Center on Budget and Policy Priorities

820 First Street NE, Suite 510
Washington, DC 20002

Tel: 202-408-1080
Fax: 202-408-1056

center@cbpp.org
www.cbpp.org

April 25, 2008

DELAYING ADMINISTRATION'S MEDICAID REGULATIONS WILL NOT WEAKEN THE PROGRAM'S FISCAL INTEGRITY

By Judith Solomon

The Bush Administration has threatened a veto of H.R. 5613, the "Protecting the Medicaid Safety Net Act of 2008," which the House passed 349-62 on April 23.[1] The bill would place a moratorium until April 1, 2009 on seven Medicaid regulations that the Administration has issued over the past year.

H.R. 5613 would delay regulations that restrict how Medicaid pays for hospital services, graduate medical education, outpatient services, school-based health services, services for individuals with disabilities and case management services.[2] The impact of the regulations will fall most heavily on low-income children and low-income people with disabilities. The regulations also will have a substantial impact on hospitals and other health care providers and state and local education agencies and foster care programs. In a report based on information from 43 states and the District of Columbia, the House Committee on Oversight and Government Reform found that the regulations would disrupt care for fragile populations, reduce federal expenditures by shifting costs to the states (rather than by lowering costs), and threaten the financial stability of many hospitals and other health care providers that provide care to the uninsured.[3]

The Administration has based its veto threat on the claim that the regulations are needed to close loopholes in current policy and stop "blatant abuses of the Federal-State partnership." The claim is unfounded.

---

[1] Statement of Administration Policy, April 22, 2008 at http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr5613-h.pdf; Letter from Michael O. Leavitt , Secretary of Health and Human Services to Chairman John Dingell and Ranking Member Joe Barton, House Committee on Energy and Commerce, April 15, 2008.

[2] Allison Orris and Judith Solomon, "Administration's Medicaid Regulations Will Weaken Coverage, Harm States, and Strain Health Care System," Center on Budget and Policy Priorities, Revised March 4, 2008.

[3] United States House of Representatives, Committee on Oversight and Government Reform Majority Staff, "The Administration's Medicaid Regulations: State-by-State Impacts," March 2008. It may also be noted that the National Governors Association has requested a delay of the regulations; see http://www.nga.org/portal/site/nga/menuitem.cff64b853e59a31818d81fa6501010a0/?vgnextoid=455c8aaa2ebbff00VgnVCM1000001a01010aRCRD&vgnextfmt=letter

Rules Not Needed to Ensure Appropriate Reimbursement of Medicaid Services

The Administration points to a series of reports by the Government Accountability Office (GAO) and the Office of the Inspector General (OIG) of the Department of Health and Human Services. The Administration has said or implied that the regulations implement OIG and GAO recommendations to close loopholes in existing Medicaid policy.

Some GAO reports and OIG audits have found that, in some circumstances, individual states have claimed federal Medicaid funds for services that should not have been reimbursed. But these reports and audits do not show that any of the seven regulations are needed to prevent similar problems in the future and do not call for the specific measures that the seven regulations would institute.

In some cases, the abuses the Administration cites involve violations of Medicaid regulations and policy guidelines that were already in place when the abuses occurred. In these cases, the problem was one of enforcement of existing policy. In other cases, changes have since been made in Medicaid policy to address problems that the audits identified; in these cases, the Administration has misleadingly cited the audit findings without explaining that the problems the audit found occurred under *old* policies that have since been changed to address these problems.

In fact, at the hearing on H.R. 5613, a representative of the GAO testified that the GAO has never recommended that the Administration make the specific policy changes these regulations would institute.

A closer look at some of the examples the Administration has cited shows that the new regulations are neither necessary nor appropriate to address problems on which the GAO and OIG reported:

- The Administration uses an OIG finding that some schools billed Medicaid for transportation on days when a child did not receive a health care service or did not need special transportation (such as a van that could accommodate a child using a wheelchair) as justification for a regulation that would eliminate *all* federal funds for transporting children with disabilities to school. Yet current federal Medicaid policy on the transportation of children to school is both clear and adequate. Transportation is covered by Medicaid *only* if the child has a need for special transportation documented in his or her special education plan and even then *only* on days that the child receives a Medicaid-covered service in school.[4]

- The Administration relies on reports that schools inappropriately claimed Medicaid reimbursement for outreach and coordination of health care services even though these problems occurred *before* the Administration issued detailed rules on billing by schools in 2003 in response to those reports.

