



CALIFORNIA MANAGED RISK MEDICAL INSURANCE BOARD

Agenda Item 7(a)(2)
05/21/08 Meeting

BILL ANALYSIS

Topic: Assembly Joint Resolution 54 (Laird) – Call to Rescind the Centers for Medicare and Medicaid Services’ August 17, 2007 Directive (Version: May 6, 2008). Analysis information as of May 15, 2008.

SUMMARY

AJR 54 would call on the President and Congress to rescind the directive in a letter issued by the federal Centers for Medicare and Medicaid Services on August 17, 2007, restricting states’ flexibility to enroll certain children in the State Children’s Health Insurance Program (SCHIP).

MRMIB POSITION: SUPPORT

The Managed Risk Medical Insurance Board (MRMIB) has taken a **SUPPORT** position on AJR 54.

BACKGROUND

The History of SCHIP

The federal SCHIP law, passed in 1997, provides federal funding for eligible children whose families make too much to qualify for Medicaid and provides states with flexibility to design their programs to meet the state-specific needs. The law provided 10 years of federal funding through Federal Fiscal Year 2007 (FFY 2007), ending September 31, 2007. One of the hallmarks of the Act is allowing states’ flexibility for establishing eligibility and benefits for children enrolled in their programs.

Throughout the last 10 years, the federal Centers for Medicare and Medicaid Services (CMS) authorized numerous states’ to expand SCHIP coverage to uninsured populations with incomes above 200% federal poverty level (FPL), including California. CMS has also consistently interpreted federal law as permitting states flexibility in setting income eligibility levels and in the way states may calculate income through the application of various income exemptions and disregards.

As Congress worked on passing legislation providing SCHIP funding beyond the end of FFY 2007, President Bush led the argument for altering rules to restrict state flexibility for enrolling children from families with incomes above 200% FPL. The President later

vetoed two bills passed by a bi-partisan Congress, arguing that enrolling children with family incomes above 200% undermined private insurance coverage. Congress rejected attempts to limit SCHIP coverage to children in families below 200% FPL in legislation. Ultimately, Congress and the President enacted a stop-gap bill that made no policy changes to SCHIP and provided funding through March 2009.

CMS' August 17, 2007 SCHIP Letter

On August 17, 2007, CMS sent a letter to all states' SCHIP programs, asserting new conditions would have to be satisfied in order for states to serve children with family incomes above an "effective" or gross income of 250% FPL. These conditions were quite similar to the policies the President had advanced for limiting SCHIP coverage during the reauthorization debate.

CMS has asserted states would no longer be given flexibility to apply income deductions, which many states have routinely done since SCHIP began. Historically, states' have modeled their approach for calculating income after Medicaid to assure consistency in calculating income for the two programs and to assure that uninsured children do not fall through eligibility cracks that would be created by evaluating income differently. CMS' new interpretation for calculating income levels would require states to maintain two eligibility systems: one for children at higher incomes and one for children at lower incomes.

CMS' letter also included a series of requirements, all of which states must satisfy to enroll children above 250% FPL. The new requirements are:

- Cost sharing cannot be more favorable than competing private plans by more than one percent of family income, unless the public plan's cost sharing is set at the maximum level allowed under federal law (five percent of family income);
- States must establish a minimum 12 month period of uninsurance for children with effective incomes above 250% FPL before they may enroll; and
- Monitoring and verification of a child's eligibility must include information regarding coverage provided by a noncustodial parent.

In addition, the letter asserts that states must:

- Assure enrollment of at least 95% of uninsured children below 200% FPL who are eligible for SCHIP or Medicaid;
- Assure a less than two percent decline in the number of children under 200% FPL who have been insured through private employers over the past five years, and;
- Assure that it is current with all SCHIP and Medicaid reporting requirements and that it report data monthly relating to these new requirements.

States seeking to expand eligibility above gross 250% FPL were told to immediately comply with the above requirements. States already enrolling children with gross income above 250% FPL were told to amend their state plans and make necessary operational and policy changes by August 17, 2008 to comply with the letter.

California's SCHIP program allows enrollment of children with gross family income above 250% FPL. These include children who are income-eligible after authorized income deductions are applied to their family income, pregnant women and their babies up to age two, and children in three counties, approved by CMS, to enroll children up to 300% FPL using local funding to draw federal funds. Consequently, CMS representatives have indicated that California must comply with the provisions of the August 17 letter by August 17, 2008.

CMS' May 7, 2008 SCHIP Letter

On May 7, 2008, CMS released a letter attempting to clarify provisions in its August 17 letter. The new letter says that states need not apply a requirement for 12 months of uninsurance prior to enrolling to "unborn children," i.e., pregnant women. Also, the letter says that none of the provisions of the August letter apply to children already enrolled in the program. However, CMS continues to assert its new interpretation of "effective" or gross income for determining SCHIP eligibility.

The May letter also says that CMS will advise states on approaches that may be taken to "refine" the use of Current Population Survey (CPS) data to measure compliance with the requirement for enrolling 95% of children below 200% FPL. This approach, however, raises serious concerns about the validity of data. A California HealthCare Foundation assessment by Harbage Consulting, using an Urban Institute model, suggests California has met and exceeded the standard by enrolling 135% of children eligible for Medi-Cal and Healthy Families.

