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Committee on Oversight and Government Reform

The Federal Government's Failure to Prevent and End Medicaid Overpayments

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Table of Contents

Executive Summary

In a May 2012 report, the Office of Inspector General (OIG) at the U.S. Department of Health and Human Services (HHS) revealed that New York State developmental centers, which treat and house individuals with developmental disabilities, received $1.5 million per year per resident in Medicaid reimbursement in fiscal year (FY) 2009. Total Medicaid payments to New York's State-operated developmental centers in FY 2009 totaled nearly $2.3 billion, an amount OIG found to be $1.7 billion beyond the facilities' reported costs. Medicaid payment rates to the developmental centers were ten times higher than Medicaid payment rates to New York's privately-run Intermediate Care Facilities, which OIG found to be comparable to the developmental centers. OIG found that these overpayments have occurred for two decades and are still occurring. By FY 2011, the daily payment rate at New York's developmental centers had increased another 24 percent, to $5,118, or the equivalent of $1.9 million per year for a *single* patient.

The daily payment rate has skyrocketed because of a feature in the formula governing Medicaid payment rates for patients in the developmental centers. The formula allows the State-operated facilities to retain nearly two-thirds of the total Medicaid reimbursement when an individual leaves the facility. According to OIG, this formula feature means taxpayers are paying twice for individuals who leave the developmental centers since most of them are transitioned into settings, such as group homes, also financed by Medicaid. In addition to the massive waste represented by these overpayments, Medicaid's payments to the developmental centers are also likely illegal because they violate the Medicaid Upper Payment Limit (UPL) requirement. Medicaid's UPL requirement caps State Medicaid reimbursements at an amount not greater than what Medicare would have paid for the equivalent service. The Committee on Oversight and Government Reform estimates that Medicaid payments to New York State developmental centers in FY 2009 were more than six times greater than what Medicare would have paid.

Overwhelming evidence suggests that the Federal Government has failed to question New York State's excessive developmental center payment rates adequately. In fact, it appears that until 2010, neither the Center for Medicare and Medicaid Services (CMS) nor its predecessor agency, the Health Care Financing Administration (HCFA), ever attempted to do so. CMS's failure to question Medicaid's excessive payments to New York developmental centers is inexcusable given that Medicaid payments to New York State's developmental centers exceeded the entire Medicaid budgets of 14 States during this time period. The failure of both HCFA and CMS suggests an institutional failure and a pattern of irresponsible actions that have cost taxpayers billions.

Given the dire budget situation faced by the nation, CMS must prevent Medicaid overpayments on the scale of the New York State developmental center overpayments. Instead of acting to defend taxpayer funds, however, CMS is currently negotiating with New York State on a plan that allows the developmental centers to continue receiving billions in overpayments over the next five years. Since the State of New York has already received overpayments from Federal taxpayers of at least $15 billion over the last two decades through its developmental centers, any Federal solution that does not immediately end the overpayments violates the law.

I. Excessive Medicaid Payment Rates at New York State's Developmental Centers

On May 17, 2012, the Office of Inspector General (OIG) at the U.S. Department of Health and Human Services (HHS) released a report regarding Medicaid overpayments to New York State-operated developmental centers, which are facilities that treat and house Medicaid enrollees with developmental disabilities.[1] The OIG report revealed that the State's eleven developmental centers[2] received nearly $1.7 billion in Medicaid payments beyond the facilities' reported costs in fiscal year (FY) 2009 alone.[3] Moreover, the OIG found that these overpayments have occurred for two decades and are still occurring.[4]

According to the OIG report, "the State's reimbursement rate for developmental centers has [increased] . . . from $195 per day in SFY [State Fiscal Year] 1985 to $4,116 per day in SFY 2009, which is the equivalent of $1.5 million per year for one Medicaid beneficiary."[5] Medicaid payment rates for New York's State-operated developmental centers were ten times higher than Medicaid payment rates to New York's privately-run, Intermediate Care Facilities (ICFs), which OIG found to be comparable to the developmental centers in both the population they serve and the type of services they provide.[6] By SFY 2011, the daily payment rate at the State-operated developmental centers increased another 24 percent, to $5,118, or the equivalent of $1.9 million per year for a *single* patient.[7]

The OIG report also compared the payment rates received by the developmental centers to the "actual costs" reported by the State for the developmental centers, finding:

> [I]f the State had used actual costs in calculating the Medicaid daily rate for developmental centers, its reimbursement would have totaled $858 million ($429 million Federal share) in SFY 2009, a difference of $1.41 billion ($701 million Federal share).[8]

However, even OIG's reported $701 million Federal overpayment does not accurately reflect the actual Federal overpayments in FY 2009. Calculations in the OIG report used a 50 percent Federal Medical Assistance Percentage (FMAP), which is the percentage of State Medicaid spending reimbursed by Federal taxpayers. However, in SFY 2009, New York had an FMAP of over 54 percent as a result of the American Recovery and Reinvestment Act (ARRA), the "stimulus" bill.[9] Correcting for the actual FMAP increases the OIG estimated overpayment

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

[2] New York State's eleven developmental centers are the Brooklyn Developmental Center (DC), Staten Island DC, B Fineson Hillside DC, B Fineson Corona DC, Wassaic DC, OD Heck DC, Sunmount DC, Valley Ridge DC, Broom DC, Monroe DC, West Seneca DC (which has closed since the OIG report).

