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Mr. Chairman and Members of the Committee:

Thank you for the invitation to testify today. Preparing for this hearing, I realized that it has been almost five years since I was last here. It's good to be back.

Medicaid in Context: Playing Catch-Up for the Broken Health Care System

We must discuss the issues of this hearing within the larger context of Medicaid policy: Why is Medicaid so expensive and why is it growing so fast? The answer is that Medicaid is doing the "catch-up" work for the whole broken health care system in the U.S.

- Medicaid must play catch-up for the omissions of Federal Medicare policy.
 - Medicaid bears the \$100 billion annual costs of inadequate coverage and benefits in Medicare for the seven million dually eligible people.
 - Medicaid also bears the \$10 billion annual costs of those people who are waiting to be duals and who have only Medicaid while sitting through Medicare's two-year waiting period.
- Medicaid is also playing catch-up for the changes in the private health insurance market.
 - Employers—especially small employers—are increasingly finding that the costs of providing insurance are unaffordable.
 - Employees are also finding that they cannot afford the rising premiums, which are growing much faster than income.
 - The population is increasing in geographic areas that have not had high rates of private insurance.
 - And the weak economy has meant that more people are poor.
- Medicaid is also playing catch-up for the accelerating costs of health care, especially prescription drugs and long-term care, for both of which Medicaid is the largest payor in the country.
- And Medicaid is playing catch-up as virtually the only insurer for people with chronic illnesses and disabilities.
 - Private insurers don't want to cover these people and actively underwrite to avoid them.
 - And neither Medicare nor private insurance provides the benefits that people of all ages with disabilities need.

Note: The views expressed are my own and should not be construed to represent past, present, or future employers.

- This valuable work of Medicaid has been clearly recognized by your work, Mr. Chairman, to make sure that more children with disabilities can be made eligible for the program. I hope that the Family Opportunity Act, for instance, can make it into law this year.

Given all the work that we have asked the program to do, how many problems it is handling for other parts of the health system, and how vulnerable its beneficiaries are, it is performing flexibly and well--and, I would note, efficiently, with fewer overhead costs than private insurers who deal with a much less difficult job.

Protecting Against Abuse of Medicaid

I am certain that the program includes waste and fraud and problems of financial integrity. I defer to my colleagues on this panel to describe these abuses in detail, but one need look no further than the appendices of the recent OIG semiannual report or the case docket of TAF to see the hundreds of millions of dollars that are at stake every year.

This is not unique to Medicaid: No program of this size can avoid attracting people who would abuse it. I am against these abuses, and I take backseat to no one in my work against them. We should fix them as we find them—both to ensure that the public continues to trust the program as efficient and responsive and to reinvest the money that is saved back into the good work of Medicaid.

Such a prudent course of ferreting out abuse and plowing the savings back into Medicaid is especially needed now because the program is seriously under-financed. Many States are still in economic and fiscal distress. On top of that, more than two dozen States (many represented by Members of this Committee) will have their Federal matching rates lowered this year and even more will next year. States are feeling the pressure and are making serious cuts in eligibility and services. Hundreds of thousands of poor people are being cut off of Medicaid because of State retrenchments. One State wants to limit people to two prescription drugs a month—no matter how sick they are. Another has proposed eliminating coverage of oxygen. And, of course, the Medicare clawback will only perpetuate and exacerbate these funding problems.

While Medicaid is doing hard work credibly, it is an extremely strained system, especially from a State perspective. The Federal government should, therefore, be careful about making big changes or fast moves. So much is at stake—the safety net under the rest of American health care—that none of us will be unaffected if the system is pressed too hard.

This is why I find the way that the current Administration is now dealing with State financing systems so troubling. Let me provide a little background.

The Example of Aggregated Upper Payment Limits (UPL)

As I mentioned, I was before this Committee five years ago. I was testifying as the Federal director of the Medicaid program. I had found out about a State financing system that I believed was inappropriate—aggregated upper payment limits, or the so-called UPL. I was trying to issue a regulation to close abusive UPL schemes down.

UPL was complicated and it was big. The Congressional Budget Office had informally estimated that, if left unchanged, UPL alone would raise Federal costs by more than \$100 billion.

But we dealt with it correctly and transparently.

- We made our views about UPL clear in advance.
- We met with the Office of the Inspector General and with the General Accounting Office and briefed them about the problems we had found and about our proposed solutions. We asked them for their help and we worked together.
- We met with the governors, with the State legislatures, with hospitals, and with advocates.
- We met repeatedly with Congressional staff and kept them apprised of our work.
- We published a proposed regulation, solicited comments on it, and made the regulation final as a clear and enforceable statement of law.
- We gave States notice of the new regulation and we gave them a transition period to change their systems.
- And we effectively closed down the abuses of UPL. Some estimates show that UPL spending is now down 90% from its high point, and I am happy to see that the recent OIG report estimates that our actions resulted in \$5 billion in Federal savings in this year alone—five years after we finished our work.

