Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000) do not apply to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 14, 2007.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.535 is amended by alphabetically adding the following commodities to the table in paragraph (a), removing the expired time-limited tolerances in paragraph (b), and reserving it to read as follows:

§ 180.535 Fluroxypyr 1-methylheptyl ester; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * *	*
Fruit, pome, group 11	0.02
* * * *	*
Millet, forage	12.0
Millet, grain	0.5
Millet, hay	20.0
Millet, proso, straw	12.0
* * * *	*

(b) *Section 18 emergency exemptions.* [Reserved]

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[FR Doc. E7–25092 Filed 12–27–07; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 431, 433, and 440

[CMS–2287–F]

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: Final 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.'' This final rule eliminates Federal Medicaid payment for the costs of certain school-based administrative and transportation activities because the Secretary has found that these activities are not necessary for the proper and efficient administration of the Medicaid State plan and are not within the definition of the optional transportation benefit. Based on these determinations, under this final rule, Federal Medicaid payments will 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 for transportation from home to school. In addition, this final rule responds to public comments received on the September 7, 2007 proposed rule.

EFFECTIVE DATE: These regulations are effective on February 26, 2008.

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

SUPPLEMENTARY INFORMATION: We published a proposed rule in the **Federal Register** on September 7, 2007, at 72 FR 51397 that would eliminate Federal Medicaid payment for school-based administrative activities, based on a Secretarial finding that such activities are not necessary for the proper and efficient administration of the Medicaid State plan. Moreover, the proposed rule would also eliminate Federal Medicaid payment based on 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 Medicaid State

plan, nor within the scope of the optional medical transportation benefit. We received 1,240 timely public comments on the proposed rule. After careful consideration of these comments, we are adopting the rule as proposed without change. We discuss later in this preamble our response to comments and our reasons for going forward with the proposed rule. Below, we first summarize the background and provisions of the proposed rule.

I. Background

A. Administrative Activities and Transportation Services Under the Medicaid Program

Title XIX of the Social Security Act (the Act) authorizes Federal grants to States for Medicaid programs, operated by each State under an approved Medicaid State plan that provide medical assistance to needy individuals including low-income families, the elderly, and persons with disabilities. Federal payment is available to a State for a proportion of expenditures for medical assistance under the approved Medicaid State plan, and of expenditures necessary 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 either of these provisions, administrative expenditures must be reasonable and necessary for the performance of functions funded by the Federal award.

Transportation to and from providers is not expressly mentioned in the Medicaid statute, but States can claim Federal matching dollars for such transportation in one of two ways. Since the inception of the program the Federal government has recognized that transportation is essential to the administration of the Medicaid State plan, to ensure that beneficiaries have access to covered services. Federal regulations at 42 Code of Federal Regulations (CFR) 431.53 require that Medicaid State plans ''specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers'' and describe the methods for doing so. Under 42 CFR 440.170(a), States are afforded the option of furnishing transportation as an optional covered medical service recognized under section 1905(a)(28) of the Act as defined and specified. Under this section, transportation is defined as ''expenses for transportation and other related travel expenses determined necessary by the agency *to secure medical examination and treatment* (emphasis added) for a recipient.'' Travel expense is defined to include the cost of the actual transportation necessary to the medical service, meals and lodging en route to medical care and the cost of attendees to the beneficiary if necessary.

Whether transportation is furnished as an administrative activity under 42 CFR 431.53 or as an optional covered medical 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 final regulation.

B. Medicaid and Schools

A wide range of medical services may be 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 1903(c) of the Act 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 may be within the scope of medical assistance services covered under the Medicaid program. Medicaid covers medically necessary direct medical services included in an IEP or IFSP that are in a Medicaid covered category under the approved State Medicaid plan (such as speech therapy or physical therapy, but also including Early and Periodic Screening Diagnosis and Treatment), and that meet all other Federal and State Medicaid regulations (including provider qualifications and any amount, duration and scope limitations).

Schools and school districts perform a myriad of administrative activities that arise directly from the educational mission of the schools. Though these activities may include coordinating the delivery of Medicaid services with educational services, they are primarily associated with educational program requirements including IDEA requirements. Transportation to and from the school for most students is also part of the schools' educational responsibility.

C. Prior Agency Experience With School-Based Administration and Transportation

As detailed in the proposed rule, CMS had previously issued several guidance documents on school-based administration and transportation. In those interpretive guidance documents, CMS set forth a complex set of principles permitting State claims for school-based administration and transportation. The claims that resulted from this guidance were the subject of several audits by the Office of the Inspector General finding widespread fraud and abuse as well as improper claiming of costs to the Medicaid program that were incurred to meet mandates under educational programs.

II. Provisions of the Proposed Regulations

We published a proposed rule on September 7, 2007, at 72 FR 51397, that would eliminate Federal Medicaid payment for school-based administrative activities, based on a Secretarial finding that such activities are not necessary for the proper and efficient administration of the State plan. Moreover, the proposed rule would also eliminate Federal Medicaid payment based on a Secretarial 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 specified that Federal financial participation (FFP) under the Medicaid program will not be available for school-based administrative and certain transportation costs, with the exception of administrative activities conducted by employees of the State or local Medicaid agency.

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

- FFP would no longer be available for the costs of school-based administrative activities under

Medicaid. By administrative activities, we referred 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 proposed 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 did 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 a 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 Federal medical assistance percentage (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 would remain eligible for FFP under the proposed rule.

The proposed rule was based on a determination 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.

III. Analysis of and Responses to Public Comments

We received approximately 1,240 timely comments from State officials, school districts and consortia, educational organizations, child advocacy groups, health care organizations, school nurses, parents, teachers, school officials, providers, and other interested individuals. The largest group of comments came through a write-in campaign initiated by an organization titled the Council for Exceptional Children (CEC). The State with which the largest number of commenters identified themselves was California. All comments were reviewed and analyzed. After associating like comments, we placed them in categories based on subject matter. Summaries of the public comments received and our responses to those comments are set forth below.

General

Most commenters opposed the proposed regulation, for the reasons specified below. Of the commenters supporting the proposed rule, they either concurred that Medicaid funds should not be used to fulfill educational requirements or appreciated the potential for savings in Federal expenditures. The categorized comments and our responses are listed below.

Funding Issues

Comment: The largest number of comments focused on funding issues, arguing that any loss of funding would potentially ''* * * reduce the funds available to our already strained special education budgets,'' according to one commenter. Another commenter argued that ''* * * if States cannot take up the slack, and most of them are struggling to provide non-medical transportation to get children to school, as well as to satisfy other Federal requirements, this funding cut will be yet another unfunded * * * mandate.'' Many commenters noted that in their districts, schools are already strapped with tight budgets, some even specifying the exact amount of revenue they believed would be lost under the proposed regulation. One commenter noted that ''Should administrative claiming be eliminated, we would have to shift funds from other areas in our budgets to cover the cost or raise taxes if this proposal should become a reality.'' And: ''Our school division struggles daily with dwindling local resources and increasing demand * * *. Loss of these funds * * * would unfairly exacerbate a dire situation.'' It is unrealistic, many commenters argued, to assume that any State or school would be able to replace the loss of Federal Medicaid reimbursement that would result from finalization of the proposed rule.

Response: Such comments appear to support our view and concern that Title XIX funds are being used as a funding source without specific benefit to the Medicaid program. Constrained local and State funding for education is not the basis for determining whether a cost is properly claimed under Medicaid. Specifically, administrative expenditures must be deemed necessary for the proper and efficient administration of the Medicaid State plan in order for reimbursement to be available. The need for schools to obtain additional funding in itself does not justify continued Federal Medicaid reimbursement. Limitation of Medicaid claims to administrative and transportation activities that are directly related to the furtherance of the Medicaid State plan is necessary to maintain the financial integrity of the Medicaid program. None of these commenters provided any factual basis to conclude that the activities in question were, indeed, necessary for the proper and efficient administration of the Medicaid State plan (or transportation necessary to ensure that individuals obtain access to Medicaid providers).

