

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

#### 42 CFR Parts 431, 433, and 440

[CMS–2287–P]

RIN 0938–AP13

#### Medicaid Program; Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Proposed rule.

**SUMMARY:** Under the Medicaid program, Federal payment is available for the costs of administrative activities “as found necessary by the Secretary for the proper and efficient administration of the State plan.” The proposed rule would eliminate reimbursement under the Medicaid program for the costs of certain activities based on a Secretarial finding that these activities are not necessary for the proper and efficient administration of the State plan, nor do they meet the definition of an optional transportation benefit. Based on these determinations, under the proposed rule, Federal Medicaid payments would no longer be available for administrative activities performed by school employees or contractors, or anyone under the control of a public or private educational institution, and transportation from home to school and back for school-aged children with an Individualized Education Program (IEP) or an Individualized Family Services Plan (IFSP) established pursuant to the Individuals with Disabilities Education Act (IDEA).

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on November 6, 2007.

**ADDRESSES:** In commenting, please refer to file code CMS–2287–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (no duplicates, please):

1. *Electronically.* You may submit electronic comments on specific issues in this regulation to <http://www.cms.hhs.gov/eRulemaking>. Click on the link “Submit electronic comments on CMS regulations with an open comment period.” (Attachments should be in Microsoft Word,

WordPerfect, or Excel; however, we prefer Microsoft Word.)

2. *By regular mail.* You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2287–P, Mail Stop S3–14–22, 7500 Security Boulevard, Baltimore, MD 21244.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2287–P, Mail Stop S3–14–22, 7500 Security Boulevard, Baltimore, MD 21244.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to one of the following addresses. If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–3256 or (410) 786–9215 in advance to schedule your arrival with one of our staff members. Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201; or 7500 Security Boulevard, Baltimore, MD 21244–1850.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

**FOR FURTHER INFORMATION CONTACT:** Sharon J. Brown, (410) 786–0673, Judi Wallace, (410) 786–3197.

*Submitting Comments:* We welcome comments from the public on all issues set forth in this proposed rule to assist us in fully considering issues and developing policies. You can assist us by referencing the file code CMS–2287–P the specific “issue identifier” that precedes the section on which you choose to comment.

*Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any

personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: <http://www.cms.hhs.gov/eRulemaking>. Click on the link “Electronic Comments on CMS Regulations” on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. E.S.T. To schedule an appointment to view public comments, phone 1–800–743–3951.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

###### A. Medicaid Program

Title XIX of the Social Security Act (the Act) authorizes Federal grants to States for Medicaid programs, operated by the State under an approved State plan, that provide medical assistance to needy individuals including low-income families, the elderly, and persons with disabilities. Federal payment is available to States for a proportion of expenditures for medical assistance under the approved State plan, and qualified expenditures for administration of the State plan. This joint Federal-state financing of expenditures is described in section 1903(a) of the Act, which sets forth the rates of Federal financing for different types of expenditures.

Under section 1903(a)(7), of the Act, Federal payment is currently available at a rate of 50 percent of amounts expended by a State “as found necessary by the Secretary for the proper and efficient administration of the State plan.” In addition, OMB Circular A–87, which contains the cost principles for State, local and Indian tribal governments for the administration of Federal awards, states that, “Governmental units are responsible for the efficient and effective administration of Federal awards.” Under these provisions, administrative expenditures must be reasonable and necessary for the operation of the governmental unit or the performance of the Federal award.

Transportation to and from providers is not expressly mentioned in the Medicaid statute. Since the inception of the program, however, the Federal

government has recognized that transportation is essential to the administration of the State plan, to ensure that beneficiaries have access to covered services.

Federal regulations at 42 Code of Federal Regulations (CFR) 431.53 require that State plans “specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers” and describe the methods for doing so. Alternatively, under 42 CFR 440.170(a), the option of furnishing transportation as an optional covered service recognized under section 1905(a)(28) of the Act is defined and specified. Whether transportation is furnished as an administrative activity or as a covered service could affect the Federal Medicaid matching rate and the flexibility available to the State, but these issues are not relevant for purposes of this proposed regulation.