[3] According to the OIG report, New York claimed Medicaid reimbursement totaling $2,266,625,233 in SFY 2009 and the State's actual costs for the developmental centers that year totaled $577,684,725.

[4] *See* OIG Report, *supra* note 1.

[5] *Id.* at 4.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] 74 Fed. Reg. 75 (Apr. 21, 2009); 74 Fed. Reg. 234 (Dec. 8, 2009); *See* The American Recovery & Reinvestment Act of 2009, Pub. L. No. 111-5, Title V, § 5001, 123 Stat. 115, 496 (2009).

to nearly $770 million.[10] Moreover, this amount understates the true overpayment for two reasons. First, instead of using reported costs to calculate the overpayment, the OIG used reimbursable costs, which were nearly $300 million greater than reported costs.[11] Second, the State's reported costs, which formed the basis for the calculation of reimbursable costs, were not verified or audited by either OIG or the CMS.[12] In fact, the actual costs reported by the State for its developmental centers – which amounted to slightly more than $1,000 per patient per day for each center – are more than twice the average Medicaid payment rate received by ICFs operating in the State.[13]

Title XIX of the Social Security Act mandates that State Medicaid payment rates must be consistent with "efficiency, economy and quality of care" and comparable to the services available to the general public.[14] New York State's Office for People with Developmental Disabilities (OPWDD) administered and set Medicaid payment rates for services provided in the developmental centers. OPWDD uses a complex formula that has generated the extraordinarily high reimbursement claims by the State. The formula includes a factor that allows the developmental centers to maintain nearly two-thirds of the payment for a patient *even after* this individual leaves the facility.[15] According to the OIG Report:

> The volume variance adjustment was intended to ensure that annual decreases in headcount at a developmental center did not cause a center to lose operating funds needed to support its fixed costs. The volume variance adjustment achieved this by allowing the State to retain 64 percent of the costs associated with beneficiaries no longer in a developmental center.[16]

The volume variance adjustment resulted in the dramatic increase in the Medicaid payment rate per person as enrollment in the facilities decreased. Such rates are clearly inconsistent with principles of efficiency and economy, and resulted in OIG's probe into the State's compliance with the Federal requirement. Additionally, OIG confirmed with staff of the House Oversight and Government Reform Committee that taxpayers are paying twice for individuals who leave the developmental centers since most of them are transitioned into settings, such as group homes, also financed by Medicaid.[17]

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[10] The ARRA (stimulus bill) raised State FMAP rates. For State fiscal year 2009, New York's FMAP was 50% for the first and second quarters and 58.78% for the third and fourth quarters. The average FY 2009 FMAP was 54.39%. The OIG report found that the total overpayment was $1.41 billion in FY 2009. Using an FMAP of 54.39% means the Federal share alone of the overpayments was $767 million.

[11] *See* Appendix A in the OIG Report, *supra* note 1.

[12] Briefing with Centers for Medicare & Medicaid Services (June 28, 2012); Phone briefing with Department of Health and Human Services Office of Inspector General (September 5, 2012).

[13] According to Appendix A in the OIG Report, the total reported developmental center costs for SFY 2008 were $580,689,833. Dividing that number by 559,974 patient days yields $1,037 in reported costs per patient day.

[14] *See* Social Security Act §1902(a)(30)(A).

[15] According to the OIG Report, "[t]he volume variance adjustment was intended to ensure that annual decreases in headcount at a developmental center did not cause a center to lose operating funds needed to support its fixed costs. The volume variance adjustment achieved this by allowing the State to retain 64 percent of the costs associated with beneficiaries no longer in a developmental center."

[16] *See* OIG Report, *supra* note 1.

[17] Phone briefing with Department of Health and Human Services Office of Inspector General (September 5, 2012).

CMS is responsible for overseeing Medicare and Medicaid and preventing fraud, waste, and abuse in both programs. Unfortunately, negligence at CMS and its predecessor agency, the Health Care Financing Administration (HCFA), over a period exceeding 25 years is largely to blame for the excessive payment rates received by New York's State-operated developmental centers. According to the OIG report:

> CMS did not adequately consider the impact of State plan amendments on the developmental centers' Medicaid daily rate. Specifically, CMS approved more than 35 State Plan Amendments related to the . . . rates, including some that pertained only to developmental centers. CMS reviewed the proposed amendments and, in some cases, asked the State for additional information to address concerns CMS had about the rate-setting methodology. However, CMS's efforts did not prevent the rate from increasing to its current level.[18]

II. Developmental Center Overpayments Violate the Law

State Medicaid spending is reimbursed by the Federal Government at a percentage determined by State per capita income, with the Federal Government reimbursing about 60 percent of Medicaid spending in the aggregate.[19] The open-ended Federal reimbursement of State Medicaid expenditures provides States with a large incentive to maximize Washington's contribution to their State program.[20] A previous Committee staff report explained how States can create the appearance of actual State Medicaid expenditures without actually spending any State money:

> The most common type of State technique requires providers, such as nursing homes, to contribute money to the State. The State will take the provider contribution and spend the money back on the provider. While this may not make sense, since the State is now spending the money it can submit a receipt for the spending to CMS. CMS will then provide the State a refund based on the State's Medicaid reimbursement rate, and the State will then share the Federal refund with the provider. As this example illustrates, the scheme enables the State to compensate the provider without any net contribution of State tax dollars.[21]

