

Detour on the Road to Kids Coverage: Administration Creates Roadblocks, So States Seek Alternate Routes

Introduction

One year ago, states seemed to be on the brink of major breakthroughs in children's coverage. At least 17 states were considering increasing eligibility for children's health coverage in Medicaid and the State Children's Health Insurance Program (CHIP). The promise of significant new federal support from CHIP reauthorization seemed imminent. However, despite valiant efforts on the part of members of Congress, not to mention scores of child advocates around the country, the Bush Administration successfully prevented reauthorization of CHIP by twice vetoing legislation that would have covered almost 4 million uninsured children. In the wake of this defeat, Congress passed an 18-month extension that funds CHIP at 2007 levels (\$5 billion per year) through the end of March 2009.¹ In the heat of the reauthorization debate, the Administration also issued a directive² that effectively prohibits states from expanding CHIP income eligibility above 250 percent of the federal poverty level (\$44,000 for a family of three in 2008³). Finally, in the early months of 2008, it became clear that the national housing crisis was fueling a serious economic downturn, with at least 27 states facing budget shortfalls for 2009.⁴ Some states are already considering cutting health coverage programs, including children's coverage, in response to the budget pressures they face.

How has children's coverage weathered this tumultuous year? This brief examines the current state of children's coverage and finds that, while the Administration's new directive has created roadblocks that stymied state efforts to expand eligibility, it has not stopped states from making progress. However, the directive is standing between at least nine states and the expansions they had planned for this year. With one hand tied behind their backs, some states are moving forward with smaller expansions or other modest program improvements within the new limits allowed by the Administration. Others are choosing to fund additional eligibility expansions exclusively with state funding. Unfortunately, some states are grappling with budget shortfalls that are precipitating cuts to Medicaid and CHIP that will affect children's health coverage. In the absence of additional federal support for CHIP, which states would have received had the President not vetoed the reauthorization legislation last year, these states are forced to make difficult decisions due to state budget constraints.

Table 1.

Status of Recent Children's Coverage Expansions

State	Proposed Expansion (as % of the federal poverty level)		Original Expansion Denied by CMS	Expanding CHIP to 250% of Poverty	Using State-Only Funds to Expand CHIP above 250% of Poverty	Expansion Not Yet Submitted To CMS
	From	To				
Indiana	200%	300%		●*		
Louisiana	200%	300%		●*		
New York	250%	400%	●		●	
North Carolina	200%	300%				●
Ohio	200%	300%	●	●	●**	
Oklahoma	185%	300%		●		
Washington	250%	300%				●
West Virginia	220%	300%				●
Wisconsin	185%	300%		●*	●	

* Expansion to 250 percent of poverty approved by CMS. As of the date of publication, Ohio and Oklahoma were still in negotiations with CMS and had not yet gained federal approval for their proposed expansions.

** Ohio is using state-only funds for an expansion for certain children who cannot obtain health coverage in the private market. This is not a Medicaid or CHIP expansion.

Expansion Plans Thwarted

Although a few states made significant expansions in children's coverage in 2005 and 2006 (notably Illinois and Pennsylvania), 2007 was to be the banner year for covering uninsured children. In anticipation of a strong federal CHIP reauthorization that would include both an increase in federal support for the program and new tools to facilitate outreach and enrollment, many states passed legislation to increase eligibility levels for children's coverage.

However, with the release of its CHIP "crowd-out prevention" directive on August 17, 2007, the Administration effectively disrupted many states' expansion plans and called into question future funding for states that already have CHIP eligibility limits that are greater than 250 percent of poverty.⁵ For more about the directive and what it requires of states, see the Families USA publication, *9 Million and Counting: The Administration's Attack on Health Coverage for America's Children*.

In May 2008, CMS issued a clarification letter that described how the agency interprets several aspects of the August 17th directive, but it did not change or soften any of the requirements. It did assert that CMS is willing to negotiate with states that make good-faith efforts to comply with the directive. The letter confirms that CMS intends to continue applying the directive on a piecemeal basis behind closed doors—no efforts have been made to make the process more transparent or consistent.

