public schools must meet this very specific guideline. The proposed rule that says we may not seek reimbursement for the NECESSARY services prior to a physician referral is unwarranted. Physicians do not sit in the IEPs and, in districts across our state, may not be able to authorize the signature for several weeks from the IEP meeting date. Who are we punishing with this type of rule – physicians, school districts, or students? Perhaps all three. I find this rule an assault to the integrity of the special education profession.
- All mandated health related services are fully funded by Idaho state and local funding. Consideration by state officials should encourage districts to seek the federal reimbursement as intended by the program development.
- With the way this rule is written it is very unclear. I would like to see the rule more clearly written with the consideration that the physician is not the one that decides the services that will be provided in a school setting.
- Obtaining a physician's referral has always been a requirement of community providers delivering the same services, and this is not a change in policy.
- Without an independent physician determining medical necessity, there are no checks and balances that the school is providing services appropriately.

Responses to specific questions:

1. Do IDEA services in schools require prior authorization by a physician? *Medicaid services require a referral from a physician prior to rendering services.*
2. Can IDEA services which are determined by the IEP team be withheld until physician referral is obtained? *This is not a Medicaid regulation.*
3. Who determines medically necessary IEP services? *A physician must determine if services are medically-necessary in order to receive Medicaid reimbursement.*
4. Does a physician order school based services? *A physician must determine if services are medically-necessary in order to receive Medicaid reimbursement.*
5. Will the physician be responsible for oversight and supervision of the IEP services they referred? *The physician assesses the child at least annually, and makes referrals as determined necessary for all Medicaid services.*
6. What timeline are physicians required to respond to the referral requests. Is it the same day they receive the referral? If not how can school districts have any control on the signature date of the referral? *Idaho has a medical home model that encourages providers to work with the child's physician to obtain needed referrals.*
7. If the referral isn't obtained prior to the beginning of services are all subsequent claims subject to recoupment? *Services may be reimbursed after the physician has signed and dated a referral for services. Retro billing is not allowed for Medicaid. Schools should have a relationship with the child's physician to ensure a referral can be obtained in advance of annual planning.*
8. Can referrals be sent electronically via secured emails? Can they be approved by electronic signature? *Yes, see above.*

852. Coverage and Limitations		
Personal Care Services (PCS) definition	<ul style="list-style-type: none"> In section 852.03.e.iv, the proposed language on continuity of rehabilitation programs is limited to students with “developmental disabilities.” There is no reason that this should be limited to children with developmental disabilities. Other children with disabilities also should have continuity with their rehabilitation programs. In section 852.03.e.vii, excludes “insertion or sterile irrigation of catheters”. As it is written it appears to exclude clean catheter which can be delegated for spinal cord injury. Best practice would be to refer to the nursing practice act when delegating services. If the intent of the section is to exclude the performance of sterile instillations and sterile irrigation of body cavities using catheters by unlicensed personnel, the following language is recommended: <u>vii. Medicaid will not pay for irrigation, instillation or suctioning of body cavities which require sterile procedures, application of dressings using prescription medications and aseptic techniques, injection of fluids into the veins, muscles or skin, or administration of medications, unless the procedure is performed by a health care professional who is licensed or certified to perform the procedure.</u> Since all of these activities would be entirely appropriate for a RN providing “nursing services” under section 852.03.c, and for some other professionals, the language should not be completely exclusionary, and should recognize that such services are reimbursable when provided by a qualified professional within the scope of a person’s care plan. 	<ul style="list-style-type: none"> The intent of this rule is not to limit continuity of rehabilitation programs, but rather to allow DD programs to be carried out with oversight of a qualified intellectual disabilities professional (QIDP). <u>Changes Based on Comments:</u> Changed language for clarification: <ul style="list-style-type: none"> 852.03.g.iv - “The continuation of developmental disabilities programs to address the activities of daily living needs in the school setting as identified on the child’s PCS assessment, in order to increase or maintain independence for the student with developmental disabilities as determined by the nurse or QIDP” According to 854.06, nurses and assistants are subject to the “Rules of the Idaho Board of Nursing” which defines their scope of work, therefore this rule is duplication. <u>Changes Based on Comments:</u> Removed the list of excluded services: <ul style="list-style-type: none"> 852.03.g.vii – Deleted subsection. The qualifications listed in 854.06, include the list of professionals qualified to deliver PCS under the State Plan.
Behavioral Intervention - Individual vs. Group	<ul style="list-style-type: none"> Rates should reflect that the service is group (ex. 1:2) versus individual, and should not be a blended rate. Allowing group therapy takes away from the service being individualized for the child, and may incentivize inappropriate treatment. There may be some instances where group services are appropriate, such as working on socialization goals, but these should be defined in rule. Use caution with adding instances in rule because it may be too limiting and is difficult to capture all scenarios. 	<ul style="list-style-type: none"> Rates will be set using the Department’s established rate setting methodology. Rates are not blended for children’s services. The Department agrees there should be language that describes the intent of group services without being too limiting. <u>Changes Based on Comments:</u> Added limitation for group intervention: <ul style="list-style-type: none"> 852.03.b.v. - “Group services should only be delivered when the child’s goals relate to benefiting from group interaction”.

