



April 18, 2008

Managed Risk Medical Insurance Board
Attn: JoAnne French
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Re: Official Comment from Concerned Organizations Regarding Notice of Proposed Rulemaking R-2-07, Establishing Waiting List and Disenrollment Procedures in the Healthy Families Program

Dear Managed Risk Medical Insurance Board Staff;

The following organizations are united in opposition to proposed Managed Risk Medical Insurance Board ("MRMIB") regulation R-2-07, which would provide authority for MRMIB staff to establish procedures for developing wait lists for new Healthy Families Program ("HFP" or "Program") applicants and for disenrolling children currently receiving coverage through the HFP: **American Academy of Pediatrics - California, California Children's Hospital Association, California Pan-Ethnic Health Network, The California Partnership, California Rural Legal Assistance, Children's Defense Fund - California, Children Now, The Children's Partnership, The Children's Specialty Care Coalition, Community Health Councils, Health Access California, Health Rights Hotline, Insure the Uninsured Project, L.A. Care Health Plan, Latino Coalition for a Healthy California, Legal Aid Society of San Mateo County, Maternal and Child Health Access, National Health Law Program, PICO - California, and Western Center on Law and Poverty.**

Together, we – the leading organizations advocating on behalf of California children, children's health, and health coverage – urge MRMIB to reconsider the current effort to make permanent these regulations, and instead allow the previously established emergency regulations to expire on June 11, 2008.

First, we assert that creating this waitlist/disenrollment authority in anticipation of some future, as-yet unforeseen financial insufficiency, is both unnecessary and

inappropriate. Permanent authorization to institute waitlists or disenrollments is not something the Board should seek. Such a policy would directly and significantly impact access to health coverage for thousands of California's most vulnerable children, and therefore is a fundamental policy decision more appropriately left to the Legislature and Administration to decide at such time as it becomes necessary to do so. There are other, less harmful and more appropriate approaches that the Board can pursue to achieve the HFP enabling statute's requirement that the Board ensure expenditures do not exceed amounts available. Ultimately, the Board maintains the ability to authorize such measures through emergency regulations if and only if an imminent fiscal insufficiency exists.

Second, we strongly believe that making these regulations permanent will cause significant harm to the Program, to children covered by HFP (current and future), and to their families. While we recognize MRMIB's fiduciary responsibility to manage the Program wisely, such action at this time would create confusion among subscribers and applicants, depress HFP application and enrollment, weaken the Program's hard-earned good will, and undermine California's case for a strong federal funding package. Disenrollments and waiting lists are among the most draconian possible approaches to funding shortfalls, potentially resulting in many tens of thousands of children either being denied or dropped from coverage.

The evidence is vast and clear: children without health insurance even for short periods are less likely to receive timely care. In the end, because these children will be forced to obtain more expensive treatments for conditions that could have been prevented, their lack of coverage will negatively affect their health, cause their families to incur medical debt, and increase the cost of health care for all Californians.

Finally, in the event that staff does not halt this effort to make permanent these emergency regulations, over our strong objections, we ask that specific alternatives and modifications be made to the proposed regulations in order to account for policy and population priorities not considered by the current proposal.

I. Authorization of Wait Lists and Disenrollments are Unnecessary and Inappropriate

Making permanent regulations that authorize MRMIB to create waitlists for new applicants and disenrollment procedures for current HFP enrollees is both unnecessary at this time and an inappropriate response to a non-existent financial insufficiency. While we recognize that MRMIB must operate the HFP within its funding resources, wait-listing and/or disenrolling children in order to address funding shortfalls would be extremely damaging both to the integrity of the Program and to the children served by the HFP. Fortunately, there are established, approaches to addressing funding shortfalls that are preferable to those proposed in these draft regulations. We urge MRMIB to consider the measures outlined below in lieu of the approach taken in the proposed regulations.

Policy and Budget Decisions Properly Rest with the California Legislature and Administration

We first note that in the case of an imminent fiscal insufficiency, MRMIB maintains the capability to pursue emergency regulatory authority. The Board need not impose waiting lists or disenrollments as a matter of regulatory authority now. Instead, funding shortfalls – most likely state or federal SCHIP insufficiencies – can and should more appropriately be dealt with as part of the regular legislative process by the Legislature and Administration.

The Legislature has access to and control over many more options of how best to deal with fiscal issues resulting from a lack of program funding, including raising additional revenues, cutting spending via other means or shifting funds from other parts of the state budget. For that reason, the Legislature and the Administration, not the MRMIB Board, are the bodies best suited to make these policy decisions at the appropriate time. Our elected officials have the responsibility to address the consequences of the state budget and to determine through the budget process how Healthy Families should be structured to meet Program needs. Legislative options may, but do not necessarily have to, include waiting lists or disenrollments, items previously proposed in the state budget-making process.

