



AMERICAN  
PSYCHOLOGICAL  
ASSOCIATION

October 12, 2007

Secretary Michael O. Leavitt  
Centers for Medicare & Medicaid Services  
U.S. Department of Health and Human Services  
7500 Security Boulevard  
Baltimore, MD 21244

File Code: CMS-2261-P  
Medicaid Program; Coverage for Rehabilitative Services

Dear Secretary Leavitt:

On behalf of the 148,000 members and affiliates of the American Psychological Association (APA), I would like to thank you for the opportunity to comment on the August 13 Proposed Rule regarding Medicaid coverage of rehabilitative services. We appreciate the time and consideration that the Centers for Medicare and Medicaid Services (CMS) dedicates towards drafting these proposed regulations to provide for much-needed beneficiary protections and to ensure fiscal integrity in the provision of Medicaid rehabilitative services.

APA is the largest scientific and professional organization representing psychology in the United States and is the world's largest association of psychologists. Comprised of researchers, educators, clinicians, consultants, and graduate students, APA works to advance psychology as a science, a profession, and a means of promoting health, education and human welfare. APA has a long-standing commitment to promoting the optimal development and care of all individuals with disabilities. Psychological research has played a pivotal role in our understanding of the social, emotional, and physiological aspects of human behavior.

The sections provided below highlight several important recommendations regarding the proposed regulations. We hope that you will consider these comments as you work to develop the final regulation.

### **Section by Section Analysis – Provisions of Proposed Regulations**

SECTION 440.130(D)(1)(V) DEFINITIONS – REHABILITATION PLAN
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**Recommendation:** APA supports the CMS requirement of a written rehabilitation plan.

**Rationale:** A written rehabilitation plan will ensure the input and participation of the individual, their family or authorized health care decision maker, and/or persons of the individual's choosing in the development, review and modification of the rehabilitation/recovery goals and services. For people with mental health and substance abuse problems, this person-centered approach is critical to an effective recovery. A secondary result of a written plan is that it increases state transparency and state accountability.

SECTION 440.130(D)(VI)      DEFINITION OF RESTORATIVE SERVICES
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**Recommendation #1:** APA supports the CMS language that clarifies that “the emphasis in covering rehabilitation services is on the ability to perform a function rather than to actually have performed the function in the past” and urges CMS to further clarify the language within the regulation to state that restorative services include services to enable a child to achieve age-appropriate growth and development and that it is not necessary that the child actually performed the activity in the past.

**Rationale #1:** Clarification of eligibility for rehabilitation services to allow children to achieve age-appropriate skills is critical as they will not necessarily have had the ability to perform a function in the past due to their level of development and acquisition of age appropriate skills. In addition, the inclusion of the recommended language will mirror the language in the current CMS regulation of managed care plans at 42 CFR 438.210(a)(4)(ii)(B).

**Recommendation #2:** APA recommends that CMS revise 440.130(d)(1)(vi) to define, as an acceptable goal of a rehabilitation plan, the provision of rehabilitation services to assist individuals in retaining their current functional level or preventing a relapse.

APA also recommends the modification of the language in 72 Fed. Reg. at 45204, Section II.C of the preamble stating that “[i]f it is determined that there has been no measurable reduction of disability and restoration of functional level, any new plan would need to pursue a different rehabilitation strategy . . .” to reflect the inclusion of prevention of relapse as an appropriate rehabilitation goal.

**Rationale #2:** The proposed regulation states that restorative services are those “provided to an individual who has had a functional loss and has a specific rehabilitative goal toward regaining that function.” This focus that rehabilitation services must reduce disability and restore function to be reimbursable under Medicaid is emphasized throughout the proposed rule.

However, the pervasive emphasis on restoring functioning and change in status rather than maintaining functioning could have the unintended effect of denying reimbursement for services that should be covered as rehabilitative for individuals with mental health and substance abuse problems. For these

individuals, the recovery process is varied and can be cyclical in nature with periods of stability, periods of regression or relapse and periods of restoration. The continuation of rehabilitative services is at times essential to retain these individuals' functional level and failure to provide a supportive level of rehabilitation could result in deterioration, necessitating a reinstatement of intensive services.

In addition, this section might be in direct conflict with section 1901 of the Social Security Act which specifically authorizes funds to furnish, "(2) rehabilitation and other services to help such families and individuals attain or retain [emphasis added] capability for independence or self-care..."

