

# Historical Medicaid Information

**Final regulations** 57 F.R. 54705, Nov. 20, 1992.

## **Medicaid: Payment for Training Institutionalized Individuals**

**Payments to states--Training for institutionalized individuals.**--Reproduced below are a summary, supplementary information, and a final regulation clarifying the prohibition of federal Medicaid funding for vocational training and educational activities in intermediate care facilities for the mentally retarded and in psychiatric facilities or programs providing psychiatric services to individuals under age 21.

Health Care Financing Administration

42 CFR Part 441

Medicaid Program; Prohibitions on FFP for Educational and Vocational Training for Institutionalized Individuals

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

**SUMMARY:** This final rule revises and clarifies the meaning of the prohibition against the use of Federal financial participation (FFP) for vocational training and educational activities in intermediate care facilities for the mentally retarded (ICFs/MR) and in psychiatric facilities or programs providing psychiatric services to individuals under age 21. It resolves issues that have been raised by the States and courts regarding the method and criteria that have been used by HCFA to determine which services are not eligible for FFP because of the educational and vocational training services exclusion.

**EFFECTIVE DATE:** These regulations are effective December 21, 1992.

**FOR FURTHER INFORMATION CONTACT:** Martha Kuespert (410) 966-1782.

### **SUPPLEMENTARY INFORMATION:**

#### **I. Background**

Medicaid regulations have contained a provision prohibiting payment for educational and vocational services in intermediate care facilities for the mentally retarded (ICFs/MR) since 1974, when initial regulations for the ICF/MR program were published. The initial regulations implementing the psychiatric services benefit for those under age 21 also included the educational and vocational exclusion. This exclusion is found at 42 CFR

441.13(b). The exclusion was based on the fact that the Medicaid program is fundamentally a medical assistance program that has as its primary purpose the provision of medical care and services (which are defined in section 1905(a) of the Social Security Act (the Act)). It was also based on the principle of Medicaid as the "payor of last resort" under sections 1902(a)(25) and 1902(a)(17)(B) of the Act, which HCFA believed obligated State education agencies, not Medicaid, to pay for services related to special education. The exclusion was explained in a 1978 Medicaid instruction (HCFA Action Transmittal 78-104), which stressed the need to ensure that Medicaid payment is made only for "medical assistance" and not for services covered as educational services under the **Education for All Handicapped Children Act of 1975 (Pub. L. 94-142)** or for vocational training services. While the issuance stated that there is a distinction between medical assistance and educational or vocational services and stressed the need to avoid duplicate payments, it did not clearly establish the basis for the distinction. Questions concerning decisions by the Departmental Appeals Board (among them Decision Numbers 367, 438, and 777) and audit activities conducted by the Office of Inspector General (reported under audit control numbers 01-20201, 01-40212, 04-50205, 04-50210, and others) led us to conclude that there was a need for a clearer interpretation of the regulation to provide criteria to distinguish ICF/MR services from "educational services" and "vocational training." Therefore, in September 1985, we issued at section 4396 of part 4 of the State Medicaid Manual, new Instructions (Transmittal No. 16) to assist in differentiating educational services from ICF/MR services reimbursable under the Medicaid program. In September 1986, a parallel instruction (Transmittal No. 21) relating to vocational services was issued at section 4397 of the Manual. These issuances were developed with assistance from a Technical Advisory Group composed of State Medicaid representatives.

Our instructions at section 4396 of the State Medicaid Manual recognized that many of the services required to be provided to children under Federal and State education statutes are also services that are covered under the Medicaid program. Such services, in our view, would only be covered under Medicaid if the State educational agencies were not obligated by law to pay for them. We adopted the approach that all services described in the Individualized Education Plan (IEP) and all services required under State and Federal education laws were excluded from Medicaid reimbursement because these services are the responsibility of the State.