### *B. Medicaid and Schools*

#### **1. Medical Assistance Furnished in Schools**

A wide range of medical services are furnished to students in school settings. In particular, pursuant to requirements under the Individuals with Disabilities Education Act (IDEA), schools deliver a broad range of educational and related services (e.g., educational, social, and medical services) to students with disabilities to address their diverse needs.

Section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988 (MCCA) amended section 1903(c) of the Act to clarify that Federal Medicaid payment is available for otherwise covered services furnished to children in fulfillment of requirements under IDEA. Specifically, section 1903(c) of the Act, as amended by the MCCA, prohibits the Secretary from denying or restricting Federal Medicaid payment to States for covered services furnished to a child with a disability on the basis that the services are included in the child’s Individualized Education Program (IEP) or Individualized Family Services Plan (IFSP) established pursuant to the IDEA.

Some of the special education and related services required by the IDEA are within the scope of services provided under the Medicaid program. Medicaid covers direct medical services included in an IEP or IFSP under the following conditions:

- The direct medical services are medically necessary and included in a Medicaid covered category (speech therapy, physical therapy, etc.);
- All other Federal and State Medicaid regulations are followed,

including those for provider qualifications, comparability of services and the amount, duration and scope provisions; and

- The direct medical services are included in the State’s approved Medicaid plan and/or available under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) program.

As discussed in more detail below, the proposed rule would not affect Federal reimbursement for direct medical service expenditures (other than certain transportation costs, discussed separately below).

#### **2. Administrative Activities Performed by School Employees or Contractors (School-Based Administrative Activities)**

CMS has previously recognized that schools and school districts may perform activities that provide support for the Medicaid State plan. In 1997, CMS issued a guidance document entitled, “MEDICAID AND SCHOOL HEALTH: A TECHNICAL ASSISTANCE GUIDE,” that interpreted existing law and regulations to permit States to claim Federal Medicaid matching funds for the costs of school-based administrative activities, specifically including Medicaid outreach, eligibility intake, information and referral, coordination and monitoring of health services, and interagency coordination. In that guidance, CMS emphasized that allowable activities must directly relate and support the Medicaid State plan or waiver services.

In May 2003, CMS issued additional guidance on school-based claiming in the “Medicaid School-Based Administrative Claiming Guide” (the Guide). The Guide was intended to inform schools, State Medicaid agencies, and other interested parties on the appropriate methods for claiming Federal reimbursement for the costs of Medicaid administrative activities performed in the school setting. The Guide described allowable Medicaid school-based administrative activities as including the following:

- Medicaid Outreach
- Facilitating Medicaid Eligibility Determinations
- Transportation Related Activities in Support of Medicaid Covered Services
- Translation Related to Medicaid Services
- Program Planning, Policy Development, and Interagency Coordination Related to Medical Services
- Medical/Medicaid Related Training
- Referral, Coordination, and Monitoring of Medicaid Services

As discussed further below, this proposed rule would supersede the prior guidance and would represent the Secretary’s determination that Medicaid expenditures for such school-based administrative activities do not meet the statutory test under section 1903(a)(7) of being “necessary \* \* \* for the proper and efficient administration of the State plan.” However, the proposed rule does not bring into question the legitimacy of the types of Medicaid administrative activities provided in schools. Rather, it reflects the Secretary’s determination that such activities are only necessary for the proper and efficient administration of the State plan when conducted by employees of the State or local Medicaid agency. Due to inconsistent application of Medicaid requirements by schools to the types of administrative activities conducted in the school setting, the Secretary has determined that such activities can only be properly conducted, overseen and appropriately allocated to Medicaid when conducted by employees of the State or local Medicaid agency.

CMS recognizes that schools are valid settings for the delivery of Medicaid services. Under the proposed rule, CMS would continue to reimburse States for the costs of school-based direct medical services under the IDEA that are covered in their approved State Medicaid plan, and for transportation of school-age children from school to a non-school-based provider that bills under the Medicaid program, among other types of expenditures that will remain eligible for Federal financial participation (FFP).

