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COMMENTARY: THE OREGON MEDICAID PROGRAM: IS IT JUST?

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INTRODUCTION

ACCCESS TO AFFORDABLE health care has become an issue of great national concern with nearly one-fourth of all Americans either underinsured, uninsured or uninsurable at the present time. Federal initiatives have failed to provide universal medical coverage. As the problem reaches crisis proportions individual states have responded with their proposals to meet pressing health needs of their citizens.

The State of Oregon attracted national attention in 1989 by adopting innovative legislation (S.B. 27) which would mandate a uniform health benefit package and prepaid managed care for all persons with incomes below the federal poverty level. A unique feature of the plan is a process for ranking services by efficacy and cost. The budget of the program would be balanced by cutting services with the lowest scores if required by financial constraints.

Mehlman, in an eloquent analysis, has considered the legal implications of the Oregon Plan and has questioned the validity of the concept from a public policy viewpoint.

HEALTH CARE RIGHTS UNDER THE LAW

Mehlman states at the outset that there appears to be no impediments to implementation of the Oregon Medicaid Program under either state or federal constitutional law.¹ The Supreme Court of the United States has ruled that health care is not a fundamental right of American citizenship. The government is not obligated to provide health care services for those who are unable to pay for it.

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1. Mehlman, *The Oregon Medicaid Program: Is It Just?*, 1 HEALTH MATRIX: CASE W. RES. J. L. MED. 175 (1991).

Furthermore, the Court has declared that denial of payment does not discriminate against the poor as a class in terms of equal protection under the law. Consequently, the Oregon proposal which could deny some medically necessary services to current Medicaid recipients to allow for coverage of all low income individuals would not violate the constitutional rights of those who may be denied some previously enjoyed services.

THE MEDICAID WAIVER ISSUE

On the other hand, a looming, perhaps insurmountable legal hurdle facing Oregon legislators is the need to obtain waivers from federal statutes which govern the Medicaid Program. Regulatory laws specify the medically necessary services to which the "categorically" eligible are entitled. Proponents of the Oregon Program have downplayed the fact that ADC mothers and children are the only persons who would be directly affected by the proposed rationing process. The aged and disabled Medicaid recipients are excluded from the priority setting process. Segregation of recipients is likely to generate intense political opposition within Congress, which in 1989 mandated expanded benefits for all pregnant women and children from families with incomes which fall below federal poverty level.

In recent weeks Senator Albert Gore (D. Tenn) has challenged the fairness of the Oregon proposal because of perceived discrimination against the most vulnerable of economically disadvantaged citizens. In addition he has questioned the level of commitment of Oregon to efficient management and financial support of the State's Medicaid effort in general. He has pointed to the fact that Oregon was highest among 50 states in administrative costs and ranked 46 among states in lowest per capita contribution of tax dollars in support of the program. Such criticism by a powerful congressional leader does not bode well for Oregon in its quest for Medicaid waivers.

Although the Secretary of Health and Human Services could waive the mandated provisions to "further the objectives of the Medicaid Program" it seems likely that he would prefer that Congress make the decision in view of mounting political concerns as to certain features of the proposal. Without waivers of the Medicaid regulations the Oregon Plan cannot be implemented — certainly not in 1991 as intended.

OTHER LEGAL CONSIDERATIONS

Mehlman has raised the disconcerting possibility that Medicaid recipients may be required to forfeit certain civil rights under common law with implementation of S.B. 27. The new plan would give legal immunity to health providers who were unable to provide "reasonable health care" to Medicaid recipients because necessary medical services were unavailable for financial reasons. The provider would be obligated to advise the recipient that the treatment prescribed was not the preferred method but was the only available option imposed by the rationing process. The legislation appears to introduce a "legal morality" into the doctor-patient relationship which could compromise the traditional professional obligation of the doctor to his patient. The response of the Oregon medical community to this ethical dilemma has not been heard. Furthermore, what legal redress does a patient have under this proposal in the event of a therapeutic misadventure? Can the State of Oregon be sued for medical malpractice?

A MATTER OF PUBLIC POLICY

Mehlman has concluded that the Oregon Proposal is not primarily a legal issue — rather that it should be judged on its merit as a social program in terms of equity and societal benefit. He has questioned the appropriateness of basing the plan upon a utilitarian philosophy of resource allocation — of providing the greatest good for the largest number — because of a concern for possible infringements upon certain basic rights of the individual. The fact is that citizens of Oregon have had similar concerns as to individual needs and rights versus values of society in general and have engaged in public debate of these issues since 1982.

Oregon Health Decisions, a citizens group concerned with the medically uninsured have conducted public meetings throughout the state for the last six years. From these deliberations came a set of 15 Principles of Health Care Allocation which has served as a guideline for the Oregon Medicaid Priority Setting Project. It is the belief of the citizens group that society is responsible for allocation of public funds to support essential services and that they and the legislators are accountable for any adverse consequences of rationing health care to low income groups. Although there has been public involvement in the evolution of the prioritization concept the question must be raised as to what role was played in the process by low income citizens. Was there the opportunity for their values and

preferences to be heard? Or, as feared by Mehlman, were decisions made on their behalf by the more affluent without adequate participation by those who will be affected by the law?

A MATTER OF FUNDING

While Mehlman does not express a specific preference, the tone of his thesis is that overall the resources available to society should be equally and equitably distributed to all persons and that the poor should not be required to accept the burden of greater deprivation than those who are more economically privileged. This is the very basis of social equity. In truth, our society is always rationing its benefits, and to some extent, allowing the marketplace to govern the acquisition of additional benefits. We, in fact, practice a "statistical morality" whether we admit it or not. For example, by allocating a specific amount of money for the provision of such universally acknowledged needs as childhood immunization, highway safety, environmental protection, to name just a few, we are clearly condemning some people to illness or death in comparison with what would be the case if we allocated much greater amounts of money. For example, just last month the Center for Disease Control reported that 40 children had died of measles because of inadequate funding of the immunization program. A major flaw in the Oregon Plan is the expressed unwillingness on the part of the legislature to raise more revenue through taxes to pay for the extended program. The burden is placed upon the recipients of care instead of being shared by all segments of society. However, public visibility of the allocation process may be the stimulus for eventual raising of funds through tax mechanisms to cover necessary services.

CONCLUSION

It will require major systemic changes within the states and the nation to arrive at greater affordability and equity in health care. Programs such as the Oregon Program must be looked upon as interim measures, as trials and demonstrations, which eventually will lead to a more effective system of universal coverage for the population of America. It may be that Congress will allow Oregon to implement its proposal as an experiment in social engineering within specific guidelines which would protect the rights of all individual citizens. The answer to this possibility may be forthcoming later this year.