These schemes are not new and are well-known. In fact, the U.S. Government Accountability Office has written numerous reports detailing these techniques and the need for greater Federal oversight over Federal reimbursement of State Medicaid expenditures.[22] The Federal Government does place certain restrictions on the ability of States to leverage the Federal

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[18] *See* OIG Report at ii.
[19] Department of Health and Human Services, "Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy, Aged, Blind or Disable Persons for FY 2012," November 10, 2010. *Available at*: http://aspe.hhs.gov/health/fmap12.shtml.
[20] *Uncovering Waste, Fraud, and Abuse in the Medicaid Program*, U.S. House Committee on Oversight and Government Reform (April 25, 2012).
[21] *Id.*
[22] *See*, e.g. U.S. GOV'T ACCOUNTABILITY OFFICE (GAO): CMS NEEDS MORE INFORMATION ON THE BILLIONS OF DOLLARS SPENT ON SUPPLEMENTAL PAYMENTS (2008), *available at* http://www.gao.gov/new.items/d08614.pdf.

Medicaid reimbursement with artificial State contributions. One restriction is called Medicaid upper payment limits (UPLs).[23] According to health care expert Kip Piper:

> [T]he Upper Payment Limit is the maximum a given State Medicaid program may pay a type of provider in the aggregate, Statewide in Medicaid fee-for-service. State Medicaid programs cannot claim Federal matching dollars for provider payments in excess of the applicable UPL. . . . To create an upper bound to Medicaid spending on fee-for-service hospital rates, Congress imposed an Upper Payment Limit based on what Medicare would have paid facilities for the same services.[24]

Medicaid payments to the State's developmental centers, which exceeded $5,100 per patient per day in SFY 2011, appear to have violated UPL requirements for the better part of the last two decades. By way of comparison, Medicaid's FY 2009 reimbursement rate of $4,116 for New York's developmental centers was more than five times higher than the rate paid by Medicare for the most costly individuals residing in a skilled nursing facility (SNF) in New York City.[25] According to the Committee's calculations, between 1991 and 2011, the Medicaid program made payments to New York's developmental centers of nearly $30 billion beyond the Medicaid UPL,[26] or the amount that Medicare would have otherwise paid for residents in these facilities. (Please see the Appendix for a discussion of the methodology used in calculating this figure.) Since the Federal Government generally finances half of New York's Medicaid expenditures, Federal taxpayers would have therefore paid around $15 billion to the State's developmental centers beyond what the law allowed. When asked by the Oversight Committee for information relating to this abusive use of Federal taxpayer dollars, an aide to New York Governor Andrew Cuomo responded, "We aren't sure responding to the Committee's request at this time when we are working through these issues serves the best interests of the State."[27]

III. Federal Inaction on Developmental Center Overpayments is Inexcusable

In 1990, CMS's predecessor agency, HCFA, approved an amendment to New York's Medicaid State plan which affected developmental center reimbursement.[28] According to a memo on May 11, 1990, HCFA was assured that the aggregate payments for facilities under this

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[23] 42 C.F.R. 447.272.

[24] Kip Piper, *Medicaid Upper Payment Limits: Understanding Federal Limits on Medicaid Fee-for-Service Reimbursement of Hospitals and Nursing Homes*, The Piper Report, April 25, 2012.

[25] Medicare's payment for skilled nursing facility (SNF) care varies based upon the beneficiary's case-mix and the location of the SNF. In 2009, the average Medicare SNF daily payment rate was only $373. The case-mix group with the highest Medicare reimbursement rate is within the Rehabilitation Plus Extensive Services (RUX) group, because beneficiaries classified under RUX generally have complex needs and require more assistance with activities of daily living, a greater amount of physical therapy, occupational therapy, and/or speech-language pathology services, and more complex clinical care. For a SNF in New York City, the daily RUX reimbursement rate was $748 in FY 2009.
Source: Emails from Scott Talaga, Congressional Research Service employee, to Brian Blase, professional staff member on the Committee on Oversight and Government Reform, September 11, 2012.

[26] The Committee's estimate is in 2011 dollars.

[27] Email from Alexander Cochran, Special Counsel to the Governor, to Brian Blase, professional staff member on the Committee on Oversight and Government Reform, September 4, 2012.

[28] Memo from Associate Regional Administrator at HCFA's Division of Medicaid to Anthony C. Lovecchio, Director of Alternative Payment Systems at HCFA (May 11, 1990).

amendment would fall under the UPL.[29] The memo also indicated that HCFA would routinely monitor and assess the State's compliance with Federal law.[30] HCFA's indication of routine assessment is consistent with Mr. Piper's analysis that "CMS routinely examines and questions State modeling, assumptions, and data to ensure compliance with the Federal UPLs."[31]

Overwhelming evidence suggests that the Federal Government failed to adequately monitor or assess Medicaid payments to New York's developmental centers. In fact, it appears that until 2010, neither HCFA nor CMS raised any questions about the out-of-control payment rate. This failure is inexcusable given that Medicaid payments to New York State's developmental centers exceeded the entire Medicaid budgets of more than a dozen States during this period.[32] In fact, total Medicaid's payments to New York's developmental centers that served about 1,700 residents in 2009 was roughly the same as total payments made on behalf of the 372,522 enrollees in Kansas's Medicaid program.[33] Given the magnitude of this failure, the Committee has serious concerns about CMS's institutional capabilities to assure program integrity and protect taxpayer dollars.

