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Blocking Medicaid Rules: Hurting Families and Taxpayers Alike

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Congress is about to make a bad decision on Medicaid that will affect taxpayers and families alike. The Centers for Medicare and Medicaid Services (CMS), which is responsible for administering the Medicaid program, has issued seven rules designed to curb certain Medicaid fraud and abuses. Congress is poised to block these rules and thus allow abusive, fraudulent, and wasteful activities to continue.

The proposed CMS rules largely focus on technical issues of Medicaid administration, but they have broader policy implications. They would close the loopholes involved with intergovernmental transfers; end Medicaid payments for graduate medical education; limit provider taxes; and clarify Medicaid's reimbursement policy for school-based administrative and transportation services, rehabilitation services, outpatient hospital services, and targeted case management.[1]

The CMS regulations have provoked opposition from a number of state officials and allied special interests who have been using the Medicaid program to transfer costs from their state agencies to federal taxpayers in order to fund non-medical activities and balance the state budgets. Under pressure from state officials to allow the *status quo* to continue without interruption, Congress is considering legislation (H.R. 5613) that would prohibit these rules from going into effect until June of 2009, when the next presidential administration takes control of the program.

Of particular importance to American families is a rule that would remove Medicaid funding for activities at school health clinics. Some schools use Medicaid's seemingly bottomless budget to build and operate elaborate health clinics. Medicaid nonetheless gets billed for their seed money and overhead, and for administrative or other activities that are not related to direct medical care. These activities include "family planning" education and referrals, substance-abuse treatment referrals, and arranging for children's' psychiatric evaluations and treatment.

No Parental Consent. Medicaid funded school-based clinics should be worrisome to parents. Today, Medicaid rules prohibit schools from including parents in medical decisions regarding their own children if they are on Medicaid, even sensitive decisions regarding family planning or psychiatric counseling and drugs, *unless the child consents.* Parents thus have serious reason for concern whenever Medicaid dollars flow directly into the schools. Since many of the school-based clinics depend on this funding practice for their day-to-day operations, the new CMS regulation would have the effect of reducing the number of such clinics and directing the children back to their family pediatricians. Congress should allow the regulations to go into effect,

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so as to keep Medicaid focused on providing access to medically necessary services for the poor families it is designed to help.

Medicaid and School Based Clinics. One of the proposed regulations, CMS 2287-F, would alter how Medicaid reimburses schools, school-based health clinics, and their subcontractors.[2] The regulation has two parts. The first part would prohibit schools from charging Medicaid for travel to and from school unless for a medical reason. Remarkably, some school districts bill Medicaid for their school busing, even when the children bused are healthy and receive no Medicaid services. State officials and school administrators often argue that, because they are transporting a child eligible for Medicaid-funded health care to a location that provides Medicaid-funded health care, that alone qualifies the transportation as a Medicaid expense. Congress, nonetheless, seems prepared to tolerate this abuse.

The second part of the this CMS regulation would prohibit schools and third-party clinics from billing Medicaid for the administrative overhead and the general infrastructure of school-based health clinics—expenses such as staff training, educating students about services provided, and referrals to doctors, psychiatrists, or other third-party health care providers. Many of these clinics would not be economically viable were they not able to bill Medicaid for their overhead. Because these administrative costs are often not tied to any actual medical services, it is easy to use them to defraud Medicaid. CMS has tried to address this issue repeatedly since the Clinton Administration,[3] but the problems have remained, including a continuation of fraudulent claims. Finally, CMS concluded that the surest way to reduce the fraud was to accept only those claims which are submitted by the state Medicaid agency (which does not have any incentive to defraud itself), and not to accept those submitted by school employees or contractors. As a result, while Medicaid would continue to pay for medical care through school clinics, it would cease to pay for the clinics themselves. CMS estimates this would save $3.6 billion over five years.[4]

Medicaid Requires Family Planning for Minors (But Not in Schools). Administrative expenses at school based clinics, the exact costs targeted by this proposed rule, are currently used to direct low-income students to family planning clinics. For instance, California's manual for school-based clinics instructs school staffers to bill Medi-Cal, the state Medicaid office, for "Identifying and referring adolescents who may be in need of Medi-Cal family planning services," and for "Conducting a family planning health education outreach program or campaign—if it is targeted specifically to family planning Medi-Cal services that are offered to Medi-Cal-eligible individuals."[5]

