

## **NHeLP's Capital Communique JUNE/JULY 2010**

This issue is part of 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 Deborah Reid at [reid@healthlaw.org](mailto:reid@healthlaw.org). For updates and information on NHeLP publications, go to <http://www.healthlaw.org>.

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## **NEW LAW**

### *Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010*

On June 25, President Obama signed the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (H.R. 3962) into law. Previously, on June 24, the House passed the legislation by a vote of 417-1. The Senate had approved the legislation by unanimous consent on June 18.

Among other provisions, the new law prevents the 21 percent reimbursement cut for Medicare

physicians that went into effect in June, and instead provides a 2.2 percent payment increase for six months through the end of November 2010. It also prevents hospitals from obtaining Medicare payments for outpatient and inpatient services provided within 72 hours of a hospital admission if related to that admission.

## **BILLS OF INTEREST**

### *Promoting American Jobs and Closing Tax Loopholes Act*

Although the fate of the Promoting American Jobs and Closing Tax Loopholes Act (H.R. 4213) remains uncertain, Congress has undertaken some recent activity on the bill. Senator Baucus (D-Mont.) introduced an amendment substituting new language for the prior text of H.R. 4213. The provisions included continuing the federal Medicaid matching rate (FMAP) increases for six months, through June 30, 2011. The 6.2 percent FMAP increase is currently scheduled to expire on December 31, 2010. In this bill, FMAP assistance increases would be phased down: in January-March 2011, FMAP would be increased by 3.2 percentage points; and for April-June 2011, FMAP would be increased by 1.2 percentage points. States with high unemployment rates would continue to receive the current 6.2 percent FMAP increase. The bill also included extensions of unemployment benefits and other expired provisions.

Nevertheless, the Baucus amendment did not extend COBRA benefit subsidies, which have now expired. This amendment also provided for use of 2009 federal poverty guidelines until May 31, 2011. Because the Senate has not acted on the overall bill, the status of federal poverty guidelines is uncertain. Previous law that required using 2009 poverty guidelines until May 31, 2010, to avoid reductions in eligibility has expired. As a result, there is concern about the impact that any new poverty levels may have on eligibility for programs for low-income communities.

The Senate failed to obtain 60 votes on June 16, 17, and 24, to move the bill forward and avoid a Republican filibuster.

*Possible Action:* Those wishing to do so could contact their elected officials in Congress to urge them to extend FMAP funds, COBRA benefit subsidies, and other provisions to benefit low-income communities in H.R. 4213.

### *Fiscally Responsible Relief for Our States Act of 2010*

On June 30, Senator Scott Brown (R-Mass.) introduced the Fiscally Responsible Relief for Our States Act of 2010 to address extensions of FMAP and unemployment benefits, as well as other expired provisions. The bill provides extensions of unemployment benefits until November 30, 2010, and FMAP benefits until June 30, 2011. Like H.R. 4213, extensions of FMAP benefits are gradually phased-down with the FMAP increase being 3.2 percentage points during the second quarter of FY 2011, and 1.2 percent during the third quarter of FY 2011. There is concern, however, that this phased-down approach will not meet the budget needs of states struggling

with deficits and other spending pressures.

## EXECUTIVE ACTION

### *National Prevention, Health Promotion, and Public Health Council*

President Obama issued Executive Order 13544 on June 10, creating the National Prevention, Health Promotion, and Public Health Council (Council). The Council will be comprised of the Surgeon General as chairperson; as well as the heads of various federal agencies and departments including the Secretaries of the Departments of Agriculture, Labor, HHS, Transportation, Education, Homeland Security; Chairpersons of the Federal Trade Commission and the Corporation for National and Community Service; the Administrator of the Environmental Protection Agency; the Director of National Drug Control Policy; and the Assistant Secretary of the Interior for Indian Affairs.

The Council's duties include:

- providing federal coordination and leadership among all executive agencies on wellness, prevention, and health promotion practices;
- receiving input from stakeholders and developing a national health promotion, public health, and integrative health-care strategy that improves the health status of Americans and reduces the incidence of preventable diseases and disabilities in the U.S.; and
- reviewing and proposing evidence-based models, policies, and approaches for the promotion of models of integrative health, prevention, and public health.

The Executive Order also establishes an advisory group within HHS that will report to the chairperson of the Council. The Council will be comprised of non-federal stakeholders and licensed health professionals who have expertise in areas such as community services, preventive medicine, workplace health promotion, and public health education. These stakeholders will be appointed by the President.

[Click here](#) for the Executive Order.

## HHS UPDATES

### *Medicaid Program; Premiums and Cost Sharing -- Comments Due by July 27*

CMS issued a revised final rule with a comment period on Medicaid premiums and cost-sharing. The final rule implements and interprets provisions of the Deficit Reduction Act of 2005, amended by the American Recovery and Reinvestment Act of 2009, which increase state flexibility to impose premiums and cost sharing for individuals with family incomes above certain levels. The Recovery Act prohibits states from charging premiums and cost sharing to Native Americans who receive direct or contractual services from the Indian Health Service, Indian Tribes, Tribal Organizations, or Urban Indian Organizations.

It is unclear how CMS will apply these rules in Medicaid Section 1115 demonstration projects. For the sake of uniformity, ease of administration, and recognition that individuals receiving Medicaid pursuant to a waiver are still low-income, CMS should apply these rules equally across all Medicaid-funded programs, whether through a state plan or an 1115 demonstration project.

