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Dear Deputy Administrator Mann,

We appreciate the opportunity to provide comment on the Wisconsin Maintenance of Effort (MOE) waiver request. Founded in 1994, Advocacy & Benefits Counseling for Health (ABC) helps families across Wisconsin gain access to health care benefits and services. ABC's mission is to provide parents and providers with information, advocacy tools, legal services, and expert support they need to secure health care coverage and services. ABC works to translate individual case experiences into local strategies as well as system level reforms. ABC also serves as a catalyst in the development of local HealthWatch Coalitions to promote community efforts and community voices directed at health care coverage and access concerns for children and families.

In March 2011, Wisconsin's Administration under Governor Scott Walker introduced a budget repair and subsequent biennial budget that included a provision to terminate 53,000 childless adults and parents from BadgerCare Plus should the federal review of the MOE waiver request not be completed by December 31, 2011. However, the administration, through Wisconsin Department of Health Services Secretary Dennis Smith, did not submit the request until November 10, 2011, leaving CMS fewer than 50 days to conduct an initial technical review of the waiver and subsequent process of negotiation. The Walker Administration simply tried to create and amplify a hostage situation with 53,000 people—childless adults over 133% of the Federal Poverty Level on the BadgerCare Plus Core Plan and parents on BadgerCare Plus. Creating a catch-22 situation is not the way for Wisconsin, or any state, to do business with CMS and certainly not the way to treat low income people and families. If CMS approves the Wisconsin MOE waiver, almost 65,000 BadgerCare recipients including 29,000 children will lose coverage. If CMS denies the waiver, over 53,000 adults lose coverage effective July, 1, 2012. Both options are untenable.

Act 32, the Wisconsin State Budget as approved by the Wisconsin legislature, delegated authority to Department of Health Services Secretary Smith to create changes in BadgerCare and Medicaid laws, needing only a "passive review" of the Joint Finance Committee, not a review by the full legislature. On Thursday, November 10, the Wisconsin Legislature's Joint Finance Committee met to discuss and vote on the Wisconsin Department of Health Services proposal to gut BadgerCare and Medicaid. The Joint Finance Committee was comprised of 11 Republicans and 4 Democrats (one Republican Senator was absent). The Committee's approval, not review by the Wisconsin Legislature, is all that was required to set the waiver request in motion to the federal government for review. By a party-line vote, 11-4, the Committee approved the Department's proposal with no changes. Therefore, DHS was able to forward aspects of the plan



that require federal approval to CMS.<sup>1</sup> We strongly urge CMS to stand firm against the Walker Administration request and not be bullied into a premature response for the following reasons.

**1. Not an Appropriate Waiver Request.** Above all else, Section 1115 of the Social Security Act gives the Secretary of Health and Human Services authority to waive provisions of major health and welfare programs, including certain Medicaid requirements, and to allow a state to use federal Medicaid funds in ways that are not otherwise allowed under federal rules. The authority is provided at the Secretary's discretion for *demonstration projects* that the Secretary determines *promote Medicaid program objectives*. What Secretary Dennis Smith put in front of the Wisconsin Joint Finance Committee and now has presented to CMS was neither a demonstration project nor a plan to promote Medicaid program objectives. It wasn't even a test of the Affordable Care Act, another attempt by Secretary Smith to stretch the intent of the waiver. The Wisconsin Legislative Fiscal Bureau called attention to this fact in many instances throughout its review of the proposal.<sup>2</sup> When evaluating the crowd-out provision, dependent coverage, or counting "household income," for example, the Fiscal Bureau identified Smith's proposal as "not an accurate test of the Affordable Care Act" for failure to implement similar provisions as the ACA. In fact, Democratic Joint Finance Committee member Representative Tamara Grigsby called what Smith proposed "a grand experiment...playing with people's lives," not a demonstration or test that promotes the objectives of Medicaid. Similarly, Joint Finance Committee member Senator Robert Jauch suggested that Smith didn't get to the threshold of what was appropriate for the federal government to evaluate. Jauch called into question whether Secretary Smith was even withholding the mission of the Department of Health Services: to protect and promote the health and safety of the people of Wisconsin.

