

decided to resign en masse from Ivision, which would cause a great uproar among the plans' subscribers.

In early October 2004, some Colegio representatives, including Dr. Dávila and Dr. Rivera, met with officials from some of the health plans with which Ivision contracted. The Colegio representatives requested that the health plans pay optometrists higher fees. They also asked the health plan officials to put pressure on Ivision, and informed them that providers were not going to remain in the Ivision network if the reimbursement rates did not increase.

The Colegio's and Drs. Dávila's and Rivera's efforts to obtain higher reimbursement rates from Ivision succeeded. By mid-October, almost 40 Colegio members had left the Ivision network. These optometrists either quit outright by notifying Ivision that they were cancelling their optometrist agreements (some in similarly-worded letters), or by simply refusing service to those patients enrolled in Ivision plans, so that Ivision was forced to terminate these doctors as optometrists. In order to maintain an effective network, retain its remaining optometrists and recruit new optometrists in the face of the Colegio's efforts and success in organizing a boycott, Ivision was forced to substantially raise its reimbursement rates. In November 2004, Ivision significantly increased its reimbursement rate for an eye examination and the dispensing of eye glasses; it made a similar increase for an examination and the dispensing of contact lenses. Ivision was also forced to waive monetary amounts that some optometrists owed it.

In addition to the conduct outlined above, the Colegio and Drs. Dávila and Rivera orchestrated collective negotiations with at least two other plans. Their efforts included several meetings with and letters to a certain health plan, all directed at having that plan amend its contracts with optometrists so that the optometrists could provide additional higher paying services for the plan. Indeed, to increase its negotiating leverage with this plan, Dr. Dávila sent a letter to all Colegio members urging them not to join the plan until these issues were resolved to the Colegio's satisfaction. Further, officers of the Colegio on several occasions approached another health plan and attempted to negotiate higher reimbursement levels for its members who service that plan. Thus far, these two health plans have been able to resist the collective action exerted by the Colegio.

Respondents' price fixing and concerted refusal to deal, and the

agreements, acts, and practices described above, have not been, and are not, reasonably related to any efficiency-enhancing integration among the optometrist members of the Colegio. By the acts set forth in the Complaint, the Colegio and Drs. Dávila and Rivera violated Section 5 of the FTC Act.

### The Proposed Consent Order

The proposed consent order is designed to prevent a recurrence of the illegal concerted actions alleged in the complaint, while allowing the Colegio and its members, including Drs. Dávila and Rivera, to engage in legitimate joint conduct. The proposed order is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements refusing to deal with health plans.<sup>2</sup>

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits the Colegio, Dr. Dávila, and Dr. Rivera, from entering into or facilitating agreements among any optometrists with respect to their provision of optometry services, including: (1) Negotiating on behalf of any optometrist with any payor; (2) dealing, refusing to deal, or threatening to refuse to deal with any payor; (3) regarding any term upon which any optometrist deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor other than through the Colegio.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Colegio, Dr. Dávila, and Dr. Rivera from exchanging or facilitating the transfer of information among optometrists concerning any optometrist's willingness to deal with a payor, or the terms or conditions, including any price terms, on which the optometrist is willing to deal. Paragraph II.C prohibits the Colegio, Dr. Dávila, and Dr. Rivera from attempting to engage in any action prohibited by Paragraphs II.A or II.B. Paragraph II.D prohibits the Colegio from encouraging, pressuring, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

Paragraph III requires that the Colegio, Dr. Dávila, and Dr. Rivera for three years from the date the Order becomes final, notify the Secretary of the Commission in writing at least sixty days prior to: (1)

participating in, organizing, or facilitating any discussion or understanding with or among any optometrists in any qualified joint arrangement relating to price or other terms or conditions of dealing with any payor; or (2) contacting a payor to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor, on behalf of any optometrists or any optometrist group practice in such arrangement. The remaining provisions of Paragraph III contain other standard notification and compliance-related provisions.

Paragraph IV requires the Colegio to translate the Order and the Complaint into Spanish, distribute the translated Order and Complaint to Colegio members, as well as payors, and annually publish these documents in official annual reports or newsletters.

The proposed order will expire in 20 years.

By direction of the Commission.

