Congress of the United States

Washington, DC 20515

March 8, 2005

The Honorable Mark B. McClellan, M.D., Ph.D.
Administrator
Center for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244-1850

The Honorable Dan Levinson
Acting Inspector General
Department of Health and Human Services
330 Independence Avenue, SW
Washington, DC 20201

Dear Dr. McClellan and Mr. Levinson:

We urge you to halt an initiative by the Office of the Inspector General to cut off federal funding for the medical treatment of some of our most vulnerable citizens: children who have been hospitalized with severe mental illness. This initiative has no basis in the law and reverses decades of precedent in the Medicaid program. It also threatens to worsen what is already a national crisis in access to quality mental health care for children.

In July, we released a study showing that because of a lack of community mental health services, thousands of youth with mental illness are needlessly incarcerated in juvenile detention facilities across the United States. Yet even as we have investigated this issue, a recent series of audits by the Inspector General could compound the problem.

For the first time, the Inspector General is auditing state Medicaid programs based on the premise that the federal government is not permitted to fund the medical care of children in mental institutions. As a result, Virginia, New York, Texas, New Jersey, and California have been asked to repay over $10 million spent on medical services for institutionalized children. If the states do not repay these funds voluntarily, the Center for Medicare & Medicaid Services may compel them to do so.

Because the loss of these funds could threaten the viability of institutions that provide critical mental health services, these audits are a direct threat to the health of needy children. The audits also misconstrue the letter, purpose, and history of Medicaid law.

The audits relate to what is known as the "IMD exclusion" — the exclusion of federal funding for services provided in "institutions for mental diseases." Historically, the federal government has refused to pay for such services in order not to displace traditional state responsibility. In this letter, we are not questioning this exclusion as it applies to adults ages 21 to 64.

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But in 1972, Congress carved out an exception to the IMD exclusion that permits federal support for children to receive "inpatient psychiatric hospital services." This term is defined in regulations to encompass medical treatment provided in accredited institutions.

Unfortunately, the Inspector General has misread the law and regulations as permitting support only for "inpatient psychiatric services" — dropping the word "hospital." What has resulted is a bizarre policy under which Medicaid would pay for psychiatric services for children in Medicaid in inpatient facilities, but not for their medical care. This policy conflicts with the structure and purpose of Medicaid, a program that was created to provide access to medical care for indigent children. While the premise of the IMD exclusion is that federal funding for psychiatric services is disfavored, Congress has never discouraged federal support for children's medical services. It makes no sense for the federal government to deny funds for essential medical treatment for children in the Medicaid program.

There is no precedent for the Inspector General's actions. For more than 30 years, the federal government, the states, and the courts have never doubted that federal funds can support the comprehensive care of children in mental institutions. No previous inspector general has pursued these audits in the past. To reverse this longstanding policy now, without any opportunity for public input, defies reason and violates the requirements of the Administrative Procedures Act.

We urge you to intervene. These audits threaten to take away millions of dollars in scarce resources from a mental health system already stretched past its limit. The Center for Medicare & Medicaid Services (CMS) should acknowledge that the law as plainly written and as it has been interpreted permits federal support for medical services.

The rest of this letter explains our concerns in greater detail.

A Crisis in Access

The Surgeon General has reported that one in five U.S. children ages 9 to 17 has a mental or addictive disorder that causes impairment.[1] However, many children and families struggle to get care in communities without adequate inpatient, residential, and outpatient treatment services.

In April 2003, the General Accounting Office reported that at least 12,700 families relinquished custody of their children to the child welfare or juvenile justice systems so that they

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[1] Department of Health and Human Services, *Mental Health: A Report of the Surgeon General* (1999).

could receive mental health services.[2] In July 2004, we released a report demonstrating that over 15,000 youth were held in detention facilities during a 6-month period because community mental health services were unavailable to them.[3]

Our report was based upon a survey of every juvenile detention facility in the country. More than 500 administrators from 49 states responded, yielding a response rate of 75%. Two-thirds of the administrators, located in 47 states, reported that their facilities hold youth unnecessarily because community mental health services are unavailable. Some of these children with mental illness are held beyond their sentences because they cannot receive adequate services in the community. In 33 states, youth are held in detention centers without ever having any charges against them. As one Louisiana administrator wrote, "We appear to be warehousing youths with mental illness due to a lack of mental health services."

