

This issue is one in a series of periodic reports from the National Health Law Program's Washington office, reporting briefly on recent and forthcoming developments in federal policy of interest to NHeLP advocates and friends. We always appreciate your feedback and comments. Please send them to Mara Youdelman at [youdelman@healthlaw.org](mailto:youdelman@healthlaw.org).

For updates and information on NHeLP publications, go to <http://www.healthlaw.org>.

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## THE BUDGET AND MEDICAID

### Medicaid Commission

The Bush administration's Medicaid Commission (see June 2005 Capital Communique) will hold its first meeting on July 27 in Washington. The agenda will include options to achieve \$10 billion in scorable Medicaid savings over five years while at the same time make progress toward meaningful longer-term program changes to better serve beneficiaries. The term "scorable" refers to changes that the Congressional Budget Office and /or the Office of Management and Budget would find affect federal revenues and expenditures.

HHS Secretary Michael Leavitt announced his appointments to the commission on July 8. The chairman is former Tennessee Governor Don Sundquist (R); the vice-chairman is former Maine Governor Angus King (I). HHS's announcement says, "The National Governors Association Center for Best Practices will serve as a working group tasked with informing the commission on the range of issues that will be considered."

Most patient advocacy groups, Congress's Democratic leadership, and House Energy and Commerce Committee Chairman Joe Barton (R-TX) have refused to make appointments to the commission. You can find the HHS announcement and other appointees at <http://www.hhs.gov/news/press/2005pres/20050708.html>

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## Medicaid Hearings

Several hearings on Medicaid have been held as a prelude to legislation expected in the fall:

\* On June 15, the National Governors Association (NGA) testified in both the House and Senate on their proposals and received a mixed reception. Some members of Congress welcomed the governors' proposals as constructive ways to curtail spending in the program. Others said that cutting Medicaid would increase the number of uninsured people and suggested that Congress repeal tax measures which have reduced revenues.

\* The House Energy and Commerce Subcommittee on Health (June 22) and the Senate Finance Committee (June 28) hearings examined Medicaid drug spending, an area that appears to be a target for legislation. In the Senate hearing, Chairman Charles Grassley (R-IA) estimated that \$4 billion could be saved by greater use of generic drugs and changes in the current average wholesale price (AWP) system. He suggested that basing payment on the average sales price (ASP) might be preferable. A U.S. Department of Justice official testified that Medicaid's current pricing mechanisms for prescription drugs are "problematic and subject to manipulation."

\* The Senate Aging Committee on June 28 looked at "optional" beneficiaries and benefits, people and benefits that states may, but are not required to cover under the Medicaid Act.

Diane Rowland, Kaiser Family Foundation, testified that optional populations, most of whom are elderly or people with disabilities, account for 42 percent of all Medicaid spending, of which 70 percent is for "mandatory" services and 30 percent is for "optional" services. Patient advocates suggested that many optional services, like prescription drugs, should be considered "mandatory" because they are critical to good health care. On July 20, the Aging Committee held a hearing on "saving money in Medicaid." For the testimony, go to <http://aging.senate.gov/public/> and click on "Hearings."

The hearings are in preparation for so called "budget reconciliation" bills, legislation to change the authorizing law to meet an arbitrary spending target. The target in this year's budget will require \$10 billion in health care program cuts over five years. It is anticipated that most of that money will come from the Medicaid program, although Medicare could also be looked to for some of the required savings. Authorizing committees are to report this legislation by September 16.

**POSSIBLE ACTION:** Those wishing to do so could urge members of Congress to reduce the subsidies given to managed care organizations and employers in last year's Medicare Modernization Act before reducing health benefits to those living in poverty, and to oppose cuts in Medicaid or policies that reduce Medicaid coverage, protections or eligibility.

## FAMILY OPPORTUNITY ACT

Senator Edward Kennedy (D-MA) hopes to offer S. 183, the Family Opportunity Act, as an amendment to the Department of Defense reauthorization bill (S. 1043) when the Senate considers the DOD bill this summer or fall. S. 183, introduced by Senators Kennedy and Grassley, would allow states to offer families of disabled children the option to purchase Medicaid coverage for their children. The bill would also authorize demonstration projects under which up to ten states could test the effectiveness of providing home and community-based alternatives to psychiatric residential treatment for children with Medicaid coverage.

