FAX TRANSMITTAL

TO:	Jennifer Klein	
ORGANIZATION:	The White House	
Telephone Number: 456-2599	Fax Number: 456-2878	# of Pages (including cover sheet) 4
FROM:	Stan Dorn	
	CHILDREN'S DEFENSE FUND HEALTH DIVISION	
Telephone Number: (202) 662-3541 FAX Number: (202) 662-3560		Date: 4/1/96 Time: AM PM
Comments:		

Please call 662-3541 if you did not receive all of this fax transmission.

MEMORANDUM

to: Jennifer

from: Stan

re: Medicaid optional benefits

date: April 1, 1996

I hope you are doing well. It was great to see you and Chris a few weeks ago. This memo follows up your request for information about the optional Medicaid benefits we mentioned in the meeting that, on their face, appear open-ended. This memo focuses on IICFA's regulatory and other interpretations of covered benefit categories. The few cases we found in our brief search did not add to the following analysis. We found that, as construed, these benefits are not open-ended, have parameters that are relatively clear-cut, are limited to medical services, and are ultimately determined by state law. Accordingly, EPSDT's requirement that children must receive these benefits, where medically necessary, subjects states to limited and controllable liability.

As you know, states must provide children with only medical assistance as defined in Social Security Act ("SSA") §1905(a). Most listed services are fairly precise (e.g., physician services, laboratory and X-ray services). Three optional Medicaid benefits listed in this section appear more open-ended. The first is "medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law." SSA §1905(a)(6)(emphasis added). According to Attachment 3.1-A to IICFA's State Plan Form, this benefit covers podiatrists, optometrists, chiropractors and other practitioners recognized by state law. The applicable regulation, 42 CFR 440.60, provides that covered chiropractic services include only manual manipulation of the spine by a state-licensed chiropractor meeting the Secretary's standards acting within the scope of practice permitted under state law.

The second benefit is "other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level." SSA §1905(a)(13)(emphasis added). The applicable regulation, 42 CFR 440.130, defines this service as follows:

(a) "Diagnostic services," except as otherwise provided under this subpart, includes any medical procedures or supplies recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under State law, to enable him to identify the existence, nature, or extent of illness, injury, or other health deviation in a recipient.

440.170 Any other medical care or remedial care recognized under ... .

...State law and specified by the Secretary.

(a) Transportation. (1) ''Transportation'' includes expenses for transportation and other related travel expenses determined to be necessary by the agency to secure medical examinations and treatment for a recipient.

(2) Transportation, as defined in this section, is furnished only by a provider to whom a direct vendor payment can appropriately be made by the agency. If other arrangements are made to assure transportation under 431.53 of this subchapter, FFP is available as an administrative cost.

(3) ''Travel expenses'' include-

(i) The cost of transportation for the recipient by ambulance, taxicab, common carrier, or other appropriate means;

(ii) The cost of meals and lodging en route to and from medical care, and while receiving medical care; and

(iii) The cost of an attendant to accompany the recipient, if necessary, and the cost of the attendant's transportation, meals, lodging, and, if the attendant is not a member of the recipient's family, salary.

(b) Services of Christian Science nurses. ''Services of Christian Science nurses'' mean services provided by nurses who are listed and certified by the First Church of Christ, Scientist, Boston, Mass., if-

(1) The services have been requested by the recipient; and

(2) The services are provided-

(i) By or under the supervision of a Christian Science visiting nurse organization listed and certified by the First Church of Christ, Scientist, Boston, Mass.; or

(ii) As private duty services to a recipient in his own home or in a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass., if the recipient requires individual and continuous care beyond that available from a visiting nurse or that routinely provided by the nursing staff of the sanatorium.

(c) Services in Christian Science sanatoriums. ''Services in Christian Science sanatoriums'' means services provided in Christian Science sanatoriums that are operated by, or listed and certified by, the First Church of Christ, Scientist, Boston, Mass.