The Ad-hoc, Non-transparent Practices of the Current Administration's Review of Medicaid Financing

In dealing with State financing of Medicaid, this Administration has done none of that.

- CMS is making ad hoc and variable decisions about financing rules and waiver conditions.
- Waivers and even State plan amendments are being held hostage until States give up options that the statute says are State prerogatives.
 - For example, intergovernmental transfers (IGTs) and Targeted Case Management (TCM) are both provided for in Title 19—and while there may be abuses of them, the Administration has never defined what is abusive and what is not—much less made those definitions formal.
- States are being asked to agree to terms and conditions that people do not even understand.
 - For example, the Administration is pressing for States to substitute certified public expenditures (CPEs) for intergovernmental transfers (IGTs), without any clear definition of what is allowed in the former or what was wrong with the latter. In informal discussions, I have found that

even Federal auditors do not understand the new terms and what they do or do not include.

Good State Medicaid directors feel that they are being treated unfairly—and they are. Given the huge catch-up work that Medicaid has to do, they are looking for—and their Governors expect them to find—any way to stretch limited State dollars while staying within the law. They think that they are running their programs correctly, but the rules seem to change midstream. Sometimes they have to spend more time justifying what they did yesterday than doing what they need to do today or planning what they will do tomorrow.

This Committee has expressed serious concern that CMS is running Medicaid through waivers that are not transparent in their content or their process, leading to an uncertainty among advocates, States, and even lawmakers about what is allowed and what is not. In passing, I would say that your concern about waivers is even more pressing now: the Administration is taking over what should be Congress's job, and special terms and conditions are trumping Title 19. More and more frequently, the statute and some of its most fundamental promises are being waived away outside of the public view.

But my main point is that the manner in which CMS is administering State-financing rules is directly parallel to its treatment of waivers, and it should raise similar concern. Decisions worth billions to States, providers, and beneficiaries are being made in private, often as part of large, complex, and unreviewed deals. CMS methods and policies in this highly technical area are opaque, not transparent.

Most States do not want to find themselves on the wrong side of Federal auditors. But how can they be sure that they will not if the rules are unspoken and unwritten? Equally important, this basic uncertainty about financing makes it harder for State officials to do their real jobs—managing their programs to hold this strained safety net together.

This is not the way to run a program as complex and important as Medicaid. If the Administration has determined that a current financing system is illegal under current statute and regulations, the Administration should say that clearly and enforce the law evenly and fairly in all States. If they have determined that a practice is legal under the regulations but inappropriate, they should propose a change in the regulations; that's what I did—with GAO and OIG support. If they have determined that a practice is legal under the statute but inappropriate, they should bring the Congress a proposal to change the statute. No one is well served by this ad-hoc, non-transparent approach.

Let me also remind the Committee that running the program this way creates a high risk of increased Federal costs. If a State were to file and win a suit against CMS for acting in an arbitrary and capricious manner by failing to go through formal changes in the regulations, the State would be entitled to claim back payments all the way back to the beginning of the fiscal quarter in which it first filed its State plan amendment. The

best protection against being found to be “arbitrary and capricious” is to go through the process for rulemaking laid out in the Administrative Procedures Act. Agencies that do so are given substantial deference by the courts. Agencies that fail to do so generally lose that deference. There are billions of dollars at stake here.

Going through transparent and formal process to clear up financial integrity issues is hard work. But it is necessary if the Federal government is to be a reasonable partner with States and if the Federal government is to protect Medicaid and the fisc from abuse.

Conclusion

I would be remiss if I did not refer you to the thoughtful work of my former deputy, Penny Thompson, who came to the Medicaid program from the OIG and the HCFA Office of Program Integrity. She has outlined a series of financial safeguards and management structures in her work, “*Medicaid’s Federal State-Partnership: Alternatives for Improving Financial Integrity*,” done for the Kaiser Commission on Medicaid and the Uninsured last year. Most of the measures she describes can be accomplished without legislative change, requiring only a CMS commitment to do so.

Finally, in closing, I would ask that the Committee not approach these issues as a means of cutting the Medicaid budget. Find all the waste, fraud, and abuse that you can. Provide a legislative means to stop it or press the Administration to use current law to do so.

But then plow those savings back into Medicaid. Give the States dollar-for-dollar relief of the estimated billion dollars of new costs of Medicare Part D and, thus, make both programs as successful as possible. Reduce the clawback. Stop the drop in FMAP in the 29 States that are about to be cut. Enact the Family Opportunity Act. These are important measures to protect Medicaid as the safety net under all the rest of American health care, and Medicaid needs all the help it can get.

Thank you.