Moreover, neither New York State nor CMS dispute the fact that the State's developmental centers are significantly overpaid. During a briefing with Committee staff on June 28, 2012,[34] Penny Thompson, CMS's Deputy Director of the Center for Medicaid and CHIP Services, Stated that CMS uncovered the State's high reimbursement rate for developmental centers through a financial review of the State's Medicaid Management Information System in 2007.[35] It is difficult to believe that CMS was unaware of high developmental center payment rates in New York State prior to 2007. For instance, a book was published in 2005 that detailed the high developmental center payment rates and how the excessive rates caused the State to delay plans to close its developmental centers by 2000.[36] Moreover, the amount of Federal money flowing to New York State through the developmental centers was so massive, it is surprising that not one of CMS's 4,500 employees[37] started asking relevant questions.

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[29] *Id.*
[30] *Id.*
[31] Kip Piper, *Medicaid Upper Payment Limits: Understanding Federal Limits on Medicaid Fee-for-Service Reimbursement of Hospitals and Nursing Homes*, The Piper Report, April 25, 2012.
[32] In SFY 2009, the Medicaid spent $2.267 billion on about 1,400 enrollees through New York's developmental centers. In FY 2009, Kansas spent $2.366 billion on Medicaid on 372,522 enrollees. 14 States had Medicaid budgets less than what New York received through the developmental centers. In FY 2009, Wyoming's Medicaid program spent $528 million on 82,365 enrollees, North Dakota's Medicaid program spent $573 million on 75,328 enrollees, South Dakota spent $709 million on 128,063 enrollees, Montana spent $845 million on 114,958 enrollees, Vermont spent $971 million on 182,045 enrollees, Alaska spent $1.065 billion on 121,290 enrollees, New Hampshire spent $1.111 billion on 159,262 enrollees, Delaware spent $1.232 billion on 207,243 enrollees, Nevada spent $1.245 billion on 290,435 enrollees, Hawaii spent $1.271 billion on 247,246 enrollees, Idaho spent $1.289 billion on 227,849 enrollees, Nebraska spent $1.538 billion on 253,474 enrollees, Utah spent $1.615 billion on 294,903 enrollees, and Rhode Island spent $1.755 billion on 204,829 enrollees. Kaiser Family Foundation, *Total Medicaid Enrollment, FY 2009*, and Kaiser Family Foundation, *Distribution of Medicaid Payments by Enrollment Group, FY 2009*.
[33] *Id.*
[34] Briefing with Centers for Medicare & Medicaid Services (June 28, 2012).
[35] *Id*.
[36] Paul J. Castellani, *From Snake Pits to Cash Cows: Politics and Public Institutions in New York*, State University of New York Press, 2005.
[37] U.S. Department of Health and Human Services, *HHS: What We Do, available at* http://www.hhs.gov/about/whatwedo.html (September 12, 2012).

The George W. Bush Administration initiated rule-making in 2007 that would have limited Medicaid reimbursements to public providers to the cost of providing services.[38] The rule attempted to increase program integrity by clarifying the types of permissible State techniques to finance Medicaid costs and requiring certain providers to retain all the Medicaid reimbursements they receive.[39] A Federal court found that the rule was "improperly promulgated" and vacated the rule.[40] The current Administration has taken the opposite approach. The first major law signed by President Obama, the American Recovery and Reinvestment Act of 2009 (the "stimulus" bill), contained a provision that it was the "sense of Congress" that the Secretary of Health and Human Services should not promulgate final regulations limiting Medicaid reimbursements to public providers to cost.[41] Moreover, the Obama Administration has not taken any serious actions to prevent inappropriate State leveraging of Federal Medicaid money. Rather, the stimulus bill made it more advantageous for States to figure out how to game the Federal Medicaid reimbursement since it contained a massive increase in each State's FMAP.[42]

CMS's failure to specifically address the New York developmental center overpayments resulted in taxpayers continuing to overpay by nearly $1 billion per year without even asking New York officials to answer any questions about the overpayments. CMS acted only after an in-depth story regarding the developmental center overpayments appeared in the *Poughkeepsie Journal* on June 20, 2010.[43] The article quoted Michael Melendez, regional branch manager for CMS's division of Medicaid and children's health, that a "focused financial review" had not been done in his four years in office, but that a review may take place "now that you've brought this to our attention."[44]

About three weeks after the initial developmental center overpayment article in the *Poughkeepsie Journal*, three years after CMS officials told the Committee that the agency learned of the overpayment problem, and 17 years after the overpayments began,[45] CMS finally sent New York State officials a letter.[46] According to CMS spokesman Jeffrey Hall, CMS's inquiry was a "result of what [the *Poughkeepsie Journal*] brought to our attention."[47] The letter Stated 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

