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SCHIP Expansion: More Birth Control for Minors, Less Involvement by Parents

Daniel Patrick Moloney

In their effort to override the President's veto of legislation to expand the State Children's Health Insurance Program (SCHIP), Members of Congress have added to the "compromise" legislation (H.R. 3963) two little noticed provisions that would undermine parents' right to consent to—or even know about—medical care given to their children through school-based health clinics. Such "medical care" could involve as intimate and delicate a matter as giving contraceptives to children. If the proposed legislation goes into effect, federal laws and regulations would make contraception available to millions of children, for free, while prohibiting doctors and schools from informing the children's parents.

SCHIP Pays for Family Planning. Currently, SCHIP allows each state to provide "prepregnancy family planning services and supplies" [1] to eligible children, and then pass on the bulk of the costs to the federal taxpayer. Within a few years of the passage of SCHIP in 1997, nearly every state had taken advantage of this new avenue of funding to offer a wide range of contraceptive services to children, including oral contraceptives, contraceptive implants, and "the morning-after pill."[2] Many of these states also included provisions in the programs they designed that made it illegal to notify parents when their children requested contraceptive services.[3]

The Medicaid Connection. While, by itself, SCHIP *allows* states to fund family planning services for teens, according to the way it is frequently implemented, in much of the country it would go even further and *require* such funding if H.R. 3963 becomes law. In as many as 32 states and the District of Columbia,[4] SCHIP works as an expansion of Medicaid; state officials simply add to their Medicaid programs children who were previously ineligible under the original Medicaid rules. In those states, therefore, the proposed SCHIP expansion bill would also basically expand Medicaid—along with all of its existing rules and regulations.

Since 1972, Medicaid statutes have mandated that all states provide contraceptives and other family planning supplies to all "individuals of childbearing age (*including minors who can be considered to be sexually active*) who are eligible under the State plan and who desire such services and supplies."[5]

Medicaid has been the number one source of taxpayer funding for contraception and other family planning supplies and services nationwide, accounting for 61 percent of all public funds spent on contraception in 2001.[6] One out of every eight women of reproductive age has used Medicaid to pay for services and supplies related to family planning.[7] The proposed SCHIP expansion of Medicaid into the middle class would be taking what is already the federal government's largest source of family planning funds and inviting even more children to join—400,000 more, according to the Congressional Budget Office estimate.[8]

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214 Massachusetts Avenue, NE
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(202) 546-4400 • heritage.org

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Parental Notification Problems. Under the language of the latest SCHIP legislation, many more children would be able to receive contraception without their parents' knowledge or consent. According to federal law, those who provide Medicaid benefits are prohibited from sharing "confidential" information about the patients, regardless of the age of the patient.[9] Doctors and school nurses who care for children covered under Medicaid are not allowed to inform parents about the "confidential" care being given unless the child signs a consent form. In many states, because the SCHIP expansion of Medicaid is accompanied by an extension of the regulations that accompany Medicaid, all eligible children who qualify for SCHIP funds can get contraceptive services without letting their parents know about it.

Under the proposed SCHIP expansion, where Medicaid becomes the vehicle for state SCHIP coverage, it would be easier and less expensive for children to engage in risky sexual behavior, and parental and community oversight would be weakened. Medicaid requires the states to provide contraception to each eligible minor, *regardless of age*, who is sexually active and requests contraception. Under Medicaid-SCHIP, any eligible child who has reached puberty has a legal right to contraception[10] and a legal right to confidentiality.[11] This legal and regulatory regime endures, even though robust findings in the professional literature clearly show that teen sexual activity is fraught with serious risks including health risks.[12]