The bill is comparable to a provision in the 2001 Defense reauthorization bill, in which Congress

decided to cover disabled children of military families under the DOD TriCare health insurance program. Eight percent of children have severe mental or physical disabilities and families that often cannot get private insurance, must impoverish themselves before becoming eligible for Medicaid.

POSSIBLE ACTION: Those wishing to do so could urge their senators to support this amendment.

## JUDICIAL NOMINATIONS

President Bush has nominated D.C. Court of Appeals Judge John G. Roberts for the U. S. Supreme Court. If confirmed, Judge Roberts would fill the vacancy created by retiring Justice Sandra Day O'Connor. The Senate Judiciary Committee could begin hearings in late August, but more likely, early September. O'Connor, the first woman justice appointed to the Supreme Court, announced that she would serve until her replacement is confirmed.

Because Judge Roberts has only been on the bench since 2001, many advocacy groups say too little is known about his views. Several pro-choice groups oppose his nomination.

The Senate outlook is unclear at this time. After an examination of Judge Roberts' views on the issues of our times, senators who end up opposing his nomination will have to decide whether or not to employ a filibuster. If a filibuster occurs, this nomination might present the first opportunity to explore the meaning of the "extraordinary circumstances" clause agreed to by 14 senators who compromised earlier this year to prevent a Senate leadership initiative designed to prohibit the use of filibusters altogether for judicial nominees (the so-called "nuclear option." See June 2005 Capital Communique).

On June 14, 2005, the U.S. Senate confirmed Thomas B. Griffith for the U.S. Court of Appeals for the District of Columbia Circuit, on a 73-24 vote.

For a table showing the status of judicial nominations, go to <http://judiciary.senate.gov/nominations.cfm>

**POSSIBLE ACTION:** Those who conclude, for example, that Judge Roberts might not assume Justice O'Connor's centrist position on the Court, but instead provide a reliable fifth vote for some of the more extreme positions espoused by Justices Scalia and Thomas, and who find that prospect undesirable, could urge senators to examine Judge John Roberts's views closely and to vote in a manner that will maintain the balance that Justice O'Connor has brought to the Court.

## CONSENT DECREE BILLS

Two hearings have been held on S. 489 and H. R. 1229, which deal with consent decrees (see June 2005 Capital Communique). On July 19, the Senate Judiciary Subcommittee on Administrative Oversight and the Courts held a hearing titled "A Review of Federal Consent Decrees." On June 21, the House Judiciary Subcommittee on the Courts, the Internet and Intellectual Property held a hearing on H.R. 1229 (Blunt, R-MO), the Federal Consent Decree Fairness Act.

Proponents of H.R. 1229 argued that consent decrees entered against states and municipalities tie the hands of government officials by turning over the administration of government programs to plaintiffs' attorneys and special masters, thereby preventing newly-elected officials from implementing creative "reform" measures.

Opponents maintained that the bill is not needed because Federal Rule of Civil Procedure 60(b) already provides an effective way for either party to move to modify or terminate a decree. Judge Jones, retired from the 6th Circuit, pointed out that the practical effect of H.R. 1229 would be that parties would not enter into consent decrees, thus eliminating an efficient tool for resolving complicated issues, increasing costs and further burdening already strained federal courts.

A coalition of almost 100 organizations opposes the bill. The National Governors Association has indicated support for some version of the bills, and at the hearing on S. 489, the bill's sponsor, Sen. Alexander (R-TN) asked that the bill be considered in tandem with any Medicaid "reform" legislation that may be enacted as part of the budget reconciliation process.

**POSSIBLE ACTION:** Those wishing to do so could educate members of Congress on how important consent decrees are to protecting the rights of the poor and urge them not to cosponsor or otherwise support the bills.