The instruction also made it clear that Federal financial participation (FFP) was not available for traditional educational activities such as training in academic subjects on the basis of the broader authority in section 1905(a) relating to the medical and remedial orientation of the Medicaid program.

This aspect of the instruction was not controversial.

Several factors have led us to reevaluate our policy on the educational and vocational exclusion. First, in *Commonwealth of Massachusetts v. Heckler*, 616 F.Supp. 687 (D. Mass. 1985), the court rejected HCFA's position that FFP is unavailable for services that

are covered by State education statutes. Accordingly, HCFA's policy of disallowing certain costs solely because they were included in a client's IEP was invalidated. The court concluded that determination of whether a service is educational (and therefore not eligible for FFP) should rest on the nature of the service rather than on the State's method of administering the service. In *Commonwealth of Massachusetts v. Bowen*, 816 F.2d 796 (1st Cir. 1987), the First Circuit Court affirmed the finding of the district court. Following an appeal to the United States Supreme Court on a jurisdictional issue (*Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct 2722 (1988)), the district court opinion was upheld.

⇒ **Second, the Education of the Handicapped Act Amendments of 1986 (Pub. L. 99-457) make it difficult to employ the "payor of last resort" principle outlined above. These amendments indicate that funds provided under Pub. L. 94-142 would not be used to satisfy a financial commitment for services that would have been paid for by other Federal, State, and local agencies (including health agencies) if these services were not provided as part of the handicapped child's IEP.**

Also, section 1903 of the Act has been amended by section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100-360). As amended, section 1903 includes a statement that nothing in title XIX--

shall be construed as prohibiting or restricting, or authorizing the Secretary to prohibit or restrict, payment under subsection (a) for medical assistance for *covered services* [emphasis added] furnished to a handicapped child because such services are included in the child's individualized education program established pursuant to part B of the Education of the Handicapped Act or furnished to a handicapped infant or toddler because such services are included in the child's individualized family service plan adopted pursuant to part H of such Act.

⇒ **The intent of these amendments is to ensure that services that would ordinarily be provided or paid for by other agencies for handicapped children would be continued. The congressional committee report that accompanied the change states explicitly the committee's intent that Medicaid cover the "related services" it had previously denied under the educational services exclusion (H.R. Rep. No. 661, 100th Cong., 2nd Sess. 26869 (1986)).**

⇒ **Finally, we note that, in its report on the FY 1991 "Appropriations for Labor, HHS, Education, and Related Agencies" (S. Rep. No. 516, 101st Cong., 2d Sess. 180 (1990)), the Senate Appropriations**

**Committee expressed concern about State Medicaid programs refusing to pay providers for services that were otherwise covered under the State plan. In response to this concern, HCFA assured the Committee that it was working to ensure proper payment of benefits under Medicaid. This rule is part of the effort to ensure proper payment.**

## II. Provisions of the Proposed Rule

On February 21, 1990, we published a proposed rule in the Federal Register (55 FR 6015). In it we proposed to revise the regulations concerning the prohibition against the use of FFP for educational and vocational services as a result of the litigation in Massachusetts and in order to conform the regulations to the 1986 amendments to Public Law 94-142 and to the provisions of the Medicare Catastrophic Coverage Act of 1986.

Specifically, we proposed revising 42 CFR 441.13(b) to clarify the current prohibition against the use of FFP for vocational and educational activities in ICFs/MR and psychiatric facilities or psychiatric programs for those under 21. The proposed language stated that FFP is not available for formal educational services or vocational services for residents of ICFs/MR or for those receiving services from psychiatric facilities or programs that provide inpatient psychiatric services to individuals under age 21. The proposed rule stated that covered services include only those services that are medical or remedial in nature.

We proposed specifying that formal educational services are those relating to training in traditional academic subjects. We said that subject matter rather than setting, time of day, or class size would determine whether a service is educational, and that traditional academic subjects include, but are not limited to, science, history, literature, foreign languages, and mathematics.