How States Are Weathering the Setbacks

■ Rolling Back Expansions

Four states had passed legislation to expand CHIP for children in families with incomes up to 300 percent of poverty before the directive was issued. After the directive was issued, these states scaled back their plans. They reduced the requested expansions to 250 percent of poverty instead, which the Administration is far more likely to approve.

It is important to note, however, that even with more modest program expansions, CMS has insisted on additional program restrictions. The most notable new restriction concerns how states calculate family income. States have long held the right to determine how to count a family's income for the purpose of determining whether that family is eligible for Medicaid or CHIP. Just as the IRS allows income deductions for tax purposes, states base eligibility decisions on net income. Net income is determined using a formula that deducts certain amounts or types of income to encourage certain behaviors. These deductions ensure that families do not lose eligibility for health coverage for their children just because, for example, they are able to collect a small amount of child support or their income rises slightly due to a pay increase. Many states also allow families to deduct expenses such as child care that allow parents to work. However, the Administration's directive requires that states' upper income eligibility limit be no greater than 250 percent of gross income (no deductions).

- **Indiana:** The state passed legislation in 2007 to expand its CHIP income eligibility level from 200 percent to 300 percent of poverty. However, due to the directive, it decided to limit its expansion to 250 percent of poverty. CMS approved Indiana's state plan amendment in May 2008. Although the eligibility limit is capped at 250 percent of gross income, the state was able to maintain its existing three-month waiting period (children must be uninsured for at least three months to be eligible for CHIP) rather than adopting the 12-month waiting period called for in the directive. The state anticipates beginning enrollment for children with family incomes between 200 percent and 250 percent of poverty in October 2008.⁶ The expansion will bring up to 10,000 new children into the program, according to state officials.⁷
- **Louisiana:** The state passed legislation in 2007 to create a new, "separate" CHIP program, on top of its existing Medicaid program, for children with family incomes between 200 percent and 300 percent of poverty. Again, after the directive was issued, and after several discouraging exchanges with CMS, Louisiana decided to expand to only 250 percent of poverty. The state was forced to accept this new gross income limit of 250 percent of poverty, which adds new complications for its eligibility determination process, even though it has always used deductions for Medicaid and continues to do so. The state was also forced to accept a 12-month waiting period for children in the expansion group (children with family incomes between 200 percent and 250 percent of poverty) that will prevent eligible children from enrolling in CHIP unless they have been uninsured for 12 consecutive months.

- **Ohio:** In 2007, Ohio enacted legislation to establish a new, “separate” CHIP program for children in families with incomes between 200 percent and 300 percent of poverty. In light of complications due to the directive, the state instead requested that CMS allow it to expand its Medicaid program to 300 percent of poverty, even though Medicaid carries a much smaller federal match. (The state receives \$2.64 in federal matching funds for every dollar it spends on CHIP and \$1.55 in federal matching funds for every dollar it spends on Medicaid.) The state was willing to accept this lower match because it believed doing so would allow it to expand coverage without being subject to the CHIP directive, since it believed the directive applied only to separate CHIP programs and not to Medicaid.⁸ CMS rejected the state’s request on the grounds that Ohio must first use all of its CHIP allotment on its expansion population before it could receive the lower Medicaid match for this group. Ohio submitted an appeal to CMS that is scheduled to be heard later this summer, as well as a new request for a CHIP program expansion to 250 percent of poverty.⁹

Complicating matters, at the same time the Ohio legislature passed a bill to expand CHIP to 300 percent of poverty last year, it also created a state-funded, buy-in health insurance program for children with disabilities who have family incomes above 300 percent of poverty. This program does not offer benefits that are as comprehensive as the state’s Medicaid program, and it is only for children who have been uninsured for at least six months and who meet certain criteria that make it difficult for their families to obtain coverage in the private market. The program began accepting applications in April 2008, effectively creating a coverage gap in which children with family incomes between 200 and 300 percent of poverty cannot get health insurance assistance from the state. The state is attempting to change the eligibility level of the buy-in program to begin at 250 percent of poverty, so when the CHIP expansion to 250 percent of poverty is approved, there will no longer be a gap in public children’s health coverage.