(d) Skilled nursing facility services for individuals under age 21. ''Skilled nursing facility services for individuals under 21'' means those services specified in 440.40 that are provided to recipients under 21 years of age.

(e) Emergency hospital services. ''Emergency hospital services'' means services that-

(1) Are necessary to prevent the death or serious impairment of the health of a recipient; and

(2) Because of the threat to the life or health of the recipient necessitate the use of the most accessible hospital available that is equipped to furnish the services, even if the hospital does not currently meet-

(i) The conditions for participation under Medicare; or

(ii) The definitions of inpatient or outpatient hospital services under 440.10 and 440.20.

(f) Personal care services in a recipient's home. Unless defined differently by a State agency for purposes of a waiver granted under part 441, subpart G of this chapter, ''personal care services in a recipient's home'' means services prescribed by a physician in accordance with the recipient's plan of treatment and provided by an individual who is-

(1) Qualified to provide the services;

(2) Supervised by a registered nurse; and

(3) Not a member of the recipient's family.

(g) Rural primary care hospital (RPCH) services. (1) RPCH services means services that (i) are furnished by a provider that meet the requirements for participation in Medicare as an RPCH (see subpart F of part 485 of this chapter), and (ii) are of a type that would be paid for by Medicare when furnished to a Medicare beneficiary.

(2) Inpatient RPCH services do not include nursing facility services furnished by an RPCH with a swing-bed approval.

[43 FR 45224, Sept. 29, 1978, as amended at 45 FR 24889, Apr. 11, 1980; 46 FR 48540, Oct. 1, 1981; 58 FR 30671, May 26, 1993]

TESTIMONY OF GREGG HAIFLEY

ON BEHALF OF
THE MATERNAL AND CHILD HEALTH COALITION

HOUSE COMMITTEE ON COMMERCE

HEARING ON
NATIONAL GOVERNORS' ASSOCIATION MEDICAID PROPOSAL

WEDNESDAY, MARCH 6, 1996

SUMMARY: TESTIMONY OF MATERNAL AND CHILD HEALTH COALITION

Our message is simple: Children should not lose present guarantees of necessary health coverage through Medicaid. Because the National Governors' Association ("NGA") proposal repeals current guarantees of essential health coverage for children, it fails this test.

With an average of more than 1% of American children losing private, work-based health coverage each year since 1987, it is particularly important for children not to lose ground on Medicaid as well. By the end of the decade, fewer than half of American children will receive health coverage through their parents' work. If several million children lose Medicaid coverage at the same time other children lose health coverage in the private sector, America's children and America's future will suffer a double setback.

The NGA proposal takes away from children three guarantees of essential health coverage:

1. The NGA proposal would repeal current guarantees of medically necessary care for children covered by Medicaid. For each child receiving Medicaid coverage, the EPSDT program (Early and Periodic Screening, Diagnosis and Treatment) now guarantees: (a) health screenings to detect disease and medical conditions; (b) necessary dental, vision and hearing care; and (c) all other medically necessary services required to treat a disease or condition revealed by a health screening.

The NGA proposal would repeal the latter two provisions and grant states complete flexibility to determine the amount, duration and scope of services within benefit categories they choose to cover. Accordingly:

- **Children would lose entire categories of guaranteed benefits**. States could deny children services like dental care, prescription drugs, and vision and hearing care, which children need to develop, stay healthy, and learn in school.

- **Children would lose current guarantees of medically necessary care within covered benefit categories**. For the services states continue to cover, states could apply whatever limits they want. For example, Alabama limits adults to 16 days of inpatient hospital services per year. Under the NGA plan, it could apply this limit or a shorter limit to children, even very sick, premature newborns who need longer hospital stays to survive.