**2. Wisconsin is not in a budget deficit.** The Patient Protection and Affordable Care Act (ACA) provisions specify that existing coverage for adults under the Medicaid program generally remains in place until the Secretary determines that an Exchange established by the State under section 1311 of the ACA is fully operational, which is likely to be January 1, 2014, and, for children, under both Medicaid and the Children's Health Insurance Program (CHIP), through

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<sup>1</sup>As the Joint Finance Committee was meeting on November 10, so too were Democratic members of the Wisconsin Legislature. Their intent was to hear about the impact of the proposed BadgerCare and Medicaid cuts on the people of Wisconsin--the same people not allowed to testify at the Joint Finance Committee meeting. During his comments, ABC for Health public interest attorney and Executive Director Bobby Peterson identified the Pathway Plan for 2012 as an alternative to the draconian cuts of the Health Secretary. "The Pathway Plan for 2012" is a creative and cost effective public-private partnership and an alternative to Wisconsin's Department of Health Services Waiver proposal to CMS that drastically restructures and limits or eliminates coverage for many BadgerCare and Medicaid recipients. Peterson implored the Joint Finance Committee to take a smarter approach and examine better alternatives to the DHS plan that rips massive holes in the successful BadgerCare pool. Peterson says the Pathway Plan for 2012 could eventually cover all Wisconsin residents while providing high-quality care, continued choice, and strong consumer protections. Read the Pathway Plan for 2012, a working document:

<http://www.safetyweb.org/healthwatchwi/PathwayPlan2012.pdf>.

<sup>2</sup> [http://legis.wisconsin.gov/lfb/publications/Section-13.10/Documents/2011\\_11\\_10JFC\\_DHS\\_4.pdf](http://legis.wisconsin.gov/lfb/publications/Section-13.10/Documents/2011_11_10JFC_DHS_4.pdf)



Federal fiscal year 2019. The purpose of this MOE provision is to ensure that state policies do not interfere with the ACA's goal of providing affordable health care coverage to all Americans through state-level medical insurance exchanges. However, exceptions apply to the Medicaid MOE for states experiencing or projecting a deficit to permit Medicaid eligibility restrictions for certain nonpregnant, nondisabled adults. Walker Administration is certain to attempt to certify to CMS that Wisconsin has a budget deficit. Any claim from the Administration that Wisconsin is in deficit is not accurate. By state law and the Administration's own assertion, the state is not in deficit, and is instead on sound financial footing. Our state constitution Section 5 of Article VIII does not permit the legislature to pass a budget that includes a deficit. Second, fully funding Medicaid in Wisconsin requires approximately \$220 million in state revenue. This amount is almost equal to the \$210 million Wisconsin spent on tax breaks in fiscal years 2011-2013. Finally, the Governor has touted projections from the independent Legislative Fiscal Bureau that showed both a balanced budget and that Wisconsin is not projected to have a budget deficit in the next biennium.

### **3. Using EPSDT (Early Periodic Screening Diagnosis and Treatment) as a Cover**

Secretary Smith has been hiding behind early periodic screening diagnosis and treatment (EPSDT) saying that any changes in benefits would not impact children, as EPSDT would still "be available" for medically necessary services. We cannot agree with the premise of Smith's argument. While EPSDT, called "HealthCheck" in Wisconsin provides for services and benefits, even those not included in the state plan, a family has to jump through hoops and hurdles to get to these benefits. Using HealthCheck means that many of the services children got on the BadgerCare Plus Standard Plan will now have access restricted, with hurdles such as verifications, Prior Authorizations and clinical information. The Department, even under EPSDT retains discretion to approve referrals. But since the Walker administration has eliminated Consumer Assistance Grants<sup>3</sup> and Civil Legal Services<sup>4</sup> funding for low-income families, there are very limited opportunities to challenge these decisions. Smith never identified a process for DHS to evaluate requests, such as reviewing medical necessity, establishing criteria for provision of services, and determining the amount, duration and scope of services. Nor did Smith identify how the Department would assist families seeking services through EPSDT, the outreach and education that would be needed to facilitate the requests, and the relationship with the HMOs charged to provide these "other services."