- **Oklahoma:** The state enacted legislation in 2007 to raise CHIP eligibility from 185 percent to 300 percent of poverty using a premium assistance program for the expansion population. After the directive was issued, the state chose to scale back the expansion to 250 percent of poverty. The state is still in negotiations with CMS about whether any income disregards will be used. If the state opts to use income disregards that allow families with gross incomes greater than 250 percent of poverty to enroll, CMS has made it clear that it will approve the expansion only if the state is in compliance with the directive.

■ Using State Funding to Finance Expansions

- **New York:** New York was the first state to request an increase in CHIP eligibility above 250 percent of poverty after CMS issued its directive. The state wanted to expand children's eligibility from 250 percent to 400 percent of poverty, which would have made New York's eligibility levels the highest in the country. However, CMS rejected the request on the grounds that the state did not provide evidence that it had enrolled 95 percent of the eligible children with family incomes below 200 percent of poverty, and therefore it was not in compliance with the directive.

Less than a month after this denial, the state announced a multi-state lawsuit challenging the Administration on the directive. New York also resolved to keep its promise to cover children with family incomes between 250 percent and 400 percent of poverty by using state dollars to fund the expansion. The state is spending an extra \$19 million in its 2008-09 budget year to fill the gap left by the federal government's refusal to fund the expansion; this extra expenditure will cover an estimated 70,000 additional children.¹⁰

- **Wisconsin:** In 2007, Wisconsin passed a much-anticipated expansion of health coverage for children, as well as for some parents and adults. As part of this expansion, the state intended to increase the income limit for CHIP from 200 percent to 300 percent of poverty. In negotiations with CMS, it became clear that CMS would approve the CHIP expansion only up to 250 percent of poverty. Rather than hold up the entire health care expansion (which went beyond just children's coverage), the state agreed not to use federal matching funds for children in families with gross incomes greater than 250 percent of poverty. It is using exclusively state funding for these children. Despite the different funding sources, the expanded coverage works seamlessly for families.

■ Other Strategies

- **North Carolina:** The state passed legislation in 2007 to expand its CHIP program (NC HealthChoice) from 200 percent to 300 percent of poverty. The state has not yet requested CMS approval to make this change, because without the additional funding it had expected to receive as a result of CHIP reauthorization, it does not have enough money to expand coverage. It is unclear whether the state will move forward with a more modest expansion to 250 percent of poverty, which would cost less than the full expansion to 300 percent of poverty, and which CMS would be more likely to approve.

■ Filing Lawsuits

There are currently three active lawsuits related to the CMS directive. In October 2007, a multi-state suit was filed by Illinois, Maryland, New York, and Washington, with amicus briefs filed by Arizona, California, Connecticut, New Hampshire, and New Mexico. On the same day, an individual suit was also filed by the state of New Jersey, with an amicus brief filed in April 2008 by 25 “prominent health policy and child health” experts.¹¹ A third suit, the first on behalf of individual children harmed by the directive, was filed in January 2007.

For more information on how the August 17th directive is affecting states, and for links to important documents, go to <http://familiesusa.org/issues/childrens-health/>.

Rhode Island: The First State to Comply with the CMS Directive

In early May, CMS announced that Rhode Island became the first state to be declared by CMS to be in compliance with the directive. Rhode Island currently covers children with family incomes up to 250 percent of net income, and it will be allowed to continue doing so because of this determination. According to CMS, the state satisfied the requirement that 95 percent of children with family incomes below 200 percent of poverty be enrolled before coverage is expanded. The state also supplied data that suggested that it meets the requirement that private employer-based coverage had not decreased by more than 2 percent over the prior five years. Also in compliance with the CMS directive, CHIP cost-sharing for children with family incomes above 250 percent of poverty is higher than the cost-sharing required by competing private plans. Finally, CMS did not require the state to implement a 12-month waiting period (Rhode Island currently does not have a waiting period) because the state mandates that new enrollees with access to employer-based coverage enroll in the state’s premium assistance program.