2. The NGA proposal would repeal current guarantees of Medicaid eligibility for millions of children. The NGA proposal would eliminate current guarantees of Medicaid eligibility for many children, including children ages 13-18 in working poor families not receiving AFDC; families moving from welfare to employment, who currently are guaranteed 12 months of Medicaid coverage; children over age 12 who are permanently and totally disabled, according to federal SSI definitions; and children over age 12 who currently receive AFDC, any of whom could be denied AFDC and Medicaid under the NGA welfare and Medicaid proposals.

3. The NGA proposal would eliminate crucial means of holding states accountable. The NGA proposal would forbid beneficiaries from going to federal court to protect their federal legal rights to health care. Beneficiaries could go only to state court, and only after exhausting state administrative remedies. A single federal law would be construed by 50 separate state court systems rather than a unified, federal judiciary. Many of the state courts that would be responsible for enforcing this law now lack the power to grant the full range of effective remedies that are available to federal courts. Families could be forced to exhaust futile administrative procedures or suffer irreparable harm while awaiting the outcome of prolonged administrative appeals. Any remaining federal guarantees of essential health coverage for children may look good on paper but mean little in practice if states know they are largely immune from effective enforcement.

Good afternoon, Mr. Chairman. My name is Gregg Haifley and I am the Senior Health Associate at the Children's Defense Fund ("CDF"). I am testifying today on behalf of the Maternal and Child Health Coalition, of which CDF is a member. Thank you for inviting us to testify today about the National Governors' Association ("NGA") Medicaid proposal.

The Maternal and Child Health Coalition is composed of fifty national organizations for whom maternal and child health is a significant priority. Members include providers such as the Association of Maternal and Child Health Programs, the American Academy of Pediatrics, and The National Association of Children's Hospitals and Related Institutions; advocacy organizations representing children with disabilities and their families, such as Family Voices; and groups such as the March of Dimes Birth Defects Foundation, the Child Welfare League of America, the Children's Defense Fund, Catholic Charities USA, The U.S. Catholic Conference, and the American Public Health Association. Attached to my testimony today are several letters previously sent to Congress from members of the Coalition and similar organizations across the country that are concerned with maternal and children's health, including a letter from more than 250 such organizations urging Congress to reject Medicaid block grant proposals. The vast majority of the groups in our Coalition, as well as similar groups across the country, are gravely concerned about proposals like those recently advanced by the NGA.

The maternal and child health community has a very simple message to convey to you today. Children should not lose the health coverage they currently are guaranteed through Medicaid. Unfortunately, because the NGA Medicaid proposal repeals current guarantees of essential health coverage for children, it fails this test, and it fails the most basic test of health care policy stated by Hippocrates thousands of years ago: "First, do no harm."

With private, work-based health insurance for children disappearing at an alarming pace, it is particularly important for children not to lose ground on Medicaid. Since 1987, an average

of more than 1% of American children have lost private, employer-based health insurance coverage every year. If these trends continue, by the end of the decade fewer than half of American children will receive health coverage through their parents' work. If several million children lose Medicaid coverage at the same time private employers deny employment-based health coverage to other children, America's children and America's future will suffer a double setback.

My testimony focuses on three areas of concern with the NGA proposal: its repeal of the current guarantee that children covered by Medicaid will receive medically necessary health care; its repeal of guaranteed eligibility for millions of low-income children and pregnant women; and its repeal of current methods to hold states accountable for following federal laws that guarantee essential health care for women and children.

1. THE NGA PROPOSAL WOULD REPEAL CURRENT GUARANTEES THAT CHILDREN COVERED BY MEDICAID CAN OBTAIN MEDICALLY NECESSARY CARE.

The Governors' Medicaid proposal would repeal current guarantees of essential health care for children, taking away many guaranteed benefits from the one in four American children and the one in three newborns now covered by Medicaid.

Current law. For each child receiving Medicaid coverage, the EPSDT program (Early and Periodic Screening, Diagnosis and Treatment) now guarantees: (a) health screenings to detect disease and medical conditions; (b) necessary dental, vision and hearing care; and (c) all other medically necessary services required to treat a disease or condition revealed by a health screening. EPSDT has been part of Medicaid for the past three decades, except for the third provision I just described, which was passed on a bipartisan basis in 1989.