#### **3. Transportation From Home to School and Back**

Ensuring transportation to and from providers is a required administrative activity under CMS regulations at 42 CFR 431.53 or, alternatively, transportation to and from providers can be furnished as a medical service recognized by the Secretary under section 1905(a)(28) of the Act, as indicated in 42 CFR 440.170(a).

CMS previously addressed school-based transportation in the guidance document discussed in the prior section, and in guidance contained in a May 21, 1999, letter to State Medicaid Directors. In those documents, CMS expressed the policy that Medicaid payment for transporting Medicaid-eligible children to and from school was extremely limited, including only specialized transportation that is required under an IEP for children with disabilities, on a day when that child receives a covered medical service from a qualified provider at the school. In

this guidance, CMS indicated that the same interpretation was applicable to transportation claimed as a covered medical service.

However, as discussed further below, the proposed rule would supersede the prior guidance and would represent the Secretary's determination that transportation from home to school and back does not meet the definition of an optional medical transportation service nor is it necessary for the proper and efficient administration of the State plan.

### C. Medicaid Reimbursement

In general, States submit claims for Federal funds with respect to expenditures under their Medicaid programs either as "medical assistance" or as "State/local administration."

#### i. Medical Assistance

FFP for allowable medical assistance expenditures under the Medicaid program is determined by the applicable Federal medical assistance percentage (FMAP) rate for a given State. The FMAP rate is determined annually for each State by a formula based on the relationship of the State's average per capita income level with the national per capita income level.

The State Medicaid Agency (SMA) reimburses participating Medicaid providers, including school providers, for allowable direct medical service expenditures. These reimbursement rates are set by the SMA and, therefore, any discussions regarding the appropriateness of such rates on the part of providers must be conducted at the State level. The reimbursement methodology is contained in the CMS approved Medicaid State Plan.

The proposed rule would not affect Federal reimbursement for the costs of allowable direct medical service expenditures.

#### ii. Administration

According to the Medicaid statute at section 1903(a)(7) of the Act and implementing regulations at 42 CFR 430.1 and 42 CFR 431.15, for the costs of any administrative activities to be allowable and reimbursable under Medicaid, the activities must be "found necessary by the Secretary for the proper and efficient administration of the plan" (referring to the Medicaid State plan).

In addition, OMB Circular A-87, which contains the cost principles for State, local and Indian tribal governments for the administration of Federal awards, states that, "Governmental units are responsible for the efficient and effective

administration of Federal awards."

Under these provisions, administrative expenditures must be reasonable and necessary for the operation of the governmental unit or the performance of the Federal award.

FFP for allowable administrative expenditures in schools is available at a matching rate of 50 percent. The proposed rule would eliminate reimbursement for administrative expenditures conducted by school employees or contractors, or anyone under the control of a public or private educational agency, and certain transportation costs, as specified below. However, under the proposed rule, Federal funding would continue to be available for administrative overhead costs which are integral to, or an extension of, a specified direct medical service to the extent those costs are factored into the rate paid for such services and reimbursed at the applicable FMAP rate. These overhead costs include patient follow-up, assessment, counseling, education, parent consultations, and billing activities. Furthermore, school-based administrative activities, such as Medicaid outreach and eligibility intake, that are conducted by employees of the State or local Medicaid agency, will remain eligible for FFP.

#### D. Improper Billing

CMS has had long-standing concerns about improper billing by school districts for administrative costs and transportation services. The U.S. Department of Health and Human Services' Office of the Inspector General and the Government Accountability Office have identified these categories of expenses as susceptible to widespread fraud and abuse. In addition, costs related to education mandates have been improperly allocated to Medicaid. Congress has also expressed concern about the dramatic increase in Medicaid claims for school-based costs, which were the subject of two U.S. Senate Finance Committee hearings, held in June 1999 and April 2000. In fact, examining State-reported expenditure data related to schools reveals that, in certain years, a number of States' reported school-based administrative expenditures approached or even exceeded their reported school-based direct medical service expenditures, which is clearly evidence of improper claiming in this area. There may be certain States that do not submit claims for the costs of direct services provided in schools, thereby accounting for instances in which a State's school-based administrative expenditures exceed their direct service expenditures,

but such instances are an exception to overall school-based expenditure reporting trends.

