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GAO REPORT RAISES CONCERNS ABOUT RECENT HEALTH CARE WAIVERS: FINDINGS RELEVANT TO CURRENT "SUPERWAIVER" DEBATE

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The TANF reauthorization bill (H.R. 4737) passed by the House of Representatives earlier this year contains a "Superwaiver" provision that would give Executive Branch officials nearly unfettered authority to override most provisions of federal law that govern more than a dozen low-income and other domestic programs.[1] The superwaiver is an expanded, cross-program version of the type of waiver authority that currently exists in Medicaid and the State Children's Health Insurance Program (SCHIP). In a recent report, the General Accounting Office identified a number of serious concerns about how the Bush Administration has used this waiver authority in SCHIP.[2]

Most notably for the superwaiver debate, the GAO found that the Department of Health and Human Services has approved SCHIP waivers inconsistent with the basic purposes Congress established for the SCHIP program. The GAO reported that HHS has granted waiver requests to use *child* health insurance funds for *childless adults*. The GAO also reported that HHS has failed to follow its own policy on providing opportunity for the public to learn about and comment on pending waiver requests.

These findings demonstrate that broad and virtually unchecked waiver authority can be used to institute waivers that effectively rewrite federal laws and alter the fundamental nature of programs on a statewide basis, and do so without public input or Congressional approval. By extending sweeping waiver authority to a substantial number of additional federal programs that distribute tens of billions of dollars in federal funds, the superwaiver would pose significant risks.

In particular, the GAO report illustrates how one of the few restrictions that would be placed on Executive Branch authority to waive federal laws under the superwaiver — a requirement that Executive Branch officials determine if a state's waiver has a reasonable likelihood of "achieving the objectives" of the programs that would be altered under the waiver — would likely have little practical effect. As the GAO report indicates, the

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[1] For detailed analyses of the superwaiver proposal, see the following Center publications: Robert Greenstein, Shawn Fremstad, and Sharon Parrott, "*Superwaiver" Would Grant Executive Branch and Governors Sweeping Authority to Override Federal Laws,* June 11, 2002; *Superwaiver Would Allow Fundamental Changes to Public Housing and Homelessness Programs,* September 16, 2002; *The Superwaiver Would Cause Serious Damage to the Food Stamp Program and Risk Benefits to Low-Income Families,* May 31, 2002.

[2] U.S. General Accounting Office, *Medicaid and SCHIP: Recent HHS Approvals of Demonstration Waiver Projects Raise Concerns,* GAO-02-817, July 2002.

Executive Branch can interpret such a requirement so expansively as to allow it to approve waivers that are directly contrary to the expressed will and intent of Congress, such as the use of child health insurance funds for childless adults.

Findings from the GAO Report

Under section 1115 of the Social Security Act, the Secretary of Health and Human Services can grant state requests to waive certain provisions of the federal laws that govern the Medicaid and SCHIP programs. Over the past decade, a number of states have obtained section 1115 waivers to make substantial changes in these programs. During the past year, the Bush Administration unveiled two new section 1115 waiver initiatives, which it calls Health Insurance Flexibility and Accountability (HIFA) and "Pharmacy Plus." The HIFA initiative provides for expedited review of statewide section 1115 waivers that are designed to develop coordinated health insurance coverage options for the uninsured. The "Pharmacy Plus" initiative provides a framework for waivers that expand prescription drug coverage for low-income seniors.[3]

In response to concerns that had been raised about the Administration's new waiver guidance, Senators Max Baucus (D-MT) and Charles Grassley (R-IA) asked the GAO to review waivers that have been granted since the new initiatives were put into effect. The GAO examined waivers granted to Arizona, California, Illinois, and Utah. It concluded that the waivers raised a number of significant legal and policy concerns.

HHS Approved Waiver Allowing Child Health Funds to Be Spent on Childless Adults

SCHIP funds must be used to promote the purposes of the SCHIP program, namely, to expand the provision of "child health assistance" to "uninsured, low-income children."[4] Waivers can be granted to allow states to use SCHIP funds in ways that are not authorized by the SCHIP statute as long as the Secretary of Health and Human Services determines that such waivers are likely to promote the program's purpose of expanding child health assistance.