Comment: Some commenters focused on the fact that Medicaid reimbursement is used to meet other educational needs and augment underfunded budgets. Commenters noted that reimbursement for school-based administrative activities is used for a wide variety of unrelated, but important, purposes, such as instructional materials and equipment, or to fund staff positions, and that schools rely on this funding for such purposes. According to one commenter, Medicaid reimbursement is used to allow service staff to attend workshops and to purchase ''* * * needed technology and materials to better educate our children.'' Some asked how States and schools would make up for any funding shortfalls that result from finalization of the proposed rule. As one commenter noted: ''* * * this * * * action by the Federal government would force us to make cuts in other essential educational programs to ensure that federally required services can continue, despite the lack of funding,'' such as electives, after-school activities, or arts and music programs. The loss of Medicaid payments could also result in schools having to lay off staff or curtail referral services, according to some commenters.

Response: Federal matching funds under Medicaid are only available for Medicaid services provided to Medicaid eligible individuals as described in the Medicaid State plan. The commenters expressly identified non-Medicaid costs that are clearly educational in nature. Constrained local and State funding for education is not the basis for determining whether a cost is properly claimed under Medicaid. We believe the final rule is necessary to maintain the financial integrity of the Medicaid program and there is nothing in this final rule which would eliminate funding for necessary direct medical services eligible for Medicaid funding.

Comment: Some commenters noted the fact that Congress has never fully funded the IDEA, and in lieu of such funding, Medicaid reimbursement must be used. One commenter stated the following: ''At a time when the Federal government is funding barely 18 percent of the national average per-pupil expenditures for each child in special education instead of the 40 percent that Congress promised to pay when IDEA was first enacted, major cutbacks in Medicaid reimbursements will severely restrict the ability of State and local school districts to provide much-needed health care services to disabled children.'' Without a commensurate increase in funding for IDEA-related requirements to offset cuts resulting from the proposed rule, they argue, critical services may be cut. The proposed rule makes no attempt to explain how States and school districts might compensate for the reduction in funding under Medicaid and the inadequate funding of IDEA-related mandates, they noted.

Response: The desire for supplemental funds to augment IDEA funding does not justify Medicaid payments that are not authorized by the Medicaid statute, regulations and applicable cost accounting principles. Under Office of Management and Budget Circular A–87, ''governmental units are responsible for the efficient and effective administration of Federal awards.'' It is not consistent with efficient and effective administration of the Medicaid program to pay for administrative activities (including transportation from home to school and back) that are performed as part of a school's educational mission, do not specifically benefit the Medicaid program, are neither controlled nor supervised by the Medicaid program, and would be performed by the schools even in the absence of the Medicaid program. As stated earlier, we believe the final rule is necessary to maintain the financial integrity of the Medicaid program. Such comments appear to support our view and concern that Title XIX funds are being used for non-Medicaid purposes and that the request for additional funding for educational activities should be more appropriately directed to other Federal, State, and local funding sources.

Provision of Services

Comment: Some commenters worried that the proposed rule would adversely impact the provision of needed services to school-age children. One commenter noted that ''* * * schools are providing necessary medical/psychological services and/or referrals that others are able to be reimbursed for, so this should not be cut.'' Some argued that any changes to the Medicaid program would have a detrimental effect on the medical care provided to students.

Response: The provision of, and reimbursement for, school-based medical services are not affected by the changes specified in the final rule. CMS will continue to recognize schools as valid settings for the delivery of direct medical services recognized in the Medicaid State plan. Medicaid reimbursement would remain available for covered services provided to children pursuant to an IEP or IFSP, whether they are provided in school or in the community. That is, CMS will continue to reimburse States for school-based Medicaid service costs authorized in their approved Medicaid State plans, including transportation of school-aged children from school or home to a non-school-based direct medical service provider that bills under the Medicaid program, and from the non-school-based provider to school or home. CMS will also 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 a school, and back to receive direct medical services, as long as the transportation is not primarily for purposes other than gaining access to a Medicaid provider for covered services (such as when it is regularly scheduled transportation to a day care program).

We do not believe the final rule will impact children eligible for Medicaid. IDEA mandates that services prescribed by a child's IEP or IFSP be provided to children. Section 1903(c) of the Act provides clearly that Medicaid reimbursement be made available for such services, when provided to Medicaid-eligible children, covered under the State plan, and provided by qualified providers that properly bill the Medicaid program. These requirements will not change as a result of the final rule. As a result, these services will continue to be provided to children pursuant to their IEP or IFSP, and will continue to be paid by Medicaid.

Comment: One commenter noted that ''* * * while the proposed regulation does not directly affect reimbursement for these services, a school district's inability to be reimbursed for administrative services related to the provision of the medically necessary services will in fact have a chilling effect on a school district's ability to deliver these services.'' To deny Federal Medicaid matching for administrative activities provided by school employees or its contractors would, in the words of one commenter, ''* * * improperly shift the cost of allowable Medicaid services entirely to State and localities, without regard for the reduction in service that would result.''

Response: Federal funding would 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 can include administrative activities under the direction of the medical service provider, such as patient follow-up, parent consultations, and billing activities, when included in the

negotiated rate paid for direct medical services.

Comment: In certain comments, it was noted that Medicaid funding helps school pay for other types of services, such as mental health services, which would not otherwise be available to students. One commenter argued that if the proposed rule is promulgated, school-based services will be less effective and more costly for CMS, State Medicaid agencies, and schools. Another commenter noted that while the proposed rule does not explicitly restrict access to services in schools, it would make it less desirable for Medicaid programs to use school settings to provide services, and could inadvertently make it more difficult to meet Medicaid's original intent to fund necessary medical assistance ''* * * to promote growth and development and prevent or ameliorate disabilities and conditions.''

Response: Medicaid payment remains available for all covered services furnished in a school setting and for children. These covered services include the broadest possible range of services under the mandatory Medicaid covered benefit for early and periodic screening, diagnostic and treatment (EPSDT) services. As Medicaid will still provide funding for such services that qualify under the Medicaid State plan, this will likely mean that the availability of such services in a school setting will not diminish as a result of this rule.

Comment: A few commenters pointed to past and ongoing litigation over the failure to provide mandated services to children with disabilities and suggested that the likely consequences of the proposed rule would be a reduction in funding for necessary services they have fought in court to secure for these children. Specifically, some commenters cited the ruling in the *Bowen* v. *Massachusetts* case (487 U.S. 879 (1988) No. 87–712), in which an appellate court ruled that ''* * * it is the nature of the services, not what the services are called or who provided them'' that determines whether the services qualify for Medicaid reimbursement. By eliminating Federal Medicaid reimbursement for administrative activities engaged in by school employees, the proposed rule goes against Federal court interpretations of the Medicaid statute, they argue. Others interpret that ruling to mean that any attempt to eliminate Medicaid reimbursement for transportation as a covered service in a State plan based solely on the child's participation in an educational program would be in violation of the court's ruling in Bowen. The court ruling, they contend, nullifies CMS's attempts to justify elimination of reimbursement for school-based administrative and transportation service expenditures by labeling such expenditures as ''educational'' in nature.

Response: The final rule clarifies that Federal Medicaid funding is available for direct medical services provided by schools. To the extent that a State elects to reimburse transportation as an optional medical service, Federal reimbursement will still be available to the extent that the primary purpose of that transportation is access to a medical service. That is, CMS will continue to reimburse States for transportation of school-aged children from school or home to a non-school-based direct medical service provider that bills under the Medicaid program, and from the non-school-based provider to school or home. Furthermore, CMS will 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 a school, and back to receive direct medical services, as long as the transportation is not primarily for purposes other than gaining access to a Medicaid provider (such as when it is regularly scheduled transportation to a day care program). However, routine transportation from home to school and back for school age children is primarily educational in nature and will not be eligible for Medicaid reimbursement as part of a medical service.