**4. Choice is Not Part of the Equation.** Secretary Smith noted that the Administration's proposed cuts would cause little disruption to families, as those individuals being cut could simply buy private insurance. He indicated that the only individuals who would lose coverage will be those who "make the choice not to pay their fair share." We encourage you to not accept the premise of his argument.

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<sup>3</sup> <http://www.safetyweb.org/projectsConsumerAssistance.html>

<sup>4</sup> <http://www.safetyweb.org/healthwatchwi/updates/update051611.html#headlines>

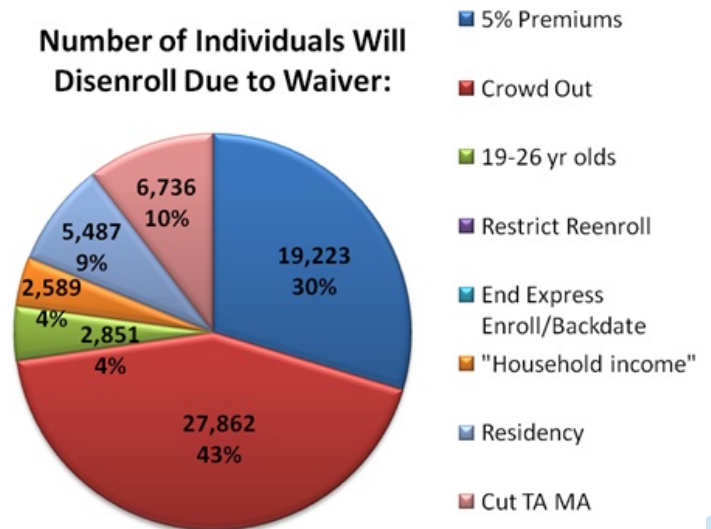


Smith wanted us to accept that everyone has the ability to pay for health coverage and that some simply choose not to. He believed that the healthy people were selecting BadgerCare, creating "inequity" in the small group and individual market. Smith insinuated that BadgerCare stole the healthy from the private market. Secretary Smith said that health insurance is all about pools and Medicaid has taken healthy lives out of pools. This increases premiums for everyone else in private insurance. Wisconsin needs to stop trying to save a failing small group and individual insurance market by ripping holes in the BadgerCare pool.

**5. Untenable Impact on Wisconsinites.**

Wisconsin's Legislative Fiscal Bureau<sup>5</sup> drafted a memo that identified almost 65,000 people would not be eligible for BadgerCare Plus under the new proposal. Secretary Smith has consistently stated, "We're just simply carrying over federal policy." Instead, we believe this to be a blatant and cold attempt to gut part of a well established safety net for our most vulnerable, especially children. The Joint Finance Committee rubber stamped a dangerous and foolish DHS proposal and failed in an essential responsibility to the people of Wisconsin. They failed to consider the greater good and the long term financial interests of the state. The Republican majority proved to be tone deaf to the concerns of families, children, and communities across the state served by the BadgerCare program. The actions of the committee will subject our economy to long term harm as we have fewer federal resources to cover medical care and larger uncompensated care costs (like certain emergency room services) that will drive up health care costs for everyone. But remember, damaging a program that affects 1.2 million people and many more family members and friends across Wisconsin is playing with fire. Before too long the smoldering will become a flame that could singe the short-sighted Republican majority.

