

United States Senate

WASHINGTON, DC 20510

June 19, 2008

Via Electronic Transmission

The Honorable Michael O. Leavitt
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Leavitt:

As you know, Section 1115 of the Social Security Act allows the Secretary to waive certain federal requirements that apply to Medicaid and the State Children's Health Insurance Program (SCHIP). Such waivers may involve far-reaching and complex policy changes that could have a significant impact on beneficiaries. They could also set precedent for future waivers. For these reasons, waiver proposals require a thorough and transparent review that includes the input of stakeholders at both the state and federal level. We are concerned that the Department generally, and the Centers for Medicare & Medicaid Services (CMS) specifically, have failed to implement such a process.

In 1994, the Department published policies and procedures for reviewing waiver proposals in the Federal Register, which included notice and comment at both the state and federal level. Specifically, HHS stated:

The Department recognizes that people who may be affected by a demonstration project have a legitimate interest in learning about proposed projects and having input into the decision-making process...A process that facilitates public involvement and input promotes sound decision-making. 59 FR at 49250.

We wholeheartedly agree. We also note that since 1994, no law, regulation, or published policy has reversed the 1994 policy. However, HHS has indicated to the Government Accountability Office (GAO) that it no longer follows the 1994 policy, and that current Department policy is to post waiver proposals on its website prior to approval. Unfortunately, according to a July 24, 2007 letter to Members of Congress, the GAO found that HHS did not even fulfill this basic requirement for transparency before it approved comprehensive waivers for Florida and Vermont.

The GAO has repeatedly found that there is no opportunity for public comment on pending waiver proposals. Stakeholders have reported that they did not have specific information or sufficient time to review and comment on proposals. In Vermont, stakeholders reported that they were only presented with

the broad concepts of the proposed global waiver, which lacked specifics on the methodology used to project savings, implementation, and the effects on beneficiaries. Accordingly, the GAO has repeatedly recommended that Congress take action to ensure that individuals affected by waivers have an adequate opportunity to review and comment on proposals before they are approved.

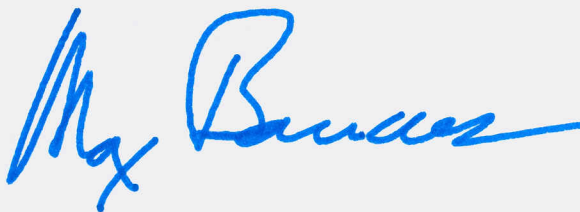
Similarly, in 2006, the final report of the Medicaid Commission – whose members you appointed – recommended compliance with the existing policy for notice and comment. The Commission found that information and perspectives offered during public comment periods constitute important feedback.

Despite this broad consensus regarding notice and public comment, waiver negotiations are currently conducted largely behind closed doors. The problem with this lack of transparency is exacerbated by the fact that waivers may be approved within days. As a result, beneficiaries and other stakeholders may be unaware of a waiver proposal until after it has already been approved.

We strongly urge you to ensure a meaningful opportunity for public notice and comment on all Medicaid and SCHIP waiver proposals submitted to the Department for consideration – both formally and informally. We further request information on current Department and/or CMS policies related to this issue, as well as the steps that you will take immediately to improve the process.

Thank you for your assistance in this matter. We look forward to your response no later than July 11, 2008.

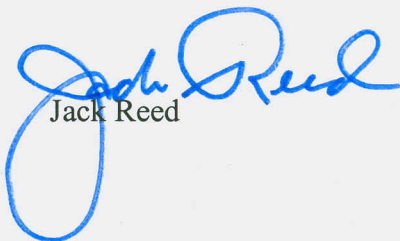
Sincerely,



Max Baucus



John D. Rockefeller, IV



Jack Reed



Sheldon Whitehouse