In general, each state is allowed to decide whether or not to offer most medical services in its Medicaid plan. The category of "family planning" is an exception. Since 1972, Medicaid statutes have mandated that every state provide contraceptives

1. For a helpful summary, see Nina Owcharenko, "The Medicaid Regulations: Stopping the Abuse of Taxpayers' Dollars," Heritage Foundation *WebMemo* No. 1911, May 2, 2008, at *http://www.heritage.org/Research/HealthCare/upload/wm_1911.pdf*.
2. Final Rule, CMS-2287-F, Fed. Reg. Vol. 72, No. 248, pp. 73635–73651, December 28, 2007; Notice of Proposed Rulemaking, CMS-2213-P, Fed. Reg. Vol. 72, No. 188, pp. 55158–55166, September 28, 2007.
3. See Sally Richardson, Director, Center for Medicaid & State Operations, Health Care Financing Administration, U.S. Department of Health and Human Services, testimony regarding Medicaid Coverage of School-Based Services before the Senate Finance Committee, June 17, 1999 at *http://hhs.gov/asl/testify/t990617a.html* (May 2, 2008). See also Centers for Medicare and Medicaid Services, *Medicaid School-Based Administrative Claiming Guide*, May 2003, p. 16, at *http://cms.hhs.gov/MedicaidBudgetExpendSystem/Downloads/Schoolhealthsvcs.pdf* (November 20, 2007).
4. See Centers for Medicare and Medicaid Services, "CMS Proposes Improvements to Medicaid Payments," Fact Sheet, at *http://www.cms.hhs.gov/apps/media/press/factsheet.asp?Counter=2445* (November 28, 2007). Also available at *http://ppsm.net/mac/CMSCuts/SchoolBasedServicesFactSheetFinal8_31.pdf*.
5. California Department of Health Care Services, *California School-Based Medi-Cal Administrative Activities Manual*, July 2007, pp. 5-5 and 5-6, at *http://www.dhcs.ca.gov/provgovpart/Pages/SMAAManual2007.aspx* (May 2, 2008).

and other family planning supplies to all "individuals of child-bearing age (*including minors who can be considered to be sexually active*) who are eligible under the State plan and who desire such services and supplies."[6] As a result, Medicaid is the number one source of taxpayer funding for contraception and other family planning supplies and services nationwide. In 2006, Medicaid spent $1.3 billion on family planning, accounting for 71 percent of all public funds spent on contraception that year.[7]

Although the law does require that state Medicaid plans cover family planning services and supplies for those minors who request them, it does *not* require several otherwise implied or assumed services:

- It does not require that family planning be made available in the schools.
- It does not require the schools to promote family planning services.
- It does not require that schools provide referrals to family planning clinics.
- It dies not require that there be a health clinic in the school.

The proposed rule would not make it illegal for school officials to provide sex-education classes, or contract with Planned Parenthood to hold family planning "outreach campaigns," or refer a minor on Medicaid to a family planning clinic. It would merely forbid them to bill Medicaid—and the federal taxpayers—for these programs and expenses. As many of the school-based clinics are not economically viable without massive Medicaid overbilling, the rule would reduce the number of clinics and direct children back to their family pediatricians.

Medicaid Confidentiality Rules Restrict Parents' Involvement in Children's Health Care. Doctors and school nurses who care for children covered under Medicaid are not allowed to inform parents about care given to their child unless the child signs a consent form. According to federal law, those who provide Medicaid benefits are prohibited from sharing "confidential" information about the patients, regardless of the age of the patient.[8] The same policy that prohibits doctors from releasing the medical records of adults enrolled in Medicaid also prohibits school nurses from sharing information about children enrolled in Medicaid with the children's parents. The U.S. Supreme Court has ruled that Medicaid's confidentiality rules trump any state or local laws requiring parental notification or consent for their child's medical care, including contraception.[9]

The members of the Senate Finance Committee that wrote this portion of the Social Security Act in 1972 said in their report:[10]