These regulations became effective July 1, 2010. The final rule allows an additional opportunity for comments, which are due by July 27.

*Possible Action:* Those interested and willing to do so should submit comments to CMS and urge them to require all states to adhere to Recovery Act regulations (especially those provisions that prohibit nominal cost sharing for those individuals with incomes below the federal poverty level), as well as prohibit cost sharing in all Medicaid-funded programs.

*Patient Protection and Affordable Care Act (PPACA) Interim Final Rules -- "Patients' Bill of Rights" -- Comments Due by August 27*

On June 22, President Obama announced that HHS and the Departments of Labor and Treasury issued interim final rules implementing certain provisions of the PPACA, which he entitled, the "Patients' Bill of Rights." The new interim final rules provide additional guidance for a number of health reform provisions, including:

- preventing health insurance companies from removing coverage for individuals who become ill, and for individuals and employers who inadvertently make errors on insurance applications;
- prohibiting insurers from denying coverage to children because of pre-existing conditions, as of September 23 (for plan years that begin after that date);
- ensuring that women's preferences for obtaining gynecological or obstetrical care without the need for a referral from their primary care provider are protected, as well as those of patients' choices of a primary care physician or pediatrician that are within their health plan networks;
- preventing insurers from using lifetime limits in all health plans and insurance policies issued or renewed on or after September 23, 2010; and
- defining "grandfathered" health plans as those that existed as of March 23, 2010, which are exempt from certain PPACA requirements. The insurers are still permitted to make routine changes to plans to contain costs without them losing their grandfather status. These routine changes include: making simple adjustments to existing benefits, offering new health benefits, establishing adjustments to keep up with medical inflation, or creating changes to comply with state or federal laws. Grandfathered status can be lost if plans significantly reduce benefits or increase costs to consumers.

Comments on the interim final rules must be received on or before August 27. More details can be found in the *Federal Register*; [click here](#).

*New Proposed Rule to Ensure Equal Visitation Rights for All Hospital Patients -- Comments Due by August 27*

On June 28, HHS released proposed rules on visitation rights that would impact all hospitals and critical access hospitals participating in the Medicaid or Medicare programs. The proposed rule is in response to President Obama's April 15 Presidential Memorandum, which requested the start of rulemaking to ensure that hospitals receiving Medicare or Medicaid funding adhere to patients' preferences for visitors, regardless of the relationship of the visitors to the patient, to improve the patient's wellbeing. Comments on the proposed rule must be submitted by August 27. For the proposed rule, [click here](#). For President Obama's April 15 Memorandum, [click here](#).

HHS Secretary Kathleen Sebelius issued a letter to major hospital associations asking for their compliance with the new rule, prior to its creation through the rulemaking process. [Click here](#) for the HHS letter to hospital associations.

## LITIGATION UPDATE

### *McCartney v. Cansler*

The Fourth Circuit Court of Appeals affirmed the district court's decision in *McCartney v. Cansler*, a Medicaid due process case that NHeLP is co-counseling. The case involves notice and fair hearings in North Carolina when behavioral health and developmental disability services are denied, reduced or terminated. The Court affirmed the District Court's decision that the Secretary of the North Carolina Department of Health and Human Services was not entitled to sovereign immunity protection in this complaint, primarily because the complaint alleged ongoing violations of federal laws involving notice and fair hearings, and the plaintiffs sought immediate relief to prevent the occurrences of these violations.

## RESOURCES

NHeLP's in-depth analysis of PPACA provides summary and analysis for sections of the new law that are particularly relevant to the health of low-income populations, such as private market reforms and state based exchanges; changes in the Medicaid program; financial assistance for purchasing private insurance through the new exchanges; women's and children's health; health disparities; language access; and other selected provisions from titles of PPACA and reconciliation law. For the complete analysis, [click here](#).

NHeLP is tracking litigation that is being filed to stop the new health reform law, with at least 12 cases currently underway around the country. Go to NHeLP's website to find: copies of selected pleadings in these cases, resources discussing and analyzing the legal issues, and a case schedule (updated by NHeLP twice weekly) that shows recent and upcoming activity in all of the cases. Specifically of interest is a letter from Connecticut Attorney General Richard

Blumenthal to Members of Congress explaining why his office decided not to join in pending litigation. For further information, [click here](#).

The Urban Institute, "Are State Challenges to the Legality of the Patient Protection and Affordable Care Act Likely to Succeed?" The analysis examines current legal challenges to the constitutionality of the recently passed health reform laws and concluded that PPACA was constitutional. Specifically, the report found that previous Supreme Court decisions have established insurance as interstate commerce (which the federal government has the constitutional authority to regulate), and that state participation in the law (such as in Medicaid) is voluntary. For the complete analysis, [click here](#).

## **FEDERAL FACTOID**

States would receive significant benefits in Medicaid savings from a six month extension of FMAP increased rates. For example, estimates for Alabama are \$133 million; California: \$1.9 billion; and Pennsylvania: \$667 million. The failure of Congress to pass legislation extending FMAP assistance to the states will result in more severe state spending cuts and will raise taxes, which will ultimately raise the risk of a double-dip recession. The Center on Budget and Policy Priorities, "What States and the Economy Lost When the Senate Jobs Bill Failed: Data on How Much Medicaid Aid Each State Lost." For the full report, [click here](#).