1. Section 2110(a)(9) of the Social Security Act.
2. Rachel Benson Gold and Adam Sonfield, "Reproductive Health Services for Adolescents Under the State Children's Health Insurance Program," *Family Planning Perspectives*, v. 33, no. 2, March/April 2001, pp. 81–87, at *www.guttmacher.org/pubs/journals/3308101.pdf*.
3. *Ibid*.
4. Ten states (Alaska, Hawaii, Louisiana, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, South Carolina, and Wisconsin) and the District of Columbia simply apply Medicaid rules. Twenty-two states (Arkansas, California, Delaware, Florida, Iowa, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Maine, Michigan, Minnesota, North Carolina, North Dakota, New Hampshire, New Jersey, Rhode Island, South Dakota, Tennessee, and Virginia) have a program that combines Medicaid components with state-designed components. See "State Children's Health Insurance Program Plan Activity as of January 18, 2007," Heritage Foundation chart, at *www.heritage.org/research/healthcare/images/B2029_map1-lg.gif*. Not all of the combination programs provide the same health care coverage in the same way. For instance, some cover family planning by extending Medicaid, while others cover family planning under the state-designed portion of the plan. But wherever a component of a combination plan involves an extension of Medicaid, Medicaid rules apply.
5. Section 1905(a)(4)(C) of the Social Security Act. Emphasis added.
6. Adam Sonfield and Rachel Benson Gold, *Public Funding for Contraceptive, Sterilization and Abortion Services, FY 1980-2001*. The Alan Guttmacher Institute, at *www.guttmacher.org/pubs/fpfunding/tables.pdf* (November 15, 2007).
7. *Medicaid's Role in Family Planning*, Kaiser Family Foundation and Alan Guttmacher Institute *Issue Brief* No. 7064-03, October 2007, at *www.guttmacher.org/pubs/IB_medicaidFP.pdf* (November 15, 2007). Family planning services and supplies include, *inter alia*: condoms, oral contraceptives, injectable contraceptives, intra-uterine devices, spermacides, the diaphragm, "the morning-after pill," tubal ligation, and contraceptive counseling.
8. "CBO's Estimate of the Effects on Direct Spending and Revenues of the Children's Health Insurance Program Reauthorization Act of 2007," Congressional Budget Office, at *www.cbo.gov/ftpdocs/87xx/doc8741/hr976DingellLtr10-24-2007.pdf* (November 30, 2007).
9. 1902(a)(7)(A) and 1902(a)(8) of the Social Security Act; 42 CFR 441.20. The interpretation of the statutes prohibiting states from passing parental notification and consent laws was upheld by the Supreme Court. See *T.H. v. Jones* 425 F. Supp. 823 (1975), 425 US 986 (1976). See also Abigail English and Carol A. Ford, "The HIPAA privacy rule and adolescents: legal questions and clinical challenges," *Perspectives on Sexual and Reproductive Health* v. 36, n.2, March/April 2004, at *http://findarticles.com/p/articles/mi_m0NNR/is_2_36/ai_n6069101/print* (November 27, 2007); and "Parental Consent and Notice for Contraceptives Threatens Teen Health and Constitutional Rights," Center for Reproductive Rights *Domestic Fact Sheet* No. F008, November 2006, at *www.reproductiverights.org/pub_fac_parentalconsent.html* (November 15, 2007).
10. Section 1905(a)(4)(C) and Section 1902(a)(8) of the Social Security Act.
11. Section 1902(a)(7)(A) of the Social Security Act; 42 CFR 441.20.

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Under the language of the SCHIP "compromise," even more taxpayer dollars would be available for third-party contractors such as Planned Parenthood. If anything, Congress should intensify oversight of the existing family planning clinics. According to recent media accounts, certain clinics have failed to report statutory rape, in violation of local mandatory reporting laws,[13] or have been caught explicitly encouraging children to lie about their age to avoid the reporting laws.[14]

School-Based Clinics: Sections 506 and 616. Two provisions of the "compromise" bill, sections 506 and 616, would allow SCHIP and Medicaid funding to go to school-based health clinics, making it easier and cheaper to provide free contraception to children without their parents' knowledge.

Over the last several months, there has been an intense debate about several Medicaid regulations, which had the effect of restricting the use of Medicaid and SCHIP funds used in school-based clinics. Under current rules, most school-based clinics are not eligible for federal reimbursement for contraceptives or other health care, unless they meet rigorous criteria.[15] Pending federal regulations—designed to fight billions of dollars worth of state Medicaid fraud[16]—would make the eligibility criteria even more rigorous.[17]

In May 2007, a little-noticed provision of the catch-all "U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007" was used to delay the implementation of such regulations.[18] The House Committee on Government Reform and Oversight, held heated hearings on the regulations on November 1.[19] The SCHIP legislation before Congress would annul all the recent regulations[20] and explicitly allow school-based clinics to receive SCHIP and Medicaid funds, under which family planning services are an eligible expenditure.[21]

Together, these provisions would have the effect of lifting many of the federal restrictions governing the use of Medicaid or SCHIP funds in health clinics that are "school-based." This would make it easier for clinics and third-party contractors such as Planned Parenthood[22] to distribute contraceptives in the schools at a discounted rate[23] and—in those states in which SCHIP extends Medicaid coverage—without parental knowledge.