Because of Medicaid's key role in ensuring access to care for millions of U.S. children, CMS should pay attention to this crisis. But the first step must be not to make the situation worse. Unfortunately, the agency could do considerable harm by disallowing millions of federal dollars spent on children's mental health care based on a new and erroneous reading of the Medicaid statute.

The IMD Exclusion and the Exemption for Youth

At issue is a provision in the Social Security Act known as the "IMD exclusion," which is the exclusion of federal support for the care of patients in "institutions for mental diseases." This provision dates back prior to the passage of the original Medicaid statute, and its logic was to avoid the displacement of the historic state financing of institutional mental health care.[4]

In 1972, Congress broadly exempted children from the IMD exclusion. According to the Senate Finance Committee, Congress intended to authorize "federal matching under [M]edicaid for eligible children" on the grounds that "the nation cannot make a more compassionate or better investment in [M]edicaid than this effort to restore mentally ill children to a point where

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[2] General Accounting Office, *Child Welfare and Juvenile Justice: Federal Agencies Could Play a Stronger Role in Helping States Reduce the Number of Children Placed Solely to Obtain Mental Health Services* (Apr. 21, 2003).

[3] Minority staff, Government Reform Committee, *Incarceration of Youth Who Are Waiting for Community Mental Health Services in the United States* (July 2004).

[4] The IMD exclusion first appeared in the 1950 amendments to the Social Security Act regarding "old age assistance." Department of Health and Human Services, *Medicaid and Institutions for Mental Diseases: Report to Congress* (Dec. 1992).

they may very well be capable of rejoining and contributing to society as active and constructive citizens."[5]

The general IMD exclusion can be found in section 1905(a) of the Social Security Act, which lists types of services that do and do not qualify as "medical assistance" eligible for federal matching funds. This section states that medical assistance "does not include … any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for mental diseases."[6] The term "institution for mental diseases" is defined to mean an institution "primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services."[7]

The exception for youth was created by the Social Security Amendments of 1972 (Public Law 92-603), which took effect on January 1, 1973. This law specifically amended the IMD by providing that the federal government must pay its share for "inpatient psychiatric hospital services for individuals under age 21."[8]

Under the law, "inpatient psychiatric hospital services" are defined as "inpatient services" that meet three main criteria:

- Covered inpatient services must be provided in a psychiatric hospital or another "inpatient setting" specified in regulations,[9] such as a residential treatment center.[10]
- Covered inpatient services must "involve active treatment,"[11] defined by regulation as including a plan of care with a goal of early discharge.[12]

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[5] *Report of the Committee on Finance, United States Senate, to Accompany H.R. 1, To Amend the Social Security Act, and for Other Purposes*, Senate Report No. 92-1230 (Sept. 26, 1972).

[6] Social Security Act § 1905(a)(27).

[7] Social Security Act § 1905(h)(2)(i).

[8] Social Security Act § 1905(a)(16). This provision became effective January 1, 1973.

[9] 42 CFR 441.151.

[10] Social Security Act § 1905(h)(1)(A).

[11] Social Security Act § 1905(h)(1)(B)(i).

[12] 42 CFR 441.154.

- Covered inpatient services must be determined to be necessary by a qualified medical team.[13] Implementing regulations provide additional detail on this team.[14]

Significantly, none of these three criteria limits "inpatient services" to psychiatric services or any other particular kind of care. Medical services can meet all three criteria.

Consistent with the statute, the implementing regulations expressly authorize the use of federal funds for "services for . . . an individual who is under age 22 and receiving inpatient psychiatric services."[15] The "services" to be covered are not restricted. In this regulation, the phrase "inpatient psychiatric services" serves to identify those who are eligible for coverage — not to limit the range of treatment that may be provided to them. So long as the patient is a youth and receiving inpatient psychiatric services, federal funding is available for all care provided by their team.