This approval was released on the heels of the Administration’s clarification letter that suggested that CMS would negotiate with states on meeting the requirements of the directive. Although states will do what they must to preserve federal funding for CHIP, CHIP directors and governors from around the country remain strongly opposed to the directive—and committed to overturning it.

States That Are Forging Ahead

Despite the very challenging environment that state policymakers face in 2008, a few states are actually planning to expand children's coverage this year.

- **Colorado:** Colorado began implementing presumptive eligibility for children and pregnant women in January 2008. In April 2008, the governor signed legislation that did the following:
 - Increased CHIP (CHP+) eligibility from 205 percent to 225 percent of poverty (with the potential to increase to 250 percent of poverty if there is adequate funding in the budget),
 - Increased the mental health benefits included in CHIP so that they are the same as those offered to children in Medicaid,
 - Increased outreach funding for CHIP, and
 - Streamlined children's Medicaid and CHIP enrollment by transitioning to centralized eligibility determinations.
- **Florida:** The state budget increased funding for CHIP (KidsCare) by \$13 million this year, which is estimated to help cover an additional 38,000 children. As part of a larger statewide coverage effort (Cover Florida), the state will also begin allowing families with incomes greater than 200 percent of poverty to buy into KidCare at full cost (without a state subsidy).
- **Iowa:** The state recently passed an expansion of its CHIP program (hawk-i) from 200 percent to 300 percent of poverty. This expansion is due to begin in July 2009, contingent on federal CHIP reauthorization that provides the state with the funding and authority to use CHIP funds for children at this income level. The bill will also increase infants' Medicaid eligibility from 200 percent to 300 percent of poverty effective July 2009, and it implements 12-month continuous eligibility for all children in Medicaid and hawk-i.
- **Kansas:** The governor recently signed legislation to expand CHIP (HealthWave) eligibility from 200 percent to 250 percent of poverty, contingent on additional federal funding. The legislation also increases outreach for children's coverage.
- **Montana:** A children's coverage coalition is trying to place a ballot measure on the fall ballot (Initiative 155) that would increase CHIP eligibility from 175 percent to 250 percent of poverty.

Cuts to Children's Coverage in 2008

Luckily, most states have not yet resorted to cutting children's coverage to address their budget problems. However, a few states are considering significant cuts that could affect millions of children. These states in particular would have greatly benefited from the additional federal funding they would have received this year from CHIP reauthorization—had the President not vetoed the legislation.

- **California:** The state is facing an enormous budget shortfall this year, and Governor Schwarzenegger has proposed several cuts that affect children in Medicaid (Medi-Cal) and CHIP (Healthy Families).¹² First, individuals in Medicaid would have to renew coverage on a quarterly basis, rather than every 12 months, as children are currently required to do. Second, the governor has proposed an increase in CHIP cost-sharing and premiums while cutting the dental benefits that are currently offered.

These changes would not save the state significant money in the long run, because most of those who would lose coverage due to the increased administrative hurdles would still be eligible for coverage and would eventually reapply. When these children do reenroll, they are more likely to have greater, more expensive health care needs that could have been avoided if they had stayed continuously enrolled in the program and received ongoing care.¹³

Although the General Assembly rejected these changes in their budget deliberations this year, they are all part of the governor's revised budget, which was released in May.¹⁴ In addition, the revised budget proposes to reduce parent eligibility for Medicaid (which could have an effect on child enrollment¹⁵) and delay until 2010 the implementation of a bill that would have streamlined children's enrollment in Medicaid and CHIP.¹⁶

- **Rhode Island:** The state is facing a \$384 million deficit for fiscal year (FY) 2009. Governor Carcieri has proposed massive Medicaid cuts as a part of the state's FY 2009 budget.¹⁷ These cuts include the elimination of Medicaid/CHIP eligibility for children who have been legal permanent residents in the country for fewer than five years, those who are undocumented, and those whose parents are self-employed family child care providers. These cuts will affect approximately 3,000 children. The state is also considering increases in CHIP premiums from 3 percent to 5 percent of income for families with incomes greater than 133 percent of poverty. The state Department of Human Services has estimated that the premium increases will result in at least a 5 percent reduction in enrollment due to families' inability to afford the increase.

