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## *FOR YOUR INFORMATION*

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News for School Clients

### **IDEA Requires Parental Consent When Applying for Medicaid Reimbursement of IEP Services**

Under the Individuals with Disabilities Education Improvement Act (IDEA), a school district may access the Medicaid or other public benefits or insurance programs in which a student with disabilities participates in order to provide or pay for some of the services required in the student's individualized education program (IEP). In accessing public benefits, school districts create an interagency relationship that helps to defer some of the cost of special education services. A school district can seek Medicaid reimbursement for medically necessary services, such as physical therapy.

In fact, the U. S. Congress encourages school districts to use public funds provided by Medicaid and other public benefits to help support the cost of special education and related services to the extent possible. A school district's access to such public benefits is subject to limitations, however. First, a district may not require a parent to sign up for Medicaid or other public insurance programs as a condition of the student's receipt of a free appropriate public education. Second, a district may not require parents to incur any out-of-pocket expense, such as a deductible or a co-pay, that is incurred when a claim is filed under

the reimbursement provision of the IDEA. Finally, a district may not access a student's public benefits or public insurance programs if doing so would decrease the available lifetime coverage for the student, result in the family paying for services or increased premiums, or risk loss of eligibility for other services.

Importantly, before accessing a student's public benefits, a school district must have parental consent. The requirement to obtain parental consent is based on privacy considerations. The Family Educational Rights and Privacy Act (FERPA) protects parent and student privacy by regulating the disclosure of student education records containing personally identifiable information. Where student education records are involved, parental consent must be provided before disclosure is made to a third party.

The U.S. Department of Education, Family Policy Compliance Office (FPCO), has historically taken the position that parental consent is required when a school district seeks Medicaid reimbursement for IEP services. In a letter opinion issued ten years ago, the FPCO concluded that school districts must have written parental consent

prior to releasing student records when either (1) determining the student's Medicaid eligibility, or (2) seeking reimbursement for school-based services. The FPCO recognized that in order to determine student eligibility for Medicaid services, for which the district would then seek reimbursement, student education records had to be disclosed. The information needed by the State Medicaid agency for the determination of eligibility identifies the student as disabled, and, if reimbursement of services is subsequently requested, the information will include the nature and extent of services that are provided to the student. Therefore, when a school district releases information to the Medicaid agency for the purpose of seeking reimbursement for a specific student, the FPCO concluded that FERPA requires parental consent because of the personally identifiable information involved.

In keeping with FPCO's interpretation of the FERPA protections, the 2004 reauthorization of the IDEA incorporated a consent requirement when school districts seek reimbursement for a student's school-based services from a public agency. The 2006 IDEA implementing federal regulations explicitly require parental consent each time a school district accesses Medicaid or other public benefits. As a result of this new IDEA requirement, school districts must ensure that proper parental consent is in place prior to applying for reimbursement of medically necessary services from Medicaid or accessing other public benefits. Importantly, the district must notify parents that the parent's refusal

to allow the school district to access their public benefits does not relieve the school district of its responsibility to ensure that all required IEP services are provided for their student at no cost to the parents.

It is recommended that school districts seeking Medicaid or other public benefit reimbursement for school-based services review their parental consent procedures. The U.S. Department of Education has explained that a parent may give consent directly to the state Medicaid agency as long as the criteria for "consent" under IDEA are met; however, the school district is obligated to ensure that such informed consent is in place. This means that (1) the parent must be fully informed of all information relevant to the activity, (2) the consent describes the records that will be released and to whom, and (3) the form explains that the consent is voluntary and can be revoked.

The federal regulations require that school districts obtain parental consent "each time access to public benefits is sought," but do not define "each time." Requiring districts to obtain consent each time they submit monthly reimbursement reports seems overly burdensome. Therefore, it is recommended that school districts obtain written parental consent for reimbursement for school-based services from Medicaid or other public benefit agency at least annually, perhaps at the student's annual IEP meeting. Alternatively, the district can confirm with the parent that they have already provided such a consent to the public agency from which reimbursement is sought and request a copy of the parent's written consent.

*If you have any questions regarding this topic, please call one of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.*

David E. Rohrer (608) 286-7249      Joanne Harmon Curry (608) 286-7248

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