Potential Impact on EPSDT

Comment: Some commenters argued that the proposed rule will make it difficult for States to fulfill requirements under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefit specified in section 1905(a) of the Act. This mandate, they note, requires States to inform families about the availability of EPSDT services and assist them in accessing services. Many school systems have contracted with States so that school nurses and staff inform families about EPSDT. As currently written, the proposed rule would limit reimbursement for these activities to employees of the State Medicaid agency. This potential conflict between the EPSDT mandate and the proposed rule, they argue, would severely restrict the ability for States to meet their responsibility under ESPDT and hamper access to necessary services for children. Under EPSDT requirements, one commenter noted, States are urged to make use of other public, health, mental health and educational programs in order to ensure an effective child health program. They cited the State Medicaid Manual as not only encouraging State Medicaid agencies to coordinate EPSDT administrative activities with ''school health programs of State and local health agencies,'' but also offering FFP to cover the costs to public agencies of providing direct support to the Medicaid agency in administering the EPSDT program.

Response: Under the final rule, States will still be required to meet EPSDT requirements and are afforded flexibility in meeting these requirements. We do not believe it is consistent with proper and efficient administration of the Medicaid State plan, however, to commingle EPSDT outreach functions with other school administrative or direct service activities. We continue to encourage States to coordinate Medicaid EPSDT programs with school health programs and State, local and other Federal health care or social welfare programs. Schools employ health care providers and other educational staff as information points for a variety of medical and social services far beyond simply the Medicaid program. This function is specific to the nature of a school-based provider and is not directly related to the administration of the Medicaid State plan. Coordination and information dissemination efforts that are not under the control and supervision of the State agency and are performed by schools, however, are fundamentally functions that further the mission of the schools to ensure that students receive necessary services using available Medicaid resources. Such activities are not directly for administration of the State Medicaid plan.

Support for School-Based Administration

Comment: A substantial number of commenters urged CMS to continue its support for school-based Medicaid administrative activities because, they argued, it can be an effective way to reach children in need of services and to ensure adequate medical care for disabled students and their families, who are often low-income and uninsured. One commenter noted that: ''Families are familiar and comfortable with the people and the school, which makes schools a logical place to families to access health care. The unique role played by schools as a health service portal is irreplaceable.'' Some thought the proposed regulation would decrease the opportunities for children and families to learn about the availability of Medicaid, and the services provided to those eligible for coverage. As a result,

the proposed rule could result in increased health care costs through missed opportunities to enroll eligible children in Medicaid and connect them to needed services before they become catastrophic. A recurring theme was that the proposed rule fails to recognize that certain administrative activities performed by school-based staff are instrumental to ensuring access to covered Medicaid services for eligible low-income children.

Response: We acknowledge the importance of outreach and referral activities, and in no way preclude State or local Medicaid agencies from engaging in such activities. Nor do we preclude school employees from conducting activities that inform individuals of the availability of Medicaid services. But we disagree that such school employee activities are properly considered administration of the State plan. Such activities are performed as part of the normal operation of the school to ensure that students receive educational and related services, and to coordinate with other payers for those services. These activities are not performed for the purpose of State Medicaid plan administration. Moreover, this rule protects the financial integrity of the Medicaid program from the improper claiming and cost shifting found in Inspector General audits.

Comment: Other commenters cited the success of their school-based Medicaid programs and provided specific examples of such successes, noting the number of children enrolled in Medicaid as a result of their efforts and the ability to connect such children to needed services. One commenter stated that ''* * * the proposed rule goes beyond reducing waste and abuse among the few by eliminating for all schools the positive benefits the program was designed to achieve.'' Another noted that the proposed rule does not take into account the appropriateness of schools providing administrative activities, especially to students with disabilities.

Response: CMS applauds the numerous examples of successful school-based Medicaid outreach and referral programs submitted by commenters. The success of these programs, however, does not compel a finding that school-based administration activities are a proper and efficient method for administration of a Medicaid State plan. In determining that these activities are not a proper and efficient method for administration of a State Medicaid program, we considered the extent to which such activities are conducted as a normal part of the operation of school education programs. We further considered the costs of improper Medicaid claiming because these activities are commingled with other school administrative activities and cannot be accurately allocated to Medicaid. Because these activities should occur in schools regardless of the availability of Medicaid funding and because the primary purpose of these activities is not the administration of the Medicaid program, we believe Medicaid should not provide funding for them.

Comment: Some commenters pointed to the May 2003 CMS Medicaid School-Based Administrative Claiming Guide, which states that ''* * * the school setting provides a unique opportunity to enroll * * * and to assist'' Medicaid eligible children ''access the benefits available to them'' as evidence that school-based Medicaid administrative claims should remain eligible for FFP. Another quote cited by commenters can be found in the 1997 CMS Medicaid and School Health: A Technical Assistance Guide, which stated:

> ' ''Because of the proximity of schools to the target population, HCFA (now CMS) has always encouraged the participation of schools in the Medicaid program * * * [s]chool-based health services can represent an effective tool which can be used to bring more Medicaid-eligible children into preventive and appropriate follow-up care. In addition, schools present a wonderful opportunity for Medicaid outreach. That is, because schools are by definition ''in the business of serving children,'' they can be a catalyst for encouraging otherwise eligible Medicaid children to obtain primary and preventive services as well as other necessary treatment services * * * we encourage efforts to inform potential eligibles about the Medicaid program and the EPSDT benefit.''

The proposed rule, they believe, will force many States to curtail successful school-based initiatives to identify and enroll eligible low-income children in Medicaid that were encouraged by CMS itself, which is now promulgating a regulation to discontinue funding. Some commenters argued the proposed rule is a misguided approach and that it contradicts CMS' position that States should enroll eligible children.

Response: Schools remain a gateway for the delivery of health services for many children. As our response to the prior comment indicated, the issue is whether school-based administrative activities are a proper and efficient methodology for administration of the Medicaid State plan. We expect the central role of schools to continue, and we expect that many of these school-based administrative activities will continue as a normal part of the operation of a school program. We also expect that State or local Medicaid agencies will continue outreach efforts under their direction and control. This rule simply sets forth a clear test for the administrative activities that are appropriately claimed as necessary for the proper and efficient administration of the Medicaid State plan, and distinguishes those activities from the administration of a school program.

Better Guidance Needed

Comment: Some commenters argued that the solution to evidence of improper claiming for costs related to school-based Medicaid administration and transportation from home to school and back should be increased oversight, enforcement, and/or additional guidance, rather than elimination of reimbursement for such costs. They encouraged CMS to review the program and identify strategies for eliminating improper claiming practices without eliminating reimbursement for administrative costs. One commenter stated that ''* * * Numerous alternative solutions exist, the most obvious of which is to install safeguards and auditing procedures that would eliminate the possibility of such fraudulent activity taking place in the future, thereby solving the problem while keeping the services intact.'' Many believe that clarifying guidance and controls on claiming are better alternatives to promulgating the proposed regulation, which was seen as draconian and dismissive of medical necessity. They believe the proposed rule is ''* * * an overreaction to perceived problems in the past.'' CMS should focus its efforts on working with States to ensure proper claiming rather than promulgating new regulations. One commenter stated the following: ''If CMS eliminates funding for every type of service, activity, or delivery system where it identifies inappropriate or even abusive claiming practices by some providers, funds would no longer be available for any benefits under the Medicaid program today.''

Response: As described in Section VII of the responses, titled Alternatives Considered, we ultimately rejected the types of alternatives suggested by many of the commenters because the intervening years have proven that administrative activities cannot be adequately regulated or overseen within the resource limits available to CMS and the States. Plainly stated, we have concluded that it is not an effective approach to administration of the Medicaid State plan to rely on audits and monitoring to ensure that all claims are allowable.

Comment: One commenter recommended that ''* * * CMS use its

rulemaking authority in a more constructive manner by defining clear guidance, criteria and limitations'' and suggested applying the results of OIG's previous audits of States' school-based Medicaid claiming programs to develop better guidance and more effective oversight. That, they argue, would preserve the original intent of the program to reimburse States for legitimate activities performed by schools in support of Medicaid. As an alternative to the proposed rule, some suggested that CMS revisit past guidance and improve reporting requirements for school and States. One commenter suggested that ''* * * Congress and the Administration * * * work together to achieve consensus on the appropriate policies and procedures.'' According to one commenter, CMS should work with representatives from State Medicaid agencies, schools systems, and other interested parties to ''* * *resolve questions and areas of confusion'' stemming from the 2003 Guide, develop clear claiming protocols, and reach consensus on related issues. According to some commenters, many of the claiming problems, stemmed from differing interpretations of Federal guidelines for claiming administrative and transportation costs based on inconsistent guidance from CMS Central and Regional Offices, and a lack of detailed guidelines on how to implement the programs. Commenters also recommended that CMS identify claiming issues in particular States and work with the appropriate State agencies to improve those programs rather than eliminating reimbursement for programs that are compliant with Federal requirements.

