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THE WHITE HOUSE

WASHINGTON

July 31, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: Bruce Reed
Elena Kagan

SUBJECT: DPC Weekly Report

1. Health Care -- Patients' Bill of Rights: The Senate adjourned this week without bringing patients' bill of rights legislation to the floor. Earlier this week, Senators Chafee, Lieberman, and Graham introduced their own bill of rights proposal. The proposal includes all of the rights recommended by your Quality Commission, in addition to enabling individuals to sue health plans for economic (but not non-economic or punitive) damages in federal court. This enforcement scheme is an attempt to split the difference between the provision in the Kennedy bill, which allows individuals to sue health plans in state court for all damages, and the provision in the Republican Leadership bill, which relegates individuals to a schedule of civil monetary penalties that bears no relation to the amount of damages actually suffered.

Senator Lott is placing pressure on Republicans not to co-sponsor the Chafee-Lieberman bill, and Senator Spector is the only Republican likely to join it. At the same time, Senators Daschle and Kennedy have criticized the bill, especially its enforcement provision, as inadequate. We have kept our distance from the bill, both because most Senate Democrats do not yet want to compromise and because early Administration support for such an approach could *decrease* the likelihood of eventually getting a strong bill out of the Senate. We have tried, however, to refrain from any sharp criticism of the bill, given that it is in fact a quite strong piece of legislation. Our task for this month is to emphasize the differences between the Republican and Democratic bills, so that when the Senate Republicans return, they feel a need to engage seriously with the Administration and Senate Democrats on this issue.

2. Health Care -- DeSario Case and Guidance: The Department of Health and Human Services will issue a guidance letter to all state Medicaid directors this week on their obligations to cover medical devices. The guidance comes in the wake of a controversial decision by the U.S. Court of Appeals for the Second Circuit in the DeSario case, holding that Connecticut could limit coverage to a list of approved medical devices, which the State had compiled by reference to the needs of the average Medicaid beneficiary. The HHS guidance letter will adopt a contrary interpretation of the law, stating that although states may set some limits on coverage of medical devices, they must take into account when doing so the special needs of Medicaid beneficiaries with disabilities. The guidance also will remind the states of their obligation to provide notice of any coverage restrictions, and to put in place a public and timely appeals process. Some Governors will complain that HHS's interpretation will increase

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their Medicaid expenditures; and although most disability advocates will welcome the letter, some will complain that it allows states to impose certain restrictions, rather than requiring them to pay for all medically necessary devices. We believe that the letter represents the best possible balance between these competing interests.

3. Tobacco -- Legislative Update: House Republicans have decided not to introduce tobacco legislation next week, as originally planned, and are arguing among themselves as to whether to do so when they return from recess. Speaker Gingrich and Congresswoman Pryce (whom Gingrich appointed to head the tobacco effort) continue to want to pass a skinny tobacco bill, with a counteradvertising campaign, some access restrictions, limited FDA authority, and no lookbacks or price increase. Other prominent Republicans, however, argue that such a bill will be subject to attack by Democrats and that there is no advantage in reviving this issue. If the Republicans do decide to bring a bill to the floor after recess, Democrats are ready with numerous amendments, including two full substitutes: the comprehensive Hansen-Meehan bill and a new Waxman bill that replaces an up-front price increase with lookback penalties of huge proportions.

Senator Hatch is talking with Democrats -- particularly Senator Conrad, to whom a great many Democrats defer on tobacco -- about possible compromise legislation, but their talks have not yet progressed very far. Conrad is willing to make some compromises on price and perhaps even on lookbacks, but he is insistent that liability protections be put into the bill only in conference and that they be limited to an $8 billion annual cap. Hatch wants more extensive liability protections, and remains adamant that they go into the bill prior to conference (even though he knows that Senators Gregg and Leahy will again try to strip the liability protections on the floor). We have been talking to both sides in an effort to move them closer together, but something more dramatic is probably necessary to break the current impasse.

4. Tobacco -- State and Federal Suits: The settlement discussions between the industry and the state attorneys general "recessed" late last week, with industry negotiators saying that they needed further guidance from the CEOs of the companies. The talks so far have focused on non-monetary issues, with both sides apparently assuming that the industry will pay about $200 billion. Opinions are very mixed as to whether the AGs and industry will return from the recess ready to strike an agreement.

We continue to have discussions with Justice Department attorneys about the possibility of filing suits against the companies for federal Medicare costs. (We say "suits" because the most likely way to bring such litigation is to file not a single national suit, but a number of suits in different states.) They continue to be very resistant, arguing that these suits probably would be thrown out of court on a motion to dismiss, and that this result would subject the Department to criticism that it brought litigation for political reasons. Other attorneys experienced in tobacco litigation -- Dick Scruggs, Stan Chesley, John Cole, etc. -- have far greater confidence that federal suits could survive a motion to dismiss and that such suits could bring the tobacco companies to the table and force them to make substantial concessions (perhaps even before

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motions to dismiss are decided). The Attorney General may raise this matter with you when she sees you this week.