## II. Provisions of the Proposed Regulations

The proposed rule would establish a Secretarial finding that school-based administrative activities are not necessary for the proper and efficient administration of the State plan. Moreover, this proposed rule would establish a finding that transportation from home to school and back for school-age children is neither necessary for the proper and efficient administration of the State plan, nor within the scope of the optional medical transportation benefit. Based on these findings, the proposed rule would specify that FFP under the Medicaid program will not be available for school-based administrative and certain transportation costs unless conducted by employees of the State or local Medicaid agency.

Under the proposed rule, the following changes would apply for the costs of the following activities or services:

- FFP would no longer be available for the costs of school-based administrative activities under Medicaid. As discussed below, by administrative activities we refer to activities that are not properly included in the scope of a covered service. School-based administrative expenditures are expenditures under the administrative control of a public or private educational institution and that are conducted by school employees or contractors, or anyone under the control of a public or private educational agency.

- FFP would no longer be available for the costs of transportation from home to school and back for school-age children with an IEP or IFSP established pursuant to the IDEA.

The rule would supersede all previous guidance, including guidance on school-based administrative claiming and school-based transportation.

Under the proposed rule, CMS would continue to reimburse States for school-based direct Medicaid services in their approved State plans. That is, the proposed rule would not affect the treatment of expenditures for direct medical services that are included in the approved State Medicaid plan and provided in schools, nor would it affect transportation of school-aged children from school or home to a non-school-based direct medical service provider that bills under the Medicaid program, or from the non-school-based provider to school or home.

Furthermore, under the proposed rule, CMS would continue to reimburse States for transportation costs related to children who are not yet school-age and are being transported from home to another location, including school, and back to receive direct medical services, as long as the visit does not include an educational component or any activity unrelated to the covered direct medical service.

Federal funding would also continue to be available for administrative overhead costs that are integral to, or an extension of, a direct medical service and, as such, are claimed as medical assistance. These activities are properly reimbursed at the applicable FMAP rate for the related direct medical service, and include patient follow-up, assessment, counseling, education, parent consultations, and billing activities. Furthermore, school-based administrative activities, such as Medicaid outreach and eligibility intake, that are conducted by employees of the State or local Medicaid agency will remain eligible for FFP under the proposed rule.

CMS has determined that administrative activities performed by schools, and transportation of school-age children from home to school and back, are not necessary for proper and efficient administration of the State Medicaid plan, and are not within the scope of the transportation services recognized by the Secretary under 42 CFR 440.170(a), for the following reasons:

(1) The activities or services support the educational program and do not specifically benefit the Medicaid program;

(2) The activities or services are performed by school systems to further their educational mission and/or to meet requirements under the IDEA, even in the absence of any Medicaid payment;

(3) The types of school-based administrative activities for which claims are submitted to Medicaid largely overlap with educational activities that do not directly benefit the Medicaid program; and

(4) Transportation from home to school and back is not properly characterized as transportation to or from a medical provider.

School-based administrative activities and transportation from home to school and back are performed primarily to support educational programs rather than administration of the State Medicaid Plan. One of the essential functions of schools is to ensure that students receive all required services

necessary to obtain a free appropriate public education.

Students receive transportation from home to school and back regardless of whether or not they are determined eligible for special education services. Transportation from home to school and back is an essential school function and is furnished by the school regardless of whether medical services are received at the school. School-age children, including children with an IEP or IFSP, are transported from home to school primarily to receive an education, not to receive direct medical services. Because transportation coincides with the school schedule and is not directly related to a visit to a medical provider, characterization of the transportation as medically necessary to gain access to providers is inaccurate.