Response: Schools repeatedly complained that CMS guidance and oversight was burdensome and added substantially to the cost of activities that the schools were undertaking to fulfill their educational mission. More fundamentally, however, we disagree with the commenters' assumption that the problem is related to Federal oversight. Instead, we believe there is an inherent structural conflict of interest in commingling school administrative activities with Medicaid administrative activities.

Better Data Needed

Comment: Some commenters believe there needs to be clear set of data demonstrating the need to eliminate such reimbursement before the proposed regulation takes effect. They asked for data supporting the Secretary's finding that school-based administrative activities are not necessary for the proper and efficient administration of the State plan. One commenter stated: ''[The proposed rule] does not provide evidence * * * in the form of an estimated dollar amount of fraudulent claims that have continued to occur after 2003.'' These commenters requested specific examples of the noted fraud and abuse, and suggested a clear, chronological accounting of improper billing is required before promulgating new regulations. One commenter urged CMS to ''* * * examine thoroughly and report on the current effects of policies implementation through'' its 2003 Guide before promulgating new regulations. There is no evidence, they note, to suggest that the 2003 Guide was inadequate.

Other commenters pointed to the fact that the Senate Finance Committee hearings cited in the preamble were held more than five years ago, and preceded the issuance of new guidance by CMS in 2003, which was intended to improve compliance with claiming requirements. CMS should carefully scrutinize current claims for school-based administrative expenditures, they argue, which would put the agency in a better position to establish regulations to ensure proper claiming.

Response: Detailed data on school-based Medicaid claiming is not available to CMS, due to limitations with respect to reporting requirements. Reporting for school-based Medicaid expenditures is voluntary; therefore, the data CMS used in calculating the projected cost savings may not match actual current spending. The proposed rule specifically requested public comment on potential fiscal impact. Commenters did not provide any clear data that were at variance with CMS assumptions. The limited data of which CMS is aware support the findings underlying the final rule.

Comment: Many commenters found it disingenuous for CMS to use as the rationale for the proposed rule OIG and GAO reports regarding alleged abuses that occurred in the early 1990s, prior to the issuance of any directives or guidelines on school-based Medicaid claiming. Furthermore, some commenters argued, these audits only took into account an insignificant number of schools, and the findings should not be extrapolated to all schools and claiming programs nationwide. Some commenters were troubled by ''* * * dubious enforcement actions and audits'' that have appeared ''* * * more focused on limiting Federal expenditures than improving the appropriateness or effective administration'' of the Medicaid State plan. Moreover, one commenter contended, the instances of inappropriate billing fall within the low to moderate range of similar billing problems elsewhere in overall Medicaid claiming. Another commenter noted that the proposed rule does not highlight the fact that their have been OIG audits of school-based Medicaid administrative claiming programs that did not identify any significant claiming errors.

Commenters highlighted the fact that the proposed rule refers to negative audit findings from a few States without indicating the prevalence CMS has found such practices among all States. Nor does the proposed rule describe the efforts CMS and the offending States have taken since those audit to remediate noncompliance. One commenter suggested that CMS conduct compliance audits on school-based administrative activities that have been conducted pursuant to the 2003 Guide before promulgating new regulations. As one commenter stated: ''CMS has not yet fulfilled its own responsibility to conduct appropriate, consistent, and complete oversight and to provide reliable localized guidance.'' Overall, these commenters believe the negative audit findings referred to in the proposed rule do not establish an appropriate basis to eliminate a nationwide program.

Some focused on references in the proposed rule to OIG and GAO findings and Congressional concern over the dramatic increase in Medicaid claims for school-based costs. They argued that Congress expressed more concern for how CMS was administering the program, rather than how they were being operated, with the overall conclusion from the Senate Finance Committee hearings held in June 1999 and April 2000 being that there was a need for greater Federal oversight.

Response: The final rule is not based on any particular audit findings; but rather, the overall claiming trends and improper billing practices. We disagree with the premise that more Federal oversight could address the basic structural conflict of interest in commingling school administration with Medicaid administration; there is a strong incentive to shift costs to Medicaid for activities that would have been performed by schools in the normal course of their operation. As important, the activities are not under the supervision or control of the State or local Medicaid agency, and are not undertaken for the purpose of administration of the Medicaid State plan.

Comment: One commenter suggested that as an alternative to the proposed

regulation, CMS should consider investing resources from the Medicaid Integrity Program (MIP), established in the Deficit Reduction Act of 2005 (Pub. L. 109–432), to address school-based policy and reimbursement concerns and strengthen the integrity of the Medicaid program rather than impose a general prohibition on such reimbursement. They believe MIP resources could assist State agencies in determining when it is reasonable to bill Medicaid and develop cost-effectiveness guidelines related to school-based administration and transportation services.

Response: CMS may in the future utilize MIP funding to address school-based Medicaid issues. But this approach alone would not be sufficient to address the underlying problems with school-based administrative claiming and transportation. There is an inherent structural conflict of interest in commingling school administrative activities with Medicaid administrative activities and, as a result, we do not believe an audit approach would be adequate or the most efficient use of limited Federal resources in addressing these issues.

Statutory Intent

Comment: Some commenters argued that the proposed rule contradicts the intent of the Medicaid statute and other Federal regulations by reversing a policy that made Federal matching funds available for transportation provided to children with special health care needs who receive health care services while they are at school. Others argue that the policy determination underlying the provisions of the proposed rule contradicts the Medicaid statute insofar as it allows States flexibility in administering their Medicaid plans and collaborating with other State agencies. One commenter stated that ''* * * singling out children and school districts is an arbitrary application of the ''efficiency and economy'' tenets central to Medicaid law and the administration of the State plan within it.'' Another commenter suggested the proposed rule would contradict existing law and circumvent Congressional intent were CMS to promulgate the regulations without specific legislative guidance.

A number of commenters focused on the intent of the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100–360), which amended the Medicaid statute to allow States to begin receiving Medicaid reimbursement for services delivered to Medicaid-eligible children in schools pursuant to the IDEA. Therefore, they argue, Congressional intent is clear that Medicaid reimbursement should not be refused for activities performed in school settings. According to one commenter, the proposed rule ''* * * obstruct[s] the Congressional directive establishing Medicaid funds to share in the cost of providing health care services to children in conjunction with their educational program.'' These commenters believe there to be firm legal standing for the allowable use of Medicaid claiming for the costs of transportation and administration, and that the proposed rule contradicts current law, citing section 1903(c) of the Act, which prohibits payment for covered services provided pursuant to the IDEA. Historically, they note, Congress and the Federal government have encouraged Medicaid to share in schools'' costs for meeting the medical needs of students with disabilities.

Some commenters argued that the proposed rule would arbitrarily and capriciously reverse legal and historical precedents. They note that the underlying statutory basis for such activities has not changed in any way, and, as a result, CMS should not seek to reinterpret statutory basis to enforce new definitions for necessity and proper and efficient administration of the Medicaid State plan.

Response: Section 1903(c) of the Social Security Act authorized Medicaid funding for covered medical services included in an individualized education program (IEP) under the IDEA and covered in the Medicaid State plan, it does not, however authorize Medicaid funding for administrative activities that schools conduct in implementing their IDEA responsibilities. As a result, the final rule does not contradict the Medicaid statute.