A consequence of taking CMS' approach to measure compliance with the 95% standard is it will reduce a state's true number of uninsured but eligible children. Because each state's SCHIP allotment is calculated using the number of its low income uninsured children, by agreeing to this refinement process, states would artificially reduce their annual SCHIP funds.

National Impact

The impact of the August 17th letter was swiftly felt by lower income children. A Georgetown University, Center for Children and Families report found that four states that enacted legislation expanding their SCHIP programs were forced to halt or cut back their plans. Two other states have chosen to finance their expansions without federal funds and 18 more states are expected to be affected over the next five months, including 14 that cover children above gross income of 250% FPL.

A Families USA's February 2008 report estimates that the letter has prevented more than 150,000 children nationally from getting health care in states that tried to expand SCHIP coverage.

Many states either can not or believe they should not comply with letter which effectively imposes a new income eligibility cap.

States' Challenge CMS' Authority to Change Policy Via a Letter

CMS' actions have spawned lawsuits by states and consumers. California and other states do not concede the legality of the directive and do not believe that CMS has authority via letter to force states to make changes that undermine the SCHIP goal to maximize coverage of uninsured children of working families.

The states of New York (joined by Illinois, Maryland and Washington) and New Jersey have filed lawsuits against the federal Department of Health and Human Services (HHS) seeking to prevent HHS from disapproving any state plan amendment using the criteria based on the August letter. California, Connecticut, Massachusetts, and New Mexico have jointly filed an amicus brief in support of the New York litigation. In addition, a New York advocacy organization has filed a lawsuit against the Secretary of HHS asking for similar relief.

Congress Challenges CMS' Authority to Enforce the August 17 Letter's Provisions

Members of Congress have introduced three bills, highlighted later in this analysis, with provisions that would rescind the provisions of the August letter.

Impact on California

As noted, CMS has not issued any written instructions ("guidance letters") on how to comply with its new requirements. Instead CMS representatives have contacted states individually to discuss ways that the state may comply or measure compliance. The CMS staff has declined to articulate the process that will be taken if a state is ultimately seen as out of compliance with any of the requirements, since states have been told that they must comply with **all** them or will be out of compliance.

It is unlikely that California could comply with several of the requirements. The California HealthCare Foundation's October 5, 2007 report "Assessing California's Ability to Comply with New Federal SCHIP Rules" identified two requirements that are virtually impossible for California to meet:

- Assure that the number of children in the target population (under 200% FPL) insured through private employers has not decreased by more than 2% over the prior five years, and;
- Assure that the state has enrolled at least 95% of the state's uninsured children below 200% FPL eligible for SCHIP or Medicaid.

The report also identifies other requirements that California may meet but would significantly increase program administrative costs and complexity while increasing the barriers to enroll uninsured eligible children.

MRMIB staff estimate approximately 35,000 children with gross family income above 250% FPL are currently enrolled in the "Healthy Families" program. Under the conditions of the letter, if these children were to drop out of the program for any reason, such as failure to pay their monthly premium, they would not be allowed to reenroll using federal funds. Furthermore, if California could not comply with the letter's requirements, additional children who are currently eligible in families with gross income above 250% FPL would not be allowed to enroll using federal funds. Also, MRMIB staff project that 14,000 children currently eligible would be turned away from enrolling in coverage annually under the provisions of the August 17 letter.

The new requirement that children must be uninsured for 12 months before enrolling in SCHIP would mean that California would need to increase its current requirement for a 3-month period of uninsurance by 400%. The price for this policy would be great. Children would lack access to affordable health care or any health care, and the demand on emergency rooms, already overburdened, would increase even more, potentially threatening the lives of other persons in need of emergency care.

California's Response

Governor Schwarzenegger wrote to President Bush on August 29, 2007 and U.S. Health and Human Services Secretary Leavitt on September 17, 2007 asking that they withdraw the August letter. Governor Schwarzenegger also directed the California Attorney General to file an amicus brief in conjunction with the New York State lawsuit. The states of Connecticut, Massachusetts and New Mexico joined California in filing the brief on April 18, 2008.

California has repeatedly made clear statements that some policies in August 17, 2007 letter are simply bad public policy and contrary to the policy direction that has been embraced by California's Governor, Legislature and existing state law for the last 10 years.

RELATED LEGISLATION

The following federal bills have been introduced in order to rescind the August 17, 2008 CMS letter's provisions from being implemented:

S 2819 (Rockefeller) – April 3, 2008: Introduced and referred to the Committee on Finance.

H.R. 3555 (Pallone) – September 17, 2007: Introduced and referred to the Energy and Commerce Committee.

H.R. 5998 (Pallone) – To be introduced and scheduled to be heard May 15, 2008 in the Energy and Commerce Subcommittee on Health.

STATUS

As of May 12th, AJR 54 was scheduled for Third Reading on the Assembly Floor.

POSITIONS OF ORGANIZATIONS

Support: The 100% Campaign (sponsor)
PICO California (sponsor)
American Academy of Pediatrics - California District
American Federation of State, County and Municipal Employees
California Children's Hospital Association
California School Boards Association
California State Association of Counties
Children Now
Children's Defense Fund California
Community Health Councils
Insure the Uninsured Project
Los Angeles Unified School District
Napa County Children's Health Initiative
Regional Council of Rural Counties
The Children's Partnership
United Ways of California

Opposed: None currently on file.