One of the waivers granted by HHS allows Arizona to use federal SCHIP funds to cover adults who are not raising children. Over the five-year period of the waiver, Arizona will use approximately $126 million in SCHIP funds for childless adults. The GAO concluded that this use of SCHIP funds is inconsistent with the statutory purposes of the SCHIP program. It recommended that HHS amend the Arizona waiver to prohibit any future use of funds in this manner.

HHS has rejected this recommendation, however, and has taken the position that it may grant waivers that allow states to use SCHIP funds for childless adults. In fact, a month *after* release of the GAO report, HHS approved a similar waiver request from New Mexico to

[3] For a detailed discussion of the HIFA waiver initiative, see Cindy Mann, *The New Medicaid and CHIP Waiver Initiatives*, Kaiser Commission on Medicaid and the Uninsured, February 2002.

[4] Section 2101 of the Social Security Act.

use SCHIP funds for childless adults. HHS's position appears to be that it can grant state requests to use SCHIP funds in ways that are inconsistent with the purposes of SCHIP as long as the request is part of a larger waiver package that, when taken as a whole, promotes the purposes of SCHIP. According to HHS, the overall Arizona demonstration will promote the purposes of SCHIP because it will "decrease the number of uninsured children by an additional 2 percent." This claim appears to be based on Arizona's estimate that an entirely separate provision in its waiver package, which expands coverage to parents with incomes between 100 percent and 200 percent of the poverty line whose children enroll in Medicaid or SCHIP, should decrease the number of uninsured children in Arizona by one to two percent.

There is evidence that expanding coverage for parents increases the probability that parents will enroll their children in health insurance and take the steps necessary to maintain their children's coverage.[5] In fact, when Congress created SCHIP, it authorized the use of funds to cover both children and their parents under certain circumstances. There is no reason to believe, however, that providing health insurance to childless adults will have similar effects on child insurance rates. (HHS suggests that these adults could become parents or caretaker relatives in the future. This is true, but they and their children would become eligible for Medicaid or SCHIP at that time if they meet the income eligibility limits for these programs. HHS has failed to explain how providing health insurance to adults *before* they become parents or caretakers will decrease the percentage of children that are uninsured.)

Moreover, HHS has failed to consider the basic fact that use of SCHIP funds for childless adults in a particular state *reduces* the number of children that can be insured *nationwide* through SCHIP, an outcome that is certainly contrary to the purposes of the SCHIP program. SCHIP is a block grant that provides states with a fixed level of funding each year. If a state fails within three years to use all of its SCHIP allotment for a given fiscal year, the unspent funds are redistributed to states that have fully spent their allotments.[6] HHS and Arizona have argued that the Arizona waiver will not divert SCHIP funds away from children because the state will cover childless adults by using SCHIP funds that remain unspent after the state has extended eligibility to all SCHIP-eligible children up to 200 percent of the poverty line. This argument misses the point. If HHS had not granted Arizona's waiver, unspent SCHIP funds from Arizona would have been redistributed to provide health care for uninsured needy children in other states.

Nearly five million uninsured children live in low-income families.[7] Furthermore, the Office of Management and Budget recently projected that under current federal SCHIP policies,

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[5] See Lisa Dubay and Genevieve Kenney, *Covering Parents through Medicaid and SCHIP: Potential Benefits to Low-Income Parents and Children*, The Urban Institute, October 2001 and Leighton Ku and Matthew Broaddus, *The Importance of Family-Based Insurance Expansions: New Research Findings about State Health Reforms*, Center on Budget and Policy Priorities, September 5, 2000.

[6] See Jocelyn Guyer, *Maximizing Child Health Coverage Depends on Establishing an Effective System for Reallocating Unspent SCHIP Funds*, Center on Budget and Policy Priorities, October 18, 2000.

[7] The Urban Institute, "Uninsured Children (Ages 0-18) and SCHIP/Medicaid Enrollment Estimates," July 2002.

the number of children insured through SCHIP will fall by 900,000 between 2003 and 2006.[8] On a national basis, Arizona's SCHIP waiver clearly results in the diversion of SCHIP funds from needy uninsured children to childless adults.

