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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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July 11, 2012

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LAWRENCE J. BRADY
STAFF DIRECTOR

Ms. Marilyn Tavenner
Acting Administrator
Centers for Medicare and Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Ms. Tavenner:

On June 28, 2012, officials from the Centers for Medicare and Medicaid Services (CMS) briefed Committee staff on CMS' historical overpayment to New York State-operated developmental centers with federal Medicaid reimbursement funds.¹ Committee staff requested the briefing in light of the Department of Health and Human Services (HHS) Office of Inspector General (OIG) May 2012 report entitled, "Medicaid Rates for New York State-Operated Developmental Centers May Be Excessive."² The OIG report identified at least \$1.4 billion in overpayments to the State for fiscal year 2009 and found that these overpayments have occurred for over two decades.³ CMS officials confirmed in the staff briefing that New York may have received upwards of \$10 billion beyond actual costs through this program to subsidize other State spending. This alone is not acceptable but what is more alarming is that these overpayments are still occurring.

Neither New York nor CMS dispute the fact that New York's developmental centers are significantly overpaid. In fact, CMS officials informed Committee staff that CMS uncovered the State's high reimbursement rate for developmental centers through a financial review of the State's Medicaid Management Information System (MMIS) in 2007.⁴ However, CMS chose not to contact the State for nearly three years about this problem, allowing federal taxpayers to continue overpaying the State's development centers in excess of \$1 billion per year. It appears CMS only acted after this scandal was uncovered and reported by *The Poughkeepsie Journal* on

¹ Briefing with Centers for Medicare & Medicaid Servs. (June 28, 2012) [hereinafter Briefing].

² OFFICE OF INSPECTOR GEN., DEPT. OF HEALTH & HUMAN SERVS., A-02-11-01029, MEDICIAD RATES FOR NEW YORK STATE-OPERATED DEVELOPMENTAL CENTERS MAY BE EXCESSIVE (2012), available at <http://oig.hhs.gov/oas/reports/region2/21101029.pdf>. [hereinafter OIG Report].

³ *Id.*

⁴ *Id.*

June 20, 2010.⁵ In a July 13, 2010, letter to Donna Fescatore, the Deputy Commissioner of the New York State Department of Health, CMS explained that, “[i]t has come to CMS’ attention that several New York State operated developmental centers currently claim for ICR-MR services at daily Medicaid rates in excess of \$4,500 per beneficiary.”⁶ Two months later, the State acknowledged in its response to CMS that “the approved rate methodology does result in institutional payments that exceed the costs of operating the facilities.”⁷

Despite recognition of the overpayments, both parties failed to stop the daily reimbursement rates from increasing to \$5,118, or the equivalent of \$1.9 million per beneficiary per year by 2011.⁸ During the June 28, 2012, briefing, however, CMS officials informed Committee staff that both parties have engaged in ongoing negotiations to develop a corrective action plan that limits the State’s overpayments for developmental centers.⁹ Although CMS officials were unable to provide Committee staff with details of the corrective action plan, CMS explained that the plan allows the State to continue to receive billions of dollars in overpayments for at least the next five years.

This plan, which is grossly unfair to federal taxpayers, indicates CMS is cavalier with taxpayer resources. For example, we doubt that if you caught someone deliberately overcharging you, that you would allow them to continue overcharging you as long as they gradually overcharged less over time. As a guardian of limited taxpayer resources, you have a responsibility to end all excess payments immediately.

According to Penny Thompson, CMS’ Deputy Director of the Center for Medicaid and CHIP Services, CMS is going to continue to allow New York to overcharge federal taxpayers for at least another five years because the State has grown dependent on the excess federal funds for developmental centers.¹⁰ Unfortunately, given the federal government’s current budget deficit and enormous debt load, New York’s windfall through this program is unacceptable on all levels. It is time for New York to make tough choices regarding the State’s Medicaid program, which spends 25 percent more than California spends on Medicaid despite having only half the population.¹¹

The Committee requests that you act in accordance with the law to ensure that state Medicaid payment rates are consistent with efficiency, economy and quality of care comparable

⁵ Mary Beth Pfeiffer, *At \$4,556 a day, N.Y. disabled care No. 1 in nation*, PoughKeepsieJournal (June 20, 2010), <http://www.poughkeepsiejournal.com/article/20100620/NEWS01/6200374/At-4-556-day-N-Y-disabled-care-No-1-nation>.

⁶ Letter from Sue Kelly, Assoc. Reg’l Adm’r, Centers for Medicare & Medicaid Servs., to Donna Fescatore, Deputy Comm’r, New York State Dept. of Health (July 13, 2010).

⁷ Letter from Donna Fescatore, Deputy Comm’r, State of New York Dept. of Health, to Sue Kelly, Assoc. Reg’l Adm’r, Centers for Medicare & Medicaid Servs. (Sept. 14, 2010).

⁸ OIG Report, *supra* note 2.

⁹ Briefing, *supra* note 1.

¹⁰ *Id.*

¹¹ *Total Medicaid Spending, FY2010*, THE HENRY KAISER FAMILY FOUNDATION, <http://www.statehealthfacts.org/comparemaptable.jsp?ind=177&cat=4> (last visited July 3, 2012).

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to the services available to the general public.¹² Specifically, the Committee urges you to ensure the corrective action plan with the State of New York includes the immediate cessation of excessive reimbursement rates for the State's developmental centers. Rather than enabling the State to continue overcharging federal taxpayers, we urge you to assess your ability to recover the billions in improper payments that was sent to the State over the past two decades through the State-operated developmental centers.

In addition, we request that you provide responses to the following questions and that you provide the following documents by July 25, 2012:

1. Please provide a breakdown of what the State of New York is doing with the excessive funds at part of the overpayments.
2. Are any of the excess funds being used by the State to leverage additional federal Medicaid money?
3. How is New York calculating actual costs and are the State's reported costs legitimate?
4. Please provide a copy of all audits from calendar year 1990 to present concerning Medicaid funding to the State of New York operation of development centers.

In preparing your answers to these questions, **please answer each question individually** and include the text of each question along with your response. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

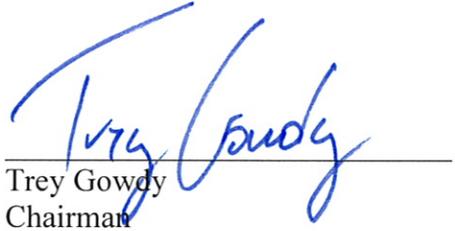
The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about the Committee's request. We prefer, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Brian Blase with the Committee staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman



Trey Gowdy
Chairman

Subcommittee on Health Care, District of
Columbia, Census and the National Archives

¹² See Social Security Act §1902(a)(30)(A).

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Attachment

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

The Honorable Danny Davis, Ranking Minority Member, Subcommittee on Health Care,
District of Columbia, Census and the National Archives

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Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.