SECTION 440(D)(1)(VII)	DEFINITION OF MEDICAL SERVICES
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**Recommendation:** APA urges CMS to modify the language of 440(d)(1)(vii) to include: "services that are required for the "diagnosis, assessment, treatment or care of a physical or mental condition..."

**Rationale:** The proposed regulations provide that medical services are those required for the diagnosis, treatment or care of a physical or mental disorder. It would be helpful to clarify that rehabilitation services include a functional assessment of the individual. It is critical for a provider to attain the correct diagnosis, but individuals with the same diagnosis may have very different rehabilitative goals and services based on their current functional level and stage of recovery.

This would provide consistency with later requirements in the proposed regulation for a rehabilitation plan which must be "based on a comprehensive assessment... including diagnosis and presence of a functional impairment in daily living."

SECTION 440.130(D)(4)	IMPAIRMENTS TO BE ADDRESSED
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**Recommendation:** APA urges CMS to modify the language of 440.130(d)(4) to include: "may address the individual's physical or mental impairments, mental health impairments, and/or substance-related disorder treatment needs."

**Rationale:** APA strongly supports the inclusion of individuals with "mental impairments" to this section. The proposed language may have the unintended consequence of individuals with cognitive impairments and developmental disabilities who meet the requirements for the provision of rehabilitation services being denied services.

SECTION 440.130(D)(5) SETTINGS

**Recommendation #1:** APA requests that CMS omit the language in the preamble granting states the authority to determine the setting.

**Rationale #1:** The preamble would seem to conflict with the statutory definition of 42 U.S.C. § 1396d(a)(13) which defines the service as “rehabilitation services, including any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts.”

**Recommendation #2:** APA urges CMS to modify the language to include additional settings:

“...**school, workplace, foster home, group home, community mental health center, substance abuse treatment center, community settings**, and other locations.”

**Rationale #2:** While the preamble includes some of the settings, a more inclusive statement in the proposed regulation of where rehabilitative services may be provided, reinforces the emphasis on the provision of services in a setting that is most appropriate and will yield the best results.

SECTION 440.140(D)(3) DEFINITION OF WRITTEN REHABILITATION PLAN

**Recommendation #1:** APA urges CMS to modify the language to include rehabilitation coverage for the prevention of relapse, and the retention of functional ability as appropriate goals within a written rehabilitation plan.

**Rationale #1:** The recovery process for individuals with mental health conditions and substance abuse problems is not always a linear process and unique to each individual. The inclusion of “prevention of relapse” for these populations recognizes this and allows states to continue to offer a supportive level of rehabilitation as a legitimate goal.

**Recommendation #2:** APA urges CMS to modify current language to include exigent circumstances by adding: “(xv) document that the individual or representative participated in the development of the plan, signed the plan, and received a copy of the rehabilitation plan **or document the exigent circumstances which prevented such participation in the development of the plan, signing of the plan and/or receipt of a copy of the plan.**”

**Rationale #2:** There may be circumstances where an individual or their representative may not be able to be an active participant in the creation of a rehabilitation plan. The proposed regulations should have sufficient flexibility to allow for Medicaid financing in these cases. As an example, an individual

undergoing a psychological crisis may not be able to actively participate in a treatment plan at that time.

**Recommendation #3:** APA urges CMS to offer guidelines to clarify the requirements for participation in the development of a rehabilitation plan for children in foster care.

**Rationale #3:** For a child in foster care, and therefore under state custody, who is receiving rehabilitative services, it is unclear who has authority and who should be involved in the decision-making process. In addition, the provisions do not offer guidelines regarding what happens when a family is not accessible or chooses not to participate.

SECTION 441.45(A)(1)	ASSURANCE OF COMPLIANCE WITH OTHER FEDERAL REGULATIONS
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**Recommendation:** APA strongly urges CMS to add the language: “Ensure that services are provided in accordance with Sec. 431.50, Sec. 431.51, Sec. 440.230, Sec. 440,240 of this chapter ~~and 440.40(b)~~ of this chapter and **42 U.S.C. Sections 1396(d)(r)(5) and 1396a(a)(43).**”

**Rationale:** With regard to the intersection of these provisions and other Federal regulations, it is crucial to also include the regulatory and statutory requirements of Early and Periodic Screening, Diagnosis and Treatment Services (EPSDT), which mandate that Medicaid beneficiaries under the age of 21 must receive all medically necessary services to ameliorate or correct a physical or mental condition regardless of whether the services are included in a state’s Medicaid plan. 42 U.S.C. Section 1396d(r)(5) and 42 C.F.R. Section 440.40(b).