Agency Guidance and Court Opinions

We have conducted a broad review of relevant Medicaid program documents, Department Appeals Board decisions related to the IMD exclusion, and court cases that cite section 1905(a)(16) and section 1905(h) of the Social Security Act. In this review, we could not find a single document or opinion that supports cutting off Medicaid payments for medical treatment for children in mental institutions.

To the contrary, several of these sources do provide direct support for interpreting the statute and regulations as providing for Medicaid coverage for the medical expenses of these needy children.

In 1974, District Court Judge Gerhard Gesell discussed the nature and purpose of the exemption for children, writing that Congress "chose to make a compassionate, sound investment to restore mentally ill children amenable to treatment to constructive citizenship." Nowhere in his opinion, which contains an extensive review of the exemption's legislative history, is there any reference to limitations on federal funds for any type of services.[16]

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[13] Social Security Act § 1905(h)(1)(B)(ii).

[14] To ensure that institutionalized children are not simply warehoused in mental institutions with federal funds, the regulations require that a team with mental health expertise certify that the services are needed and help to prepare the patient for discharge. 42 CFR 441.152 and 441.153.

[15] 42 CFR 441.13.

[16] *Kantrowitz v. Weinberger*, 388 F. Supp. 1127 (D.D.C. 1974).

In 1992, the Department of Health and Human Services (HHS) reported to Congress on the subject of Medicaid and Institutions for Mental Diseases. In this report, HHS states that the IMD exclusion does not apply to those "individuals under 21" who are receiving inpatient psychiatric care. The report refers to adults as "the excluded age group."[17] No suggestion was made that individuals under 22 were restricted to federal support for only a limited package of benefits. In fact, a detailed economic analysis of the IMD exclusion assessed all services provided to beneficiaries.

In 1996, the Department Appeals Board, an administrative court within HHS, rejected an attempt by New York to obtain federal funds for adult patients in mental institutions. In its opinion, the Board wrote: "This provision, known as the general IMD exclusion, was modified as of January 1, 1973 to allow for coverage of persons in IMDs who had not yet reached the age of 21, or, in some cases, the age of 22."[18] Nothing in the opinion contemplates selective funding for services for these persons.

Most recently, the Seventh Circuit Court of Appeals ruled in 2003 that Indiana's Medicaid program was required to pay for medically necessary inpatient residential treatment services for youth. In discussing the IMD exclusion, the court found that the statute provides for federal support of "services rendered" in residential treatment centers.[19] In this case, Indiana had made numerous arguments to support the claim (ultimately rejected by the court) that the IMD exclusion prohibited payment for the inpatient services, yet the state did not attempt to argue, even in the alternative, that any subset of the services (such as medical services) could not be covered.

Audits by the Inspector General

Recently, without notice or public comment, the Inspector General adopted a new and misguided approach to the IMD exclusion. According to this interpretation, Medicaid funds cannot be used to support the medical care of low-income children in mental institutions.

Using this theory, the Inspector General is conducting a series of audits of state Medicaid programs. In September 2003, the Inspector General asked Texas to repay $1,290,047 that had

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[17] Health Care Financing Administration, Department of Health and Human Services, *Medicaid and Institutions for Mental Diseases: Report to Congress* (Dec. 1992).

[18] Department Appeals Board, New York State Department of Social Services, DAB 1577 (1996).

[19] *Collins v. Hamilton*, 349 F.3d 371 (7th Cir. 2003).

been spent on the medical care of children in mental institutions.[20] In February 2004, the Inspector General asked New York to repay $7,642,194.[21] In March 2004, the Inspector General asked Virginia to repay $3,948,532.[22] In October 2004, the Inspector General asked New Jersey to repay $848,374.[23] In November, after auditing only state-operated psychiatric hospitals, the Inspector General asked California to repay $190,460.[24]

These audits rest on a flawed interpretation of the law.

The audits repeatedly claim that the law exempts from the IMD exclusion only "inpatient psychiatric services" for children. In fact, the statute exempts "inpatient psychiatric hospital services" for children. As detailed above, section 1905(h) of the Social Security Act delineates the group of patients who can receive care, not the type of care that they can receive. The Inspector General is not empowered to drop the word "hospital" and redraw the boundaries of what care may be covered.

