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# United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

August 6, 2002

The Honorable Tommy G. Thompson  
 Secretary  
 Department of Health and Human Services  
 200 Independence Avenue, S.W.  
 Washington, DC 20201

Dear Secretary Thompson:

We are writing to follow up on the General Accounting Office (GAO) report on Medicaid and State Children's Health Insurance Program (SCHIP) Section 1115 waivers, *Recent HHS Approvals of Demonstration Waiver Projects Raise Concerns*. After reviewing the report and your July 12, 2002 letter, we would like to highlight some of our concerns regarding recent approvals of comprehensive Section 1115 waivers. In expressing our thoughts about past waiver approvals, we hope to promote the appropriate use of waiver authority in the future.

As you know, in the past year, we have had regular correspondence with the Department regarding Section 1115 waivers. We appreciate your willingness to engage in a dialogue on the important issues raised by these waivers, and we look forward to further constructive exchanges on how to assure state flexibility, accountability, and the integrity of the Medicaid and SCHIP programs.

We have three main concerns arising out of the GAO's findings, and we have also attached a list of questions prompted by the report that we would like the Department to address. First, we disagree with the Department's position that using SCHIP funds to provide health coverage for adults who do not care for or live with an eligible child ("childless adults") is appropriate. Second, as we have repeatedly voiced to the Department, we are committed to guaranteeing an open and inclusive public process in the development and consideration of waiver applications. It is our belief that the Department has not done as much as it promised to do to ensure public access to waiver information. Finally, if the waiver process is to promote both flexibility and accountability, we believe that the determination of budget neutrality must be based on reasonable and accurate baselines, appropriate assumptions, and enforcement mechanisms that do not put vulnerable populations at substantial risk of unplanned benefit and eligibility reductions.

### *Covering Childless Adults with SCHIP Funds*

In 1997, when SCHIP was created, Congress specified that SCHIP allocations could only be used "to enable [States] to initiate and expand the provision of child health assistance to

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uninsured, low-income children in an effective and efficient manner.” Social Security Act Section 2101(a). This focus on children is not a “technicality” of the law, as your July 12 letter suggested, but rather the explicit purpose of SCHIP. We agree that covering uninsured adults is also an important public policy objective, but that does not justify the defiance of Congressional intent. The use of funds dedicated by Congress to low-income uninsured children on childless adults is an inappropriate implementation of the SCHIP statute.

We have reviewed the Department’s various statements concerning the use of SCHIP funds on childless adults, and we conclude that none present a convincing position. On page 16 of the GAO report, a letter from HHS’ Office of General Counsel states, “[i]n approving a Medicaid or SCHIP demonstration, the Secretary may consider the likelihood of promoting the objectives of the programs authorized under any of the titles of the Social Security Act listed in section 1115.” This extraordinary interpretation would seem to authorize the use of funds from any program subject to Section 1115 – for example, Medicaid – to advance the purposes of any other such program – for example, SSI or TANF. We disagree that the Secretary’s waiver authority is that broad, or, with regard to this particular issue, that it takes precedence over the clear intent of Congress to insure that SCHIP funds are used to improve coverage of uninsured children.

The Department’s other justifications – that insuring childless adults may benefit future parents and those who have aged out of SCHIP – make a weak case for why childless adults should be covered using SCHIP funds. Finally, your insistence that “no child . . . will lose coverage” as a result of any particular waiver authorizing the use of SCHIP funds on childless adults does not satisfy our concerns. We are concerned not only that presently-covered children do not lose coverage, but that eligible children who are not yet enrolled have an opportunity to do so using funds set aside for them by Congress.

In 1999, Congress approved legislation to redistribute unspent SCHIP funds to states that are eager and able to cover children through this program. As you know, the redistribution process allows states who have spent their allotments to continue to enroll more eligible children in their programs. If SCHIP funds are spent on childless adults, there will be less money to redistribute to states with robust programs for children. Our concern with limiting the availability of funds for redistribution is underscored by recent findings that nearly five million children who are fully eligible for low-income health programs are not yet enrolled and remain uninsured. These children should never have to compete with childless adults for the use of remaining SCHIP funds.

For these reasons, we strongly disagree with the Department’s view that SCHIP funds can be used to insure adults without children at the cost of the health of low-income children. It is our belief that you should not continue to approve waivers that divert funds set aside by Congress

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for children to insure childless adults, Please inform us as to whether you plan to continue this policy. If you do plan to continue approving coverage of childless adults with SCHIP funds, we intend to take legislative action to end this violation of Congressional intent.

### ***Public Participation in the Waiver Process***

In previous correspondence, we have made it clear that an open and inclusive public process similar to that described in the 1994 *Federal Register* guidelines should be an essential part of a state's waiver application preparation. We were pleased to see the May 3, 2002 letter to State Medicaid Directors from Dermis Smith, Director of Medicaid and State Operations, urging states to follow the 1994 federal guidelines describing this process. We have also been encouraged by the Department's efforts to improve public access to comprehensive Section 1115 waiver applications, approvals, and terms and conditions via the Department's website.

However, we believe that the Department can and should do more to ensure that the public has meaningful access to information about Section 1115 waivers. We have noted that the Department has posted waiver applications under the Health Insurance Flexibility and Accountability (HIFA) initiative on its website. We have also noted that in recent days the Department has finally begun to post non-HIFA waiver applications on its website, but we are disappointed both that the Particular site is difficult to find from the CMS homepage and that key documents and updates are missing from the postings. For instance, there is no information on the website -- not even an initial application or indication that an application was pending -- relating to one of the Pharmacy Plus waivers that was formally approved last week.