[38] HHS, CMS, Medicaid Program; Cost Limit for Providers Operated by Units of Government and Provisions to Ensure the Integrity of Federal-State Financial Partnership, 72 Federal Register 29748 (May 29, 2007).
[39] *Id.*
[40] *Alameda County Medical Center v. Leavitt*, 559 F. Supp. 2d (D.D.C. 2008).
[41] Elicia J. Herz and Vanessa K. Burrows, Congressional Research Service, Select Bush Administration Medicaid Rulemakings: Congressional and Administrative Actions (July 30, 2010), *available at* http://www.crs.gov/Products/rl/pdf/RL34764.pdf.
[42] The American Recovery & Reinvestment Act of 2009, P.L. 111-5, Title V, § 5001, 123 Stat. 115, 496 (2009).
[43] Mary Beth Pfeiffer, *At $4,556 a Day, N.Y. Disabled Care No. 1 in Nation*, POUGHKEEPSIE JOURNAL, June 20, 2010.
[44] *Id.*
[45] The graph in the OIG report shows Medicaid daily rates for developmental centers and three privately operated ICFs. Between 1985 and 1990, the rates for all four institutions were similar. However, beginning in 1990, the payment rates for the developmental centers began to steadily outpace the payment rates for the ICFs. In 1995, the gap was about $600 per day; by 2000, the gap was about $1,500 per day; by 2005, the gap was about $2,500 per day; and by 2009, the gap was about $3,500 per day.
[46] Letter from Sue Kelly, CMS's Regional Administrator for the region covering New York, to Donna Frescatore, the Deputy Commissioner of the New York State Department of Health, July 13, 2010.
[47] Mary Beth Pfeiffer, *Feds Probe Payouts to 9 State Facilities*, POUGHKEEPSIE JOURNAL, July 16, 2010.

$4,500 per beneficiary."[48] 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."[49]

During a briefing with Committee staff, Ms. Thompson admitted that CMS failed to adequately monitor the rate taxpayers were paying to New York's State-operated developmental centers for the past two decades.[50] Despite recognition of the overpayments, both CMS and the State failed to stop the daily reimbursement rate from increasing to $5,118 per year by SFY 2011.[51] Moreover, CMS has not taken the necessary corrective action. CMS has not yet taken disciplinary actions against any employees for the agency's failure to prevent this massive loss of tax dollars. CMS officials also informed Committee staff that New York and CMS are in negotiations to develop a corrective action plan regarding the developmental center payment rates.[52] However, at the briefing, Ms. Thompson explained that the corrective action plan would allow New York to continue to receive billions of dollars in overpayments for at least the next five years because the State has grown dependent on the excess Federal funds.[53]

The Committee found the corrective action plan outlined by CMS officials to be grossly inadequate. Rep. Darrell Issa (R-CA), Chairman of the Committee on House Oversight and Government Reform Committee, and Rep. Trey Gowdy (R-SC), Chairman of the Subcommittee on Health Care, District of Columbia, Census and the National Archives, sent a letter to Marilyn Tavenner, Acting Administrator of CMS, on July 11, 2012, urging her to end the overpayments immediately:

> [The corrective action] plan, which is grossly unfair to Federal taxpayers, indicates CMS is cavalier with taxpayer resources. . . . 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 to the services available to the general public.[54] 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.[55]

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[48] Letter from Sue Kelly, Assoc. Regional Administrator, Centers for Medicare & Medicaid Services., to Donna Fescatore, Deputy Commissioner, New York State Dept. of Health (July 13, 2010).
[49] Letter from Donna Frescatore, Deputy Commissioner, State of New York Dept. of Health, to Sue Kelly, Assoc. Regional Administrator, Centers for Medicare & Medicaid Services. (Sept. 14, 2010).
[50] Briefing with Centers for Medicare & Medicaid Services. (June 28, 2012).
[51] *See* OIG Report, *supra* note 1.
[52] *Id*.
[53] *Id.*
[54] *See* Social Security Act §1902(a)(30)(A).
[55] Darrell Issa, Chairman of the Committee on House Oversight and Government Reform Committee, and Trey Gowdy (R-SC), Chairman of the Subcommittee on Health Care, District of Columbia, Census and the National Archives, Letter to Marilyn Tavenner, Acting Administrator of CMS, July 11, 2012.

IV. Developmental Center Overpayments Delay Needed Reform

Over the past two years, there have been several reports indicating many patients in New York's developmental centers have received substandard care, and many advocates of the disabled in New York support the closure of the developmental centers.[56] According to the *Poughkeepsie Journal*, "[t]he closing of the [developmental centers], once a certainty, has been delayed for a decade as reimbursement rates have soared; closing would shut off a gushing faucet of cash in a State dogged by deficits."[57] In 1991, Elin Howe, then-Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities, and New York Governor Mario Cuomo called for the closure of New York State developmental centers by 2000.[58] According to Howe, "[i]ndependent fiscal analyses of closure demonstrate that it is the most cost-effective course to take."[59] Former New York State Senator Nicholas A. Spano, then-Chairman of the Committee on Mental Hygiene, concurred, recommending that "all developmental centers in the State of New York be permanently closed by the year 2000."[60]

When high-ranking New York officials recommended closing the developmental centers in the early 1990s, payment rates for the centers were 95 percent lower than today's rates and were in line with the costs of delivering services in those facilities. As rates rose throughout the 1990s, however, New York reneged on its plans to close its developmental centers. Given the enormous fixed costs at these facilities, which house a very small fraction of the thousands of residents they once housed, common sense budgeting would have suggested eliminating or consolidating the developmental centers. For example, because the campuses of the State's developmental centers are so vast, energy costs are enormous: $14,000 a year for each resident at a Wassaic developmental center, $14,300 per person at a Rochester developmental center, and $21,000 at a developmental center in Erie County.[61] The huge overpayments received by New York State, which one State official called "cash cows,"[62] disincentivized the State from eliminating or consolidating the developmental centers.