The Inspector General's case appears to depend entirely on one sentence in the State Medicaid Manual, a guidance document, which states that federal matching funds are only available for "inpatient psychiatric services under age 21." But this phrase cannot be relied upon to justify such a radical change in the Medicaid program. The language of the manual omits the key word "hospital" and thus conflicts with the plain language of the statute and accompanying regulation, which have the power of law. Moreover, the Medicaid manual taken as a whole does not support the Inspector General's argument. It describes the IMD exclusion as a "broad

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[20] Office of the Inspector General, Department of Health and Human Services, *Review of Medicaid Claims for Beneficiaries under the Age of 21 Who Reside in Institutions for Mental Diseases in the Commonwealth of Texas* (Sept. 2003).

[21] Office of the Inspector General, Department of Health and Human Services, *Review of Medicaid Claims for Beneficiaries under the Age of 21 Who Reside in Institutions for Mental Diseases in the Commonwealth of New York* (Feb. 2004).

[22] Office of the Inspector General, Department of Health and Human Services, *Review of Medicaid Claims for Beneficiaries under the Age of 21 Who Reside in Institutions for Mental Diseases in the Commonwealth of Virginia* (Mar. 2004).

[23] Office of the Inspector General, Department of Health and Human Services, *Review of Medicaid Claims Made by New Jersey for Residents of Institutions for Mental Diseases Who Were Under the Age of 22* (Oct. 2004).

[24] Office of the Inspector General, Department of Health and Human Services, *Review of Medicaid Claims for Patients under Age 21 in State-Operated Psychiatric Hospitals That Were Institutions for Mental Diseases in California during the Period July 1, 1997, through February 28, 2001* (Nov. 2004).

exclusion" that applies to "services provided either in or outside the facility for IMD patients." This description leaves no room for an interpretation of the IMD exclusion to deny payment for medical services alone.[25]

As discussed above, there does not appear to be any support in other agency documents, Department Appeals Board decisions, and court rulings for the conclusion drawn by the Inspector General. Indeed, staff from the Inspector General's office acknowledged in a congressional briefing that, as far as the staff was aware, this is the first time in Medicaid's history that such audits have ever been conducted.

Conclusion

Congress passed the Medicaid statute to provide medical care to the indigent. Over time, Congress has added special protections to the statute to ensure access to medical care for poor children, including a guarantee of early periodic screening, diagnosis, and treatment. In the 30 years since the 1972 amendments, it has been clear to the agency, to states, and to courts that this provision of care extends to children in mental institutions.

The Inspector General's recent audits have no roots in the law or history. They lead to an absurd result: federal funding is made available for the traditionally state-covered area of psychiatric services, but federal funding is prohibited for the traditionally Medicaid-covered area of medical services. As the legislative history makes clear, Congress wanted to see children with severe mental illness improve and rejoin society — not languish without support for potentially lifesaving medical treatment, with only their psychiatric problems addressed.

The timing of these audits could not be worse. The mental health care system for youth is broken, with thousands of children being warehoused in detention centers across the country. Withdrawing millions of dollars in federal funding for children's mental health will increase the pressure on overburdened providers of critical mental health services. As beds close, the numbers of youth needlessly incarcerated to wait for community services will inexorably rise.

We urge you to intervene immediately. The Inspector General should stop the audits. CMS should clarify that the law stands as plainly written and as interpreted for the last 30 years. We then look forward to working with you on positive ways in which CMS can address the crisis of access to community mental health services for children.

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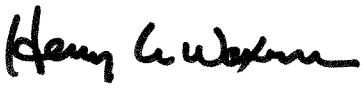
[25] The manual also describes the IMD exclusion as applying to one age group. In context, it is obvious that the applicable age group is adults age 22 to 64. "This age group" could not refer to individuals over 65 or under age 21, as the Medicaid Manual explains that these groups are eligible for federal funding. Health Care Financing Administration, Medicaid Manual, Section 4390, Rev. 65 (Mar. 1994).

If you have any questions about these concerns, please contact us or our staff responsible for this issue, Josh Sharfstein on the Government Reform Committee staff at (202) 225-5420, or Priscilla Hanley on the Governmental Affairs Committee staff at (202) 224-4751).

Sincerely,



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