With respect to school-based administrative activities, section 1903(c) of the Act provides specific authority under the Medicaid program only for reimbursement of medical assistance for specified covered services in schools; it contains no provision authorizing claiming for the costs of school-based Medicaid administration. CMS has determined that the costs of school-based administrative activities only meet the requirement of being proper and efficient for the administration of the State plan to the extent they are conducted by employees of the State or local Medicaid agency, rather than school employees or contractors, or anyone under the control of a public or private educational institution. In addition, the types of school-based administrative activities for which claims are submitted to Medicaid largely overlap with educational activities that do not directly benefit the Medicaid program. Furthermore, there is unclear and inconsistent application of Medicaid requirements by schools to the types of administrative activities conducted in the school setting. Therefore, under the proposed rule, the costs of school-based administrative activities would only be allocable to Medicaid when provided by employees of the State or local Medicaid agency.

States receive Federal aid under IDEA to assist public schools in delivering mandated services in pursuit of a free appropriate public education. Section 1903(c) of the Act was intended to provide States with access to Medicaid funding for services provided under IDEA in addition to Federal funding provided through IDEA grants to States. Therefore, CMS has determined that the proper and efficient operation of the State Medicaid plan does not require payment for the cost of administration unrelated to the provision of a covered

direct medical service or for transportation from home to school and back. Schools must perform these activities pursuant to education requirements, even in the absence of Medicaid payment. Activities performed by school employees are therefore not specifically authorized by the responsible State Medicaid agency.

The proposed rule would eliminate FFP for State claims related to transporting school-age children from home to school and back. However, if a Medicaid eligible student is transported from school to an appointment for a covered service with a non-school-based direct medical service provider that bills under the Medicaid program, the costs of such transportation would remain eligible for FFP.

Furthermore, under the proposed rule CMS would continue to reimburse States for transportation costs related to children who are not yet school-age and are being transported from home to another location, including school, and back to receive direct medical services as long as the visit does not include an educational component or any activity unrelated to the covered direct medical service.

### III. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

### IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

### V. Regulatory Impact Statement

#### A. Overall Impact

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-534), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), and Executive Order 13132. Executive Order 12866 (as amended by Executive Order 13258 and Executive

Order 13422) directs agencies to assess all costs and benefits of all available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). The proposed rule's savings would exceed this economic threshold and it is therefore considered a major rule. The proposed rule is estimated to reduce Federal Medicaid outlays by \$635 million in FY 2009 and by \$3.6 billion over the first five years (FY 2009–2013). The RFA requires agencies to analyze options for regulatory relief of small entities if proposed rules have a "significant economic impact on a substantial number of small entities." For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions, including school districts. "Small" governmental jurisdictions are defined as having a population of less than fifty thousand. Individuals and States are not included in the definition of a small entity. Although some school districts have populations below this threshold and are therefore considered small entities for purposes of the RFA, CMS has determined the impact on local school districts as a result of the proposed rule would not exceed the threshold of "significant" economic impact under the RFA, as discussed below. However, we are specifically soliciting comments from the public regarding the potential impact on local schools.

States have the option under the proposed rule to continue funding school-based administrative activities using State-only funds; this rule simply eliminates the availability of Federal Medicaid matching funds for these expenditures when they are performed by employees of the school or contractors, or anyone under the control of a public or private educational institution, rather than employees of the Medicaid agency. However, with respect to transportation specifically, States and/or schools will be required under the proposed rule to continue funding transportation of school-age children from home to school and back to the extent it is required by education statute(s). That is because schools provide transportation to and from school for all students, not just (or even primarily) special education or Medicaid eligible students.

The Individuals with Disabilities Education Act (IDEA) requires public schools to provide a free appropriate public education to children with disabilities. The IDEA authorizes funding through the U.S. Department of Education (not Medicaid) for special education and related services for children with disabilities. While section 1903(c) of the Social Security Act authorized Medicaid funding for covered services included in an individualized education plan under the IDEA, section 1903(c) does not expressly authorize Medicaid funding for administrative activities that schools conduct in implementing their IDEA responsibilities.