We proposed that vocational services relate to organized programs that are directly related to the preparation of individuals for paid or unpaid employment. (This definition was adapted from 34 CFR 300.14(b)(3), the Department of Education regulations implementing Pub. L. 94-142.) We used this definition because it clearly ties vocational services to employment, not to acquisition of normal health status. This is compatible with the statutory philosophy of Medicaid as a medical program rather than an educational program. As a side benefit, we hoped that the use of a single definition of vocational training by HCFA and the Department of Education would help eliminate confusion about the nature of covered services. We proposed specifying that examples of vocational services include, but are not limited to, sheltered workshops and supported employment.

Additionally, we proposed to provide an exception to the FFP limitation. We proposed specifying that services required to provide active treatment to residents would not be subject to the exclusion. Thus, FFP would be available for active treatment as defined at

§483.440(a) for ICF/MR residents and at §441.154 for individuals under age 21 receiving inpatient psychiatric services.

### **III. Discussion of Comments**

We received 42 timely items of correspondence in response to the February 21, 1990 proposed rule. The comments were primarily from State government agencies and departments, and providers of educational and vocational training. The specific comments and our responses to these comments are as follows:

*Comment:* One commenter requested that HCFA either rescind this rule or hold it in abeyance until completion of a 3-year HCFA-funded demonstration project to test the effect of receiving educational and vocational services on success in placement in a community setting. A few commenters asked that the rule on the exclusion of FFP for educational and vocational services be deleted.

*Response:* The exclusion on FFP for vocational and educational services with the clarification provided by this rule is necessary to ensure that Medicaid funding is limited to services covered under title XIX. Because we do not believe that the suggested demonstration project would have an impact on this issue, we have not provided for the delay.

*Comment:* A few commenters asked whether these rules applied to all individuals in ICFs/MR or only those clients who are under age 21.

*Response:* This rule applies to all services provided by ICFs/MR, regardless of age of the individuals to whom the services are provided.

*Comment:* Many commenters were concerned about the statement in the preamble of the notice of proposed rulemaking (NPRM) which cautioned that the degree of independence and self-reliance exhibited by an individual effectively using educational and vocational services should bring into question the propriety of his or her placement in an ICF/MR. Some commenters feared that this statement would have an adverse impact on services provided to ICF/MR clients and that it would foster arbitrary denials of eligibility for ICF/MR placement. Other commenters objected for different reasons, including a belief that this statement was unfair and without basis. One commenter asked what criteria would be used to determine whether an individual is ineligible for ICF/MR placement because of effective use of educational or vocational services.

*Response:* We understand commenter concern about this statement. We had intended for this statement to suggest that ICF/MR placement should be reconsidered for individuals who can successfully use educational and vocational services of the kind that are used by the general public. For example, appropriateness of ICF/MR placement should probably be reevaluated for an individual who is successful at learning history, foreign languages, or carpentry. We did not intend to limit needed active treatment services for

ICF/MR clients or to tie ICF/MR eligibility to effective utilization of such services. We believe that the confusion resulting from this statement was due, in part, to our use of supported employment and sheltered workshop services as examples of vocational services. Therefore, we have removed the sheltered workshop and supported employment as examples of vocational services. The new example of vocational services provided is time-limited vocational training provided as a part of a regularly scheduled class available to the general public. We believe that this new example will help to resolve commenter concern.

*Comment:* A number of commenters expressed confusion or dismay about the statement in the preamble of the NPRM which said that Medicaid is primarily a medical program, not an educational program. Some commenters were confused by a statement that indicated that only those services that are medical or remedial in nature are covered. Commenters posed many specific questions about the issue of medical and remedial services.