**Number of Individuals Will Disenroll Due to Waiver:**



**Conservative Estimate 458,000 People Impacted by Proposal**

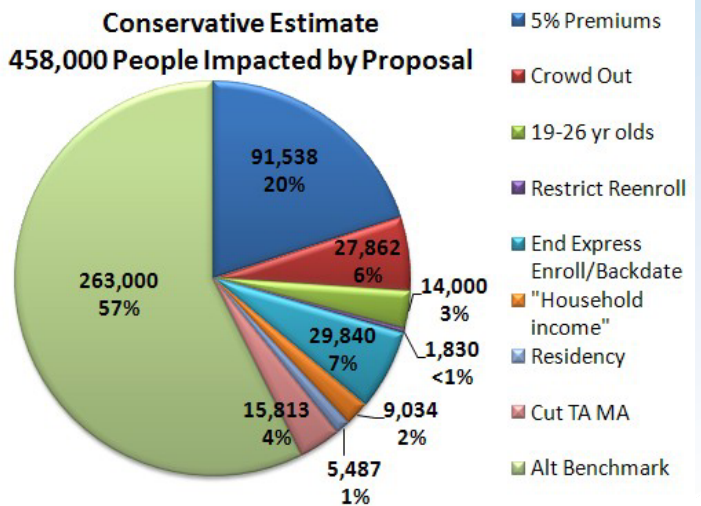


Figure 1. Legislative Fiscal Bureau analysis of the impact of the waiver on Wisconsinites

<sup>5</sup> [http://legis.wisconsin.gov/lfb/publications/Section-13.10/Documents/2011\\_11\\_10JFC\\_DHS\\_4.pdf](http://legis.wisconsin.gov/lfb/publications/Section-13.10/Documents/2011_11_10JFC_DHS_4.pdf)



**6. Specific Elements of the Waiver are Unjust and May be Illegal.** Secretary Smith defends a provision of the MOE waiver that is very troubling. In what he calls an “income determination update,” Smith explained that DHS will include the income of all adults living in the same household (except grandparents) in determining Medicaid eligibility. After receiving criticism, Smith amended his claim to explain that there was a duration requirement of 2 months for the “adults” in the household. This provision unfairly counts all household members-relatives, roommates, houseguests, etc. without regard for lines of legal responsibility or without counting the expenses of these unrelated adults. Wisconsin Joint Finance Committee member Senator Lena Taylor dislikes the provision for another reason, stating, “One of the biggest indirect consequences of this combined income approach is a decrease in willingness to help others. If allowing a family member or close friend to live with you would jeopardize access to health insurance for yourself and your children, would you be more or less likely to offer a helping hand?” Once again, this new eligibility plan is not a trial implementation of the ACA which determines family income using only the income of the immediate family, excluding grandparents. Wisconsin is using different, potentially illegal standards.

**7. Limited Comment Period.** When preparing comments to the federal government on the Department of Health Services (DHS) Waiver Request, one of the hot button issues for us became the process for public input, as envisioned by the ACA. We started reviewing the details: DHS only released copies of the full proposal on November 8, 2011 for public review. Although DHS accepted public comments on its website and provided a rough outline of its proposed changes prior to a hastily arranged daytime public hearing process, the public involvement was minimal and working families were largely excluded from testifying. Finally, the full breadth and reach of this dramatic proposal were only better understood after the non partisan Wisconsin Legislative Fiscal Bureau submitted its comprehensive analysis of the MOE-related proposals to the Joint Finance Committee. This important analysis and detail was provided less than 48 hours prior to the committee’s public meeting to vote on the proposals and following all opportunities for public input. DHS never held a briefing on the details of the proposal following the release of the Fiscal Bureau’s analysis. We believe this is contrary to the Affordable Care Act’s requirement for a process when applying for demonstration waivers that involves “public notice and comment at the State level, including public hearings, sufficient to ensure a meaningful level of public input.”<sup>6</sup> Until the release of the Fiscal Bureau analysis, a typical parent or affected individual did not have a way to assess impact on his/her personal situation and therefore could not testify in a meaningful or sufficient manner.

**8. Wisconsin’s Administration did not wait for a Medicaid Audit Report.** Republican lawmakers requested in January 2011 that the Wisconsin Legislative Audit Bureau conduct an audit of Wisconsin’s Medical Assistance programs. Now, almost a year later, on December 20,

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<sup>6</sup> <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=0950-AA10>



2011 the Audit Bureau has released its comprehensive audit report.<sup>7</sup> It reveals a disproportionate, wasteful dependence on vendors to administer Wisconsin's Medicaid programs and no evidence of fraud and abuse that Medicaid opponents cited when they called for the audit. While the audit report is not as thorough as some we have seen in the past, it still offers valuable insights into the status of Wisconsin's health care system and spending – insights that could have been used to inform DHS officials and lawmakers before they developed and shepherded a waiver proposal that may irrevocably alter the face of Wisconsin's public health landscape.