Behavioral intervention is a component of Occupational Therapy (OT)	<ul style="list-style-type: none"> Behavioral intervention is part of an occupational therapists' scope of work, however the rules seem to carve out occupational therapists as qualified providers of behavioral intervention services. <p>If an OT is delivering behavioral intervention, it should be billed as OT.</p>	<ul style="list-style-type: none"> There should not be an instance where an OT bills behavioral intervention. <p>The IEP team will identify when OT is necessary, which may include addressing behavioral needs if appropriate.</p>
Question: Is a limit of 36 hours per year sufficient for consultation?	<ul style="list-style-type: none"> No comments 	<ul style="list-style-type: none"> This requirement will remain the same.
A physician referral for a Functional Behavioral Assessment (FBA) is unreasonable	<ul style="list-style-type: none"> To seek a referral from a physician before an FBA is absolutely unreasonable. An FBA is conducted when a student is in crisis and the team must come together to problem solve and determine another course of action. Why must we wait for a referral? Isn't the student's progress and our immediate assistance necessary for a student in crisis? 	<ul style="list-style-type: none"> In order to receive Medicaid reimbursement, a physician's referral is required for all Medicaid services, including evaluations. <p>The school should ensure the physician is involved early on in the process to assist the team with planning.</p>
853. Procedural Requirements		
Brief summary needs to be further defined under Service Detail Reports.	<ul style="list-style-type: none"> It is important to further define what is required for a "brief summary" to assist schools in meeting this requirement. How will the Medicaid Program Integrity Unit interpret this requirement, is it a summary per 15 minutes, does it need to include a narrative, and will a check off chart that includes a comment section suffice? 	<ul style="list-style-type: none"> The Department will follow up with the Medicaid Program Integrity Unit to discuss what needs to be included in this requirement. Additional guidelines will be included in the provider handbook. <p><u>Changes Based on Comments:</u> Changed language for clarification:</p> <ul style="list-style-type: none"> 853.03.e - "Category of service and brief description of the specific areas addressed"
Services should not be required to be on an IEP for Medicaid reimbursement in the schools	<ul style="list-style-type: none"> Section 853.01 recognizes that some services can be addressed on a "Services Plan (SP)" which is not an IEP, but the subsequent language (subsections i-iv) applies only to IEPs. Some of these requirements may also apply to a non-IEP services plan. However, for many Medicaid covered services, such as those in Personal Care Services (PCS), measurable goals would not seem to be needed. These services may or may not be included in an IEP, and the student entitled to the services may or may not have an IEP. <p>For example, nursing services for a child with diabetes, or asthma, or personal assistance with toileting for a student with a physical disability who does not receive IDEA covered services would be Medicaid reimbursable but could not be included on an IEP and if they are included on an IEP, as ancillary services, they would not require measurable goals.</p>	<ul style="list-style-type: none"> The "Services Plan" referred to in rule is defined in the Idaho Special Education Manual - Chapter 9: Private School Students. <p>"Services Plan means a written statement that describes the special education and related services the (Local Education Agency (LEA) will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services...and is developed and implemented in accordance with Sections 34 CFR 300.137 through 34 CFR 300.139, 34 CFR 300.37."</p>

		<p>The Services Plan does not include any plan, such as a PCS plan of care that is unrelated to IDEA. All services must be identified on an IEP, Individualized Family Service Plan (IFSP), or Services Plan (as defined above) for a school to receive Medicaid reimbursement.</p> <p><u>Changes Based on Comments:</u> Added language for clarification:</p> <ul style="list-style-type: none"> ○ 853.01 – Added “Services Plan, as defined in the Idaho Special Education Manual available online at the State Department of Education Website” ○ 853.01.iii - Changed to “Measurable goals, when goals are required for the service”
<p>Continue to include IFSP as an allowable plan</p>	<ul style="list-style-type: none"> ● Regarding IDAPA 16.03.09.853.1 (and any other references to the IEP and SP), the language should continue to include the IFSP. The IFSP may serve as the IEP for children who transition from Infant Toddler Program (ITP) to Part B services until an IEP is developed. If not included, the schools would not be able to receive reimbursement for those services. 	<p><u>Changes Based on Comments:</u></p> <ul style="list-style-type: none"> ○ Added the IFSP back into rule.
<p>854. Provider Qualifications/Duties</p>		
<p>Special Education teacher’s time should not be reimbursable by Medicaid for behavioral intervention</p>	<ul style="list-style-type: none"> ● Special education (SPED) teachers are already providing intervention services as part of their job responsibilities, and their time should not additionally be reimbursed by Medicaid. ● A Special Education teaching certificate alone does not necessarily include behavioral intervention to qualify teachers to provide or supervise the service. 	<ul style="list-style-type: none"> ● The Department has expressed the same concerns regarding SPED teachers delivering services for Medicaid reimbursement. In a recent discussion with CMS, the recommendation is to require schools complete a time study to determine how time is spent delivering intervention services separate from special education services. The Medicaid School-Based Committee will explore this further. <p>The Department cautions schools interested in pursuing reimbursement for special education teachers that there needs to be clear documentation to support how the service is not part of the special education curriculum.</p> <ul style="list-style-type: none"> ● The special education certificate includes relevant training for behavioral intervention, however it is agreed that additional qualifications such as requiring experience should be in place.