## MEDICARE PRESCRIPTION DRUGS IMPLEMENTATION

The Center for Medicare and Medicaid Services (CMS) and the Social Security Administration (SSA) are now sending out notices to people potentially eligible for Medicare's prescription drug benefit, due to begin on January 1, 2006. Some states are sending notices to Medicaid beneficiaries.

The federal notices (in both English and Spanish) to be sent to "dual eligibles" — people eligible for both Medicare and Medicaid — can be reviewed at [www.cms.hhs.gov/medicarereform/lir.asp](http://www.cms.hhs.gov/medicarereform/lir.asp).

One study found that some states are planning to eliminate Medicaid coverage for dual eligibles because of the Medicare drug law's "clawback" provision, which requires states to contribute to the federal cost of providing Medicare drug coverage to this population. You can read the study at <http://www.familiesusa.org>. Some states, including Texas, New Hampshire and Ohio, are contemplating a legal challenge to the clawback, claiming that it is an unconstitutional tax on the states.

## CONGRESSIONAL SCHEDULE

The House and Senate will not be in session in August and the House has set a targeted adjournment date for the year of September 30. The Senate has not yet announced an adjournment date. Many Washington observers predict that both houses will be in session most of October and perhaps into November.

## FACTOIDS

Two-thirds of uninsured women reported that they delayed or went without needed health care in the past year because they could not afford it, a rate that has jumped from 59 percent in 2001. For example, only 40 percent of uninsured women over age 40 had a mammogram in the past year, compared to 74 percent of women with private coverage and 73 percent of women with Medicare. -- Kaiser Family Foundation, July 7, 2005

□ In the next fiscal year, the federal government will □ spend□ more money using special provisions in the tax code than it does through the ordinary budget process. . . There are 150 or more of these special provisions, covering everything from the deduction for home mortgage interest payments to a tax credit for the maintenance of railroad tracks. Tax breaks are, in effect, another form of spending □ which is why they are called □ tax expenditures□ in Treasury Department lingo. Many cost a few tens of millions of dollars or so a year, relatively little in budgetary math, and one or two cost more than \$100 billion a year. But they will add up to more than \$920 billion in lost revenue in fiscal 2006, according to the latest estimates of the Joint Tax Committee of Congress□ -- Congressional Quarterly Weekly, April 4, 2005

## RESOURCES

"Federal Funding of Emergency Health Services Furnished to Undocumented Aliens: 2005-2008" (June 2005). Visit <http://www.healthlaw.org/link.cfm?3391> .

"Straight Talk: Model Hospital Policies and Procedures on Language Access," a legal and regulatory roadmap for hospitals to ensure that patients have access to interpreter services for both inpatient and outpatient services. Funded by The California Endowment, Straight Talk was written by Melinda Paras of Paras and Associates in collaboration with the California Health Care Safety Net Institute (SNI) staff. Visit <http://www.safetynetinstitute.org> .

New from the National Health Law Program:

"Children's Health Under Medicaid: A National Review of Early Periodic Screening, Diagnosis and Treatment - 1999-2003" (May 2005) \$45.00  
<http://www.healthlaw.org/link.cfm?3413>

This chartbook presents national EPSDT trend data from FY 1999-2003. In addition, state-by-state charts show EPSDT performance from FY 1999-2003, reporting on such measures as medical, dental, and lead screening rates, as well as referrals for corrective treatment. This is the 3rd edition of the chartbook, which is one of NHeLP's most popular publications. The first edition was published in 1998 and revised in 2002.

Section I of the chartbook provides a brief overview to the EPSDT program, federal EPSDT requirements, and the value of preventive care.

Section II summarizes national findings and provides innovations and recommendations for improving EPSDT screening and reporting.

Sections III and IV contain state profiles and individual state charts for fiscal years 1999 through 2003.



To order a copy of "Children's Health Under Medicaid," please contact NHeLP's Los Angeles office at [nhelp@healthlaw.org](mailto:nhelp@healthlaw.org) or (310) 204-6010. \$45, 165 pp.

Go to the publications section of NHeLP's website ( <http://www.healthlaw.org/link.cfm?3413> ) to find out more about this and other NHeLP publications.