Specifically, the audit looked at:

- Trends in the number of Medical Assistance recipients, by subprogram;
- Trends in program expenditures, by funding source, type, and subprogram;
- Alternatives for providing services in a more cost-effective manner;
- How Wisconsin's Medical Assistance costs and benefits compare to those of other Midwestern states, as well as how states have attempted to control these costs; and
- The potential effects of changes in federal law on the provision of Medical Assistance-funded benefits.

One of the most disconcerting reveals of the audit report is the inadequacy of the DHS's accounting system. The report notes that auditors had to rely on estimates from HP Enterprise Services and other vendors and contractors to conduct the audit. The report says, "Neither the State's accounting system nor the internal accounting system used by DHS contain sufficient information to apportion all Medical Assistance expenditures by subprogram." The Audit Bureau recommends enhancing the processes by which budgets for Medical Assistance are developed and expenditures are tracked to provide "[the administration and people of Wisconsin] with better information about how funds are likely to be spent among subprograms and whether assumptions made in developing budgeted estimates are reasonable." Given that the waiver request was panned by critics for being unreasonable and abusive to various subprograms, the people of Wisconsin are due an accurate accounting and transparent data about the BadgerCare and Medicaid program actual costs and efficiencies. Only then can there be a guarantee of a thorough program evaluation, as opposed to weighty decisions made on assumption.

**CMS should stand firm against the Walker Administration.** We understand that CMS has already acknowledged that Wisconsin may go ahead with its plan to instantly pull coverage for people who receive a termination of eligibility notice. We can expect DHS officials to move forward with this plan. (Presently, people getting a denial notice will have coverage to the end of the month, providing an opportunity for review or appeal.) But what happens to these costs that the state saves by terminating coverage earlier? Those expenses do not just vanish. The unpaid bills are absorbed into everyone else's bill. The result is a massive cost shift and socialization of that medical debt that will increase everyone's premiums. That is one problem with the Walker Administration's plan. They don't realistically follow the money. CMS should stand firm against

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<sup>7</sup> <http://legis.wisconsin.gov/lab/reports/11-15full.pdf>



the Walker Administration request and not be bullied into a premature response. Meanwhile, we have called on Wisconsin legislators to do the responsible thing and remove the termination notice for 53,000 childless adults from Wisconsin law as proposed by AB 339.

Wisconsin had a progressive health tradition. In 2008, Wisconsin merged its BadgerCare, Healthy Start and Family Medicaid programs to create a robust BadgerCare Plus program. In 2009, Wisconsin, through a federal waiver extended BadgerCare benefits to childless adults through the “BadgerCare Plus Core Plan.” In the spring of 2010, Wisconsin formed a self-funded, state administered “BadgerCare Plus Basic Plan.” As our administration was changing, Wisconsin was awarded for its innovation and progress in program enrollment, receiving \$23 million in CHIPRA “performance bonus” money. Yet, since our new administration took office in 2011, the Core Plan and Basic Plan have been frozen, additional bureaucratic hoops and hurdles have been added to application and enrollment processes, and now the administration is cutting thousands of individuals and children out of their health coverage and care.

In conclusion, big changes loom large for Wisconsin. The proposed cuts are the largest shift of expenses to the public and private sector that we at ABC for Health have seen in almost 20 years of work as lawyers for people seeking health care coverage and services. To cut \$550 million in state and federal funds means health coverage costs will be redistributed and socialized to the private sector. Regardless of what CMS or the Walker administration actually decides to do, we can expect changes and more expensive health care. People will lose coverage due to terminations of eligibility and more red tape. We can’t assume as the Walker Administration suggests, that people will jump right into a complex and expensive private individual health plan market. That, too, is extremely unrealistic. People will simply go without the coverage and the care they need. Some of the proposals in the state plan amendments and the MOE waiver request will significantly restructure the Medicaid Program. Some of these plans may be illegal and could be subject to legal challenge.

Sincerely,  
ABC for Health, Inc.

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