These guarantees recognize children's unique developmental needs. Rather than treat children as "little adults," these safeguards assure that children can receive necessary care

appropriate to their special needs, including Medicaid services classified as optional for adults.

The NGA proposal. As discussed later, the NGA proposal would repeal guarantees of eligibility for many children. For the children who remain eligible for Medicaid, the NGA proposal would also repeal EPSDT's guarantee of medically necessary care. States could deny to children any services that are optional for adults. Moreover, states would have complete flexibility to determine the amount, duration and scope of covered services. Accordingly:

- **Children would lose entire categories of guaranteed benefits.** States could deny children services like dental care, prescription drugs, and vision and hearing care, which children need to develop, stay healthy and learn in school. Children with disabilities or chronic illness could lose coverage of developmentally crucial services they need to reach their potential. These are services that are optional for adults and denied to adults by many state Medicaid programs, including physical therapy, which 10 states deny to adults; speech therapy, which 13 states do not cover for adults; rehabilitation services, which 7 states do not cover for adults; and respiratory care, which 40 states do not cover for adults.
- **Children would lose current guarantees of medically necessary care within covered benefit categories.** For services states continue to cover (either by mandate, like physician and hospital care, or at state option), states could apply whatever limits they want. Currently, while states may not apply rigid limits on hospital stays or doctor visits for children, they may and some do apply such limits to adults. For example, Alabama restricts adults to 16 days of inpatient hospital care per year. Under the NGA plan, it could apply this limit or a shorter limit to children, even very sick, premature newborns who need longer hospital stays to survive. That may save considerable sums for states in

the short run, but vulnerable infants would be placed at risk. With proper care, the vast majority of these very sick babies can grow up to be healthy, productive adults.

Under the NGA proposal, whether a child receives a healthy start would depend on where that child happens to be born. Now, every American child covered by Medicaid is guaranteed necessary care. Under the NGA plan, states could provide very different coverage to children. The accident of a child's birthplace could determine whether the child is denied essential care, with consequences that are potentially serious and lifelong. Even in financial terms alone, the long-term impact on federal and state budgets could be considerable.

EPSDT is not expensive or burdensome for the states. While a small number of sick children receive crucial but expensive services, EPSDT has not created significant overall costs.

- In 1994, the average annual cost for each **child** on Medicaid, including children with disabilities, was **$1,381**. By contrast, average annual costs per **adult** Medicaid beneficiary were **$4,907**.
- When health care inflation is taken into account, 1994 expenditures of state Medicaid funds per low-income child were only $54 higher than they were in 1988, before the current EPSDT treatment safeguard was adopted.

The NGA proposal would harm children unfairly by applying an adult conception of medical care. Children and adults have different health care needs. Children need more preventive care (check-ups, screenings, vaccinations). Also, children typically need less routine treatment of illness, such as physician visits, prescription drugs and hospital stays for heart conditions, ulcers, etc. But a small number of special needs children with serious conditions need much more intensive care, such as rehabilitation, home health care and hospitalization. In a sense, children use more of the very "front end" and "back end" of the system; adults use more

of the middle. By limiting children to the mandatory benefits package for adults, the NGA proposal would emphasize the middle, allow states to reduce the special "front end" guarantees EPSDT has created, structure health care for children around adult needs, and unfairly disadvantage and harm children.

Many states sharply limit benefits under non-Medicaid, state health programs for children. The states with their own health programs that reach non-Medicaid children tend to be those most concerned with children's health, and we support their efforts to cover more children. However, in these states arguably most concerned about child health, many of the programs that are unconstrained by any federal guarantees include serious gaps in benefits. For example, a National Governors Association survey found that, of 28 non-Medicaid, state health programs for children:

- 16 cover no physical therapy;
- 15 cover no mental health services;
- 16 cover no vision care;
- 19 cover no substance abuse treatment;
- 10 cover no care for hearing defects; and
- 20 cover no dental care.

