

111TH CONGRESS  
1ST SESSION

# S. 438

To provide for the voluntary development by States of qualifying best practices for health care and to encourage such voluntary development by amending titles XVIII and XIX of the Social Security Act to provide differential rates of payment favoring treatment provided consistent with qualifying best practices under the Medicare and Medicaid programs, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 13, 2009

Mr. WHITEHOUSE introduced the following bill; which was read twice and referred to the Committee on Finance

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## A BILL

To provide for the voluntary development by States of qualifying best practices for health care and to encourage such voluntary development by amending titles XVIII and XIX of the Social Security Act to provide differential rates of payment favoring treatment provided consistent with qualifying best practices under the Medicare and Medicaid programs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Improved Medical De-  
3 cision Incentive Act of 2009”.

4 **SEC. 2. FINDINGS.**

5 Congress makes the following findings:

6 (1) The United States spends more per capita  
7 on health care than any other nation, and yet it has  
8 mediocre health outcomes, including the second-  
9 highest infant mortality rate of all industrialized na-  
10 tions.

11 (2) The efficacy of best practices guidelines in  
12 improving health care delivery and patient outcomes  
13 is well established.

14 (3) Existing payment systems compensate phy-  
15 sicians without adequate attention to the appro-  
16 priateness or quality of care delivered and often  
17 without reference to established best practices.

18 (4) Identification of and adherence to best prac-  
19 tices can improve the quality of health care while re-  
20 ducing overall costs to the health care system.

21 (5) Orderly administrative proceedings involving  
22 knowledgeable professionals will enhance best prac-  
23 tices for health care.

24 (6) Control of medical practices through denial  
25 of claims by insurance companies has proven waste-  
26 ful and confusing, and has failed to motivate ade-

1       quate development and use of best practices for  
2       health care.

3 **SEC. 3. VOLUNTARY STATE DEVELOPMENT AND APPROVAL**  
4                   **OF QUALIFYING BEST PRACTICES; INCEN-**  
5                   **TIVES FOR PRIVATE INSURERS.**

6       (a) STATE APPROVAL OF BEST PRACTICES.—

7           (1) IN GENERAL.—A State health department  
8       may approve best practices in a course of, or as a  
9       means of treatment for, a particular condition, ill-  
10      ness, or procedure, as the qualifying standard of  
11      care for the State in order to take advantage of the  
12      differential rates of payment implemented under sec-  
13      tions 1899 and 1902(dd) of the Social Security Act  
14      (as added by sections 4 and 5, respectively) and the  
15      private insurance incentive under subsection (b).

16           (2) QUALIFYING PROCESS FOR STATE AP-  
17      PROVAL.—In order for best practices approved by a  
18      State under paragraph (1) to qualify as best prac-  
19      tices for purposes of implementing such differential  
20      rates of payment and for purposes of such private  
21      insurance incentive, a State health department  
22      shall—

23           (A) allow any duly constituted State med-  
24      ical society, medical specialty group, or medical  
25      specialty board to file with the State health de-

1           partment a course or means of treatment rep-  
2           resenting best practices for a particular condi-  
3           tion, illness, or procedure to be applicable in the  
4           State, including cost-effective prevention and  
5           management measures;

6           (B) provide for notice and hearing with re-  
7           spect to the approval of best practices for a  
8           particular condition, illness, or procedure con-  
9           sistent with—

10                   (i) section 552b of title 5, United  
11                   States Code (relating to open meetings),  
12                   or, if applicable, equivalent State law; and

13                   (ii) the administrative procedures of  
14                   the State;

15           (C) permit any health insurer described in  
16           subsection (b)(1), including any individual au-  
17           thorized by the Secretary of Health and Human  
18           Services to act as a representative of the Medi-  
19           care and Medicaid programs under titles XVIII  
20           and XIX, respectively, of the Social Security  
21           Act (42 U.S.C. 1395 et seq.; 1396 et seq.), to  
22           intervene in any administrative proceeding to  
23           approve such best practices;

24           (D) provide appropriate notice of any such  
25           administrative proceeding to established advo-

1           cacy groups concerned with the condition or ill-  
2           ness involved in the proceeding; and

3           (E) in the case where the State health de-  
4           partment determines that a course of treatment  
5           filed in accordance with subparagraph (A)  
6           would lower system costs and improve quality of  
7           care, approve that best practices course of  
8           treatment within its jurisdiction as the quali-  
9           fying standard of care under this subsection for  
10          that condition, illness, or procedure.