**Donald S. Clark**

*Secretary*

[FR Doc. E7-15356 Filed 8-6-07; 8:45 am]

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### Final Notice; Implementation of Section 6053(b) of the Deficit Reduction Act for Fiscal Year 2008 FMAP

**AGENCY:** Office of the Secretary, DHHS.

**ACTION:** Final notice.

**SUMMARY:** This notice describes the procedure utilized for implementing Section 6053(b) of the Deficit Reduction Act of 2005, Public Law 109-171 for fiscal year 2008. Section 6053(b) of the Deficit Reduction Act provides for a modification of the Federal Medical Assistance Percentages for any state which has a significant number of evacuees from Hurricane Katrina. This notice also includes an interpretation of evacuee. HHS issued a notice on January 25, 2007, announcing for public comment, a proposed methodology to implement the requirements of Section 6053(b). The notice allowed 30 days for public comment. We received one timely comment from the Texas Health and Human Services Commission. The comment letter contained several suggestions which are summarized and responded to below.

**DATES:** The figures described in this notice apply to FY 2008.

<sup>2</sup> New Century Health Quality Alliance, Inc., File No. 051-0137 (Oct. 6, 2006); Puerto Rico Association of Endodontists, Corp., File No 051-0170 (Aug. 29, 2006).

**FOR FURTHER INFORMATION CONTACT:**

Thomas Musco or Robert Stewart, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 447D—Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690-6870.

**SUPPLEMENTARY INFORMATION:****A. Background**

Federal Medical Assistance Percentages (FMAP) are used to determine the amount of Federal matching for state expenditures for assistance payments for certain social services such as Temporary Assistance for Needy Families (TANF) Contingency Funds, matching funds for the Child Care and Development Fund, Title IV-E Foster Care Maintenance payments, Adoption Assistance payments, and state medical and medical insurance expenditures for Medicaid and the State Children's Health Insurance Program (CHIP).

Sections 1905(b) and 1101(a)(8)(B) of the Social Security Act require the Secretary of Health and Human Services to publish the Federal Medical Assistance Percentages each year. The Secretary is to calculate the percentages, using formulas in sections 1905(b) and 1101(a)(8)(B), from the Department of Commerce's statistics of average income per person in each state and for the Nation as a whole. The percentages are within the upper and lower limits given in section 1905(b) of the Act. The percentages to be applied to the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified in statute, and thus are not based on the statutory formula that determines the percentages for the 50 states. The "Federal Medical Assistance Percentages" are for Medicaid.

The "enhanced FMAP" (EFMAP), for a state for a fiscal year, is equal to the Federal Medical Assistance Percentage (as defined in the first sentence of section 1905(b)) for the state increased by a number of percentage points equal to 30 percent of the number of percentage points by which (1) such Federal medical assistance percentage for the state, is less than 100 percent; (2) but in no case shall the enhanced FMAP for a state exceed 85 percent.

The "Enhanced Federal Medical Assistance Percentages" are for use in the State Children's Health Insurance Program under Title XXI, and in the Medicaid program for certain children for expenditures for medical assistance described in sections 1905(u)(2) and 1905(u)(3) of the Social Security Act. On November 30, 2006, at 71 FR 69209, we

published the FMAP and Enhanced FMAP rates for each state for October 1, 2007 through September 30, 2008 (fiscal year 2008).

**B. Section 6053(b) of the DRA**

Section 6053(b) of the Deficit Reduction Act (DRA) of 2005 requires that calculations used in computing the FMAPs disregard evacuees and any income attributable to them who were evacuated to and live in a state, other than their state of residence, as of October 1, 2005 as a result of Hurricane Katrina. The DRA defines "evacuee" as "an affected individual who has been displaced to another state" (Sec. 6201(b)(3)). This provision applies to any state that the Secretary of HHS determines has a significant number of Katrina evacuees.

The modification of the Federal Medical Assistance Percentages and the Enhanced Federal Medical Assistance Percentages under the DRA affect only medical expenditure payments under Title XIX and expenditure payments for the State Children's Health Insurance Program under Title XXI. The Department believes that the percentages in this rule do not apply to payments under Title IV of the Social Security Act. In addition, the Title XIX statute provides separately for Federal matching of administrative costs, which is not affected by the subject Deficit Reduction Act provision.