Medicaid matching funds provided as reimbursement for administrative activities are supplemental to the State and local funding localities already received. Furthermore, the estimated annual Federal savings under this proposed rule is only about one eighth of one percent of total annual spending on elementary and secondary schools (in 2004 total elementary and secondary spending was \$453 billion according to the Statistical Abstract of the United States, Table 245, at <http://www.census.gov/compendia/statab/education>). According to the "Guidance on Proper Consideration of Small Entities in Rulemakings of the U.S. Department of Health and Human Services (May 2003)," if the average annual impact on small entities is 3 to 5 percent or more, it is to be considered significant. Because we use a threshold of 3 to 5 percent of annual revenues or costs in determining whether a proposed or final rule has a "significant" economic impact on small entities, we have determined that this proposed rule will not have a significant economic impact on a substantial number of small entities. However, we welcome comments on both the stated threshold for determining what is or is not a significant economic impact and the conclusion we reached as a result of the chosen threshold. We are additionally requesting comments specific to the potential impact of the proposed rule on other programs, both Federal and State programs.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We are not

preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this rule would not have a direct impact on the operations of a substantial number of small rural hospitals. Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately \$130 million. This rule contains no mandates. The proposed rule anticipates Federal savings of approximately \$635 million in the first year following implementation, but does not require States to replace that Federal funding with State funding or take any other particular steps. Any mandates regarding school transportation spending arise under State constitutions, or other Federal or State laws. School-based Medicaid administrative activities and transportation from home to school and back are not required activities under the Medicaid statute.

Executive Order 13132 on Federalism establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirements on State and local governments, preempts State law, or otherwise has Federalism implications. EO 13132 focuses on the roles and responsibilities of different levels of government, and requires Federal deference to State policy making discretion when States make decisions about the uses of their own funds or otherwise make State-level decisions. We find that this rule would not have a substantial effect on State or local government policy discretion. While the proposed rule would eliminate the ability of States to claim Federal Medicaid funding for school-based administrative and certain transportation costs, notably routine home-to-school and back bus transportation, it would not impose any requirement as to how States or localities administer or pay for such activities, or interfere in any way with the ability of States to determine school transportation policy. The rule would simply recognize that routine school transportation from home to school and back and related administrative activities are not authorized under the Medicaid statute as necessary for the proper and efficient administration of the State plan, nor do they meet the

definition of an optional transportation benefit under Medicaid.

In accordance with the provisions of Executive Order 12866, this regulation

was reviewed by the Office of Management and Budget.

#### *B. Anticipated Effects*

The proposed rule is a major rule because it is estimated to result in \$635

million in savings during the first year and \$3.6 billion in savings over the first five years. The following chart summarizes our estimate of the anticipated effects of this proposed rule.

**TABLE I.—ESTIMATED REDUCTION IN FEDERAL MEDICAID OUTLAYS RESULTING FROM THE ELIMINATION OF REIMBURSEMENT FOR SCHOOL-BASED ADMINISTRATION AND CERTAIN TRANSPORTATION COSTS IN PROPOSED RULE**

[Amounts in millions]

|                                                                                     | 2009  | 2010  | 2011  | 2012  | 2013  | 2009–2013 |
|-------------------------------------------------------------------------------------|-------|-------|-------|-------|-------|-----------|
| School-Based Costs: Eliminate Reimbursement for Administration/Transportation ..... | – 635 | – 675 | – 720 | – 770 | – 820 | – 3620    |

These estimates assume implementation beginning in the 2008–09 school year and are based on recent reviews of State reported school-based administrative and direct medical service expenditures reported on the quarterly CMS expenditure forms (MBES/CBES Form 64.10I and Form 64.10PI Information Forms for School-Based ADM and MAP claims). From these voluntary State claiming reports, an estimate of the total amount of claims under the Medicaid program that would be affected by the proposed rule was developed and then projected forward using assumptions consistent with the most recent President's Budget projections. There is uncertainty in this estimate to the extent that State-reported expenditures related to school-based administration and transportation may not match actual current spending and to the extent that the impact of the proposed rule is greater than or less than assumed. Furthermore, claims related to the costs of transportation from home to school and back as a direct service are included in the total amount claimed for all medical assistance. Therefore, it is difficult, if not impossible, to determine the impact of the proposed rule on the types of transportation costs that would be affected.