In fact, the enormous overpayments resulted in New York State "rebuilding an entire 120-bed campus in Queens for $97 million and spending about $40 million at two others in Brooklyn and Broome County that soon will serve just 300 people combined" since 2006.[63] Additionally, the Wassaic developmental center, which at one point housed 4,500 residents, now houses about 100 residents, and was supposed to close a decade ago, has received about $30 million over the past seven years to repair the facility's infrastructure.[64] CMS's failure to end the developmental center overpayments has therefore led to a massive amount of Federal taxpayer dollars propping up outdated facilities that ought to have closed a decade ago.

[56] *See*, e.g. Danny Hakim, *A Disabled Boy's Death, and a System in Disarray*, NEW YORK TIMES, June 5, 2011.
[57] Mary Beth Pfeiffer, *At $4,556 a Day, N.Y. Disabled Care No. 1 in Nation*, POUGHKEEPSIE JOURNAL, June 20, 2010.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Mary Beth Pfeiffer, *Institutions Prop Up System – But at What Cost to State*, POUGHKEEPSIE JOURNAL, September 5, 2010.
[62] Mary Beth Pfeiffer, *State Won't Release Wassaic Resident Data*, POUGHKEEPSIE JOURNAL, October 30, 2010.
[63] Mary Beth Pfeiffer, *'Confidential' paper: Quality of care for developmentally disabled would fall without overpayments*,' POUGHKEEPSIE JOURNAL, Sept. 5, 2010.
[64] Mary Beth Pfeiffer, *Tragedy to Triumph: A Wassaic Tale*, POUGHKEEPSIE JOURNAL, June 20, 2010.

V. CMS's Failures to Stop Egregious Overpayments Must End

CMS and its predecessor agency HCFA failed on multiple counts with respect to oversight of Medicaid's excessive payments to New York State's developmental centers. First, HCFA approved the State's developmental center payment methodology and the changes to this methodology that dramatically increased payment rates. Second, both HCFA and CMS consistently failed to comprehend the impact that New York's many State plan amendments would have on developmental center payment rates. Third, both HCFA and CMS failed to identify these overpayments, which began in 1990 and progressively increased thereafter, until 2007. Fourth, CMS failed to take any specific actions for three years after it admitted to having identified the problem – and only after a newspaper in New York reported on the large overpayments. Fifth, despite writing an initial letter to the State in July 2010, CMS has not yet obtained necessary information from the State relating to the overpayments. Sixth, CMS is negotiating with New York on a plan that allows the developmental center to continue receiving billions in overpayments over the next five years.

In 2012, for the fourth year in a row, the Federal budget deficit will exceed $1 trillion. Since 2009, the United State's debt has increased nearly $5.5 trillion. Given the extraordinarily dire Federal budget situation, CMS's failure to prevent the massive Medicaid overpayments flowing to New York State's developmental centers needs to be corrected immediately. Although remedying past mistakes and having New York State return improperly received Medicaid funds to the U.S. Department of the Treasury would be extremely difficult, fixing the problem moving forward must be a top priority for CMS. In addition to fixing an out-of-control problem, the agency must demonstrate that it plans on prioritizing the financial integrity of the Medicaid program.

Appendix: Committee's Methodology for Calculating Medicaid Overpayments

On July 19, 2012, the Committee sent a letter to Dr. Nirav Shah, Commissioner of the New York State Department of Health, asking for detailed information regarding overpayments received by New York State-operated developmental centers. Despite initial assurances from State officials that New York would respond to the Committee's request for information, the State decided not to comply. Because the State refused to comply with its request, the Committee compiled as much available information as possible from reliable sources in order to estimate the amount of overpayments received by New York State's developmental centers since 1990.

The Office of the Inspector General (OIG) at the Department of Health and Human Services (HHS) supplied the Committee with a significant amount of information on these overpayments. Chiefly, OIG provided the actual payments received by New York developmental centers for State fiscal year (SFY) 2007 ($1.828 billion), SFY 2008 ($2.107 billion), and SFY 2009 ($2.267 billion), as well as the daily Medicaid payment rate per patient for New York's developmental centers over the entire period. Using the actual payments received by New York's developmental centers and OIG's calculations for reimbursable expenses, OIG estimated Medicaid overpaid the State developmental centers by $1.41 billion in SFY 2009, $1.359 billion in SFY 2008, and $1.063 billion in SFY 2007. The Committee requested that OIG estimate the developmental center overpayments over the past two decades using the same methodology it employed for its 2007-2009 estimates; however, OIG lacked the necessary information (the same information the State of New York has refused to provide the Committee) in order to perform the calculations.