Section 6053(b) applies to calculations for FMAPs for any year after 2006. The underlying data that serve as the basis for the FMAP calculations are produced by the Department of Commerce's Bureau of Economic Analysis (BEA). Section 1101(a)(8)(B) requires FMAP calculations to be determined using data from the Department of Commerce. Therefore, the standard practice in the calculation of the FMAPs is to utilize the most up-to-date BEA state per capita income data. The Fiscal Year 2008 FMAPs, which were published on November 30, 2006 use the state per capita income estimates for 2003-2005. The first year that the relevant data—state per capita personal income estimates—would show any impact related to Hurricane Katrina is 2005, since Hurricane Katrina occurred in August 2005. Therefore, this notice proposes to implement Section 6053 (b) of the DRA starting with the Fiscal Year 2008 FMAPs, since the 2008 FMAP calculation will be the first year to include 2005 data.

On January 25, 2007 at 72 FR 3391, we proposed a methodology to implement Section 6053(b) of the Deficit Reduction Act that would take

advantage of the way in which state population is usually calculated. HHS believes this methodology would comply with our understanding of Congressional intent in the first year, and raise the FMAP slightly for any affected state.

**C. Proposed Methodology**

Section 6053(b) of the Deficit Reduction Act (DRA) of 2005 requires that calculations used in computing the FMAPs disregard evacuees and any income attributable to them who were evacuated to and live in a state, other than their state of residence, as of October 1, 2005 as a result of Hurricane Katrina. The DRA defines "evacuee" as "an affected individual who has been displaced to another state" (Sec. 6201(b)(3)). This provision applies to any state that the Secretary of HHS determines has a significant number of Katrina evacuees.

The first adjustment that must take place under Section 6053(b) of the DRA is to the state population estimate by removing all Katrina evacuees in each state that were evacuated across state lines.

Because the state population estimates used in the 2005 Per Capita Personal Income estimates are from July 1, 2005, which is prior to Hurricane Katrina, these Katrina evacuees do not appear in the data that is the basis for the state population estimates for any state covered by this provision. Thus, while Section 6053(b) of the DRA requires it, no adjustment to this data is necessary to disregard Katrina evacuees.

The second adjustment that must take place under Section 6053(b) of the DRA is to state personal income by removing all income that is attributed to Katrina evacuees. Implementing Section 6053(b) is complex because the data related to personal income are not detailed enough to fully conform to all of the provision's requirements (see the detailed explanation of considerations mentioned in the **Federal Register** notice of January 25, 2007 at 72 FR 3391).

The methodology to adjust for income proposes (see 72 FR 3391) to include the available data on FEMA disaster assistance adjustments and interstate population dispersal adjustments (BEA's estimate of governmental transfer receipts that were paid to Hurricane Katrina evacuees while they were living in the states to which they had been evacuated). Transfer receipts include payments such as Medicaid or TANF.

BEA estimates these interstate population dispersal adjustments based on the evacuee population that moved

across state lines after the hurricane, and the average transfer payment per evacuee. The evacuee population is based on the FEMA Current Location Report.

The methodology described above (and in more detail at 72 FR 3391) was used to make FMAP adjustments to accommodate the requirements of Section 6053(b) with the available data. The calculations this year result in a positive impact on any affected state (i.e., increasing FMAPs). It is unclear what effect Section 6053(b) will have on future years should this provision carry forward beyond fiscal year 2008.

According to Section 6053(b), the Secretary of HHS must apply this provision to any state that the Secretary determines has a significant number of Katrina evacuees. However, the statute provides HHS no guidance on how to determine what number of evacuees constitutes a "significant number." As a result, HHS attempted to provide an objective means to determine a "significant number" of evacuees.

HHS had chosen to determine significance by calculating the numbers of evacuees beyond two standard deviations from the mean of all states' number of evacuees. Measures of significance generally involve how observations vary in their distance from the average of all observations in their particular group. In this case, the observations are the number of evacuees relocated to each of the respective states. A measure used frequently to determine significance is the standard deviation from the mean or average. We proposed to use as the measure of a significantly affected state those that incurred an influx of evacuees greater than twice the standard deviation from the mean of all states.

Using the BEA estimates for the number of evacuees relocated to each state (except as noted below for Louisiana) we calculated an average influx of evacuees for all states of 7,159. The distribution of evacuees into all states around this average produces a standard deviation of 22,375. Therefore, we propose to apply the provisions of Section 6053(b) to any state with an influx of evacuees greater than 51,909 (the mean plus two standard deviations). This methodology specified only Texas, with 154,018 evacuees, had such a significant influx of evacuees.

