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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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LAWRENCE J. BRADY
STAFF DIRECTOR

February 11, 2014

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Madam Secretary:

The Committee is continuing its oversight of CMS's management and of state Medicaid programs, particularly New York's Medicaid program. On March 5, 2013, the Committee issued a bipartisan report entitled *Billions of Federal Tax Dollars Misspent on New York's Medicaid Program*.¹ The only member who opposed this report was from New York.² The report discusses how poor program oversight at the federal and state levels and improper state financing arrangements led New York to misspend tens of billions of federal Medicaid dollars over the past two decades.³ Largely as a result of this misspending, New York spent \$2,700 per resident on Medicaid in fiscal year 2010, an amount which exceeded the per capita Medicaid spending in the rest of the country by more than \$1,500.⁴ Perhaps the most egregious example discussed in the report was the \$5,000 per day rate that the Medicaid program was paying for each resident of State-operated institutions, known as developmental centers.⁵ According to the Committee's calculations, New York State received approximately \$15 billion in federal overpayments between 1991 and 2011 through just the State-operated developmental centers.⁶

In the report, the Committee made six recommendations, several of which called for the Centers for Medicare and Medicaid Services (CMS) to take action to address problems with New York's Medicaid program.⁷ Two of the recommendations are:

- CMS should finalize an agreement with the State of New York on a corrected payment methodology that ends the developmental center overpayments as soon

¹ Committee Staff Report, *Billions of Federal Tax Dollars Misspent on New York's Medicaid Program*, U.S. House Committee on Oversight & Gov't Reform (Mar. 5, 2013) [hereinafter "Committee Staff Report"].

² *Id.*

³ *Id.* at 3.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Committee Staff Report, *supra* note 1, at 4.

as possible. CMS should pursue recovery of an appropriate portion of previous overpayments in excess of reasonable costs for Federal taxpayers.⁸

- CMS' review of New York's Section 1115 waiver request, to allow the State to keep a portion of the savings its Medicaid reforms are projected to achieve should follow all applicable statutory requirements, particularly with respect to budget neutrality. CMS should also ensure that the baseline from which New York is calculating the savings does not include developmental center overpayments or other overpayments.⁹

During a hearing in September 2012, as well as in briefings with Committee staff last year, senior CMS officials assured the Committee that CMS was committed to correcting the developmental center overpayments and determining an appropriate amount of money for the state to reimburse Federal taxpayers.¹⁰ We understand that several months ago, the Office of the Inspector General for the Department of Health and Human Services (HHS) assisted CMS in calculating the excess federal money received by New York through the developmental center overpayments. We request that you share this information with the Committee as well as the amount that you determined the State should reimburse taxpayers for over two decades of developmental center overpayments.

Recent news reports suggest that New York State politicians are pressuring HHS to approve a Section 1115 waiver request that appears to be an additional transfer of federal Medicaid dollars to New York State.¹¹ This waiver request will potentially cost taxpayers an additional \$10 billion. We urge you to ensure taxpayers are justly compensated for decades of Medicaid overpayments received by New York State prior to the approval of this pending waiver. Moreover, given last year's troubling Government Accountability Office report, which found that CMS often approves Section 1115 waivers that are not budget neutral and that have a substantial net cost to federal taxpayers, we ask that CMS's Office of the Actuary certify the budget neutrality of New York's waiver application prior to its approval.¹²

We also urge you to take actions to recover Medicaid funds inappropriately received by New York and identified in the many Office of Inspector General reports on this matter. In the past five months, the OIG has issued at least four reports of improper federal Medicaid payments received by the State. In September 2013, the OIG issued two reports – one estimated that New York received \$11.0 million in excessive Medicaid payments for hospital-based continuing day treatment services,¹³ while a second report estimated that New York improperly received \$54.3

⁸ *Id.* at 5.

⁹ *Id.*

¹⁰ *Examining the Administration's Failure to Prevent and End Medicaid Overpayments: Hearing Before the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2012)* (testimony of Penny Thompson, Deputy Director, Center for Medicaid and CHIP Services); Phone briefings between CMS and Committee staff (July 2013).

¹¹ Chris Smith, *Washington Politics Threaten Plan to Save New York's Hospitals*, NYMAG.COM, Jan. 29, 2014, <http://nymag.com/daily/intelligencer/2014/01/washington-save-new-york-hospitals.html>.

¹² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-384, MEDICAID DEMONSTRATION WAIVERS: APPROVAL PROCESS RAISES COST CONCERNS AND LACKS TRANSPARENCY (2013).

¹³ GLORIA L. JARMON, DEP'T OF HEALTH AND HUMAN SERVS., NEW YORK CLAIMED HOSPITAL-BASED CONTINUING DAY TREATMENT SERVICES THAT WERE NOT IN COMPLIANCE WITH FEDERAL AND STATE REQUIREMENTS (Sept. 2013).

million in Medicaid payments for home health services.¹⁴ In October 2013, the OIG issued a report estimating that New York improperly received \$10.9 million in Medicaid reimbursements for orthodontic services delivered in New York City.¹⁵ And just last month, the OIG issued a report estimating that New York improperly received \$25.0 million for unallowable Medicaid fee-for-service payments for beneficiaries also enrolled in Medicaid managed care plans.¹⁶ To date, it appears that CMS has not recovered any of these improper federal Medicaid payments.