HHS' Office of the General Counsel, which advises HHS on legal issues, has taken an even more extreme position. In a letter submitted to the GAO, it asserted that HHS may grant Medicaid or SCHIP waivers that do not meet those programs' respective statutory purposes as long as the waivers meet the purposes of *any* of the Social Security Act programs covered by the waiver authority under Section 1115 of the Social Security Act. The programs covered by existing section 1115 waiver authority include TANF and Child Support Enforcement, as well as Medicaid and SCHIP. Under this interpretation, states could obtain waivers to use SCHIP funds for activities that meet the purposes of one of these other programs, even if the proposed use of funds does not meet any purpose of SCHIP.

The GAO rejected HHS' arguments. It concluded that HHS had failed to provide a reasonable basis for allowing states to use SCHIP funds to provide health insurance to childless adults.[9] The GAO described the consequences of HHS' interpretation of the sweeping nature of its waiver authority as follows:

> HHS's interpretation effectively eliminates the distinctions among the programs authorized under the identified titles of the Social Security Act and would allow the agency to waive requirements or authorize otherwise impermissible expenditures under one program to promote the objectives of any other program. If HHS were to take this interpretation to the extreme, it could bypass funding limitations and mechanisms established for individual programs by funding any of the programs authorized in the identified titles of the Social Security Act with funds made available for any other title.

To be sure, providing health insurance to low-income childless adults is laudable, serves important health policy goals, and is part of what the nation must do if it ultimately is to achieve the goal of universal health care coverage. The method used by Arizona and the Administration to extend coverage to uninsured childless adults, however, is contrary to the expressed will of Congress and results in the diversion of funds that would otherwise have been used to reduce the number of uninsured children nationally. Furthermore, Arizona could have expanded coverage to childless adults *without* reducing the SCHIP funds available to insure needy children nationwide by extending coverage to childless adults through the Medicaid program rather than through SCHIP. In fact, the GAO report notes that the state had previously received HHS approval to use Medicaid funds to extend coverage to childless adults. Such a use of funds would have been consistent with the purposes of the Medicaid program and would not have

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[8] See Edwin Park, Leighton Ku, and Matthew Broaddus, *OMB Estimates Indicate that 900,000 Children will Lose Health Insurance Due to Reductions in Federal SCHIP Funding*, Center on Budget and Policy Priorities, August 2, 2002.

[9] Senators Grassley and Baucus also have stated that they disagree with the HHS interpretation. See Letter from Senator Charles E. Grassley and Max Baucus to the Honorable Tommy G. Thompson, August 13, 2002, available at www.nhelp.org/waiver.shtml.

resulted in the diversion of child health assistance funds from low-income children to childless adults.

It may be noted that Arizona would have had to extend coverage to childless adults even if it had not received the federal waiver to use SCHIP funds for this population. In November 2000, Arizona voters approved two statewide ballot propositions that required the expansion of coverage to *all* persons under 100 percent of the poverty line, as well as to additional parents and children above that level. The waiver enabled Arizona to pass a substantial majority of the cost of covering childless adults to the federal government, at the expense of uninsured low-income children in other states.

HHS Failed to Follow Its Own Public Participation Policy

In 1994, HHS established a public participation policy that provides for public notice and opportunity to comment on waivers at both the state and federal levels.[10] Under the policy, states must provide HHS with a description of their processes for obtaining public input on proposed waivers. These processes must allow for state-level public comment on waivers before they are submitted to HHS. In addition, HHS must provide a separate federal-level 30-day comment period on waivers after they are submitted. This comment period begins after HHS provides the public with notice in the *Federal Register* about the waiver and how to submit comments. The public input policy was developed in response to concerns that had been raised regarding the rapid approval and implementation of some waivers without adequate public comment, as well as a lawsuit filed by the National Association of Community Health Centers that sought to block the implementation of waivers that were approved without the consideration of interested parties.[11]

The GAO found that HHS has sometimes failed to follow its own 1994 public participation policy. HHS has not published notices of waivers in the *Federal Register* since 1994. In addition, in response to the GAO's inquiries about the federal notice-and-comment period, an HHS official told the GAO that current agency policy does not include such a period, and HHS rejected the GAO's recommendation to restore a notice-and-comment period. HHS contended that "the states are considered to be a more appropriate form for public input." This response fails to take into account that waivers of federal law and policy are not simply a matter of state interest but often involve issues of national importance.