		<p><u>Changes Based on Comments:</u> Added qualification for the professional:</p> <ul style="list-style-type: none"> ○ 854.01.iv – Added: “Must be able to provide documentation of one (1) year’s supervised experience working with children with developmental disabilities. Experience must be gained through paid employment or university practicum experience or internship.”
<p>Occupational Therapy (OT), Physical Therapy (PT), and Speech-Language Pathology (SLP) paraprofessionals</p>	<ul style="list-style-type: none"> • The Idaho Occupational Therapy Association (IOTA), Idaho Physical Therapy Association (IPTA), and the Idaho Speech and Hearing Association (ISHA) spoke to the concerns they and the licensure boards have regarding the use of paraprofessionals in the school setting. <p>The intent is to bring awareness to schools on the importance of following the licensure laws for the state of Idaho, and to educate school professionals of the risks of operating outside of their license. Medicaid’s policy has always been to align with the licensure laws.</p> <p>It appears schools are delivering OT, PT, and SLP services without proper supervision and/or using staff that are unqualified according to licensure.</p> <p>Each association followed up with written proposals for rule changes which include suggestions to add more language regarding supervision requirements, change “paraprofessionals” to “aides and assistants”, and/or remove the paraprofessional rate.</p> <ul style="list-style-type: none"> • We understand occupational and physical therapists could provide some services to address the needs of the qualifying students however it appears these professional practice acts are now written and enforced by the professional organizations in expectation to exclude the use of the “paraprofessional” in support of these services by the schools thereby increasing the cost of providing OT and PT services within school districts. 	<ul style="list-style-type: none"> • The Department agrees with the associations that schools must provide services in accordance with State licensure laws. Medicaid policy has and will continue to align with the licensure laws. • The Department recommends schools work with the appropriate licensing boards to ensure compliance with regulations when using paraprofessional staff. <p><u>Changes Based on Comments:</u> Added language for clarification:</p> <ul style="list-style-type: none"> ○ 854.13.a.b. and c. – Added: “qualifications” when referring to the licensure rules. <p>Additional language will be added to the provider handbook to explain in detail how to bill paraprofessionals in accordance with licensure qualifications.</p>
<p>Question: What should be required for the supervision of paraprofessionals delivering behavioral intervention?</p>	<ul style="list-style-type: none"> • Clarification regarding the frequency and type of supervision that is required of the behavioral intervention paraprofessional is needed in order for us to implement an appropriate level of service. Setting a standard for this would also assist the Medicaid Integrity Unit in determining an equitable level of compliance. 	<ul style="list-style-type: none"> • The rules will align with supervision requirements for community providers of DD services. <p><u>Changes Based on Comments:</u> Added supervision requirements:</p> <ul style="list-style-type: none"> ○ 854.01.c – Added: “The professional must observe and

	<ul style="list-style-type: none"> No suggestions for supervision requirements were received. 	<p>review the direct services performed by the paraprofessional on a monthly basis, or more often as necessary, to ensure the paraprofessional demonstrates the necessary skills to correctly provide the behavioral intervention service.”</p>
855. Provider Reimbursement		
	<p><u>The following comments are beyond the scope of the negotiated rulemaking:</u></p> <ul style="list-style-type: none"> The practice of having school districts pay 100 % for the services upfront and then send matching funds to receive federal reimbursements is an unnecessary administrative burden. The substance of this requirement is that school districts must out lay 130% of funds for the services in order to receive their reimbursement percentage of 70%. The matching funds could be accomplished by a “certification of funds” form as is the normal process throughout the United States. This procedure is not only costly to the schools and the state but is a direct impediment for schools to receive timely reimbursements. We recommend that DHW review this matter at Region X and obtain a change to this requirement. Districts have already paid for the services that are being provided for students. There is absolutely no need for further layout of school district monies to receive the approximate 70% back from Medicaid. Not only is it an accounting ‘nightmare’, it also puts districts with limited funds at monetary risk as another 30% of the district’s money is held. 	<ul style="list-style-type: none"> This process was established based on CMS direction. Changes to the matching funds methodology is outside the scope of these school-based changes, but can be explored for future consideration.