12. Robert E. Rector et al., "The Harmful Effects of Early Sexual Activity and Multiple Sexual Partners Among Women: A Book of Charts," Heritage Foundation *Executive Summary* June 26, 2003,at *www.heritage.org/Research/Abstinence/abstinence_charts.cfm.*
13. See Robert D. Novak, "A New Front in the Abortion Wars," *The Washington Post,*Thursday, October 25, 2007, p. A25, at *www.washingtonpost.com/wp-dyn/content/article/2007/10/24/AR2007102402345.html* (November 15, 2007). See also Charlotte Allen, "Planned Parenthood's Unseemly Empire: The billion-dollar 'non-profit,'" *The Weekly Standard*, October 22, 2007, Volume 013, Issue 06, at *www.weeklystandard.com/Content/Public/Articles/000/000/014/223livny.asp* (November 15, 2007).
14. See the report by Life Dynamics, a pro-life group that investigated several federally funded clinics and found evidence of widespread noncompliance with laws against statutory rape: Mark Crutcher, "Child Predators: Exposing the Partnership Between Planned Parenthood, the National Abortion Federation and Men Who Sexually Abuse Underage Girls," Life Dynamics Special Report, at *www.childpredators.com/Forms/ChildPredators.pdf* (November 15, 2007).
15. Centers for Medicare and Medicaid Services, *Medicaid School-Based Administrative Claiming Guide,* May 2003, p. 16, at *www.cms.hhs.gov/MedicaidBudgetExpendSystem/Downloads/Schoolhealthsvcs.pdf* (November 20, 2007).
16. Based upon studies by the Department of Health and Human Services Office of Inspector General, and the General Accounting Office. See Centers for Medicare and Medicaid Services, "CMS Proposes Improvements to Medicaid Payments," Fact Sheet, at *www.cms.hhs.gov/apps/media/press/factsheet.asp?Counter=2445* (November 28, 2007). Also available at *www.ppsm.net/mac/CMSCuts/SchoolBasedServicesFactSheetFinal8_31.pdf.*
17. CMS Final Rule CMS-2258-FC, Reg. vol. 72, No. 102, pp. 29748ff, May 29, 2007; Notice of Proposed Rulemaking, CMS-2287-P, Fed. Reg. vol. 72, No. 173, pp. 51397-51403, September 7, 2007; Notice of Proposed Rulemaking, CMS-2213-P, Fed. Reg. vol. 72, No. 188, pp. 55158-55166, September 28, 2007.
18. U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, H.R. 2206, Section 7002, at *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2206enr.txt.pdf.*
19. An overview of the hearings available at *http://oversight.house.gov/documents/20071108171200.pdf.* A preliminary transcript is available at *http://oversight.house.gov/documents/20071115174323.pdf* (November 30, 2007).

Conclusion. The SCHIP "compromise" would make Medicaid-based family planning programs available to potentially millions of children. It would widen the scope of the same Medicaid "confidentiality" rules that make it illegal for a child's doctor or health care provider to contact the parents of covered children when they notice the children are seeking contraceptive services or engaging in risky sexual behavior. Finally, the legislation would nullify a number of regulatory barriers, making it easier to distribute taxpayer-funded contraception directly to children through clinics based in the schools.

On SCHIP, Congress needs to go back to the drawing board and design a better policy for the coverage of uninsured children. Such a policy would expand, not contract, parental freedom over their children's coverage. It would expand, not contract, the choices available to families. It would deeply respect, rather than cavalierly dismiss, the ethical, moral, and religious convictions of Americans in the provision of health services for their children.

—Daniel Patrick Moloney is Senior Policy Analyst in the DeVos Center for Religion and Civil Society at The Heritage Foundation.

20. The Children's Health Insurance Program Reauthorization Act of 2007, H.R. 3963, Section 616, at *www.rules.house.gov/110/text/110_schip2.pdf* (November 15, 2007). The section reads: Moratorium on Certain Payment Restrictions.

    > Notwithstanding any other provision of law, the Secretary of Health and Human Services shall not, prior to January 1, 2010, take any action (through promulgation of regulation, issuance of regulatory guidance, use of federal payment audit procedures, or other administrative action, policy, or practice, including a Medical Assistance Manual transmittal or letter to State Medicaid directors) to restrict coverage or payment under title XIX of the Social Security Act for rehabilitation services, or *school-based administration, transportation, or medical services* if such restrictions are more restrictive in any aspect than those applied to such coverage or payment as of July 1, 2007. (Emphasis added)

21. The Children's Health Insurance Program Reauthorization Act of 2007, H.R. 3963, Section 506, at *www.rules.house.gov/110/text/110_schip2.pdf* (on November 15, 2007). The section reads: "Nothing in this title shall be construed as limiting a State's ability to provide child health assistance for covered items and services that are furnished through school-based health centers."
22. Planned Parenthood was explicitly mentioned in the legislative history of this part of the Medicaid act as being a potential contractor for providing contraceptives to minors. Cf. S.Rep. No. 92-1230, 92d Cong. (1972) (cited in 425 F.Supp 878, note 3): "Commenting on section 299E of the Senate bill amending Titles IV A and XIX of the Social Security Act, the Senate Finance Committee reported: 'The committee amendment would authorize States to make available on a voluntary and confidential basis family planning counseling, services, and supplies, directly and/or on a contract basis with family planning organizations (*such as Planned Parenthood clinics* and Neighborhood Health Centers) throughout the State, to present, former, or potential recipients including any eligible medically needy individuals who are of child-bearing age and who desire such services. *The Secretary would be required to work with the States to assure that particular effort is made in the provision of family planning services to minors* (and non-minors) who have never had children but who can be considered to be sexually active...'" (Emphasis added.)
23. Section 1903(a)(5) of the Social Security Act.

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