



## Out of Touch: A Status Report on CMS's August 17<sup>th</sup> Directive

### EXECUTIVE SUMMARY

#### Background

On August 17, 2007, the Centers for Medicare and Medicaid Services (CMS) sent a letter to state officials sharply restricting the ability of states to cover uninsured children through the State Children's Health Insurance Program (SCHIP). The policy, known as the "August 17<sup>th</sup> directive," puts the health coverage of children with moderate family incomes at risk at a time when the economy is weakening and more families need help securing affordable health coverage for their children. In recent weeks, a growing body of new data and analyses has raised serious concerns about the directive and the legality of CMS's decision to bypass Congress, states and the public when it issued this sweeping new set of rules.

#### Key Findings

- **As the economy continues to weaken, the directive sharply restricts the ability of states to cover uninsured children in moderate-income families.** Under the directive, states that plan to offer or already offer affordable health care to families earning above \$44,000 for a family of three (250 percent of the federal poverty level) must overcome a series of steep, new hurdles.

**"We had bills for (Emily) in excess of \$3,500. These bills were devastating. We had to make decisions about her therapies, and ultimately, she has been reduced to 20 minutes of speech therapy a week. This isn't nearly enough to help her skills grow."**

- Margaret Demko, mother of 3-year old Emily who has Down Syndrome and who has been blocked from enrolling in Medicaid/SCHIP because of the August 17<sup>th</sup> directive.

To date, not a single state has managed to overcome the Administration's new barriers. The impact on families comes at a time when more and more families are struggling with rising gas and food prices—and growing uninsurance—due to the weakening economy.

- **Tens of thousands of children already have missed out on coverage as a result of the directive and more are at risk in the months ahead.** To a degree often not recognized, the directive already has taken a substantial toll on state coverage initiatives for uninsured children. Since it was issued, the directive has caused several states, including Indiana, Louisiana, Ohio, Oklahoma, and New York, that had planned to

provide affordable coverage options through SCHIP or Medicaid to uninsured children in moderate-income families to delay, scale back, or state fund their initiatives. As a result, data provided by states show that tens of thousands of children already have missed out on coverage. By August of 2008, another 14 states that covered moderate-income children before the directive was issued will be forced to come into compliance with it, which means that within a few months the directive will affect the coverage of children in at least 23 states.

■ **The directive is not likely to realize its stated goals of covering more low-income children or reducing crowd out.** The stated goals of the directive are to increase coverage of low-income children and reduce the substitution of public coverage for private coverage (i.e., “crowd out”), but serious questions have been raised about whether the directive will succeed in promoting either of these widely-shared goals. For example, a report prepared by the National Academy for State Health Policy highlights that many state officials think that the directive makes it harder to enroll the lowest-income children, noting “a number of states have found that increasing eligibility to higher income levels has been instrumental in reaching more eligible children in families with income below 200 percent of the federal poverty level.” Many state officials and some academic experts have suggested that a one-year waiting period, which is required by the directive if a state meets the other requirements, is neither necessary nor effective in preventing the substitution of public coverage for private coverage. The year-long waiting period will, however, prevent uninsured children from accessing the coverage they need.

■ **Serious questions about the research and policy basis for the directive are growing.** The Congressional Budget Office, Congressional Research Service and other independent researchers have suggested that CMS may be relying on questionable assumptions, data, and methodologies to make critical decisions about which states will be permitted to cover uninsured children in moderate-income families. Many state SCHIP officials also suggest that the directive’s requirements are unattainable, arbitrary, and out of touch with states’ experiences and practice. They note, for example, that the directive holds them responsible for declines in employer-based

coverage even though they have little or no control over this trend.

■ **The Administration bypassed Congress when issuing the directive.** Soon after it was issued, a number of states brought lawsuits against CMS charging that it acted illegally by issuing this sweeping new policy as a letter to states. The Government Accountability Office and the Congressional Research Service recently have issued legal opinions that add weight to the view that CMS violated federal law when issuing the directive without any prior notice and opportunity for comment. The new opinions conclude that the directive

**“Because the directive was written and issued without any input from states, it includes provisions that are unattainable, outside the control of states, and poorly suited for achieving the purported goal of minimizing crowd-out.”**

- Alan Weil, director of the National Academy for State Health Policy

is not merely a clarification of existing SCHIP rules, as CMS has maintained, but rather a marked departure from well-settled policy that should have been reviewed by Congress.

### Conclusion

At a time when more families are experiencing hardship, the directive severely limits states’

options to soften the impact of the economic downturn on moderate-income families. A growing number of new resources indicates that CMS overstepped its bounds in issuing the directive and, in doing so, has put forth a policy with a questionable research and policy basis that is out of touch with state experiences. The policy already has taken a significant toll on state efforts to cover children. In the months ahead, even as the number of uninsured children is rising and more families are losing their health insurance due to the downturn in the economy, the directive will do even greater harm unless action is taken.

This report was prepared by Jocelyn Guyer, Michael Odeh, and Cindy Mann with support from the Robert Wood Johnson Foundation. The full report is available at <http://ccf.georgetown.edu>.