Therefore, we proposed to apply Section 6053(b) to Texas. Because the DRA defines "evacuee" as "an affected individual who has been displaced to another state" (Sec. 6201(b)(3)), we proposed that Louisiana not be considered an affected state. Although there were intra-state evacuations

within Louisiana, the provision is intended to apply only to any state that took in a significant number of evacuees from another state.

Using the methodology described above, we calculated revised FMAPs and EFMAPs for 2008. The table below presents the 2008 FMAPs and the revised 2008 FMAPs with the proposed adjustment, and the 2008 EFMAPs and the revised 2008 EFMAPs.

| Texas       | Calculated 2008 | 2008 with proposed adjustment |
|-------------|-----------------|-------------------------------|
| FMAP .....  | 60.53           | 60.56                         |
| EFMAP ..... | 72.37           | 72.39                         |

As seen in the tables above, applying the proposed adjustment increased the FMAP and EFMAP for Texas.

**D. Analysis of and Response to Public Comments on the Proposed Methodology**

In reviewing and responding to comments, HHS consulted with individuals internal to HHS and individuals at the Commerce Department.

*Comment:* Mitigate the "mismatch" between population and income estimates by adjusting downward total income for Texas to eliminate income associated with Katrina evacuees. Personal income for Texas should be adjusted by removing approximately \$4.7 billion in personal income attributable to Katrina evacuees. The rationale provided states that income and wages of Katrina evacuees are not included in the proposed adjustment, nor are the use of savings and contributions from charitable sources. Additionally, Texas states that per capita income increased in FY 2005 by more than historical averages.

*Response:* As described in the proposed methodology, both income and population must be taken into account to implement Section 6053(b) of the DRA.

No methodology is provided by Texas for the arrival at the estimate of income attributable to Katrina evacuees in Texas. BEA could not provide separable income estimates for segments of state populations as a verifiable source to replicate the findings. Further, several of the funding sources cited by Texas are not sources that would affect per capita income (use of savings accounts and charitable contributions). The amount of income Texas suggests be eliminated as attributable to Katrina evacuees would indicate a per capita income for these evacuees of in excess of \$30,000 per year, when in fact these individuals were relocated to other

states for only about one-third of the 2005 year.

Additionally, an increase in per capita income in a particular year may have multiple factors contributing to the increase. A review of BEA data on state per capita income levels for Texas over the past two decades shows the 2005 increase is not unusual. Texas experienced peaks in year to year per capita percent changes in 1990, 1997, and 2000 at rates of change greater than that experienced in 2005.

*Comment:* An alternate to adjusting Texas total income is to adjust upward Texas' population to reflect the number of Katrina evacuees residing in Texas after July 1, 2005. Adjust the population estimate for Texas by adding 154,018 Katrina evacuees to the 2005 state population estimate.

*Response:* As required by Section 6053(b) of the DRA, and reiterated above, the methodology for implementing this provision specifically indicates that calculations used in computing the FMAPs disregard evacuees and any income attributable to them. The addition to a state's population of any number attributable to Katrina evacuees is not consistent with the statute.

**E. Time Frame for the DRA Adjustment**

In the January 25, 2007 **Federal Register** notice, we noted that Section 6053(b) does not provide an express sunset for the FMAP adjustments even though it did not seem reasonable to make such adjustments in perpetuity. We indicated that it was not reasonable to consider individuals to be evacuees long after they may have established residency and employment in their host state. We expressed concern that data to accurately identify the number of evacuees and their income, already difficult to obtain, would be unavailable and/or unreliable. And we observed that compliance with Section 6053(b) of the DRA could have a negative impact on qualifying states in years beyond FY 2008, which could not have been intended by Congress.

Because of the above, HHS proposed several approaches to interpret the term "evacuee" narrowly to ensure that an adjustment is made only to the extent warranted to address the sudden influx directly resulting from Hurricane Katrina. We suggested three alternative approaches which were offered for public comment: (1) Consider individuals to be Hurricane Katrina evacuees for up to 18 months following displacement to another state, (2) consider an individual to be an evacuee while receiving FEMA Hurricane Katrina assistance, and (3) consider

individuals to be evacuees while reliable data remains available and sufficient to identify evacuees and their income in order to carry out the provisions of the DRA.