This suggests what may happen to children covered by Medicaid if federal benefits standards are weakened.

2. THE NGA PROPOSAL WOULD REPEAL CURRENT GUARANTEES OF MEDICAID ELIGIBILITY FOR MILLIONS OF AMERICAN CHILDREN.

The NGA proposal would maintain current guarantees of Medicaid coverage for: (a) children under age 6 and pregnant women in families with income below 133% of the federal

poverty level ("poverty"); and (b) children ages 6 through 12 in families with income under poverty. However, the NGA proposal would eliminate guaranteed health coverage for all other children, including the groups described later, who are guaranteed Medicaid coverage today. The proposal would do this in a way that punishes parents for making responsible choices to work, to seek child support or spousal support, and to accept adoptive or foster children into their families. (Attached to my testimony is a chart listing the numbers of children losing guaranteed coverage in each state.)

The NGA proposal would end guaranteed Medicaid coverage for the following groups of children and parents:

- **Children in working poor families not receiving AFDC;**
- **Children over age 12, parents and grandparents who currently receive AFDC**;
- **Children over age 12 who are permanently and totally disabled**;
- **Children receiving federal foster care or adoption assistance, most of whom were victims of abuse and neglect**;
- **Families receiving spousal or child support**; and
- **Pregnant women in working poor families, in certain states**.

Each of these groups deserves the coverage guaranteed under current law, which the NGA proposal would repeal. I will discuss each group in turn:

- **Children in working poor families not receiving AFDC.** Today, all poor children born after September 30, 1983 are guaranteed Medicaid coverage through age 18. Congress added this coverage so Medicaid benefits would be available to children in working poor families who could not get or afford employer-based insurance for their children. The NGA proposal would end this guaranteed coverage for poor children when they turn age

13. By the year 2002, current law will guarantee coverage to approximately 3 million children over age 12 in poor families not receiving welfare. These children would lose their guarantee of coverage under the NGA proposal.[1]

- **Children over age 12 who currently receive AFDC.** Under the NGA welfare and Medicaid proposals, a state could deny AFDC to any family, no matter how poor, and simultaneously terminate Medicaid. Families receiving AFDC are the poorest families in America, typically with incomes below 50% of the federal poverty line. Among all children, parents and grandparents who now receive AFDC, only children through age 12 in families with incomes below poverty would be guaranteed Medicaid coverage. Roughly 1.5 million AFDC-recipient children over age 12 and 4.5 million parents and grandparents would lose this guarantee of health coverage. This proposal is inconsistent with statements by Congressional proponents of welfare reform that, while families might lose welfare under a reformed program, health coverage for children and parents would not be taken away.

- **Children over age 12 who are permanently and totally disabled, according to federal SSI definitions.** Under the NGA proposal, states could cut the number of disabled children receiving Medicaid coverage by using a narrower definition of disability. Roughly 2 million disabled children now receive Medicaid. Approximately 700,000 are

[1]The NGA proposal also would repeal the current guarantee that, when a family moves from AFDC to employment, Medicaid coverage automatically continues for 12 months. Currently, 1.2 million families per year (including 400,000 - 700,000 children over age 12) make this transition and thus qualify for Medicaid. This guarantee of Medicaid coverage permits families to move from welfare to employment, even when jobs provide no health insurance. By ending this guarantee, the NGA proposal would make it more difficult for families to achieve self-sufficiency. We understand that the NGA may change its position on this issue. While this would be a welcome move, the NGA proposal would end many other current guarantees of health coverage for millions of America's children, even if the problem with transitional Medicaid coverage is solved.

over age 12 and so would lose guaranteed coverage under the NGA proposal, because they would not be covered as poor children ages 0-12, and states could deny coverage by narrowing the definition of disability.

