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ONE HUNDRED THIRTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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June 17, 2013

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

Dear Ms. Tavenner:

We write to you in continuance of the Committee's oversight of New York State's Medicaid program. Earlier this year, the Committee released a bipartisan report which concluded that New York State's Medicaid program had "misspen[t] tens of billions of Federal tax dollars over the past few decades."<sup>1</sup> One section of the report pertained to large overpayments received by New York State-operated developmental centers over the past two decades. At the Committee's urging,<sup>2</sup> the Centers for Medicare and Medicaid Services and the State agreed to reduce these overpayments considerably, saving federal taxpayers an estimated \$1.2 billion over the next 18 months<sup>3</sup> and billions more thereafter.

While the reduction in overpayments going forward is a positive development, the Committee estimated that the federal share of these overpayments was \$15 billion over the past two decades. We reiterate a Committee recommendation, from the bipartisan report, that CMS recover as much of the \$15 billion in past overpayments as soon as possible. In addition to the Committee's interest in the resolution of the developmental center overpayments and recovery of past overpayments, we write with additional concerns about New York State's Medicaid long-term care program.

<sup>1</sup> REPORT BY THE H. CMTE. ON OVERSIGHT AND GOVT. REFORM, "Billions of Federal Tax Dollars Misspent on New York's Medicaid Program," HOUSE OF REPRESENTATIVES REPORT 113-11 (Mar. 5, 2013).

<sup>2</sup> Letter from Rep. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and Rep. Trey Gowdy, Chairman, Subcomm. on Health Care, D.C., Census & the Nat'l Archives to Marilyn Tavenner, Acting Adm'r of the Ctrs. for Medicare and Medicaid Servs. (July 11, 2012).

<sup>3</sup> Ctrs. for Medicare and Medicaid Servs. estimates.

A *New York Times* article from last year described the State's plan to shift 70,000 to 80,000 Medicaid beneficiaries who need long-term care into managed care plans.<sup>4</sup> New York State allows the managed care plans, which are paid approximately \$3,800 per enrollee each month, to conduct eligibility determinations directly.<sup>5</sup> These plans typically cover services at adult daycare centers, with the number of such centers in New York City growing from eight to 192 over the past two years.<sup>6</sup> The adult daycare centers can also refer individuals to the managed care plans for enrollment. According to the *New York Times*, the daycare centers are inappropriately referring healthy individuals for coverage in Medicaid-managed long-term care plans:

[S]ome centers had persuaded seniors to sign up with incentives like free takeout food, casino visits and cash before steering them to managed care companies eager to enroll them in plans designed for older people with long-term needs like home health care and nursing.<sup>7</sup>

Reports also indicate that political corruption permeates New York City's adult daycare centers. For example, New York State Assemblyman Eric Stevenson was arrested for allegedly accepting bribes to assist individuals in opening an adult daycare center in the Bronx.<sup>8</sup>

Medicaid long-term care is intended for seniors who are frail, chronically ill, and disabled. Clearly, Medicaid is being utilized in New York by healthy seniors who do not need long-term care services and supports. Part of the problem in New York results from managed long-term care plans conducting their own eligibility determinations for Medicaid. Allowing the plans, which benefit from increased enrollment, to conduct their own eligibility determinations undoubtedly leads to a large incentive for significant waste, fraud, mismanagement and abuse in the Medicaid program. A *New York Times* reporter "observed a stream of agile elderly people collecting free restaurant takeout food [from the Medicaid-financed adult daycare center] and walking away with it, or riding off on bicycles."<sup>9</sup> While managed care companies in New York benefit from enrolling healthy seniors into their Medicaid plans, frail seniors with much greater need for extra care were prevented from enrolling.<sup>10</sup>

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<sup>4</sup> Joseph Berger, *A Shift from Nursing Homes to Managed Care at Home*, N.Y. TIMES (Feb. 24, 2012), available at [http://www.nytimes.com/2012/02/24/nyregion/managed-care-keeps-the-frail-out-of-nursing-homes.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/24/nyregion/managed-care-keeps-the-frail-out-of-nursing-homes.html?pagewanted=all&_r=0).

<sup>5</sup> Nina Bernstein, *State Suspends Enrollment in an Adult Care Plan Amid Concerns Over Fraud*, N.Y. TIMES (Apr. 26, 2013), available at <http://www.nytimes.com/2013/04/26/nyregion/new-york-suspends-enrollment-in-long-term-care-plan.html>.

<sup>6</sup> Nina Bernstein, *Day Centers Sprout Up, Luring Fit Elders and Costing Medicaid*, N.Y. TIMES (Apr. 23, 2013), <http://www.nytimes.com/2013/04/23/nyregion/day-centers-lure-fit-elders-and-bill-medicare.html?pagewanted=all>.

<sup>7</sup> Bernstein, *supra* note 5.

<sup>8</sup> Erica Orden, *N.Y. Assemblyman, 4 Others Accused of Corruption*, WALL ST. J. (Apr. 4, 2013), available at <http://online.wsj.com/article/SB10001424127887323646604578402400161115598.html>.