EPSDT is a critical requirement for children with mental health problems who require rehabilitative services to facilitate their recovery and full participation in their schools and communities. States should be required to ensure that nothing in the implementation of these regulations will compromise the mandate in the EPSDT provisions.

441.45(A)(2)	REHABILITATIVE SERVICES
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**Recommendation:** APA urges CMS to include additional language to describe when services may be furnished with the goal of retaining or maintaining functioning.

**Rationale:** This section limits rehabilitative services to those furnished for the maximum reduction of physical or mental disability and restoration of the individual to the best possible functional level, as defined in the law. However, it would be helpful to emphasize when services may be furnished to retain or maintain functioning.

SECTION 441.45(B)(1)

SERVICES THAT ARE EXCLUDED FROM REHABILITATION,  
INCLUDING THOSE THAT ARE INTRINSIC ELEMENTS OF  
OTHER PROGRAMS

**Recommendation #1:** APA strongly urges CMS to withdraw this section of the regulation.

**Rationale #1:** Requiring an intrinsic elements test without a definition creates an ambiguous standard that states and beneficiaries will be unable to apply.

In addition, with regard to children, this section directly conflicts with EPSDT. This is a clear mandate that applies regardless of whether the rehabilitative service is intrinsic to another program or is furnished as a benefit or administrative activity of another program. While the proposed regulation appears to acknowledge this in § 441.45(b)(1)(i) and (ii), without sufficient clarification eligible children may be denied appropriate services.

This requirement also appears to conflict with statutory and regulatory provisions regarding Medicaid coverage of related services under the Individuals with Disabilities Education Act (IDEA) and third party payment. In Section I.(A) of the preamble, it is noted that Medicaid has been used to fund services that are included under IDEA. 72 Fed. Reg. at 45202. Such coverage is permissible and appropriate as the Medicaid statute specifically provides that the Secretary cannot prohibit or restrict coverage of Medicaid services simply because the services are included in an individualized education plan for IDEA services. 42 U.S.C. § 1396b(c).

Finally, third party liability rules under Medicaid have already recognized that states have an obligation to determine if another entity is legally liable for payment of services. 42 U.S.C. § 1396a(a)(25)(A) requires that State and local agencies administering the state Medicaid plan “will take all reasonable measures to ascertain the legal liability of third parties...” Even if a third party is liable, when EPSDT services are at issue, the Medicaid agency is supposed to pay a claim for services, then pursue reimbursement from the liable third party. 42 U.S.C. § 1396a(a)(25)(E); 42 C.F.R. § 433.139(b)(3)(i) (2007).

**Recommendation #2:** Should CMS continue to require the limitation of rehabilitative services as outlined in this section, APA recommends the inclusion of guidelines and language to clarify that the exclusion will only apply if the non-medical programs that are providing them are legally obligated to provide the services to a specific Medicaid eligible individual. APA would also strongly recommend that discretionary appropriations and waiver-based programs do not constitute a legal obligation or liability to a specific individual.

**Rationale #2:** Medicaid rehabilitation services must be available for all eligible individuals based on an identified medical need to address a functional

impairment regardless of any involvement in another program. The preamble specifically states that “enrollment in these non-Medicaid programs does not affect eligibility for Title XIX services.” Without additional guidelines and protections, there is no assurance that eligible individuals will have access to equivalent necessary rehabilitative services as compared to the services provided under Medicaid.

**Recommendation #3:** Should CMS continue to require the limitation of rehabilitative services as outlined in this section, APA also recommends the inclusion of specific language within the regulation to reflect that children are covered under EPSDT and will receive all necessary services to correct or ameliorate a physical or mental condition, regardless of whether the rehabilitative service is intrinsic to another program or is furnished as a benefit or administrative activity of another program.

**Rationale #3:** Without sufficient clarification in the regulation regarding the provision of rehabilitative services to children, eligible children may be denied appropriate services.