- The Administration claims that OIG audits show that states have used Medicaid program's

[4] Letter to State Medicaid Directors dated May 21, 1999 at http://www.cms.hhs.gov/smdl/downloads/SMD052199.pdf.

rehabilitation option to bill Medicaid for services the program is not supposed to cover.[5] But OIG has audited rehabilitation programs in only three states, making it difficult to generalize patterns of behavior across all states. Furthermore, the claims that OIG found should not have been paid were ineligible for payment under *current* Medicaid policy. The sweeping restrictions on rehabilitative services that the new regulations would impose — such as the complete disallowance of Medicaid funding for therapeutic foster care programs for children with serious emotional disorders — are not necessary to address issues raised in the OIG audits.

- The Administration claims that the moratoria would "turn back progress" and allow states to reinstate financing schemes HHS has curbed, under which some states had forced health care providers to return funds to the state that could then be used as state match for federal reimbursement. This claim is devoid of merit. The Administration has relied on *existing* Medicaid policy to eliminate these schemes, and there is nothing in the moratoria that would allow states to revert to the disallowed practices.

Rules Make Major Changes in Medicaid Policy With No Connection to Claims of Fraud and Abuse

The seven rules that H.R. 5613 would delay would make substantial changes in Medicaid policy that have little or no connection to Administration claims of abusive billing practices. Moreover, in some cases, Congress specifically declined to make by statute the very changes that the Administration is now imposing by regulation.[6]

- In the Deficit Reduction Act of 2005 (DRA), Congress made changes to tighten Medicaid's case management benefit. But the interim final rule on case management services goes well beyond the changes Congress made, instituting major alterations in policy that have nothing to do with the DRA or claims of fraud and abuse. For example, the rule cuts from 180 to 60 the maximum number of days that case management is available for people with disabilities who are moving from institutions to the community, despite strong evidence that 60 days is insufficient for many of these individuals. It also prohibits child welfare workers and contractors of state child welfare agencies who are qualified Medicaid providers from providing case management services to children in foster care. And it prohibits beneficiaries from having more than one case manager even if the beneficiary has multiple conditions that require coordination of services across multiple systems.[7] The DRA does not call for any of these changes.

- Another regulation would eliminate federal matching funds for payments that states make to teaching hospitals to compensate those hospitals for the added costs of training medical

---

[5] For information on the rehabilitation option in Medicaid, see Jeffrey S. Crowley and Molly O'Malley, "Medicaid's Rehabilitation Services Option: Overview and Current Policy Issues," Kaiser Commission on Medicaid and the Uninsured, August 2007 and Judith Solomon, "Administration Moves to Withdraw Key Health Services from Children and Adults with Mental Illness and Other Disabilities," Center on Budget and Policy Priorities, revised March 21, 2008.

[6] For example, in 2005, the Administration tried and failed to persuade Congress to place certain restrictions on rehabilitative services (as part of the Deficit Reduction Act) that the Administration is now imposing by regulation. Testimony of Dennis Smith, Senate Committee on Finance, June 28, 2005, at http://www.senate.gov/~finance/hearings/testimony/2005test/DStest062805.pdf

[7] Judith Solomon, "New Medicaid Rules Would Limit Care for Children in Foster Care and People with Disabilities in Ways Congress Did Not Intend," Center on Budget and Policy Priorities, revised, March 6, 2008.

residents. These payments for graduate medical education (GME) have been allowed for *over 40 years*. The Administration now claims they should be eliminated because they are unintended payments that the Medicaid statute does not authorize.[8]

Conclusion

In passing H.R. 5613 on an overwhelming bipartisan basis, the House recognized the potential of the Administration's Medicaid regulations to cause serious harm. And despite the Administration's claims, the GAO and OIG did not call for the major policy changes that the regulations would impose.

Placing a moratorium on these regulations would not undermine Medicaid program integrity. However, putting the regulations into effect would likely cause serious problems for many extremely vulnerable people.

[8] Congress specifically recognized that states include GME payments in their hospital rates in a provision of the DRA that governs how managed care organizations should pay for emergency services. Section 6085 of the Deficit Reduction Act amending section 1932(b)(2) of the Social Security Act.