Nor does the Medicaid statute specifically authorize payment for transportation to and from school. Transportation from home to school and back is central to the operation of a school program and, as such, Federal Medicaid payment will not be available for the transportation services to and from school. However, Medicaid payment will remain available for direct medical services that might be required under an IEP or IFSP in the course of such transportation. For example, if a student with a disability needs to be accompanied by a personal care attendant or a home health aide during transportation from home to school and back, Federal Medicaid payment would be available to the extent that the service was covered under the approved Medicaid State plan.

Comment: Some commenters suggested that with the proposed rule, CMS is attempting to base policy determination on how a State subdivides its functions, which is contrary to the Medicaid statute. The distinction in the proposed rule between education and Medicaid personnel is in conflict with the Medicaid statute because funding cannot be denied based on what arm of the State conducts the Medicaid activity, they argue.

Response: This rule is not based on the way the State subdivides its functions, but on the inherent structural problems in commingling administrative functions of the Medicaid program with school administration.

Secretarial Authority

Comment: Some commenters believe the Secretary is without authority under section 1903(a)(7) of the Act to find that amounts expended for administrative activities are not necessary for the proper and efficient administration of the Medicaid State plan solely because they are carried out by school personnel or staff under the control of a school rather by State or local Medicaid agency staff. One commenter argued that States are accorded the administrative flexibility in operating their Medicaid programs to have reimbursable activities performed by school personnel and that the Secretary may not limit that flexibility with an unsupported findings that conditions FFP by finding certain activities necessary only when carried out by certain employees. Furthermore, they argue, CMS cites no authority for eliminating FFP completely for all providers in response to adverse audit findings related to a few States. The Secretarial finding that school-based administrative and transportation are not necessary for the proper and efficient administration of the Medicaid State plan ''* * * fails to include any analysis of fixed criteria or standards for which the Secretary would typically apply to reach that ''not necessary'' conclusion,'' according to one commenter.

Response: Under section 1903(a)(7), of the Act, it is the Secretary, not the State, that determines whether amounts expended are necessary for the proper and efficient administration of the Medicaid State plan. Therefore, it is within the Secretary's discretion to make a determination that certain administrative activities (including transportation from home to school and back) are not eligible for reimbursement. Specifically, section 1903(a)(7) states that Federal Medicaid funding is available for administrative expenditures ''as found necessary by the Secretary for the proper and efficient administration of the State plan.'' In this

section, the statute explicitly imbues the Secretary with the ultimate authority and ability to make such determinations. As a result, we do not believe the provisions of the final rule exceed Secretarial authority.

Comment: Some commenters suggested that the activities targeted by the proposed rule are specifically authorized by the approved Medicaid State plan and that it is the State that should determine whether activities are proper and efficient within the approved plan. The proposed rule, they argue, would needlessly hinder the ability of States to provide essential services in a manner in which it deems most effective.

Response: As a matter of practice, States generally do not include reimbursement for administrative services as part of their approved Medicaid State plan. The relevant portions of the Medicaid State plan as mentioned in the comment describes covered services eligible for Medicaid payments and the reimbursement methodologies for those services. The rule will not affect medical services as defined in the Medicaid State plan nor the States'' ability to offer those services in schools.

Comment: Some commenters questioned CMS' assertion that section 1903(c) of the Act contains no provision authorizing claiming for the costs of school-based Medicaid administration. They argue that because section 1903(c) does not specifically prohibit administrative claiming, the general practice is (and should be) to allow it to continue under current practice unless explicitly forbidden. Because the Medicaid statute specifically provides that the Secretary cannot prohibit or restrict coverage of Medicaid services simply because those services are included in an IEP or IFSP, the Secretary should not be allowed to impinge on States' abilities to claim for related costs.

Response: The rule does not prohibit States from claiming Federal matching funds for covered medical services pursuant to a child's IEP or IFSP. States may also claim for administrative costs directly related to the provision of a medical service, such as billing costs as part of the medical service reimbursement. Section 1903(c) specifically discusses medical services and does not address claiming for the administrative costs associated with the administration of the State's Medicaid program. The statute provides the Secretary with considerable discretion to determine allowable administrative activities. Under section 1903(a)(7), of the Act, it is the Secretary, not the State, that determines whether amounts expended are necessary for the proper and efficient administration of the Medicaid State plan. Therefore, it is within the Secretary's discretion to make a determination that certain administrative activities (including transportation from home to school and back) are not eligible for Federal Medicaid reimbursement.

Reversal of Policy

Comment: Some commenters argued that the proposed rule represents a significant reversal of long-standing policy and a revision of long-standing Medicaid regulations, policies, and guidance, noting that CMS first developed detailed guidance in 1997 regarding school-based Medicaid program. Three years later, a report issued by HHS in collaboration with the U.S. Department of Agriculture and the U.S. Department of Education and cited by many commenters stated that schools are a ''natural setting'' for conducting children's health insurance program outreach, and that ''State Medicaid and SCHIP agencies seeking the best return on outreach investments often find that working with schools simplifies targeting audiences, distributing information, reaching families, and enrolling children.'' (Report to the President on School-Based Outreach for Children's Health Insurance, July 2000).

The proposed rule, they argue, would directly contradict this July 2000 report, which sought to encourage agreements between States Medicaid agencies and schools so that the latter could receive financial assistance for administrative activities to enroll eligible children. The proposed rule, they argue, would be ''* * * regressive and a departure from acknowledged best practices in identifying and serving Medicaid beneficiaries.''

Several commenters cited the 1999 and 2000 Senate Finance Committee hearings on school-based Medicaid claiming as a evidence of CMS' recognition that schools play an important role in ensuring that children receive needed health care services.

Response: The statute provides the Secretary with considerable discretion to determine allowable administrative activities and the scope of covered transportation services. Consistent with the Administrative Procedure Act, this final rule supersedes prior statements and issuances to establish a new policy concerning school based administration activities and covered transportation services. This final rule reflects careful consideration of years of experience, and of the public input provided in the rulemaking process. CMS believes this final rule is necessary to maintain the financial integrity of the Medicaid program.

Differential Treatment of Schools

Comment: Many commenters opposed the rule in its entirety because, they argued, it reflects a differential, more restrictive treatment of schools in comparison to other settings in which the same Medicaid-related activities are provided and for which funding would continue. There is no way to justify the inference in the proposed rule that school employees are deemed capable and necessary for the delivery of covered services, but are somehow incapable and unnecessary to conduct associated administrative activities, according to one commenter. If the proposed rule is promulgated, they argue, schools alone would be designated as ineligible for reimbursement as a provider of Medicaid administrative functions while other entities would remain eligible to receive reimbursement as the State Medicaid agency's designee. School employees would still be eligible for reimbursement for covered medical services, so it is inconsistent to deem them ineligible to conduct Medicaid administrative activities, they argue.

Certain commenters argued that allowable activities should be deemed necessary for the proper and efficient administration of the Medicaid State plan regardless of who employs the individuals performing the activities. The proposed rule, they argue, unfairly and incorrectly suggested that a State agency employee public health nurse can conduct Medicaid administrative activities, but a school nurse, who has the same qualifications, cannot. The proposed rule, they note, contains no recognition of the comparable professional qualifications of both school and employees and State Medicaid agency employees conducting these activities. One commenter noted that it is unfair to infer, as the proposed rule does, that only the school-based claiming methodology is invalid, while CMS will continue to permit similar claiming procedures in various other contexts.

Response: Under the rule, CMS will continue to recognize schools as valid settings for the delivery of Medicaid services. As a result, CMS will continue to reimburse States for covered school-based Medicaid service costs pursuant to a child's IEP or IFSP. The final rule reflects a determination that schools are unique settings, and that there is an inherent structural conflict when school administrative responsibilities and Medicaid administrative activities are

commingled that precludes accurate claims. As a result, the final rule reflects a conclusion that school-based administrative activities are only necessary for the proper and efficient administration of the Medicaid 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 claimed under Medicaid when conducted by employees of the State or local Medicaid agency. School staff may continue to perform these types of administrative activities. The final rule will merely limit the availability of Federal matching funds based on the finding that it is not necessary for the proper and efficient administration of the Medicaid State plan for school staff to do so. We believe the final rule is necessary to maintain the financial integrity of the Medicaid program. The final rule does not question the importance of these types of administrative activities when performed by employees of the State Medicaid agency and still recognizes schools as valid settings for the delivery of Medicaid services.

