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**CONTACT:**

Andrea G. Cohen  
Manatt, Phelps & Phillips, LLP  
(212) 790-4562

Sara Rosenbaum  
George Washington University School  
of Public Health and Health Services  
(202) 530-2343

**SCHOLARS' LEGAL BRIEF DETAILS HOW CMS'  
SCHIP DIRECTIVE IGNORES CHILD HEALTH RESEARCH**

*Federal requirements would be de facto bar to coverage for nation's uninsured children*

WASHINGTON, D.C. – April 7, 2008 – Manatt, Phelps & Phillips, LLP, the national law and consulting firm, has filed an amicus brief on behalf of more than 25 prominent health policy and child health experts in federal district court. The brief supports the position of the State of New Jersey in the first judicial challenge to a U.S. Department of Health and Human Services directive regarding the State Children's Health Insurance Program (SCHIP).

In a dramatic policy shift, and with no advance notice or opportunity for public comment, the Centers for Medicare and Medicaid Services (CMS) issued a policy directive in August 2007 that it claimed was directed at preventing health insurance "crowd-out" (when one form of health insurance is substituted for another). As the health policy scholars explain in their brief, however, the policies in the CMS directive are poorly designed to address crowd-out but will curtail state efforts to cover uninsured children nationwide.

The August directive prohibits states from providing health coverage to uninsured children in families earning more than 250% of the federal poverty level (\$42,925 for a family of three) unless states can prove that they have enrolled 95% of children at or below 200% of the poverty level. States also would have to demonstrate that private health insurance enrollment had not declined more than two percentage points among SCHIP-eligible children in the last five years. Furthermore, the directive specifies that even if states can meet these requirements, they must force children who previously had private health coverage to be uninsured for 12 months before enrolling in SCHIP.

Based on a detailed review of the extensive published research on child health policy and health insurance crowd-out, the scholars conclude in the brief that:

"...the harsh strategies mandated in the Directive – which are utterly disconnected from research and experience relating to crowd-out and which are poorly designed to actually reduce crowd-out – would at the same time significantly increase the number of children who lack health coverage. In short, the specific strategies imposed by the Directive threaten the primary statutory objective of SCHIP – to provide coverage to low income uninsured children and thereby increase children's access to health care – without any evidence that they would effectively advance the policy goals stated in the Directive."

The brief contends that the 95% enrollment standard is unattainable and therefore will act as a de facto bar to coverage; that references to private insurance coverage levels, which are largely beyond state control, are arbitrary when viewed against the directive's stated purpose; and that the 12-month waiting period mandated by the directive will have substantial adverse health effects on the nation's youth.

The scholars who signed the brief include Dr. Philip Lee, a former U.S. Assistant Secretary of Health, and leading child health services researchers, health law professors and health policy experts from across the country. The full text of the brief can be accessed at [www.gwhealthpolicy.org](http://www.gwhealthpolicy.org). It was filed on April 4 in *New Jersey v. U.S. Department of Health and Human Services*, Civ. Action No. 07-04698.

"These new requirements represent a fundamental threat to the health of children," said Sara Rosenbaum, Hirsh Professor of Health Law and Policy at the George Washington University School of Public Health and Health Services in Washington, DC and one of the brief's signers. "This brief underscores how irrational the standards would have been shown to be, had the directive been published as a proposed rule as required by law."

Dr. Peter Szilagyi, a nationally renowned child health services researcher and a signatory to the brief, said, "It is difficult to imagine a more harmful attack on sound child health policy or a more serious effort to derail a program whose benefits for children have been shown to be beyond dispute." Dr. Szilagyi is Chief of the Division of Pediatrics at the University of Rochester School of Medicine and Dentistry.

The State of New Jersey's lawsuit, filed October 1, 2007, challenges the validity of the directive on procedural and substantive grounds. New Jersey claims, among other things, that the federal government's failure to provide a public notice and comment period before issuing such significant policy changes violated the law. The scholars brief is designed to document the extensive body of research on public health insurance programs which would have been presented during the notice and comment period.

"We are proud to be associated with these distinguished health policy and child health experts and their efforts to protect children's access to health care," said Andrea G. Cohen, counsel at Manatt, Phelps & Phillips, LLP in the firm's New York office and lead attorney on the brief. "Their brief demonstrates the damage to children that can result from policy decisions that are disconnected from real facts, experience and objective policy analysis."

Manatt lawyers are working with the health care leaders and filing the brief on a pro bono basis.

#### **About Manatt, Phelps & Phillips, LLP**

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