#### **VI. Alternatives Considered**

In developing this regulation, various alternatives were considered. We considered the possibility of conducting stronger review of reimbursement methodologies for the costs of Medicaid administrative activities provided in schools and transportation from home to school and back. We also considered seeking to implement policies requiring greater accountability and oversight responsibility for school-based administrative and transportation expenditures, and clarification of Federal requirements without any new regulation (using existing statutory and regulatory authority). In addition, we considered developing standard parameters applicable to claiming for all school-based Medicaid administration and transportation costs. However, CMS attempted, by issuing the May 2003 Medicaid School-Based Administrative Claiming Guide, to provide specific guidance on the requirements for claiming costs related to school-based activities. In the end, we ultimately rejected these alternatives because the intervening years have proven that such activities cannot be adequately regulated or overseen.

CMS has determined that the rulemaking process would be the most

effective method of implementing these policies because the rulemaking process would better inform affected parties, allow for public input, and make clear that the requirements set forth are uniform, fair and consistent with the underlying statutory intent. We welcome comments on this regulatory impact analysis and any additional information that would be useful in assessing the potential impact of the proposed rule.

#### *A. Accounting Statement*

As required by OMB Circular A–4 (available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>), in the table below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this proposed rule. This table provides our best estimate of the decrease in Federal Medicaid outlays resulting from the elimination of reimbursement for school-based administration and certain transportation costs that would be implemented by this proposed rule. The sum total of these expenditures is classified as savings in Federal Medicaid spending.

**TABLE II.—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM FISCAL YEAR 2009 TO FISCAL YEAR 2013**

[In millions]

| Category                       | TRANSFERS                                             |                        |
|--------------------------------|-------------------------------------------------------|------------------------|
|                                | Negative Transfer-estimated decrease in expenditures: |                        |
| Annualized Monetized Transfers | 3% Units Discount Rate                                | 7% Units Discount Rate |
|                                | \$721                                                 | \$718                  |
| From Whom To Whom?             | Federal Government to States                          |                        |

**List of Subjects****42 CFR Part 431**

Grant programs—health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

**42 CFR Part 433**

Administrative practice and procedure, Child support, Claims, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

**42 CFR Part 440**

Grant programs—health, Medicaid.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services would amend 42 CFR chapter IV as set forth below:

**PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION**

1. The authority citation for part 431 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 431.53 is revised to read as follows:

**§ 431.53 Assurance of Transportation.**

(a) A State plan must—

(1) Specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers; and

(2) Describe the methods that the agency will use to meet this requirement.

(b) For purposes of this assurance, necessary transportation does not include transportation of school-age children between home and school.

**PART 433—STATE FISCAL ADMINISTRATION**

3. The authority citation for part 433 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

4. Part 433 is amended by adding new section 433.20 as follows:

**§ 433.20 Rates of FFP for Administration: Reimbursement for School-Based Administrative Expenditures.**

Federal financial participation under Medicaid is not available for expenditures for administrative activities by school employees, school contractors, or anyone under the control of a public or private educational institution.

**PART 440—SERVICES: GENERAL PROVISIONS**

5. The authority citation for part 440 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

6. Section 440.170(a)(1) is revised to read as follows:

**§ 440.170 Any other medical care or remedial care recognized under State law and specified by the Secretary.**

(a) *Transportation.* (1) “Transportation” includes expenses for transportation and other related travel expenses determined to be necessary by the agency to secure medical examinations and treatment for a recipient. Such transportation does not include transportation of school-age children from home to school and back.

\* \* \* \* \*

(Authority: Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: July 20, 2007.

**Leslie V. Norwalk,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: August 10, 2007.

**Michael O. Leavitt,**

*Secretary.*

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