It is important to note that OIG's calculation of overpayments relies upon the State's reported costs, and the State's reported costs were not verified or audited by either OIG or CMS. There is a complex formula with many supplementary and substantial add-ons that convert a prior year's reported costs into a current year's reimbursable costs. For example, New York's total reported costs for SFY 2008 were $581 million. After adding the various supplementary factors, OIG calculated the reimbursable cost for SFY 2009 was $858 million, about 48 percent higher than New York's reported costs for the previous year.

Therefore, there is reason to believe that the reimbursable costs calculated by OIG are significantly higher than are necessary to serve the State's developmental center population. According to the OIG report, the total reimbursement cost per patient was $1,532 per day for SFY 2009. Since OIG reported that the average rate received by similar, privately-operated Intermediate Care Facilities (ICFs) was $444 in SFY 2009, a $1,532 rate appears very high. Since OIG's report calculates overpayments by subtracting these inflated "reimbursable costs" from the payments received by State-operated developmental centers, the overpayments calculated by OIG for SFY 2007, SFY 2008, and SFY 2009 are likely substantially too low.

To avoid the shortcomings involved with OIG's somewhat nebulous "reimbursable costs," the Committee calculated the developmental center overpayments as the amount received by New York State-operated developmental centers in excess of the Medicaid Upper Payment Limit (UPL). According to Federal Medicaid law, the UPL is the maximum a given State

Medicaid program can pay to Medicaid providers in the aggregate. To satisfy UPL requirements, Medicaid payments must not exceed what the Medicare program would pay for the same services. The Committee therefore estimated the Medicaid UPL using the most expensive Medicare payment category (see Footnote ii in the Table). Since the Committee's estimates used Medicare rates for the most costly patients in skilled nursing facilities (SNFs) and not all of the developmental center patients would fall into this category, the Committee's Medicaid UPL is almost certainly too high. Therefore, since the Committee is estimating the overpayments in excess of Medicaid UPL amounts and the Committee assumed the highest possible Medicare reimbursement rates, the Committee's estimates of the overpayments received by New York developmental centers are probably too low.

Medicare's reimbursement rates also vary by geographic location, and the State of New York has 14 geographic areas. The Committee calculated a weighted average of Medicare reimbursements using the geographic breakdown of the State's developmental centers in 2010. (This was the only year the Committee found an accounting of each developmental center's payment). Using developmental center population from that year, the Committee assigned Medicare payment regions the following weights: 37.19% to New York City, 21.10% to Binghamton, 15.81% to Rural New York State, 10.73% to Poughkeepsie, 8.75% to Rochester, 3.25% to Albany, and 3.18% to Buffalo. The Medicaid UPL estimates shown in the Table below for SFY 1999 through SFY 2011 were estimated using weighted average calculations. The Medicare payment information was easily obtainable only for the years after 1998. The average price change from 1999 to 2005 in Medicare's reimbursement rate for the most expensive patients in SNF was $12. Therefore, for purposes of the Committee's estimates, the Medicare UPL was increased $12 each year from SFY 1991 to SFY 1998.

In order to calculate the estimated payments received by New York developmental centers, the Committee multiplied daily Medicaid payment rates per patient by the estimated number of patients residing in developmental centers at one point during the SFY. OIG provided the daily Medicaid payment rates and the Committee relied on reports issued by New York's Office for People with Developmental Disabilities (OPWDD) and its predecessor agency, the Office of Mental Retardation and Developmental Disabilities (OMRDD), to estimate patient numbers.[65] The fifth column in the Table shows the Committee's estimate of the amount Medicaid paid New York State-operated developmental centers beyond the Medicaid UPL (the amount Medicare would have otherwise paid). The second to last column is the present value of each year's estimated overpayment calculated using the consumer price index. Totaling up the overpayments from 1991 to 2011 yields a net estimated overpayment of nearly $28.8 billion beyond what was allowed by the Medicaid UPL. Finally, the last column shows the Federal share of the overpayments since the Federal government reimburses at least half of New York's Medicaid expenditures. The total Federal overpayment (in present value terms) between 1991 and 2011 was approximately $15 billion.

[65]OMRDD reports from 1999 to 2006 contained annual counts of the total residents in the State's developmental centers and OIG provided the actual reimbursements received by the State-operated developmental centers for 2007 through 2009. The sources for 1991, 1994, 2010, and 2011 are contained in the footnotes below the Table showing the estimated overpayments by year. For the remainder of the years (1992, 1993, 1995, 1996, 1997, and 1998), the Committee used a linear interpolation to estimate the number of developmental center residents.

Table: Estimated Medicaid Overpayment to New York State-Operated Developmental Centers