> The committee amendment would authorize States to make available on a voluntary *and confidential basis* family planning counseling, services, and supplies, directly and/or on a contract basis with family planning organizations (such as Planned Parenthood clinics and Neighborhood Health Centers) throughout the State, to present, former, or potential recipients *including any eligible medically needy individuals who are of child-bearing age and who desire such services*. The Secretary would be required to work with the States to assure that *particular effort is made in the provision of family planning services to minors* (and non-

6. Section 1905(a)(4)(C) of the Social Security Act. Emphasis added.
7. Adam Sonfield, Casey Alrich, and Rachel Benson Gold, "Public Funding for Contraceptive, Sterilization and Abortion Services, FY 1980-2006," The Alan Guttmacher Institute, at *http://guttmacher.org/pubs/2008/01/28/or38.pdf* (May 2, 2008).
8. 1902(a)(7)(A) and 1902(a)(8) of the Social Security Act; 42 CFR 441.20. See also Abigail English and Carol A. Ford, "The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges," *Perspectives on Sexual and Reproductive Health*, Vol. 36, No. 2 (March/April 2004), at *http://findarticles.com/p/articles/mi_m0NNR/is_2_36/ai_n6069101/print* (November 27, 2007); and "Parental Consent and Notice for Contraceptives Threatens Teen Health and Constitutional Rights," Center for Reproductive Rights Domestic Fact Sheet No. F008, November 2006, at *http://reproductiverights.org/pub_fac_parentalconsent.html* (November 15, 2007).
9. See T.H. v. Jones 425 F. Supp. 823 (1975), 425 US 986 (1976).
10. Senate Finance Committee, commenting on section 299E of the Senate bill amending Titles IV A and XIX of the Social Security Act. S.Rep. No. 92-1230, 92d Cong. (1972) (cited in 425 F. Supp. 878, note 3).

> minors) who have never had children but who can be considered to be sexually active. (Emphases added.)

Thus, it is not an accident or oversight on the part of Congress that the confidentiality rules apply to minors. It is a result of the expressed intention of Congress that children who have reached puberty and might be sexually active be able to acquire birth control without their parents' knowledge. Most parents probably are unaware of Congress's current policy.

The confidentiality rules are not limited to family planning, but also apply to any part of the state Medicaid plans, keeping parents out of the loop when their children receive any care. Psychiatric care is popular with school-based clinic advocates. Rep. Darlene Hooley (D-OR), for example, has introduced separate legislation (H.R. 4230) that would provide federal funds for these clinics to deliver confidential mental health services. Medicaid policy already allows a child to receive psychiatric evaluations and therapy, including prescribed psychiatric drugs, through a school-based clinic, without parental notice or consent. School officials in California clinics, for instance, are currently instructed to refer students to mental health care, and to bill Medicaid for the administrative expense.[11]

Conclusion. Lawmakers should not block or stall rules that address real problems in Medicaid. Several of the proposed rules have already been delayed for over a year. A congressional moratorium would continue these problems for yet another year without addressing the substantive issues. The proposed regulations would not only restrict abuses and fraud regarding Medicaid billing, but would also remove Medicaid funding for the non-medical expenses of school-based clinics, reducing the harm to parental rights from Medicaid's onerous confidentiality rules. Parents should be concerned whenever any part of the Medicaid system has direct access to their children. Any entity that receives a single dollar from Medicaid is prohibited from contacting the parents of a minor who requests any sponsored care, including such sensitive medical care as family planning services and supplies.

On the issue of parental notification and consent, Congress should change sides. It should change Medicaid law to require that doctors and school nurses seek the explicit prior written informed consent of a child's parent or legal guardian before providing contraception or psychiatric care. Until Congress can reform these anti-family provisions of Medicaid, it should allow the CMS to refocus the program on its mission of funding medical care for the poor, and not picking up unnecessary administrative costs, particularly in schools. The proposed rules will not only reduce the fraudulent billing of the federal government, but which will also empower parents to have greater involvement in the lives of their children.

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11. California Department of Health Care Services, *School-Based Medi-Cal Administrative Activities Manual*, pp. 5-8 to 5-12.