Moreover, the GAO found that state compliance with the public input policies itself was not always adequate. For example, copies of Arizona's waiver application were not made public by either the state or federal government until *after* the *waiver had been approved*. Similar concerns have been raised in some states where waivers are currently pending.

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[10] Department of Health and Human Services, *Medicaid Program; Demonstration Proposals Pursuant to Section 1115(a) of the Social Security Act; Policies and Procedures*, 59 Fed. Reg. 49249, September 27, 1994.

[11] U.S. General Accounting Office, *Medicaid: Statewide Section 1115 Demonstrations' Impact on Eligibility, Service Delivery, and Program Cost*, GAO/T-HEHS-95-182, June 21, 1995.

HIFA Waiver Policy Raises Additional Issues Not Covered in GAO Report

On August 4, 2001, the Bush Administration unveiled the Health Insurance Flexibility and Accountability (HIFA) demonstration initiative, a new waiver policy for Medicaid and SCHIP. While the GAO identified a number of significant concerns about HIFA in its report, it did not address the merits of the concept that underlies HIFA: that states would be encouraged to expand coverage to the uninsured within existing Medicaid and SCHIP resources by using funds freed up by imposing greater cost-sharing requirements upon, and reducing benefits for, certain categories of current Medicaid beneficiaries.

The HIFA waiver policy permits states to reduce benefits and increase cost-sharing for so-called "optional populations" — groups that federal Medicaid rules do not require states to cover but that nonetheless have low incomes. Such optional groups include 20 percent of all children enrolled in Medicaid (generally those who are near-poor), 43 percent of all parents in Medicaid (in the typical state, eligible parents with income above 69 percent of the poverty line), 22 percent of all Medicaid beneficiaries who are disabled (generally those above 74 percent of the poverty line), and 56 percent of all elderly people enrolled in Medicaid (here, as well, generally those above 74 percent of the poverty line).

Medicaid currently sets limits on the amount of cost-sharing that low-income beneficiaries can be required to shoulder. It also requires that all Medicaid beneficiaries be eligible for certain "mandatory" services, such as hospital and physician care as well as Early Periodic Screening, Diagnosis and Treatment (EPSDT) for children. Under the HIFA waiver policy, states may, in some cases, seek waivers that would enable them to impose unlimited cost-sharing and to cease providing various mandatory services to optional populations.

Of particular note, the HIFA policy does *not* require that the savings from these benefit reductions be fully invested in efforts to reduce the ranks of the uninsured. Administration officials have repeatedly declined to say that these waivers may not be used to institute benefit reductions partly to generate savings that states can use elsewhere in their budgets.

Due to the recent economic slowdown, many states are experiencing large budget deficits. At the same time, the number of Americans who are uninsured has increased as families have lost their jobs and health insurance. Without adequate oversight and limits, HIFA waivers could be used to impose significant reductions in health benefits and/or increases in cost-sharing on vulnerable low-income families and elderly and disabled individuals partly as a way to close state budget shortfalls.

Implications of the GAO Report for the Superwaiver Debate

The GAO report shows how broad and virtually unchecked waiver authority can be used to approve waivers that effectively rewrite federal laws and alter the fundamental nature of programs on a statewide basis without public input or Congressional approval. The superwaiver would extend broad and virtually unchecked waiver authority to more than a dozen additional federal programs.

One of the ways in which the superwaiver could be used to alter the fundamental nature of a federal program is by waiving basic targeting requirements that Congress has set for the program. The GAO report provides an example of such a fundamental alteration: the diversion of health assistance funds targeted for children to childless adults. Under the superwaiver, similar fundamental changes in targeting requirements could be made in a range of

programs. For example, under public housing, at least 40 percent of applicants admitted each year must have incomes at or below 30 percent of the area median income, which in the typical area is close to the poverty line. Waiving this requirement would enable states to shift benefits away from the neediest families. That this is a risk is suggested by the fact that *state*-funded housing programs tend to be oriented much more to moderate- and middle-income households, and less to poor households, than federal low-income housing programs, despite the severe shortages of affordable housing for poor households.