*Response:* We continue to assert that Medicaid is primarily a medical program rather than an educational program. There are other Federal programs whose purpose is education. As stated previously in this preamble, this rule is designed to ensure that payment for educational and vocational services not made by the Medicaid program. We would, however, like to clarify our statement indicating that medical and remedial services are the only covered services. This statement was made in the context of a discussion on the general exclusion of FFP for educational and vocational services and did not address the application of this general principle to the services in question. Educational and vocational services which are part of active treatment (see 42 CFR 483.440) are not excluded from FFP. They would, by virtue of being included in active treatment services, be deemed to be medical or remedial under the law.

*Comment:* Some commenters requested that we allow FFP for all vocational and educational services provided to individuals in ICFs/MR. With this in mind, a commenter suggested broadening the definition of educational services provided in the NPRM. A few commenters suggested altering the definition of vocational services provided in the NPRM.

*Response:* As we indicated earlier in this preamble, a primary purpose of this rule is to ensure that educational and vocational services are paid by the appropriate funding source. Unless educational and vocational services are part of active treatment, we believe that the responsibility to pay for them does not lie with the Medicaid program. We believe that the definitions of educational and vocational services are clear as stated in the NPRM, and we note (as stated in the NPRM) that we have used the definition of vocational services developed by the Department of Education (34 CFR 300.14(b)(3)) in an effort to assist in eliminating confusion on the nature of covered services.

*Comment:* One commenter believed that HCFA is in conflict with Federal policy by not providing FFP for vocational services because Federal regulations at 34 CFR 363.3 define certain handicapped individuals as eligible for supported employment.

*Response:* Federal regulations at 34 CFR 363.3 are Department of Education regulations, not HCFA regulations, and define individuals eligible for funds from a program of the Department of Education, not Medicaid. HCFA does not pay for services for which the Department of Education (or any other entity) has responsibility unless directed to do so by a specific provision of law, such as section 1903(c) of the Act.

*Comment:* A commenter asked that supported employment be identified as the service of first choice for ICF/MR clients. Another commenter asked us to define those services essential for providing active treatment.

*Response:* Because individual needs differ, we believe it would be inappropriate for us to make a blanket determination about the suitability of supported employment for all ICF/MR clients or to mandate specific services that must constitute active treatment.

*Comment:* One commenter asked whether certain services related to vocational services are eligible for FFP when the vocational services themselves are not if the related services are in an individual's individual habilitation plan (IHP).

*Response:* The nature of the related services, rather than whether they are in the client's IHP, determines whether FFP is available.

*Comment:* A commenter asked for specific guidance on when FFP is available for educational and vocational services provided to handicapped individuals who do not reside in ICFs/MR and indicated that the NPRM could cause confusion for school districts, which might apply this regulation to services provided to children who are not ICF/MR residents. A few commenters believed that the NPRM indicated that FFP is always available for educational and vocational services and that the rule should be revised to state this more clearly.

*Response:* We do not believe that there is any reason for school districts to be confused by this rule since it is clearly labeled as applying to services provided to ICF/MR clients and individuals under 21 in inpatient psychiatric facilities. As indicated by the language in the text of the regulation, FFP is not always available for educational and vocational services when provided to ICF/MR clients. In fact, the regulation clearly indicates that FFP is not available for educational and vocational services provided to ICF/MR clients unless the services are part of active treatment. We note that we have plans to issue an instruction to clarify availability of FFP for educational and vocational services provided to handicapped individuals who are not ICF/MR clients in the future.

*Comment:* A few commenters thought that this regulation exhibited lack of support for educational and vocational programs or that it went against various goals of the

Department of Health and Human Services or other groups. One commenter expressed a belief that this regulation provided a disincentive to provide vocational services to ICF/MR clients.

*Response:* This regulation is designed to help ensure proper payment under the Medicaid program. It is not intended to reflect a judgment about vocational programs or their funding sources and does not contradict any Department of Health and Human Services goals.

*Comment:* A commenter believed that HCFA should develop regulations requiring school systems to follow certain time frames in responding to requests for educational services.

*Response:* HCFA does not have jurisdiction or authority over school systems provision of educational services, so we have not developed the regulations requested by this commenter.