<sup>9</sup> Bernstein, *supra* note 5.

<sup>10</sup> Nina Bernstein, *Advocates Say Managed-Care Plans Shun the Most Disabled Medicaid Users*, N.Y. TIMES (Apr. 26, 2013), available at <http://www.nytimes.com/2013/05/01/nyregion/advocates-say-ny-managed-care-plans-shun-the-most-disabled-seniors.html>.

Unfortunately, it appears key New York State policymakers believe managed care plans are best positioned to conduct eligibility determinations. For example, when asked about the practice of allowing managed care plans to conduct eligibility determinations, New York State Medicaid director Jason Helgeson told the *New York Times* that these long-term care managed care plans “are better positioned than us to stamp out fraud and abuse.”<sup>11</sup>

During a May 9, 2013, phone call, CMS officials told Committee staff that a recent waiver negotiated between CMS and New York State would end these abusive enrollment practices, but that they would continue up until the end of 2014.<sup>12</sup> Given the rampant abuse of eligibility rules in New York, we urge CMS to prohibit managed care companies in New York and across the country from conducting eligibility determinations for Medicaid immediately. In addition, we urge CMS to disallow the State from receiving Federal reimbursement for all unlawful or inappropriate expenditures related to improper enrollment in long-term care managed care plans. Similar to ending the developmental center overpayments, CMS must act quickly to end the waste, fraud, abuse and mismanagement, so taxpayer dollars are only supporting individuals in genuine need of public assistance.

According to the *New York Times*, Mr. Helgeson said that the State relies on the New York State Office of the Medicaid Inspector General (OMIG) to oversee and audit the adult daycare centers. However, numerous accounts suggest that OMIG cannot be trusted to conduct a complete and trustworthy audit of the adult daycare centers. Last year, the *Albany Times Union* interviewed several current and former OMIG employees who called OMIG “a highly politicized, dysfunctional, mismanaged and ineffective agency where many of the 500 or so employees have little to do.”<sup>13</sup> Last year, the *New York Times* reported that OMIG oversight became much less vigorous after James Cox replaced James Sheehan as Medicaid Inspector General, and important audits became “caught between the Legislature’s allegiances to campaign contributors from the health care field and the governor’s plans to cut Medicaid costs.”<sup>14</sup>

In addition, whistleblower information obtained by the Committee suggests that OMIG has not conducted any meaningful audits between July 2011 and May 2013, when it started redrafting and promulgating audit protocols. Given the importance of this issue, we strongly recommend that CMS conduct its own audit of adult daycare centers in New York to determine the scope and size of the problem. In order for the Committee to understand whether and how you plan to address our recommendations, we ask that you contact Brian Blase of the Committee Staff at 202-225-5074 by June 24, 2013, to arrange for a briefing.

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<sup>11</sup> Bernstein, *supra* note 6.

<sup>12</sup> Call between Committee staff and CMS officials, May 9, 2013.

<sup>13</sup> James M. Odato, *Fraud Agency Called Adrift*, ALBANY TIMES UNION, Nov. 18, 2012, at A1. Copy on file with author.

<sup>14</sup> Nina Bernstein, *Under Pressure, New York Moves to Soften Tough Medicaid Audits*, N.Y. TIMES (Mar. 18, 2012), available at [http://www.nytimes.com/2012/03/19/nyregion/new-medicaid-inspector-general-supports-less-adversarial-audits.html?\\_r=0](http://www.nytimes.com/2012/03/19/nyregion/new-medicaid-inspector-general-supports-less-adversarial-audits.html?_r=0).

The Honorable Marilyn Tavenner  
June 17, 2013  
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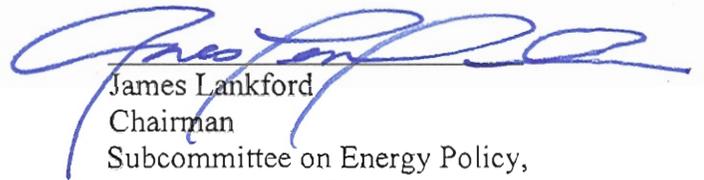
The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

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

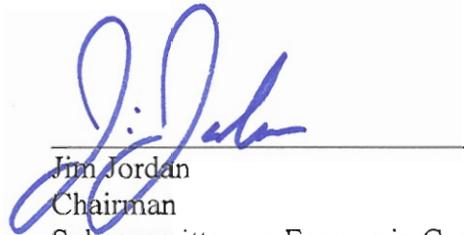
Sincerely,



Darrell Issa  
Chairman



James Lankford  
Chairman  
Subcommittee on Energy Policy,  
Health Care and Entitlements



Jim Jordan  
Chairman  
Subcommittee on Economic Growth,  
Job Creation and Regulatory Affairs

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Jackie Speier, Ranking Minority Member  
Subcommittee on Energy Policy, Health Care and Entitlements

The Honorable Matthew A. Cartwright, Ranking Minority Member  
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs

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WASHINGTON, DC 20515-6143

Majority (202) 225-5074  
Minority (202) 225-5051

**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.