The GAO report also shows how a requirement that waivers promote program purposes provides little practical safeguard against efforts to make fundamental alterations in the basic nature of programs. HHS has interpreted the current waiver law in an expansive manner that allows states to use SCHIP funds in ways that are inconsistent with the purposes of SCHIP, as long as such a use of funds is part of a larger waiver project that arguably furthers SCHIP goals. Similarly, under the superwaiver, the Secretary would need only to determine that an overall "project has a reasonable likelihood of achieving the objectives of the programs to be included in the project." Waivers could be granted to use a particular program's funds in ways that are inconsistent with the purposes of that program as long as the Executive Branch could claim the overall project somehow promoted program goals.

The superwaiver consequently presents risks of the misuse of public funds. It may be noted that the problems detailed in the GAO report regarding SCHIP waivers are not the only example of how the Executive Branch can interpret the purpose clauses of federal statutes quite broadly when it wishes to use the waiver process to alter the uses of federal funds. Earlier this year, the Department of Health and Human Services acknowledged that it was considering adopting an interpretation of existing waiver authority in the child support enforcement program that would allow states to use federal child support enforcement funds for marriage-promotion programs.[12] The statutory purposes of the child support program are to collect child support owed by non-custodial parents to their children, to locate non-custodial parents, and to establish paternity. Although these statutory purposes are unambiguous and do not include marriage promotion, the Administration apparently believed it could construe these purposes sufficiently broadly to authorize the use of child support enforcement funds for marriage-promotion activities.

Finally, the GAO report shows how waiver authority can be used to make sweeping changes outside of normal democratic processes. The GAO found changes being made without public input, even though HHS had a detailed policy that required opportunities for input at the state and federal levels before granting waivers.

This is significant since under the superwaiver, there could be even fewer opportunities for public input than under the current HHS policy for health-care waivers. The superwaiver provision approved by the House includes no general requirement that states or the Executive

[12] The plan to use child support funds has been detailed in press accounts and HHS documents. See Amy Goldstein, "Marriage Promotion Link to Child Support Eyed," *Washington Post*, March 23, 2002; Testimony of Vicki Turetsky, Senior Attorney, Center on Law and Social Policy, Senate Finance Committee, May 16, 2002. The current status of the plan is unclear, but HHS has made funds available for smaller-scale child support demonstration projects that include marriage-promotion components.

Branch obtain public input on waivers.[13] States and the federal government would not be required to provide notice of superwaiver applications and would not be required to seek or consider public comments on superwaiver applications. Cabinet secretaries could waive statutory provisions applicable to more than a dozen federal programs without following even the minimum public input standards that currently apply to section 1115 waivers. The scope of the federal requirements and standards that could be swept away by the superwaiver — through closed-door discussions without public input and outside of normal Congressional processes — is unprecedented.

Public involvement would be further hindered by the expedited timeline for waiver consideration that the House superwaiver provision would establish, as well as by the absence of any requirement to consult with Congress. If a state's superwaiver application were not denied within 90 days, a state could proceed with the waivers in the application without explicit federal approval.[14] The short timeline could result in cursory reviews of waiver applications and significant limits on opportunities for public input. In addition, no consultation with Congress on waiver applications would be required. Despite the sweeping cross-program nature of superwaivers, Congress' role would be limited to receiving reports from cabinet secretaries on waivers *after* the waivers had been approved.

Conclusion

The superwaiver proposal has profound implications and poses considerable risks. The GAO report illustrates how existing waiver authority has been misused to divert child health insurance funds from children to childless adults. The superwaiver proposal would extend sweeping waiver authority to more than a dozen programs, including the food stamp program, which currently has tailored waiver authority with essential protections, the public housing program, and the Child Care and Development Block Grant. Just as HHS has used existing waiver authority to allow Arizona and New Mexico to used child health funds for purposes not authorized by Congress, the superwaiver would give Executive Branch officials authority to allow states to use food stamp, public housing, homeless assistance, child care and other federal program funds in ways that do not serve the respective purposes of those programs. States and the Executive Branch would be able to make sweeping changes outside of normal democratic processes and without providing opportunities for comment or participation by either Congress or the general public.

[13] The only provision that provides an opportunity for public comment on superwaivers is quite limited and applies only to public housing. Public housing authorities must include in their annual plan a description of any request for a public housing waiver, any comments on the waiver from the PHA Resident Advisory Board, and the PHA's responses to comments.

[14] The 90-day period would not run during any period that the secretaries have requested additional information from the state and the state has yet to provide the information.