*Comment:* A few commenters believed that the policy for payment of educational and vocational services should be the same for services provided to home and community based services waiver recipients and ICF/MR clients.

*Response:* The statutory authority for FFP for home and community based services waivers is different than that for ICFs/MR, and we do not believe that the policy of payment for educational and vocational services provided to waiver recipients is appropriate for services provided to ICF/MR clients. At the inception of the home and community-based services waiver program in 1981, FFP was precluded for vocational and educational services under home and community-based services waivers. This policy was published formally in the Federal Register on March 13, 1985 in our final rules (50 FR 10026) implementing the home and community-based services program. Subsequently, section 9502(a) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99-272) added section 1915(c)(5) to the Act to specifically provide that certain prevocational, educational, and supported employment services could be included within the scope of habilitation services which may be provided to individuals discharged from a skilled nursing facility (SNF) or ICF into a home and community-based services waiver. Section 4118(j) of the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100-203) further amended section 1915(c) of the Act to indicate that the expanded habilitation services could be provided to individuals discharged from a nursing home into the waiver without regard to whether these individuals were receiving institutional services immediately before their participation in the waiver. Thus, there is clear statutory authority for the provision of prevocational, educational, and supported employment services under a home and community-based services waiver program.

*Comment:* A commenter believed that the only services which should not be eligible for FFP are those educational services provided under the Education of the Handicapped Act (Pub. L. 94-142) and those vocational services provided under section 110 of the



Rehabilitation Act. One commenter believed that HCFA should ensure that reimbursement systems for vocational services mesh.

*Response:* Educational and vocational services are not eligible for FFP because we do not believe they fit within the definition of "medical assistance" in the Medicaid law. It is this fact, rather than the availability of funds from other sources, that led us to determine that FFP is not available for educational and vocational services.

*Comment:* A commenter believed that this regulation would improperly cause Medicaid to pay for special educational services which are the responsibility of school districts.

*Response:* The Education of the Handicapped Act Amendments of 1986 (Pub. L. 99-457) indicate that Federal education funds under Public Law 94-142 may not be used to pay for services that would be paid for by other agencies if the services were not provided as part of a child's individual education plan (IEP). However, educational and vocational services that are part of active treatment can be covered under Medicaid, and we therefore believe that FFP must be available for them.

*Comment:* A few commenters expressed confusion about the statement in the preamble of the NPRM that indicated that FFP is available for educational and vocational services required to provide active treatment because the regulations for active treatment do not list required elements.

*Response:* In this context, "required" does not mean that there are certain specific services required to provide active treatment; it means whatever services are needed to provide active treatment.

*Comment:* A couple of commenters asked that we address whether "pre-academic" activities are included in the exclusion from FFP.

*Response:* From commenters' descriptions of pre-academic activities (for example, instruction in shapes and colors), it appears that such activities are not included in the definition of educational services and would not be subject to the FFP exclusion.

*Comment:* A number of commenters requested assistance in determining which services are educational and vocational in nature. One commenter asked that HCFA issue interpretive guidelines along with these regulations.

*Response:* The language in the regulations is detailed, and we do not believe that further clarification is needed. We do, however, plan to issue instructions relating to this regulation.

*Comment:* A few commenters believed that Medicaid should pay for any service directed toward the acquisition of the behaviors necessary for clients to function with as

much self-determination and independence as possible. Some commenters questioned whether such services would be funded.

*Response:* As indicated in 42 CFR 483.440, active treatment includes specialized and generic training, treatment, health services, and related services described in 42 CFR 483, subpart I. While one of the goals of active treatment is the acquisition of the behaviors necessary to function with as much self-determination and independence as possible, it is possible that certain services intended to help meet this goal would not be part of active treatment or any other covered service. FFP is available only for active treatment and other covered services.

*Comment:* A commenter asked that this regulation be rewritten to state goals of ICF/MR treatment and encourage a broad interpretation of active treatment.