State Fiscal Year	Estimated Dev. Center Patients	Daily Dev. Center Pay Rate[i]	Estimated Medicaid UPL[ii]	Over-payment	Overpayment Present Value (2011 $)[iii]	Federal Share of Overpayment[iv]
1991	6,350[v]	$389	$319	$162.2M[vi]	$267.9M	$134.0M
1992	5,437	$442	$331	$220.3M	$353.2M	$176.6M
1993	4,524	$552	$343	$345.1M	$537.2M	$268.6M
1994	3,611[vii]	$654	$355	$394.1M	$598.1M	$299.1M
1995	3,294	$936	$367	$684.2M	$1,009.9M	$504.9M
1996	2,978	$1,093	$379	$776.0M	$1,112.6M	$556.3M
1997	2,661	$1,310	$391	$892.7M	$1,251.1M	$625.5M
1998	2,345	$1,522	$403	$957.6M	$1,321.5M	$660.8M
1999	2,028[viii]	$1,729	$415	$972.6M	$1,313.2M	$656.6M
2000	2,020[ix]	$1,930	$426	$1,108.9M	$1,448.5M	$724.3M
2001	1,711[x]	$2,165	$435	$1,080.4M	$1,372.3M	$686.1M
2002	1,692[xi]	$2,434	$474	$1,210.4M	$1,513.7M	$756.8M
2003	1,599[xii]	$2,723	$457	$1,322.5M	$1,617.1M	$808.6M
2004	1,610[xiii]	$2,934	$483	$1,440.3M	$1,715.1M	$882.9M
2005	1,696[xiv]	$3,063	$490	$1,592.8M	$1,834.5M	$944.4M
2006	1,700[xv]	$3,284	$594	$1,669.1M	$1,862.4M	$931.2M
2007	X[xvi]	$3,715	$613	$1,526.3M	$1,655.9M	$827.9M
2008	X[xvii]	$3,736	$658	$1,736.1M	$1,813.8M	$906.9M
2009	X[xviii]	$4,116	$645	$1,911.4M	$2,004.1M	$1,090.0M
2010	1,417[xix]	$4,556	$645	$2,022.8M	$2,086.6M	$1,277.9M
2011	1,313[xx]	$5,118	$751	$2,092.9M	$2,092.9M	$1,274.3M
Total					**$28,781.6M**	**$14,993.8M**

[i] Development Center payment rates were Office of Inspector General (OIG), Department of Health and Human Services

[ii] The Committee estimated the Medicaid UPL using the Medicare case-mix group with the highest reimbursement rate. For FY 2006 to FY 2011, this group was the Rehabilitation Plus Extensive Services (RUX) group. Beneficiaries classified under RUX generally have complex needs and require more assistance with activities of daily living, a greater amount of physical therapy, occupational therapy, and/or speech-language pathology services, and more complex clinical care. For FY 1999 to FY 2005, the group with the highest reimbursement was the Ultra-High Rehab group (RUC) from the Rehabilitation case-mix group. Medicare's reimbursement rates also vary by geographic location and the State of New York has 14 geographic areas. The Committee calculated a weighted average of the Medicare reimbursement using the geographic breakdown of the developmental centers in 2010. The following weights were assigned: New York City 37.19%, Binghamton 21.10%, Rural New York State 15.81%, Poughkeepsie 10.73%, Rochester 8.75%, Albany 3.25%, Buffalo 3.18%. Therefore, the estimates in this category from FY 1999 to FY 2011 were estimated using weighted average calculations. We used the average historical price change from 1999 to 2005 of $12 to estimate that Medicaid UPL increased $12 each year from FY 1991 to FY 1998.

[iii] This column adjusts the overpayment column for 2011 values using the Consumer Price Index.

[iv] This calculation uses the State's Federal Medicaid Assistance Percentage (FMAP). Generally, New York's FMAP is 50%. In fiscal years 2004, 2005, 2009, 2010, and 2011, the Federal government increased the FMAP so the Federal share of the State's Medicaid expenditures in those years is higher. New York's FMAP in SFY 2004 and SFY 2005 was 51.48%. In SFY 2009, New York's FMAP was 54.39%. In SFY 2010, New York's FMAP was 61.24%. In SFY 2011, New York's FMAP was 60.89%.

[v] Paul J. Castellani, From Snake Pits to Cash Cows: Politics and Public Institutions in New York, State University of New York, 2005, page 249.

[vi] All of the figures in the table are in the millions. This particular figure is $162.2 million.

[vii] *Id.*, page 259

[viii] The 1998-99 Budget for the New York State Office of Mental Retardation and Developmental Disabilities

[ix] A Summary of the 1999-2000 Executive Budget Recommendation

[x] 2000-01 Executive Budget Recommendation for the New York State Office of Mental Retardation and Developmental Disabilities

[xi] 2001-02 Fiscal Year Executive Budget Recommendations for OMRDD.

[xii] 2002-03 Fiscal Year Executive Budget Recommendations for OMRDD.

[xiii] 2003-04 Fiscal Year Executive Budget Recommendations for OMRDD.

[xiv] 2004-05 Fiscal Year Executive Budget Recommendations for OMRDD.

[xv] 2005-06 Fiscal Year Executive Budget Recommendations for OMRDD.

[xvi] According to information provided by the OIG to the Committee, Medicaid made payments of $1,827,939,932 for State developmental centers in SFY 2007. Therefore, the Committee did not have to know the number of developmental center residents this year.

[xvii] According to information provided by the OIG to the Committee, Medicaid made payments of $2,107,245,318 for State developmental centers in SFY 2007. Therefore, the Committee did not have to know the number of developmental center residents this year.

[xviii] According to information provided by the OIG to the Committee, Medicaid made payments of $2,266,625,233 for State developmental centers in SFY 2007. Therefore, the Committee did not have to know the number of developmental center residents this year.

[xix] Mary Beth Pfeiffer, *At $4,556 a Day, N.Y. Disabled Care No. 1 in Nation*, POUGHKEEPSIE JOURNAL, June 20, 2010.

[xx] OPWDD Statewide Comprehensive Plan: 2011-2015.