The important distinction between a legislated policy and one instituted via regulatory authority is relevant: the policy decision to waitlist or disenroll children must be made as part of an open public legislative process that addresses fiscal shortfalls across an entire budget, not as a unilateral decision made by one department or agency. The Legislature and the Administration are ultimately accountable for the implications of their budget decisions and thus have the responsibility to put in place the policies for programs to operate within larger budget constraints.

Notifying the Legislature and Administration of funding insufficiencies is a standard agency practice. When, mid-year, a government agency determines that appropriated funds will not be sufficient to cover projected program costs through the end of the year, an agency submits to the Department of Finance, and in turn to the Legislature, a deficiency notice. The notice triggers the Legislature to consider whether or not to propose a deficiency bill to supplement current year funding for the program. Rather than having the Board authorize waitlists and disenrollments now, MRMIB should institute this practice in the event of potential HFP insufficiencies.

Similarly, if it appears that federal funding is stalled as part of SCHIP reauthorization negotiations or if MRMIB anticipates that current federal SCHIP funding will be exhausted at a certain point in the year, MRMIB should notify the Legislature and the Administration in advance of any possible upcoming shortfall and provide policy recommendations for how to address the situation. While we defer to the experts in the Legislature to develop the most appropriate response to these scenarios, one possible policy would be a temporary loan of state funding until federal funding became available.

Alternatives to Waiting Lists and Disenrollments

In addition to deferring to the Legislature and Administration when it foresees a potential financial shortfall, MRMIB could prepare for such a scenario by proposing to the Legislature and Administration a process whereby HFP enrollees are transferred, temporarily or indefinitely, to Medi-Cal and receive open-ended (albeit lower) federal Medicaid matching funds. Under this approach, if the state were to actually face a shortfall in federal SCHIP funding, even temporarily, children's coverage would not have to be disrupted, and the state would continue receiving federal matching payments. Given that the state has some time before the current SCHIP funding would need to be extended (March 2009), MRMIB has the opportunity to develop a detailed proposal for the Legislature to consider and, if approved, MRMIB and the Department of Health Care Services would have ample time to put in place the necessary process should it be needed.

This strategy would work in the following way: The federal government allows states to receive Medicaid matching funds for children in a Medicaid expansion who may have previously received SCHIP funding, if all of the state's SCHIP funding has been expended. Thereby, if it appears that HFP will not have sufficient federal SCHIP funding, children could be temporarily or indefinitely transferred (from the federal perspective) from our separate

SCHIP program to a Medicaid/SCHIP expansion program. The state could first use its SCHIP funds on the Healthy Families children and delay submitting claims relating to the HFP children (since states have up to 2 years to submit federal claims). If, after submitting all claims relating to the HFP children, the state had SCHIP funds remaining, it could then claim SCHIP funds for some or all of these Medicaid/SCHIP children. Once the state's SCHIP funds were exhausted, the state could start seeking federal Medicaid matching funding for these children. The federal approval process for moving certain Healthy Families SCHIP children into Medicaid/SCHIP would require two simple state plan amendments ("SPAs"). (Since an approved SPA does not require the state to implement that amendment, the state could have the SPAs approved and ready to be implemented should the state need to move children from one program to another.)

Under this alternative, children's coverage would continue uninterrupted, just as it does when children transfer from one program to another via the new presumptive eligibility programs. The clear advantage of this approach is that children would not have to bear the burden of any temporary gap in federal SCHIP funding, while the state would have much of the gap filled with federal Medicaid funding. We stand ready to assist MRMIB in thinking through all the important details of this transition process.

II. Procedures Establishing Wait Lists and Disenrollments Would Be Harmful to the Program and to California's Children

While we share MRMIB staff's concern for the health and wellbeing of children covered by the HFP and commend MRMIB for the development and administration of an efficient and popular program for children's coverage, these regulations work in opposition to MRMIB's mission and the Legislature's original intent when establishing the HFP. Instead of instilling a sense of commitment to children's health insurance, these regulations, if made permanent, would create confusion among subscribers and applicants, depress HFP application and enrollment, weaken the Healthy Families Program's hard-earned good will, and undermine California's case for a strong federal funding package.