Comment: One commenter argued that Office of Management and Budget Circular A–87 (OMB A–87) contradicts the proposed rule by including school districts in its definition of local governments eligible to participate in Federal awards. Insofar as school districts are defined as units of government, they should not be excluded from Medicaid participation in any way. Furthermore, it represents a reversal of recent Federal guidance on school participation in Medicaid claiming and contradictions of Federal definitions of ''governmental units'' and ''local governments'' that may participate in Medicaid claiming.

Response: This rule in no way addresses the status of schools and school districts as units of government. OMB Circular A–87 describes cost allocation requirements for units of government that receive Federal grants and must account for costs associated with those grants. OMB Circular A–87 does not, however, supplant the determination of the program agency as to the administrative activities necessary for the proper and efficient administration of the Medicaid program.

Comment: Some commenters pointed to Section 5230 of the State Medicaid Manual, which requires Medicaid agencies to coordinate services with local education agencies, title VI grantees, providers, and other public and private agencies, as support for the role of schools in helping the State administer the Medicaid program. The statute is replete with examples of the extent to which State agencies are expected to rely on other public agency staff to carry out Medicaid State plan obligations, one commenter noted. As another stated: ''Collaboration with other public agencies is a consistent statutory theme; indeed, the statute both contemplates the involvement of other public agencies and give[s] States broad discretion over plan administration.'' The proposed rule would, in the words of one commenter, ''* * * establish an operational barrier to using schools as a venue for performing administrative activities that support the Medicaid program.'' Singling out schools, school contractors, and school districts and eliminating their ability to receive reimbursement for Medicaid administrative activities will result in a less effective, less efficient Medicaid outreach and referral system.

A number of commenters took issue with the statement in the proposed rule that administrative activities provided in schools ''* * * largely overlap with educational activities that do not directly benefit the Medicaid program.'' In reality, they argue, such activities do directly benefit the Medicaid program insofar as they help Medicaid eligible children to access covered services. One commenter stated the following: ''The Secretary is * * * remiss in failing to consider that compulsory school attendance laws provide schools with a captive audience of underserved Medicaid eligible school-based children, thus providing an optimal setting for addressing their * * * needs.'' From a public policy perspective, they note, providing Medicaid activities in schools should be encouraged, rather than restricted, yet the proposed rule singles out schools settings for disparate restrictions and prohibitions that are not imposed on other eligible providers.

Response: The final rule clarifies that Medicaid is not the appropriate funding source for school-based administrative activities or for transportation from home to school and back. These activities or services are fundamentally undertaken for the educational mission of the school, rather than for administration of the Medicaid State plan. Based on our experience, we do not believe it is possible to develop and implement claiming methodologies that accurately allocate costs to Medicaid. The costs of such accounting exceed any incremental benefits to the Medicaid program from these activities and services, and we have concluded that it would be more efficient for States not to commingle Medicaid and school administration and transportation.

Potential for Outstationed State Medicaid Agency Employees

Comment: Some commenters argued that State Medicaid agencies are unlikely to send their own employees into schools to conduct administrative activities, and that to do so would be inefficient. These commenters believe that school-based outreach and enrollment efforts are successful precisely because of the involvement of school staff who are trusted by families and already in contact with children and their families. These commenters believe State and local Medicaid agencies can more efficiently carry out Medicaid administrative activities through relationships with other public entities, including schools. One commenter believes that States would have to hire thousands of eligibility workers to do the work currently carried out by school employees, at a far greater cost. To the extent State agency employees were outstationed in schools, they argue, this would establish a duplicative bureaucracy at State and Federal levels for activities that are more efficiently performed by school staff. They argue that this scenario would be financially and operationally inefficient compared to the current system.

Response: CMS cannot direct State or local Medicaid agencies to utilize their own staff to provide Medicaid administrative activities in schools, as each State Medicaid program differs, and States have flexibility in administering their programs. However, there is precedent to use agency outstation workers in alternative service delivery venues to administer the Medicaid State plan. Furthermore, outstationing eligibility workers is likely to result in enrolling eligible children more rapidly as they can make the actual eligibility determination, while school employees cannot.

While we agree that school employees often enjoy a special trust relationship with the families of students, this special relationship is more likely based on an employees'' broad knowledge of a variety of health, education and social service programs. Because of the difficulty in determining specific administrative activities that are for the purpose of administration of the Medicaid State plan, we have determined that it is not proper and efficient to use school employees'' for the administration of the State Medicaid program.

Comment: One commenter cited the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. Section 1232(g), under which schools must keep student records confidential, as a serious impediment to having non-school employees (i.e., State Medicaid agency employees) engage in Medicaid outreach, enrollment, and other administrative functions.

Response: CMS does not believe the final rule will, in any way, impact education mandates under FERPA, with which schools must continue to comply. Furthermore, we believe non-school employees can conduct effective Medicaid outreach and enrollment for students without access to individual student school records.

Transportation-Specific Issues

Comment: Some commenters focused on the impact of the proposed rule on Medicaid reimbursement for costs related to transportation from home to school and back. These commenters asserted that specialized transportation to school is necessary for a special needs student and is necessary for the proper and efficient administration of the Medicaid State plan, as required by 1903(a)(7) of the Act. One commenter argued that CMS should preserve authority for States to submit claims in limited situations, specifically for transporting Medicaid eligible children from home to school and back if the child's health status requires monitoring or medical related services during transport.

These commenters argued that the proposed rule ignores the needs of many students with disabilities who require specialized transportation between home and school to facilitate frequent contact with school-based Medicaid services providers to treat chronic health conditions that are most cost-effectively treated during the course of the school day.

Response: Medical services provided in schools or as part of transportation to school are eligible for Medicaid reimbursement. However, Medicaid will not reimburse the school for actual transportation to school. Some comments seem to suggest that children with disabilities are in school systems primarily to receive medical services rather than to receive an education. Schools are educational institutions, and children are transported to schools to receive an education. Schools are required to provide access to medical care to allow children with medical needs to participate as fully in the educational system as children without special medical needs. Children are already in the school for the purpose of receiving their education when medical services are received and no additional transportation is medically necessary. Characterizing transportation from home to school as being for the purpose of obtaining medical services overlooks the fundamental purpose of the transportation.

Comment: Some commenters pointed to CMS' assertion that schools are required to provide transportation from home to school and back. On the contrary, they argue that there is no State or Federal requirement for schools to provide transportation from home to school and back for all in students in every State. For example, one commenter noted, some schools do not provide bus transportation for students who live within walking distance. Some commenters argue that the proposed rule incorrectly compares specialized transportation services for children with significant health problems and traditional school bus transportation. They argue that States set forth conditions that must be met in order for a student to qualify for the transportation benefit. For these reasons, they note, schools throughout the country have utilized Federal funding through Medicaid to transport children to school for medical appointments and provide bus aides when deemed necessary. The proposed rule, however, would prohibit Medicaid funding for these expenditures.

Response: Schools are educational institutions that may be required, under an Individualized Education Program to provide transportation to and from school for any individual child that may require transport to participate in the public education system even if that school does not provide transportation to other children in the community. Medicaid will not reimburse school districts for transportation requirements to and from school that the school must meet as part of the IEP. Once at the school, a student may obtain medical services but no additional transportation is required at that point.

With respect to transportation to and from school, however, Medicaid payment will remain available for direct medical services that might be required under an IEP or IFSP in the course of such transportation. For example, if a disabled individual needs to be accompanied by a personal care attendant or a home health aide, Federal Medicaid payment would be available to the extent that the service was covered under the approved Medicaid State plan.

Comment: Others argued that there was no basis to change previous CMS guidance, such as a May 2003 Guide and a 1997 technical assistance guide, that supported and offered guidelines for claiming costs related to transportation. These commenters pointed to section 1903(c) of the Social Security Act, which requires Medicaid to be primary to the U.S. Department of Education for payment of covered health-related services that are included in an IEP or IFSP, as support for reimbursing costs related to transportation from home to school and back. They noted that transportation is often prescribed in a child's IEP or IFSP.