Giving states unlimited freedom to determine eligibility for children with disabilities would set off a race to the bottom among the states. Few families would change their state of residence to qualify for most public benefits. However, a family with a severely disabled child may well move to a different state if necessary to obtain health coverage for that child. Under the NGA proposal, if one state saved money by cutting its coverage for the disabled, other states could feel compelled to follow suit or risk being forced to provide very expensive health care to severely disabled children moving from the state that reduced coverage. Such a race to the bottom, with states following one another quickly to reduce coverage of essential health benefits for children with disabilities, would have grim consequences for the severely disabled children losing guaranteed health coverage under the NGA proposal. For years to come, both state and federal taxpayers would pay the price for this race to the bottom, as these disabled children fail to reach anywhere near their potential.

- **Children receiving federal foster care or adoption assistance, most of whom were victims of abuse and neglect.** The NGA would repeal guaranteed coverage for children over age 12 who receive federal foster care or adoption assistance payments.[2] This would jeopardize these children's health care and undermine future efforts to find appropriate foster parents and adoptive parents for young people with special needs. It could threaten

[2]Those under age 12 in poor families would still be guaranteed eligibility.

the availability of current foster homes. This proposal would be unfair to foster and adoptive parents and may even threaten the permanence of some homes, since parents who took on responsibility for these children with the promise of guaranteed Medicaid coverage would see this promise revoked. They may be unable to pay for the health care required by foster and adoptive children with significant medical needs. In effect, these parents would be punished for taking children into their families, and the children, commonly the victims of earlier abuse and neglect, would lose out once again.

- **Families receiving spousal or child support.** Four months of Medicaid is now guaranteed when a family loses AFDC because of increased child or spousal support. Roughly 200,000 families a year qualify for this coverage. The NGA proposal would repeal this guarantee and punish parents who act responsibly by obtaining or providing child support.
- **Pregnant women in working poor families, in certain states.** In 1989, when Congress increased Medicaid eligibility for pregnant women and infants by requiring coverage of those with family incomes up to 133% of the federal poverty level, it forbade states from cutting back their coverage to the new, national minimum. Congress should not put at risk these women's coverage.

Without federal guarantees, many of these children and pregnant women will lose essential health coverage. While these children and pregnant women would lose **guaranteed** coverage under the NGA proposal, states would have the **option** to cover them. However, given the fiscal pressures and the competing, powerful interest groups that operate at the state level, experience shows that federal guarantees are often necessary for low-income children to receive essential health care. For example, in 1989, before Congress finally stepped in and mandated

coverage, only 19 states provided then-optional Medicaid coverage to infants and pregnant women in working families with incomes up to 133% of the federal poverty level.[3] By 1991, after Congress established the present guarantees of Medicaid coverage for young children and pregnant women in low-income families, 2.6 million children and women received coverage their states had previously denied.

Moreover, the NGA proposal creates significant financial incentives that may lead states to exercise their options to deny health coverage to low-income children. The NGA proposal provides unlimited federal matching funds through the "umbrella fund" for three groups of Medicaid beneficiaries: (a) beneficiaries with coverage still required by federal law (including some children and parents); (b) seniors covered at state option; and (c) people with disabilities covered at state option. If these beneficiaries' numbers increase more than expected, states can receive additional federal payments per beneficiary, without any limit on the total amount of federal payments. **Only one group of current beneficiaries is subject to a rigid, inflexible cap on federal funds: children and their parents whose coverage will be optional, rather than guaranteed under federal law.**

States would be particularly likely to deny Medicaid coverage to the people for whom federal funding is capped. This is especially true if overall Medicaid caseloads in a state increase faster than expected, because of recession, natural disaster or other unforeseen factors. If costs are climbing rapidly, the first beneficiaries to be cut may be the one group for whom federal matching funds cannot rise. States also may be unwilling to make the initial financial and programmatic investment in children and parents whose coverage is optional, if officials

[3]The other 31 states and the District of Columbia limited coverage to income levels below 133% of poverty.

know that their coverage will end when caseloads increase, because of recession or otherwise.

