



April 23, 2008

Mr. Michael O. Leavitt
Secretary
Department of Health and Human Services
200 Independence Avenue S.E.
Washington, DC 20201

Dear Secretary Leavitt:

This letter is in response to the recent finding of the Government Accountability Office regarding the process by which the August 17th State Health Official letter on the SCHIP program was released. The American Public Human Services Association and the National Association of State Medicaid Directors have strong objections to the manner in which this new rule was released and the lack of involvement of Congress and the states. We also have expressed deep concerns about the content of the August 17th directive.

APHSA and NASMD believe that it is important in a federal-state partnership such as the Medicaid program, for both parties to follow the established policies in the furtherance of the program. Therefore, we request that CMS adhere to the findings of the Government Accountability Office's letter to Senators John Rockefeller and Olympia Snowe dated April 17, 2008.

Through the course of their investigation, the GAO found that the August 17th letter is a rule as described by the Administrative Procedures Act because "it is of general applicability; of future effect; and designed to implement, interpret or prescribe law or policy." The GAO concluded with the statement that the August 17th letter is determined to be a rule under the Congressional review act and "[t]herefore, before it can take effect, it must be submitted to Congress and the Comptroller General"

APHSA and NASMD agree with GAO's assessment that the issuance of the August 17th letter runs counter to due process, which requires, at a minimum, prior notice of a change in policy or procedure and an opportunity for those affected to provide input on the proposed change. To comply with the Constitutional mandate for due process, Congress enacted the Federal Administrative Procedure Act, codified in Title 5 of the United States Code. Title 5 specifically states that no individual (including states) can be held to a rule unless it was properly distributed (e.g. published in the *Federal Register*) or the party receives timely and actual notice of said rule (5 (U.S.C. §553). In addition, Title 5 requires public participation in rulemaking.

Therefore, APhSA and NASMD request that CMS withdraw the August 17th letter, and instead follow the prescribed regular order for the issuance of new rules and regulations. We would appreciate the opportunity to sit down with you, Herb Kuhn, and other members of the NASMD Executive Committee at any time to engage in a broader conversation about opportunities coverage for America's uninsured children.

We encourage you to engage states in identifying mutually agreeable, realistic conditions for the expansion of coverage for children under both Medicaid and SCHIP. If you have any questions, please contact Barbara Coulter Edwards, Interim Director, of the National Association of State Medicaid Directors, at (202) 682-0100.

Sincerely,



David Parrella, Chair
National Association of State Medicaid Directors



Jerry W. Friedman
Executive Director
American Public Human Services Association

cc: The Honorable Nancy Pelosi, Speaker of the House of Representatives
The Honorable Harry Reid, Majority Leader of the Senate
The Honorable John Boehner, Minority Leader of the House of Representatives
The Honorable Mitch McConnell, Minority Leader of the Senate
Senate Finance Committee
House Energy and Commerce Committee
Kerry Weems, CMS
Herb Kuhn, CMSO
Matt Salo, Director of Health Legislation, NGA
Joy Wilson, Director of Health Policy, NCSL
NASMD Executive Committee