



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

APR 15 2008

The Honorable John Dingell
Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
Washington, D.C. 20515

Dear Mr. Chairman and Congressman Barton:

I am writing to express the Administration's views on H.R. 5613, the "Protecting the Medicaid Safety Net Act of 2008." The Administration strongly opposes this legislation. H.R. 5613 purports to block the Centers for Medicare & Medicaid Services from implementing important regulations protecting the fiscal integrity of the Medicaid program, puts billions of dollars of federal funds at risk, and may turn back progress that has already been made to stop abusive state practices. If the legislation were presented to the President in its present form, his senior advisors would recommend that he veto the bill.

The Medicaid program is a partnership between the States and the federal government. Under this partnership, States contribute funds used to pay medical expenditures, and the federal government matches those expenditures in an amount represented by the federal medical assistance percentage, or FMAP. As a partner in this transaction, the federal government has an obligation to ensure that, in return for its contribution of the FMAP, States are incurring expenditures that can legally be matched by the federal government.

Over a period of years, dating back to the 1990s, the Government Accountability Office (GAO) and the HHS Office of Inspector General (OIG) have issued numerous reports identifying loopholes in CMS regulations that have permitted States to improperly enhance their claimed medical expenditures, thereby improperly increasing the federal government's contribution. These watchdog agencies, for Congress and the Executive Branch respectively, have sounded the alarm about improper State expenditures for years. Simply ignoring their findings and recommendations for another 12 months will put billions of dollars of federal funds at risk.

Both the GAO and the OIG have provided policymakers with numerous reports on various areas in which States engage in activities to inappropriately maximize Federal revenues. Examples include:

- State agencies paid private facilities under a per diem rate for providing room and board, rehabilitation counseling and therapy, educational, and other services to children in State custody, and based their claims for reimbursement on facilities' estimated costs rather than actual costs. This increased federal spending by \$58 million.
- Medicaid is frequently billed for costs related to transporting children from home to school and back on a given school day despite the fact that children are transported to school primarily to receive an education, not to receive Medicaid-financed medical services. OIG found that more than 90 percent of transportation claims to Medicaid, made on behalf of almost 700 schools and preschool providers, over a ten-year period, were not in compliance with current Federal and State regulations.
- An OIG audit of a state's adult rehabilitative services program found 65 unallowable claims out of a sample of 100. Errors included services that were not rehabilitative; services that were not actually provided (in fact, no services were provided); and conflicts of interest because the provider both authorized and rendered the services.

In response to those reports, CMS has issued a series of regulations that both clarify the current rules and close improper loopholes. In many cases, CMS acted after being directed by the Congress to do so. These regulations are designed to ensure that needy individuals who rely on Medicaid for their health care coverage will continue to have a financially secure program available for them. H. R. 5613 appears to thwart the efforts of the federal government to regain fiscal accountability and integrity in Medicaid. As currently drafted, the legislation would not simply delay implementation of these regulations, but it may, in fact, jeopardize policies and interpretations that predate the rules. For example, CMS has testified that 30 States have eliminated financing schemes that forced providers to raise funds and return those funds to the States to compensate the providers for services to Medicaid recipients. Should H.R. 5613 become law, there is a risk that States will seek to reinstate those financing schemes, resulting in continued litigation to protect the integrity of the Medicaid program. Even worse, because the legislation is broader than the moratoria currently in place, the legislation would open new avenues for fraud and abuse, potentially limiting the ability of the federal government to step in and take corrective action.

Although the Subcommittee on Health modified H.R. 5613 in an apparent attempt to secure the Administration's acquiescence to this measure, the changes made by the Subcommittee were merely cosmetic and do not alter our substantive opposition to the bill. For example, the statutory language has been re-written in a way that would permit HHS to continue to engage in some activities on the regulations, and supporters of this change note that the Administration agreed to similar language in legislation signed by the President last year. While we appreciate that the changes would permit the Department to engage in some work on these regulations, last year's legislation was completely different. It only affected two regulations, and still permitted HHS to finalize the regulations before the Administration leaves office. That is not the case with the modified H.R. 5613.

In addition, the revised legislation establishes yet another review of the regulations prior to the expiration of the moratorium. As we have noted above, however, both the GAO and the OIG have engaged in multiple reviews of the conduct that led to the issuance of these regulations and have concluded that it is important, for the integrity of the Medicaid program, for HHS to clarify our regulations in these areas. A new study will not change those findings. Although the legislation contains \$25 million for HHS to use on Medicaid anti-fraud activities, this additional funding authorization does not change the need for our regulations. In fact, the Administration not only believes these regulations are vitally important for the integrity of Medicaid, the President's FY 2009 Budget proposed a \$198 million discretionary cap adjustment for Medicare and Medicaid program integrity efforts. We would appreciate your support in securing that funding during the appropriations process for FY 2009.

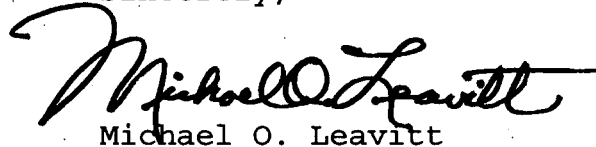
Finally, although H.R. 5613 includes some offsets, extending the moratoria until April 2009 will prohibit the Administration from finalizing the rules before leaving office, thus jeopardizing almost \$33 billion in Federal savings over the next ten years. In addition, the Administration believes that the use of offsets from our budget or closely related to our budget should be used for deficit reduction or to pay for policies that the Administration supports, not to block regulations the Administration is implementing to restore integrity to the funding of the Medicaid program.

Because H.R. 5613 could prevent the Administration from responsibly clarifying ambiguities in current Medicaid regulations and from stopping blatant abuses of the federal-State partnership arrangement that constitutes the Medicaid program, the Administration must oppose the legislation. The President's senior advisors would recommend that he veto the legislation if it were presented to him for his signature.

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The Office of Management and Budget advises that it has no objection to the contents of this letter, and that it is consistent with the Administration's programs, policies and priorities.

Sincerely,

A handwritten signature in black ink, reading "Michael O. Leavitt". The signature is written in a cursive style with a large initial "M".

Michael O. Leavitt