Response: This regulation is not inconsistent with section 1903(c) of the Social Security Act because it addresses whether transportation between home and school is a covered Medicaid service, and does not affect the general obligation of the Medicaid program to pay for covered Medicaid services that are prescribed in an IEP or IFSP primary to education programs. This regulation departs from previous guidance because it properly acknowledges that the purpose of the transportation between home and school is for education rather than medical services. Such transportation is for the purpose of securing attendance at the school for educational reasons, and not for the purpose of obtaining access to medical providers. As such, we do not believe that such transportation is within the scope of covered Medicaid transportation, either as an administrative activity or as a covered medical assistance benefit in the approved Medicaid State plan.

Comment: Some commenters asserted that, in exempting from the proposed rule the costs of transportation from home to school and back for children who are not yet school age, that CMS is acknowledging the potential for schools to provide Medicaid services and perform Medicaid activities not solely to serve an educational purpose, which undercuts this provision of the proposed rule. Additionally, some commenters noted, Federal Medicaid funding remains available for the transportation of all other groups of Medicaid-covered individuals to medical services providers; it is only school-age children receiving medical services at school whose transportation will not be reimbursable. They argue that this funding exception violates Federal regulations that require comparability in the amount, duration, and scope of services for all those who qualify for Medicaid services 42 CFR Section 440.240. As one commenter noted, Medicaid policy regarding medical transportation does not restrict the beneficiary from participating in any other activity before returning home

from the place of treatment, as is the case in schools. And still another commenter argued that the proposed regulatory text is contradictory by continuing to make Federal Medicaid reimbursement available ''for recipients to and from providers,'' while ignoring the fact that a school district can be a qualified Medicaid provider.

Response: For school-aged children, transportation between home and school is for the purpose of attending an educational institution, and not for the purpose of obtaining access to medical providers. This reasoning does not apply for individuals who are not yet school-aged, and thus we did not include this population in the rule's prohibition. The commenters err in assuming that transportation obtained for purposes other than to obtain access to medical providers is within the scope of covered Medicaid transportation. For instance, when an individual needs transportation for the purpose of attending a medical appointment in a nearby city, transportation to that provider would be covered even if the individual also shopped or engaged in other incidental activities on the trip. But when an individual is employed in that nearby city and commutes on a daily basis for the purpose of engaging in employment, the daily commute would not become covered Medicaid transportation when the individual attends a medical appointment at work. While this distinction is not always clear, it is clear in the instance of transportation between home and school for school-aged children.

Comment: Some commenters suggested that the proposed regulation may create new, unanticipated transportation costs if children begin to receive more services with a community-based provider, rather than in school, because many school districts will not be able to absorb transportation costs that were once matched with Medicaid funds. Other commenters asserted that the cost of providing specialized transportation is significantly more expensive than transportation provided to regular students, and should be reimbursable for that reason.

Response: This final rule will not interfere in any way with the ability of States to determine school transportation policy, but simply recognizes 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 Medicaid State plan, nor do they meet the definition of an optional transportation benefit under Medicaid. Children are transported to school primarily to receive an education, not to receive medical services. The final rule will merely eliminate Medicaid as a funding source; it will not affect the provision of such transportation. Moreover, this rule will not affect the status of covered medical services furnished in the course of transportation such as services of a personal care attendant or a home health aide.

Comment: One commenter suggested that CMS may have overlooked the fact that, in some cases, a child's disability is so severe that he or she is unable to attend a mainstream district school, or even a special day class within the district. In those cases, the child must attend an out-of-district public school, a non-public school placement, or a residential facility, to-and-from which districts are not automatically providing transportation. In cases where children would receive covered medical services at one of these sites, and the district must send the child to these placements because of their particular medical needs, the proposed regulations would preclude billing for the costs of such transportation, they note.

Response: We do not believe a school district's election to educate students in one location or another affects the basic purpose of the transportation to ensure attendance at an educational institution. Even in these circumstances, the transportation to and from school is for educational purposes.

We agree, however, that when an individual is transported for the provision of medical services to a location that is not a school, such as a community provider, the transportation would be covered because that transportation was necessary to access a medical service that is not available at the school.

Comment: Another commenter pointed to Executive Order 13330, issued February 24, 2004, which directs the Secretary of the U.S. Department of Health and Human Services to promote interagency cooperation in the provision of transportation services and argued that the proposed rule contradicts this Executive Order. The commenter stated: ''To determine that transportation is only necessary when performed by employees of the State or local Medicaid agency fails to recognize the efficiencies available when transportation is a coordinated effort.''

Response: The quoted language reflects confusion about this rule. This rule reflects a determination that transportation to and from school is not for the purpose of administration of the Medicaid State plan, nor is such transportation necessary to ensure beneficiary access to medical providers. We encourage the coordination of covered Medicaid transportation with other programs, but Medicaid reimbursement of transportation services is limited to ensuring beneficiary access to medical providers in the community. It does not include transportation routinely provided for other purposes.

Comment: Some commenters noted that school districts often rely on Medicaid reimbursements for the costs of outfitting buses with specialized equipment. These commenters urged that such funding remain available.

Response: Medicaid payment will continue to be available to pay for medical equipment, appliances and supplies that are covered under the home health benefit, to the extent medically necessary for a particular individual and, when furnished by schools, included in an IEP or IFSP. Medical necessity is determined under State-established medical necessity criteria. Nothing in the final rule will affect claiming under Medicaid for these types of expenditures. Medicaid reimbursement will not be available, however, for costs of permanently outfitting buses with equipment for general use in accommodating individuals with disabilities or other medical issues. Such costs are not within the scope of a covered Medicaid benefit. Instead such costs are integral to the uncovered transportation between home and school.

Impact Analysis

Comment: Some commenters argued that the estimated savings represents a cost shifting, rather than a cost savings, from the Federal government to State and local school districts that are obligated to provide these services. As a result, they believe the projected cost savings specified in the proposed rule are misleading. Another commenter argued that it is disingenuous to state that the proposed rule would not have a ''significant economic impact on local school districts.'' Schools may lose up to $600 million in the first year of the proposed rule's implementation, one commenter noted in referencing the projected cost savings. While this may be a very small component of the overall Medicaid budget, they contend, it is not insignificant to the school districts and States that rely on this funding to maintain the quality of services provided to students with disabilities.

Still other commenters question the projected savings resulting to the proposed rule, suggesting that these savings could be primarily attributable

to one of the two issues addressed in the proposed rule; specifically, transportation for school-age children. As a result, they argue the two parts of the proposed rule should be considered separately and their potential impact separately calculated. There is also no estimate in the impact analysis of the number of children who would not be identified and enrolled in Medicaid if States cannot maintain school-based outreach programs without Federal support, one commenter was disappointed to find.

Response: The final 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.

As stated in the proposed and final versions of the rule, there is admitted uncertainty in the projected cost savings 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. The cost savings are based upon State voluntary reporting of quarterly expenditures to CMS. Since this reporting for school-based activities is voluntary, these estimates may not match actual current spending. 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 final rule on the types of transportation costs that would be affected.

Comment: One commenter believed the rationale for the estimated cost savings is flawed because not all school districts currently claim or receive FFP for administrative and transportation services, and that Federal funding is spread unevenly among States, districts, and schools. Therefore, they suggest, comparing the costs of the proposed rule to overall nationwide spending for elementary and secondary education minimizes its financial impact. Instead, one commenter argued that a more realistic financial analysis is necessary, one which would:

1. Examine the financial impact of the proposed cuts only on districts that actually claim for reimbursements;

2. Take into consideration the unique aspects (such as fixed costs) of school district budgets; and

3. Include the likely loss of State Medicaid funding that would result from schools no longer being able to sustain these programs.

Response: The proposed and final rules reference total elementary and secondary spending in 2004, as defined by the Bureau of the Census, in determining the projected impact on expenditures. It is difficult, if not impossible, to reach consensus on a single expenditure total to be used as the basis for calculating the potential impact of the proposed rule. We determined the Census data to be the most reliable and accurate data available. As stated in Section VI., the estimated annual Federal savings under this final 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*).