SECTIONS 445(B)(1)(I-IV)      EXCLUSION OF THERAPEUTIC FOSTER CARE SERVICES
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**Recommendation:** APA urges CMS to include therapeutic foster care as a covered rehabilitation service for children with serious mental disorders at imminent risk of placement in a residential treatment facility. APA supports the inclusion of language in 441.45(b)(1)(i) to clarify that any covered rehabilitation service may always be furnished by mental health rehabilitation providers to children in therapeutic foster care.

**Rationale:** Therapeutic foster care is one of the least restrictive out-of-home placements for a child with a serious mental disorder. These services have been effectively used to avoid out of home placement and more trauma to the child and family.

Moreover, in describing adoption services (at (iii)) and routine supervision in schools (at (iv)), the regulation does not include the same exception for medically necessary rehabilitation services. 72 Fed. Reg. at 45212 (Proposed § 441.45(b)(1)(iii) – (iv)).

PROPOSED § 441.45(B)(2)      HABILITATION SERVICES
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**Recommendation:** APA urges CMS to withdraw the language that seems to indicate a categorical exclusion for habilitation services and add language to § 441.45(b)(2) stating that a diagnosis of mental retardation or related conditions does not automatically exclude a person from eligibility for rehabilitation services.

**Rationale:** The proposed regulations make it explicit that habilitation services are not coverable as rehabilitation services because they are designed to help individuals acquire new functional abilities rather than to restore function. 42 C.F.R. § 441.45(b)(2), see also 72 Fed. Reg. at 45205 (Section II.F.2). Such a provision may lead to automatic exclusion of services for individuals with cognitive impairments and developmental disabilities, when those services may be appropriate.

In addition, the proposed rules do not provide guidance for coverage of services for individuals with dual diagnoses of mental retardation/related conditions and mental health conditions, and may lead to a denial of medically necessary covered services for this population.

SECTION 445(B)(3):	EXCLUSION FOR RECREATION OR SOCIAL ACTIVITIES THAT ARE NOT FOCUSED ON REHABILITATION.
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**Recommendation:** APA urges CMS to include language stating that **“Recreational or social activities that are addressing a particular impairment or functional need, such as social activities addressing the goal of social skills development, are reimbursable as rehabilitation services.”**

**Rationale:** CMS states in the preamble that “for an individual with a mental illness, what may appear to be a social activity may in fact be addressing the rehabilitative goal of social skills development as identified in the rehabilitation plan.” APA urges CMS to utilize this clarifying language in the regulation itself.

SECTION 441.45(B)(4):	EXCLUSION OF SERVICES PROVIDED BY PUBLIC INSTITUTIONS.
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**Recommendation:** APA urges CMS to modify the language: “... that are not part of the public institution **system**, when the services are identified due to a medical condition targeted under the State’s Plan.”

**Rationale:** APA requests CMS to remove the word “system” to be clear that community services which are rehabilitative are reimbursable regardless of whether a child or adult remains part of the juvenile justice or correctional system. This is particularly important for rehabilitation services that are provided in the community while the adolescent or adult with mental health problems is still under the auspices of the correctional system. This may include mental health services in a group home for youth who are under juvenile court jurisdiction or community treatment for adults who are still in the corrections system. This clarification is very important given the large numbers of juveniles and adults with mental health problems who come under the jurisdiction of these systems. This is consistent with other sections of the preamble and regulation which recognize

that involvement in other programs does not affect Medicaid eligibility for services.

SECTION 441.45(B)(8):	EXCLUSION OF SERVICES THAT ARE NOT PROVIDED TO A SPECIFIC INDIVIDUAL.
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**Recommendation:** APA urges CMS to modify the language to include: **“Contacts with and services to family members and other non-eligible individuals for the purpose of treating the Medicaid eligible individual may be covered as a rehabilitative service.”**

**Rationale:** APA applauds the inclusive language in the preamble recognizing that “effective rehabilitation of eligible individuals may require some contact with non-eligible individuals,” specifically “contacts with family members for the purpose of treating the Medicaid eligible individual may be covered under Medicaid.” APA urges CMS to include specific language into the regulations.

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Thank you for your consideration of these comments concerning the proposed regulations on the Medicaid program and coverage for rehabilitative services (CMS-2261-P). We welcome the opportunity to work with CMS in helping to provide for beneficiary protections and to ensure fiscal integrity in the provision of Medicaid rehabilitative services. For additional information, please contact Day Al-Mohamed, J.D., in APA’s Public Interest Government Relations Office at (202) 336-6061.

Sincerely,



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Associate Executive Director  
Public Interest Directorate