The Chilling Effect: Making Permanent these Regulations Will Lead to Confusion for Subscribers, Applicants, and Their Families, and Ultimately Decreased Application and Enrollment

Passage of permanent regulations that specifically allow MRMIB to cease enrollment, place applicants on wait lists, and drop currently enrolled children will undoubtedly confuse subscribers and potential applicants. One can certainly imagine a potential applicant whose family learns of the Board's action and assumes that a waitlist has been initiated, or an enrollee's family who hears from a friend that due to the Board's passage of these regulations their daughter's coverage has been terminated. Such widespread confusion is both likely and, given the lack of legitimate threat of financial shortfall, wholly unnecessary.

We know from past experience that the confusion created by the adoption of these regulations will have a significant chilling effect. In 2003, Governor Schwarzenegger proposed freezing enrollment in the HFP beginning on January 1, 2004 due to projected fiscal concerns. While the proposal was never in fact implemented, many advocates, Certified Application Assistors, and other health workers "on the ground" were repeatedly asked about the freeze by clients who had heard stories about enrollment caps and waiting lists.

Additionally, MRMIB has been witness, first-hand, to the chilling effects of even temporary wait lists. In the case of the AIM program, after the imposition of a short-lived

waiting list, it took concerted effort over *several years* to rebuild enrollment of families in AIM's health insurance. If MRMIB staff proposes and the Board adopts these waitlist/disenrollment regulations, we are only left to assume that similar results will occur.

Staff may argue that when HFP began the Program had a similar waitlist/disenrollment policy in place and did not experience the harm we foresee. This present case is entirely different. Unlike the previous policies that were passed as part of the establishment of a major new program, this proposed regulation is a singular, stand-alone policy that will be enacted by the Board at a monthly meeting. With a spotlight on this action, myths will undoubtedly be created as the word spreads. What's more, in the context of the current budget uncertainty (and the Governor's proposed changes to the HFP which are expected to result in tens of thousands of HFP children losing coverage), one could easily foresee confusion being exacerbated. This would result in many families declining to apply or renew coverage, undermining a decade of MRMIB's and communities' investments in Healthy Families outreach and enrollment.

A Significant Loss of Trust and Good Will

We also have grave concerns about the impact these proposed procedures for disenrollments and waiting lists would have on the integrity of the Healthy Families Program itself. Passage of these regulations will send the message to California families that the safety net the state has worked so hard to weave might not catch them if and when they fall. And if the measures contained in the regulations are ever instituted, we believe a significant portion of California families will lose trust in the program, fearing that it will not be there for them when they need it. The hard-earned goodwill Healthy Families has achieved over the past eleven years will erode dramatically. Such potential loss is only made worse as many children are in families battling a downturn in the state's and country's economy and the immediate threat of losing coverage this year due to our current budget crisis. We therefore caution staff to not embark upon this road unnecessarily.

Undermining the Case for a Strong Federal Funding Package

Finally, we fear that passage of these regulations could have an adverse impact on California's share of federal funding as part of the State Children's Health Insurance Program ("SCHIP"). On December 29, 2007, President Bush signed the *Medicare, Medicaid and SCHIP Extension Act of 2007* (S. 2499) and extended federal SCHIP funding for eighteen months. This alleviated California's FY 2008 shortfall concerns and delayed the decision on long-term SCHIP federal funding until March 2009. Over the next eleven months, California has the opportunity to make the case for receiving robust federal SCHIP funding levels as a result of the need to cover more children through HFP. Adoption of these regulations, however, will weaken that case by sending the signal that MRMIB can and will accommodate potential cuts by wait-listing or disenrolling children if sufficient federal monies are not available.

III. Recommended Modifications to Regulations as Proposed

For the reasons outlined above, we *strongly oppose* the adoption of these proposed waitlist/disenrollment regulations. However, if MRMIB staff nonetheless recommends that the Board pass some form of waitlist/disenrollment regulations – despite their likely impact on low-income children and families – we propose the following modifications, additions, and alternatives to the proposal's current formulation. These changes are intended to ensure children and their families are aware of all relevant appeals, that applicants receive all appropriate referrals to alternative health insurance and public benefit programs, and that

beneficiaries' rights are scrupulously protected. These changes are ultimately meant to mitigate the most harmful and unforeseen consequences of such an action:

- Replace 2699.6603(a) with the following: If the Board makes the finding that sufficient funds will not be available to cover projected costs such that expenditures will exceed funding within the next three months and that, after pursuing all other remedies including but not limited to, notifying the Legislature of a projected deficiency at least six months in advance of the projected deficiency, the Board shall decide whether to institute a waiting list.
- Amend 2699.6603(b) stating: If the Board makes the finding that 1) after instituting a waiting list, sufficient funds will not be available to cover projected costs such that expenditures will exceed funding within the next three months; and 2) after pursuing all other remedies including but not limited to, notifying the Legislature of a projected deficiency at least six months in advance of the projected deficiency, the Board shall decide whether to disenroll subscriber children at the time of Annual Eligibility Review.
- Add 2966.6603(e) stating: Three months after the Board has decided to institute a waiting list pursuant to 2966.6603(a) or disenrollments pursuant to 2966.6603(b), the Board shall 1) evaluate the impact of these actions on the affected children and on the program and report those findings to the Legislature and 2) determine whether to continue the waiting lists or disenrollments based on pending financing options or alternative program modifications to allow sufficient funds to be available to cover the projected costs. Following the establishment of a waiting list or disenrollments, the Board shall report the number of children placed on the waiting list and the number of children disenrolled from the Healthy Families Program to the Legislature every quarter. It shall also report to the Legislature the expected date of elimination of the waiting list and cessation of disenrollments every quarter.
- Add 2699.6604(b)(2) stating: The program shall not disenroll from the Healthy Families Program children whose financial qualification for California Children's Services (CCS) is based solely on enrollment in Healthy Families. If such a child is not identified as being in this category through his/her application, his/her family can reverse the child's disenrollment through an appeal in order to remain enrolled in the CCS Program. MRMIB staff shall be required to re-enroll these children with no break in coverage or retroactively upon receipt of their appeal.
- Add 2699.6604(b)(3) stating: Children shall not be disenrolled from the Healthy Families Program if they are receiving treatment for chronic conditions or are scheduled for surgery within three months of their effective date of disenrollment. If such children are erroneously disenrolled, they can reverse their disenrollment through an expedited appeal in order to immediately re-enroll in the Healthy Families Program in time to obtain the necessary treatment services or surgery.
- Add 2699.6604(a)(1) stating: The program shall forward applications of children who have applied for Healthy Families and have been placed on a waiting list to the child's county of residence for a determination of Medi-Cal eligibility no later than the date on which notification of the child's placement on a waiting list has been sent to the family, unless the family has indicated that they do not want their child's application to be forwarded to Medi-Cal.
- Add 2699.6604(c)(1) stating: The program shall notify in writing the families of children who have been placed on the Healthy Families waiting list that their child may be eligible for Medi-Cal or a local Healthy Kids program.
- Add 2699.6604(b)(1) stating: The program shall forward the applications of children who have been placed on a waiting list for the Healthy Families Program to their

county of residence for a determination of Medi-Cal eligibility not later than by the date that the disenrollment notice is sent to the beneficiary, and shall notify children who will be disenrolled from the program no less than 30 days prior to the child's effective date of disenrollment, unless the family has indicated that they do not want their child's application to be forwarded to Medi-Cal.

- Amend 2699.6611(b)(2) to state: Prior to disenrolling a subscriber pursuant to subsection (a)(2) of this section, the program shall provide written notification to the subscriber no less than thirty (30) days prior to disenrollment. Such notice shall clearly state all of the following:
 - A. The reason for disenrollment;
 - B. The effective date of disenrollment;
 - C. Explanation that their child may be eligible for Medi-Cal or a local Healthy Kids program;
 - D. Explanation of the process to be taken off the waiting list;
 - E. Their right to appeal;
 - F. Explanation of the Appeal Process including the right to request continued enrollment pursuant to §2699.6612; and
 - G. Explanation that opting for employer-sponsored health insurance will not affect their future eligibility for the Healthy Families Program.
- Add 2699(d)(2)(A) stating: Section 2699.6607(d) shall not be used to assess the eligibility of children on the waiting list

We again strongly urge MRMIB staff to halt its effort to make permanent these waitlist/disenrollment regulations. They are unnecessary, inappropriate, and, if passed, will cause significant harm to the Healthy Families Program and to California children. In the event that staff nonetheless recommends their passage, we request careful consideration of the various amendments and modifications proposed above.

Thank you for your consideration of these comments. If you have any questions about or would like to discuss in detail any of these items, please contact: Cliff Sarkin, CDF-California, at 510-663-1294 or csarkin@cdfca.org.

Respectfully,

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- Health & Human Services Secretary Kim Belshé
- Assembly Speaker Fabian Núñez
- Assembly Speaker-elect Karen Bass
- Senate President Pro Tempore Don Perata
- Senate President Pro Tempore-elect Darrell Steinberg
- Assembly Member John Laird
- Senator Gilbert Cedillo
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