

**NLWJC - Kagan**

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**Health - Medicaid 100 Hour  
Rule**

THE WHITE HOUSE

WASHINGTON

June 11, 1998

Bruce/Gene -

TO: Bruce R., Gene S.

FROM: Chris J., Diana F., Jeanne L.

RE: Resolving the Medicaid "100-Hour Rule" issue

cc. Elena K., Sally K.

Please, in particular, read the "our thoughts" section. Has much broader implications than just this "100 hour rule" issue. We may want to ask Jack Lew for a principals meeting. Thanks

This is an update on an important Medicaid coverage issue that we would like to resolve as soon as possible, but that may be at an impasse. HHS has proposed a regulatory change to the definition of an unemployed parent for Medicaid purposes (i.e., allow alternatives to defining "unemployed" as working less than 100 hours per month). This change gives states the option of allowing two-parent families meeting the other eligibility criteria to qualify for Medicaid. States with pre-welfare reform waivers of this provision say it's important both in their welfare to work efforts and in encouraging two-parent families. However, the Actuaries have estimated that, for the 17 or so states without a pre-welfare reform waiver of this rule, this reg will cost about \$850 million over 5 years. OMB, HHS and White House staff all support the policy, and it is an important reg to the Governors. However, OMB is currently insisting that HHS find an offset for its cost since they are uncomfortable with its size. HHS has refused to do so because it is: (1) virtually impossible for OMB and HHS to find this amount in Medicaid (particularly in a way that the States will support), (2) against HHS policy and politically unviable to use Medicare savings to offset Medicaid costs, and (3) an OMB policy that has not been used in other health reg during this Administration.

We would like to get a decision on this issue, one way or the other, for two reasons. First, states and advocates continue to ask for this reg and wonder why it is delayed; and, second, if we decide to go forward with this reg, we would like to announce it at the Family Conference on June 22. We think that OMB and HHS may be trying to work out this issue tomorrow, but think that we ought to weigh in as well, especially if it does not get resolved.

**BACKGROUND**

**"100-hour rule."** The proposed regulation would allow states to cover two-parent families that meet other state Medicaid eligibility rules. It would do so by changing an old AFDC "deprivation" requirement that restricted AFDC / Medicaid eligibility to families that include a child who was deprived of parental support or care by reason of death, absence (single parents), incapacity, or unemployment of the parent. The old AFDC regs defined "unemployment" as working less than 100 hours per month. Before welfare reform, 31 states received statewide and another 6 states received substate 1115 waivers of this rule because they thought it overly strict and anti-family. However, because welfare reform locked in place the rules in effect in 1996, states without those waivers want this change in regulation.

**Post-welfare reform history.** This reg was one of several that were contemplated immediately after welfare reform. In fact, had it been drafted in 1996, its costs probably would have been included in the Medicaid baseline released in January 1997. However, because of the huge regulatory schedule that resulted from welfare reform, this reg was put off. The final rule with comment was signed by Shalala and submitted to OMB on January 30, 1998.

On substantive health and welfare reform grounds, OMB, HHS and White House staff all support this policy. It not only allows states to align their TANF and Medicaid eligibility, but could serve as a way for states to cover low-income parents, should they choose to do so. This could be especially helpful in the tobacco debate.

**OMB concerns.** Since its submission, OMB expressed concern about the cost of this reg and recommended that HHS use a Medicare offset for this provision. Specifically, they worry about:

- **Spending the surplus:** Since this reg's costs were not included in the post-welfare reform baseline, they would represent an increase to the baseline / decrease in the surplus if not accompanied by an offset. This goes against both the BBA and the President's "Social Security First" pledge.
- **Bad precedent.** This reg's cost are high. Allowing it to be published without an offset could encourage agencies to ignore the cost implications of administrative changes, and could make OMB vulnerable on the Hill, which has become aware of this issue.

**HHS reaction.** HHS disagrees with OMB for two main reasons.

- **Not a new precedent.** HHS points to the fact that several regs (e.g., change in the timing of SSI payments \$10 million, SSI "bucket" reg \$1.4 billion over 5 years) that did or could have had cost implications were not required to have offsets.
- **Even if they concede the cost issue, no acceptable options.** HHS thinks that it would be nearly impossible to find a Medicaid administrative offset of this size, and have policy concerns about using non-Medicaid savings -- in particular, Medicare savings. Although HHS support reducing Medicare spending, they are concerned about both enacting them because of the regulation and the political challenge of explaining why a Medicare change is needed for a Medicaid regulation.

As much as they want the reg, they are not willing to come up with an offset for it.

**Our thoughts.** We believe that this reg is important and should be published one way or another. It would be particularly appropriate for the Family Conference, because it would give the President an opportunity to talk about how he has changed Medicaid from being a program for single mothers to families. It also can help us fight off States desire to use CHIP for adults.

However, we think that there is a bigger issue here. While OMB is right that such a reg could decrease the surplus, the decision to hold regulatory actions to the same budget rules as legislative actions has important ramifications. First, it may result in delays in publishing regs, since agencies may start holding regs with savings so that they can be published at the same time as with regs with cost. Forcing a coupling of regs with savings and costs could cause political as well as policy problems. Second, we are already uncomfortable with the extent to which often extremely uncertain cost estimates influence policy decisions. Given that reg effects are typically smaller and probably more difficult to estimate, we don't think making cost estimates the central concern in whether to publish a reg is good policy. Third, it is only a small step from requiring an offset for a regulation to requiring an offset for other administrative actions (e.g., executive orders, Secretarial initiatives). Should the offset requirement be broadly applied, we are, in essence, placing a new, important restriction on executive authority. And, lastly, at a time when the Congress is rushing to spend the budget surplus, a legitimate question needs to be raised about the advisability of restricting our ability to address priorities administratively, consistent with our legal authority, even if there are cost implications.

We have had preliminary conversations with OMB, and they may eventually give on this reg if HHS promises to find offsets for all future regs. We are hoping to have some news tomorrow and will keep you informed.