Conclusion

The Administration's overt attempts to stop children's coverage expansions from moving forward this year (issuing the contentious and potentially illegal CHIP directive and twice vetoing bipartisan legislation to reauthorize CHIP) have made it more difficult, though not impossible, for states to cover more uninsured children. Even in the midst of a national economic downturn, with many states facing severe budget crises, some states are finding ways to expand coverage to hundreds of thousands of uninsured children. The battles to overturn the directive and to reauthorize CHIP will wage on, and victories on these fronts will vastly improve states' ability to implement the expansions they have passed—particularly those with the most dire budget crises. Still, many states have made it a priority to cover children this year, and they are not letting the Administration stand in their way.

Endnotes

¹ The extension also allotted an additional \$1.6 billion to states that are projected to experience CHIP shortfalls during the 18-month period.

² In independent analyses released in 2008, the Government Accountability Office and the Congressional Research Service both concluded that the directive was in fact a rule change, not simply a clarification of existing policy as the Administration contended, and as such violated the Congressional Review Act, which requires that the Administration notify both chambers of Congress and the Comptroller General of any new rules.

³ 2008 HHS Poverty Guidelines, *Federal Register* 73, no. 15 (January 23, 2008): 3,971-3,972.

⁴ Elizabeth C. McNichol and Iris Lav, *27 States Faced Total Budget Shortfall of at Least \$47 billion in 2009; 4 Others Expect Budget Problems* (Washington: Center on Budget and Policy Priorities, May 21, 2008).

⁵ States with CHIP eligibility above 250 percent of poverty at the time the CHIP directive was issued include: Connecticut, the District of Columbia, Hawaii, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, Pennsylvania, and Vermont. Other states are affected by the directive because they calculate family income in such a way that some children with gross family incomes greater than 250 percent of poverty are permitted to enroll.

⁶ Ken Kusmer, "FSSA Chief Expects Expanded Hoosier Healthwise by Oct. 1," *Associated Press*, April 21, 2008.

⁷ Ken Kusmer, "Feds OK Indiana Plan to Insure More Kids," *Associated Press*, May 10, 2008.

⁸ Medicaid law does not include any upper income limit for children's health coverage.

⁹ CMS had not acted on this request as of the date of this paper.

¹⁰ Press Release, *Governor Paterson Announces State Budget Expands Health Care Coverage to Every Uninsured New York Child*, April 9, 2008, available online at http://www.state.ny.us/governor/press/press_0409088.html.

¹¹ *Scholars' Legal Brief Details How CMS' SCHIP Directive Ignores Child Health Research* (Washington: Manatt, Phelps & Philips, LLP, April 7, 2008).

¹² *Analysis: 2008-09 Health Services Budget* (Oakland: Health Access California, March 2008), available online at <http://www.health-access.org/preserving/Docs/budget%20fact%20sheet%20031208.pdf>.

¹³ Gerry Fairbrother and Joseph Schucter, *Stability and Churning in Medi-Cal and Healthy Families* (Los Angeles: The California Endowment, March 2008).

¹⁴ George Lauer, "Holes Forming in Health Care Safety Net for California Children," *California Healthline*, April 29, 2008, available online at <http://www.californiahealthline.org/articles/2008/4/29/Holes-Forming-in-Health-Care-Safety-Net-for-California-Children.aspx?a=>.

¹⁵ Lisa Dubay and Genevieve Kenney, "Expanding Public Health Insurance to Parents: Effects on Children's Coverage under Medicaid," *Health Services Research* 38, no. 5 (October 2003): 1,283-1,302.

¹⁶ *2008 Budget Facts* (Sacramento, CA: California Health and Human Service Agency, May 2008), available online at <http://www.chhs.ca.gov/Documents/HHS%20Budget%20Facts%20Final%205%2008.pdf>.

¹⁷ *FY08 Supplemental and FY09 Budget Proposals: Implications for Health Insurance Coverage for Children and Families in Rhode Island* (Providence: Rhode Island Kids Count, April 28, 2008).



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