It is our strong belief that all Section 1115 waiver applications and official documentation should be posted on the internet. Further, we must remember in this digital age that not everyone has regular access to the internet. For this reason, we urge you to implement the GAO recommendation calling on HHS to publish regular waiver updates through the *Federal Register* notice process laid out in the 1994 guidelines. In addition, we urge you to enforce the 1994 guidelines when states apply for waivers, and we note with disappointment the GAO's finding that you approved one state's waiver application and only subsequently required the state to comply with notice requirements and confer with tribal leaders about the waiver's content.

Your promise to improve openness and inclusiveness in the governance of these programs is commendable. We firmly believe that the public should be assured a voice in the waiver process. You should know that we plan to introduce legislation to solidify the role of public process in Section 1115 waivers. We will look forward to sharing our ideas with you in the near future.

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***Ensuring Budget Neutrality and the Fiscal Integrity of Public Programs***

When states apply for Section 1115 waivers, their proposals are subject to budget neutrality requirements. It is our understanding that these requirements are intended to ensure that the federal cost of a state's newly approved demonstration project (so-called "with-waiver costs") will not exceed the federal cost of the state's program in the absence of the waiver (so-called "without-waiver costs"). While this is not a statutory requirement, we understand that it has been an administrative requirement for more than 20 years. Further, it features prominently in the HIFA guidance and application template, and it is designed to protect the federal budget. Therefore, the integrity of the budget neutrality methodology is of great interest to us.

The GAO report raises several questions with respect to the process used to assure budget neutrality. First, it raises concerns about the inclusion of "hypothetical populations" in the calculation of without-waiver costs. We understand that the use of hypothetical populations in budget neutrality calculations is longstanding, and that it has long been subject to criticism by GAO. The GAO questions why a state should be allowed to include the hypothetical costs of this population in its baseline, without-waiver costs, when the state had clearly chosen as a matter of policy not to commit its share of Medicaid expenditures to previously cover that population. Accordingly, we would like the Department to provide us with its rationale for including hypothetical costs for hypothetical populations in its without-waiver cost estimates.

In addition, we are interested in understanding the Department's rationale for including in its without-waiver cost estimates the costs of providing a limited benefit package to a hypothetical population, when coverage of that population with the limited benefit package would not have been permissible without a waiver. GAO reported, on page 20, that "some officials within HHS voiced concerns about allowing the use of this methodology; however, the waiver was still approved by HHS as a matter of policy." We would like to know what policy justified that particular budget neutrality calculation, and whether that methodology will be used in the future.

We also have apprehensions regarding the budget neutrality calculations in "Pharmacy Plus" waivers. As the GAO report explained, HHS has limited total federal risk for Pharmacy Plus waivers by establishing an aggregate, or "global," cap for payments to the state for all services to the elderly, including the drug benefit. While imposing a global cap of that kind may ensure budget neutrality to the federal government, it also shifts the risk of the demonstration financing assumptions – which "offer little margin for error," according to the GAO – entirely to the state and to the elderly Medicaid population. GAO notes that, should the state be unable to achieve the ambitious savings targets set up in the waiver, it might have to choose between cutting the drug program, rolling back eligibility for elderly beneficiaries, increasing cost sharing, or other measures. What is the policy rationale and legal authority for imposing a global cap of

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this son? Is ~~the~~ provision of federal matching payments under Section 1903(a) of the Social Security Act one of ~~the~~ provisions that ~~the~~ Department believes ~~can~~ be waived under Section 1115?

Finally, we ~~thank~~ you for your continuing ~~attention~~ to this very ~~important~~ matter. ~~Given~~ the number of waivers that are currently pending your approval, we ~~would appreciate~~ a response to our questions regarding coverage of childless adults and budget neutral ~~ity requirements~~ in comprehensive Section 1115 waivers by August 20, 2002. If you have ~~any~~ questions concerning this correspondence, please do not hesitate to contact us or have your staff ~~contact~~ Andrea Cohen (224-45 15) or Leah Kegler (224-53 15).

Sincerely,



Charles E. Grassley  
Ranking Member -



Max Baucus  
chairman

Enclosure

cc: The Honorable Thomas R. Scully  
Administrator  
Centers for Medicare & Medicaid Services  
200 Independence Avenue, S.W.  
Washington, DC 20201

The Honorable Mitchell E. Daniels, Jr.  
Director  
The Office of Management and Budget  
725 17<sup>th</sup> Street, N.W.  
Washington, DC 20503

Ms. Kathryn Allen  
Director, Health Care-Medicaid and Private Health Insurance Issues  
US. General Accounting Office  
441 G Street, N.W.  
Washington, DC 20548

**Questions for the Department of Health and Human Services**

1. Do you plan to continue to approve waivers that allow states to use ~~their~~ SCHIP allotments to cover childless adults?
2. What is the Department's rationale for including hypothetical costs ~~for hypothetical~~ populations in without-waiver cost estimates?
3. What is the policy justification and rationale ~~for including hypothetical costs for benefit~~ packages that would not be permissible absent a waiver in ~~without-waiver cost estimates?~~
4. What is the policy rationale and legal authority for ~~imposing an aggregate, or "global"~~ cap?
5. Is ~~the~~ provision of federal matching payments ~~under Section 1903(a)~~ of the Social Security Act one ~~of the~~ provisions that the Department believes can ~~be waived under~~ Section 1115?