5. Tobacco -- New CDC Data: The Centers for Disease Control released a study on Thursday indicating that minority populations would be more likely than whites to quit smoking in response to a cigarette price increase. The study found that controlling for income and education, blacks are twice as responsive as whites to price increases, and Hispanics are even more price responsive. For example, the study found that about 25 percent of 18-24 year old Hispanic smokers and approximately 10 percent of 18-24 year old black smokers would quit smoking in response to a 10-percent cigarette price increase, while only about 1 percent of white smokers of the same age would do so. The study examined data on adults only, finding that in African-American and Hispanic communities price responsiveness decreased with age, while among whites, price responsiveness remained steady.

6. Welfare Reform -- Medicaid 100-Hour Rule and Anniversary Event: You are scheduled to participate in an event this week to mark the progress of welfare reform over the past two years and announce steps to ensure that even more families make a successful transition from welfare to self-sufficiency. Most important, you can announce new administrative action (repealing the so-called 100-hour rule) to allow states to provide Medicaid to two-parent working families. (Old welfare rules precluded states from providing Medicaid to these families if the adults worked more than 100 hours each month.) You also can announce the release of HHS's first report to Congress on the new welfare law. This report focuses on the dramatic gains made in moving welfare recipients into work opportunities. Because this month is also the one-year anniversary of enacting the $3 billion Welfare-to-Work program, we are also planning for you to announce new formula grants to 5 states (MD, VA, WV, NM, NH). Finally, we may recommend that you use this opportunity to endorse the House and Senate bills to provide Individual Development Accounts for low-income families.

7. Education -- Charter Schools: The Senate Labor and Human Resources Committee reported out the charter schools bill unanimously last week, increasing the prospect that Congress will send this bill to you in September. We are attempting to work out one remaining issue with Senator Coats before the bill comes to the floor, so that we can avert a controversial amendment that could derail the bill's smooth passage. Coats wants to modify a requirement in existing law that charter schools use a lottery to select students if the school is oversubscribed. Coats thinks that charter schools should be able to guarantee slots for the children of founders and siblings of students already enrolled, as well as to use certain kinds of selective admission requirements (e.g., an audition for a performing arts school). We are working with the Education Department and Coats to see if we can accommodate Coats' concerns through new administrative guidance, without violating current law and without opening the door to abuses that could increase the number of racially identifiable schools.

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8. **Education -- D.C. Charter Schools:** We are working with Congress to address a potential shortfall of funding for charter schools in the District of Columbia during the next academic year. The budget developed earlier this year by the Control Board and the D.C. Government significantly underestimated the number of students likely to attend charter schools, providing only $12 million of the approximately $30 million needed for full per-pupil allocations to support the 4,000 students projected to attend charter schools this year. Although the original D.C. appropriations bills introduced in the House and Senate included only the $12 million recommended for charter schools, the House has added $20 million from the federal payment, with the support of the Administration. In the Senate, we are encouraging a manager's amendment on the floor either to provide additional funding for charter schools out of the D.C. surplus or to direct the Control Board to find an offset within the D.C. budget for additional funding.

9. **Education -- National Board for Professional Teaching Standards:** In preparation for the conference on the Higher Education Act, we are working on a strategy for eliminating the Goodling provision that prohibits continued funding for the National Board. This fight will be very difficult, given (1) the overwhelming majorities by which this bill passed both Houses; (2) Goodling'sapparent unwillingness to compromise on the issue; and (3) the lack of interest in the Board among House Democrats. There is bipartisan support for the Board in the Senate, and we are working closely with the NEA and AFT, Governors Hunt and Voinovich, and a variety of business leaders to put pressure on conference members to remove the Goodling provision. At the same time, we are working on compromise proposals that would give Goodling the ability to say that he corrected abuses or problems in the program, relating for example to the high salary of the Board's President and the high financial cost of seeking board certification.

10. **Education -- Ed-Flex:** The Senate Labor and Human Resources Committee reported out an Ed-Flex bill which would allow all states to waive federal education requirements if they have academic standards, assessments, and accountability measures in place. We worked hard to improve the bill, and it now reflects the principles you announced at last winter's NGA meeting. The prospects for floor action are not clear at present.

11. **Crime -- Prison Population:** The Justice Department will release a report on Sunday showing that in 1997, the nation's adult prison population grew by 61,186 men and women -- a 5.2 percent increase from 1996, but lower than the average annual growth of 7 percent since 1990. The total number of federal and state inmates reached over 1.24 million adults, with 1.13 million inmates in state prisons (a quarter in California and Texas alone) and 112, 900 in federal prisons. The report shows that since 1990, the inmate population increased by 60 percent. Violent offenders were responsible for much of this growth, accounting for a full 50 percent of the increase.

12. **Service -- Work-Study Funds:** New figures show that colleges and universities are spending more work-study funds on community service, but that there is still much room

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for improvement. According to the data, the average college/university spent 10 percent of its work-study funds on community service in 1996-97, up from 7 percent in 1994-95. As you know, a law enacted in 1992 required schools to spend at least 5 percent of work-study funds on community service. In 1996-97, 9 percent of all schools failed to meet this requirement, as compared with 24 percent two years earlier. (The Education Department does not penalize schools that fail to meet this requirement.) Only 12 percent of schools use more than 20 percent of their funds for service, and only 2 percent of schools use more than half their allocation for service. We are beginning discussions with the Education Department and Corporation for National Service on possible ways to improve these numbers.