Children and pregnant women are likely to fare poorly in state legislatures if they are forced to compete for limited Medicaid funds with nursing homes and other powerful lobbies. Children and pregnant women may experience substantial, harmful Medicaid cuts if Congress repeals current federal safeguards that guarantee their coverage.

3. THE NGA PROPOSAL WOULD ELIMINATE CRUCIAL MEANS OF HOLDING STATES ACCOUNTABLE.

Today, if a state breaks federal law by denying a child necessary health care, the family can take that state to federal court and obtain a judicial order requiring the state to obey the law. The NGA proposal would eliminate this crucial means of holding states accountable, instead limiting beneficiaries to state court. Moreover, beneficiaries could gain access to state court only after exhausting available state administrative remedies.

Access to federal court has been literally a matter of life and death to Medicaid beneficiaries. For example, in 1986 in California, pregnant women in 12 rural counties could not find a single obstetrician willing to accept Medicaid's payment of $518 for all prenatal care, delivery and two months of post-partum care. Providers also were deterred from participating in Medicaid by the state's slow processing of claims for payment. More than 140,000 Medicaid-eligible women of childbearing age lived in counties without even minimally adequate access to obstetrical care.

A class of pregnant women covered through Medicaid filed suit against the state in federal district court. The suit included a claim that the state violated the federal requirement that services must be available statewide, in every county. The state quickly settled the lawsuit. State officials knew that the federal court had the power to issue necessary injunctive relief, to

compensate plaintiffs for the injuries they suffered, and to take other necessary steps. The settlement reformed the state payment system by increasing reimbursement and using private contractors to process physicians' claims more efficiently. Now pregnant women throughout California, including in rural counties, can obtain maternity care that greatly increases the odds that pregnancy will result in a healthy mother and a healthy baby.

The Governors' proposal to limit beneficiaries to state court would make it much more difficult to hold states accountable. Some state court judges may be reluctant to overrule popular decisions made by their state Governor or legislature, particularly if the judges must stand for election. Some state courts lack the power to order many of remedies available to federal courts, such as damages to make injured parties whole, or injunctions or other class or systemic relief correcting statewide, illegal policies. Moreover, federal court judges have greater experience construing federal law. Often, Medicaid laws must be construed together with other complex, related federal statutes, making it even more important for judges to have a sound grasp and substantial experience interpreting federal law. Finally, it would make little sense to have a uniform federal statute construed by 50 very different state court systems, rather than a single, federal system.

Also troubling is the Governors' proposed requirement that administrative remedies must be exhausted before suit is brought. This proposal does not appear to include traditional exceptions to the exhaustion requirement for irreparable injury and futility. Those who would suffer serious, irreversible health harm while awaiting the outcome of prolonged administrative proceedings should continue to have the right to proceed immediately to court. Otherwise, claimants can experience serious injury that no court can remedy. Likewise, if an administrative hearing officer is powerless to award relief (e.g., because the claims involve challenges to state

regulations), claimants should not be forced to waste their time exhausting futile remedies.

No one would even consider applying such restrictions on judicial relief to other Americans. For example, no one would propose closing the federal courthouse doors to Americans seeking to contest IRS determinations about income taxes owed. Likewise, no one would propose sending defense contractors through futile administrative procedures. When it comes to low-income Americans seeking to vindicate their right under federal law to potentially lifesaving health care, Congress should be no less vigilant.

CONCLUSION

The NGA proposal would grant the states unprecedented powers to deny medically necessary health care to the one in four American children now covered by Medicaid. It would grant states similar power to eliminate Medicaid coverage completely for millions of children and their parents, particularly those in low-income working families. Finally, the Governors' proposal would eliminate critical checks and balances, now provided by an independent federal judiciary, which hold states accountable to follow federal law.

None of these extreme measures are needed to balance the budget. Mr. Chairman, we urge this Committee to reject <u>any</u> proposal that eliminates these critical safeguards for America's children.