*Response:* This regulation is intended only to reflect a Medicaid payment exclusion. Regulations relating to ICF/MR services can be found in 42 CFR part 483, subpart I.

*Comment:* A commenter asked that we state whether FFP is available for behavior management necessary for active treatment.

*Response:* If behavior management is provided in accordance with the requirements of 42 CFR 483.440, which sets forth the ICF/MR conditions of participation regarding active treatment services, then FFP is available for it.

#### **IV. Provisions of this Final Rule**

The provisions of this final rule restate the provisions of the February 21, 1990 proposed rule with two changes in §441.13(b). First, we have deleted sheltered workshops and supported employment as examples of vocational services. Second, we have added time-limited vocational training provided as a part of a regularly scheduled class available to the general public as an example of vocational services.

#### **V. Regulatory Impact Statement**

##### *A. Executive Order 12291*

Executive Order 12291 (E.O. 12291) requires us to prepare and publish a regulatory impact analysis for any final rule that meets one of the E.O. 12291 criteria for a "major rule"; that is, that will be likely to result in--

- An annual effect on the economy of \$100 million or more;
- A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

- Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This final rule clarifies the prohibition against the use of FFP for educational and vocational services in ICFs/MR and in psychiatric facilities or in programs furnishing inpatient psychiatric services to individuals under age 21. Recent court decisions and statutory changes have changed previous policy. This final rule requires coverage of certain medical and remedial services that previously were prohibited from FFP if they were part of an IEP. We believe any cost or savings associated with this final rule will be minimal.

This final rule does not meet the \$100 million criterion nor does it meet the other E.O. 12291 criteria. Therefore, it is not a major rule under E.O. 12291, and a regulatory impact analysis is not required.

#### *B. Regulatory Flexibility Act*

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a final rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we consider all SNFs, NFs, and ICFs/MR to be small entities. Individuals and States are not considered to be small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a final rule may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the FRA. 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 that has fewer than 50 beds.

We believe that Medicaid coverage for these services will have little, if any, effect on small entities and on small rural hospitals. We are not preparing analyses for either the RFA or section 1102(b) of the Act since we have determined, and the Secretary certifies, that this final rule will not result in a significant economic impact on a substantial number of small entities and will not have a significant impact on the operations of a substantial number of small rural hospitals.

#### **VI. Information Collection Requirements**

This rule contains no information collection requirements; therefore, the rule does not come under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501).

#### **List of Subjects in 42 CFR Part 441**

Family planning, Grant programs-health, Infants and children, Medicaid, Penalties, Prescription drugs, Reporting and recordkeeping requirements.

42 CFR part 441 is amended as follows:

1. The authority citation for part 441 continues to read as follows:

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

2. Section 441.13 is amended by revising the section heading and paragraph (b) to read as follows:

**§441.13 Prohibitions on FFP: Institutionalized individuals.**

\* \* \* \* \*

(b) With the exception of active treatment services (as defined in §483.440(a) of this chapter for residents of ICFs/MR and in §441.154 for individuals under age 21 receiving inpatient psychiatric services), payments to institutions for the mentally retarded or persons with related conditions and to psychiatric facilities or programs providing inpatient psychiatric services to individuals under age 21 may not include reimbursement for formal educational services or for vocational services. Formal educational services relate to training in traditional academic subjects. Subject matter rather than setting, time of day, or class size determines whether a service is educational. Traditional academic subjects include, but are not limited to, science, history, literature, foreign languages, and mathematics. Vocational services relate to organized programs that are directly related to the preparation of individuals for paid or unpaid employment. An example of vocational services is time-limited vocational training provided as a part of a regularly scheduled class available to the general public.

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Dated: April 22, 1992.

**William Toby, Acting Deputy Administrator, Health Care Financing Administration.**

Approved: April 23, 1992.

**Louis W. Sullivan, Secretary.**