While no comments were received on any of the proposed HHS definitions of an evacuee or offers of alternative definitions, HHS examined each of the approaches identified above in reaching a decision on the interpretation of an evacuee and its potential impact on future FMAP calculations.

While approach 1 uses a specific time frame (18 months following evacuation), the time frame itself is arbitrary and we believe it is unreasonable to consider a person to be considered an evacuee once they have established residency and become integrated into the economy of their host state. Former Katrina evacuees will now be reported by their place of residence for 2006 and beyond, no longer separately identified as Katrina evacuees, and will be included in the population and income estimates collected by BEA for their states of residence.

HHS has learned that approach 2 (FEMA assistance) will not be viable because Katrina FEMA assistance will not be separately identified from all other FEMA assistance to identify evacuees beyond that which was provided for 2005.

Because of the practical difficulty in calculating an adjustment, we are adopting the third approach, limiting the definition of evacuee to the time period for which reliable data remains available, because the existence of reliable data is essential to identifying individuals as evacuees. It is clear from the current effort to comply with the DRA provisions that data to support the calculations is limited at best. While information on the number of Katrina evacuees has been available, data on income attributed to evacuees has been extremely limited. BEA, which collects the data upon which FMAP calculations are made, was limited in its ability to isolate income data for Katrina evacuees. Only some of the interstate income data, such as governmental transfer receipts (TANF, Medicaid, etc.), attributable to Katrina evacuees was available, while none of a state(s)' wages and salaries paid to Katrina evacuees who moved to the host state could be isolated to determine personal income data for these evacuees. It was therefore technically difficult to perform the calculations for the current year.

We do not believe that reliable data will be available to track either the number or the income of evacuees to make calculations for the FMAP beyond FY 2008. It is our understanding that

BEA will not undertake any continuing state estimates of the number of Katrina evacuees or income attributed to them beyond what already has been done for 2005.

Moreover, we believe the adjustment time frame is sufficiently long for individuals to become an integral part of, with economic and social ties to, the State in which they have been present. We continue to believe that the intent of the statutory adjustment was to relieve the temporary burden on host states of a sudden influx of evacuees who were not integrated into the host state economy. Thus we believe it is unreasonable to consider a person to be an evacuee once they have established residency and become integrated into the economy in their host state.

For the above reasons, HHS has determined to interpret the term "evacuee" to be limited to the time period for which reliable data is available on the number and income of evacuees. Based on our current understanding of the available data sources, this interpretation means that there would be no basis for performing the calculations specified in Section 6053(b) of the DRA beyond the current year calculations for the FY 2008 FMAP.

#### F. Final FMAP and EFMAP Percentages for State(s) Affected by Hurricane Katrina

Based on the findings of our review of the comments received, we believe the methodology as described herein, and in more detail at 72 FR 3391, is the most appropriate method, given the available information, for implementing Section 6053(b) of the DRA. As such, only the FMAP and EFMAP percentages for the state of Texas are affected.

The percentages for Texas are as follows:

| Texas       | Calculated 2008 | 2008 with adjustment for Section 6053(b) |
|-------------|-----------------|--|
| FMAP .....  | 60.53           | 60.56                                    |
| EFMAP ..... | 72.37           | 72.39                                    |

#### G. Effective Dates

The percentages listed will be effective for each of the four (4) quarter-year periods in the period beginning October 1, 2007 and ending September 30, 2008 (fiscal year 2008).

(Catalog of Federal Domestic Assistance Program Nos. 93.778: Medical Assistance Program; 93.767: State Children's Health Insurance Program)

Dated: May 21, 2007.

**Michael O. Leavitt,**

*Secretary of Health and Human Services.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institute for Occupational Safety and Health; Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Dow Chemical Company, Madison, Illinois, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On June 22, 2007, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

Atomic Weapons Employer (AWE) employees who were monitored or should have been monitored for exposure to thorium radionuclides while working at the Dow Chemical Company site in Madison, Illinois for a number of work days aggregating at least 250 work days from January 1, 1957 through December 31, 1960, or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on July 22, 2007, as provided for under 42 U.S.C. 7384(14)(C). Hence, beginning on July 22, 2007, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

#### FOR FURTHER INFORMATION CONTACT:

Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C-46, Cincinnati, OH 45226, Telephone 513-533-6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to [OCAS@CDC.GOV](mailto:OCAS@CDC.GOV).