Moreover, over the past decade, the OIG has issued ten separate reports, each of which found that New York improperly claimed at least \$50 million in Medicaid money.¹⁷ The findings of improper payments in these ten reports totaled \$1.745 billion.¹⁸ According to information provided by the OIG, as of mid-2012, only \$115.6 million (or about 6.6 percent of the total improper payments received) had been returned to the Federal Treasury.¹⁹ In many of these cases, CMS disregarded the recommendation of the OIG and allowed New York to misspend federal taxpayer dollars without consequence.²⁰ We urge you to resolve all outstanding findings by the OIG involving Medicaid funds improperly received by New York prior to approving its section 1115 waiver request.

The government has a responsibility to provide a safety net for individuals who truly need public assistance. However, New York's Medicaid program has fostered a system that over the past two decades has wasted vast sums of our nation's limited resources. Powerful special interest groups, cronyism, and political corruption in the State have largely contributed to the New York Medicaid program's unchecked growth and have made program reform exceedingly difficult. As a key steward of the federal Medicaid program, you have a responsibility to ensure that taxpayers are reimbursed for improper Medicaid payments and that State waiver requests do

¹⁴ DANIEL R. LEVINSON, DEP'T OF HEALTH AND HUMAN SERVS., NEW YORK STATE IMPROPERLY CLAIMED MEDICAID REIMBURSEMENT FOR SOME HOME HEALTH SERVICES CLAIMS SUBMITTED BY CERTIFIED HOME HEALTH AGENCIES (Sept. 2013).

¹⁵ GLORIA L. JARMON, DEP'T OF HEALTH AND HUMAN SERVS., NEW YORK IMPROPERLY CLAIMED MEDICAID REIMBURSEMENT FOR ORTHODONTIC SERVICES TO BENEFICIARIES IN NEW YORK CITY (Oct. 2013).

¹⁶ GLORIA L. JARMON, DEP'T OF HEALTH AND HUMAN SERVS., NEW YORK STATE MADE UNALLOWABLE MEDICAID FEE-FOR-SERVICE PAYMENTS FOR BENEFICIARIES ALSO ENROLLED IN MEDICAID MANAGED CARE (Jan. 2014).

¹⁷ See Office of the Inspector General, Review of Speech School Health Claims – NYCDE, A-02-02-01029 (June 16, 2005); Office of the Inspector General, Review of Medicaid Personal Care Services Claims Made By Providers in New York City, A-02-07-01054 (June 8, 2009); Office of the Inspector General, Review of Retroactive School Health Claims – New York City Dept. of Education, A-02-03-01029 (Oct. 26, 2006); Office of the Inspector General, Review of Medicaid Rehabilitative Services' Claims Made For Beneficiaries In Community Residences, A-02-08-01006 (Jan. 3, 2011); Office of the Inspector General, Review of Speech School Health Claims – Rest of State, A-02-02-01030 (Feb. 17, 2004); Office of the Inspector General, Review of Medicaid Personal Care Claims Submitted by Providers in New York State, A-02-08-01005 (Oct. 13, 2010); Office of the Inspector General, Review of Transportation School Health Claims – NYC Dep't of Education, A-02-02-01023 (Sept. 15, 2005); Office of the Inspector General, Review of Medicaid Claims Made by Continuing Day Treatment Providers in New York State, A-02-09-01023 (Oct. 12, 2011); Office of the Inspector General, Review of Retroactive School Health Claims – Rest of New York State, A-02-04-01021 (Oct. 26, 2006); Office of the Inspector General, Review of Transportation School Health Claims – Rest of State, A-02-03-01008 (Aug. 31, 2004).

¹⁸ *Id.*

¹⁹ *Id.* Information about CMS recoveries was also provided by the Dep't of Health and Human Servs., Office of the Inspector General.

²⁰ Of the \$1.745 billion in improper payments to New York State, approximately \$960 million has not been collected and CMS did not concur with about \$670 million of OIG's questioned costs. Information provided by the Dep't of Health and Human Servs., Office of the Inspector General.

Honorable Kathleen Sebelius

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not impose additional costs on the program. To date, your staff has repeatedly delayed Committee requests for additional information related to your oversight of state Medicaid programs, including New York's program. I ask that you direct the appropriate HHS staff to schedule a briefing with Committee staff as soon as possible but no later than February 14, 2014.

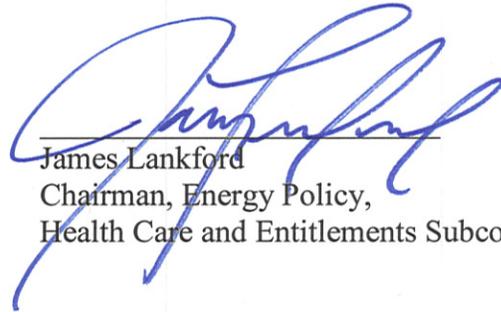
The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X.

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

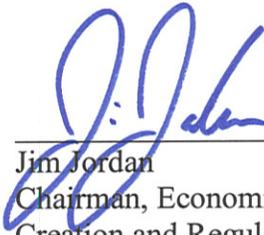
Sincerely,



Darrell Issa
Chairman



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



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

Enclosure

- cc: The Honorable Elijah E. Cummings, Ranking Minority Member
- cc: The Honorable Jackie Speier, Ranking Minority Member
Energy Policy, Health Care and Entitlements Subcommittee
- cc: The Honorable Matt Cartwright, Ranking Minority Member
Economic Growth, Job Creation, and Regulatory Affairs Subcommittee

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
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WASHINGTON, DC 20515-6143

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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.