Comment: Other commenters disagreed with the assessment in the proposed rule that it would not have a significant impact on a substantial number of small entities, either disagreeing with the threshold definition of significant impact or that of small governmental jurisdictions. This was an issue for which CMS specifically solicited public comment. Under the definition of small governmental jurisdiction used by CMS, that is, those with a population of less than fifty thousand, nearly every school district in certain States would qualify as small entities, according to one commenter. This commenter went on to note that these smaller districts are often rural with a high percentage of students receiving free or reduced priced lunches. As a result, schools that are poor, rural, isolated and small will be disproportionately impacted due to existing budget constraints and extremely limited resources.

Certain commenters believe the cost benefit analysis to be flawed. One commenter stated that the analysis presumes that most school districts are uniform in size, which is not the case. Another argued that the proposed rule aggregates all Federal spending on elementary and secondary education ''* * * as a means to minimize the rule's financial impact on school districts.'' Some stated that the proposed rule inaccurately minimizes the fiscal impact the proposed rulemaking would have on school districts, stating that it is ''* * * misleading and inaccurate for CMS to compare the cost of school-based health care to the entire budgets for K–12 education.'' Rather than ''one eighth of one percent of total annual spending, the proposed rule, they argue, would impose a 50 percent impact insofar as the matching rate for allowable administrative expenditures is 50 percent FFP.

Response: As noted in Section VI., for purposes of the Regulatory Flexibility Act, 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. Admittedly, 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. We nevertheless believe, as indicated in our calculations and in the absence of reliable data to the contrary, that the impact of this rule will be only a small percentage of administrative and transportation expenditures by such entities. Furthermore, the input we received in response to the solicitation for public comments on the potential impact on small entities offered only speculation and did not provide sufficient quantitative data to argue for a reassessment of the potential impact.

Comment: One commenter believes the discussion in the Impact Analysis of Executive Order 13132 is flawed by a failure to accurately assess the impact on State and local governments and by the factual error inherent in characterizing as ''routine'' the transportation needs of school-based children receiving Medicaid services in a school setting pursuant to an IEP.

Response: As stated in Section VI., with respect to transportation specifically, States and/or schools will be required under the final 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.

Regulatory Text

Comment: One commenter asked for clarification of what is meant in the

proposed Section 433.20 by ''under the control of'' a public or private educational institution. This commenter also asked for clarification in the regulatory text that activities required to support the provision of medical services are eligible for FFP if they are included in the rate paid for direct medical services, and requested a definition for ''administrative overhead costs'' to appear in the regulatory text.

Response: The reference in Section 433.20 to anyone ''under the control of'' a public or private educational institution is meant to incorporate any and all subcontracting arrangements that schools or other educational institutions may enter into for the provision of services or administrative activities in schools. The definition of administrative overhead costs cannot be specified in the regulatory text because it is dependent upon the types of costs that are included in the rate paid for direct medical services, which is negotiated by each State and specified in the approved Medicaid State plan. These reimbursement rates are set by the State Medicaid agency and, therefore, any discussions regarding the appropriateness of such rates on the part of providers must be conducted at the State level.

Furthermore, CMS does not believe it is necessary to specify in the regulatory text that administrative activities that are integral to, or an extension of, a direct medical service remain eligible for FFP insofar as they are reimbursed through the rate paid for the service. This is because the regulatory text only limits the availability of FFP for Medicaid administration, not services (except insofar as transportation from home to school and back is defined as a service). That is, the final rule does not affect Federal reimbursement for the costs of allowable direct medical service expenditures.

Comment: One commenter requested that the regulatory text explicitly note the continued availability of FFP for the costs of transporting school-age 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. Another commenter asked for language to be included in the regulatory text specifying that FFP is available for transportation services provided to children who are ''not yet school-age'' to and from providers, even if the site of service is a school.

Response: CMS does not believe it is necessary to specify in the regulatory text that Federal Medicaid reimbursement remains available for transportation provided to children who are not yet school-age to and from providers, even if the site of service is a school, because the regulatory text lists only those costs for which reimbursement will not be available. Similarly, it is not necessary to note in the regulatory text the continued availability of FFP for the costs of transporting school-age 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. Any such costs not included in the regulatory text are thereby exempt from the general prohibition on reimbursement.

Comment: One commenter requested a definition of ''school-age'' and ''not yet school-age.''

Response: The regulatory text purposely does not provide a definition for ''school-age'' and ''not yet school-age'' because such definitions may differ by State and no such distinction exists in the Medicaid statute; rather, such determinations are based on education requirements. We do intend the term ''school-age children'' to be defined by age. It is specifically worded as such to differentiate between children who are of the age to attend school for education and children who are not yet school-age.

Comment: One commenter asked for clarification in proposed Section 431.53 of whether transportation is only available to and from services that are included in a child's IEP or whether transportation is also available to and from other Medicaid services that are not included in a child's IEP.

Response: Federal Medicaid reimbursement for school-based services is generally available only for covered services provided pursuant to an IEP or IFSP, because non-IEP services are typically subject to Medicaid third party liability rules and ''free care'' policies, which limit the ability of schools to bill Medicaid for some of these health services and associated administrative costs. Third party liability requirements preclude Medicaid from paying for Medicaid coverable services provided to Medicaid beneficiaries if another third party (e.g., other third party health insurer or other Federal or state program) is legally liable and responsible for providing and paying for the services. The ''free care'' principle precludes Medicaid programs from recognizing as a cost of Medicaid-coverable services and activities any amount for services and activities which are available without charge or liability, and for which no other sources for reimbursement are pursued.

IV. Provisions of the Final Regulations

This final rule incorporates the provisions of the proposed rule in its entirety and does not in any way differ from the proposed rule.

V. 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).

VI. 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). This final rule's savings will exceed this economic threshold and it is therefore considered a major rule. The final rule is estimated to reduce Federal Medicaid outlays by $635 million in FY 2009 and by a total of $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 final 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 many school districts have populations below this threshold and are therefore considered small entities for purposes of the RFA, we have determined the impact on local school districts as a result of the final rule will not exceed the threshold of

''significant'' economic impact under the RFA, as discussed below.

States have the option under the final 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 continue transporting 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 Program (IEP) under the IDEA, section 1903(c) does not expressly authorize Medicaid funding for administrative activities that schools conduct in implementing their IDEA responsibilities.

The estimated annual Federal savings under this final rule are 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 used 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 final rule will not have a significant economic impact on a substantial number of small entities.

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 604 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 $127 million. This final rule contains no mandates that will impose spending costs on State, local, or tribal governments in the aggregate, or by the private sector, of $127 million. The final 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 will not have a substantial effect on State or local government policy discretion. While this final 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 will 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 will 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 Medicaid State plan, nor do they meet the definition of an optional transportation benefit under Medicaid.

B. Anticipated Effects

The final 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 final 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 per Federal fiscal year]

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

Conclusion

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 final rule was developed and then projected forward using the most recent assumptions available. 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 final rule on the types of transportation costs that would be affected.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

VII. 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, we attempted, by issuing the May 2003 Medicaid School-Based Administrative Claiming Guide, to provide specific guidance on the requirements for claming 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.

We determined that the rulemaking process was the most effective method of implementing these policies because the rulemaking process was the best way to 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.

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 final 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 will be implemented by this final rule. The sum total of these expenditures is classified as savings in Federal Medicaid spending.

TABLE II.—ACCOUNTING STATEMENT

Category	Transfers	
Accounting Statement: Classification of Estimated Expenditures, From Fiscal Year 2009 to Fiscal Year 2013 (in millions)		
	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 amends 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 a new § 433.20 to read 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.

* * * * *

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

Dated: December 13, 2007.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: December 14, 2007.

Michael O. Leavitt,

Secretary.

[FR Doc. 07–6220 Filed 12–21–07; 10:00 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket No. FEMA–8005]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

EFFECTIVE DATES: The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

ADDRESSES: If you want to determine whether a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office.

FOR FURTHER INFORMATION CONTACT: David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.