11          (3) PRIORITY OF APPROVALS.—State health de-  
12          partments are encouraged to prioritize approval of  
13          best practices that address conditions, illnesses, or  
14          procedures where those best practices are reasonably  
15          anticipated to result in the greatest overall cost sav-  
16          ings and quality improvements.

17          (4) APPROVAL OF QUALIFYING BEST PRAC-  
18          TICES.—If, at the conclusion of a process that meets  
19          the requirements of paragraph (2), the State health  
20          department approves best practices (as described in  
21          paragraph (1)), those best practices shall be—

22                  (A) deemed qualifying best practices;

23                  (B) the basis for differential rates of pay-  
24          ment under sections 1899 and 1902(dd) of the

1 Social Security Act (as added by sections 4 and  
2 5, respectively); and

3 (C) eligible for the private insurance incen-  
4 tive under subsection (b).

5 (5) DEFINITION OF STATE.—In this subsection  
6 the term “State” includes such regional or local  
7 areas as the State health department determines ap-  
8 propriate.

9 (b) INCENTIVE FOR PRIVATE INSURERS TO PROVIDE  
10 TIMELY PAYMENT FOR SERVICES PROVIDED IN ACCORD-  
11 ANCE WITH BEST PRACTICES.—

12 (1) IN GENERAL.—Notwithstanding any other  
13 provision of law, in the case where qualifying best  
14 practices have been approved by a State health de-  
15 partment in accordance with subsection (a), any  
16 health insurer doing business in interstate commerce  
17 and providing health care coverage within the State  
18 shall pay all provider charges for any service pro-  
19 vided in accordance with such best practices not  
20 later than 30 days after the date on which such  
21 service is provided and, absent fraud, without regard  
22 for the insurer’s internal utilization review or claims  
23 denial procedure.

24 (2) STANDING TO ENFORCE.—Any provider or  
25 specialty group that does business in a State where

1 the State health department has approved qualifying  
 2 best practices in accordance with subsection (a) may  
 3 bring a civil action in an appropriate United States  
 4 district court to enjoin efforts by any health insurer  
 5 to challenge or delay payment for services provided  
 6 by the provider or a member of the specialty group  
 7 in accordance with such best practices approved in  
 8 the State. The district court shall award a provider  
 9 or specialty group costs and attorney’s fees in such  
 10 a civil action if the court finds that the challenge or  
 11 delay was a willful violation of this Act.

12 **SEC. 4. IMPLEMENTATION OF DIFFERENTIAL RATES OF**  
 13 **PAYMENT FOR QUALIFYING BEST PRACTICES**  
 14 **UNDER THE MEDICARE PROGRAM.**

15 (a) DIFFERENTIAL RATES OF PAYMENT FOR QUALI-  
 16 FYING BEST PRACTICES.—Title XVIII of the Social Secu-  
 17 rity Act (42 U.S.C. 1395 et seq.) is amended by adding  
 18 at the end the following new section:

19 “DIFFERENTIAL RATES OF PAYMENT FOR QUALIFYING  
 20 BEST PRACTICES

21 “SEC. 1899. (a) IN GENERAL.—

22 “(1) DIFFERENTIAL RATES OF PAYMENT.—  
 23 Notwithstanding any other provision of law, subject  
 24 to paragraph (4), the Secretary shall establish proce-  
 25 dures to provide differential rates of payment for  
 26 items and services covered under the program under

1 this title that favor treatment provided consistent  
2 with qualifying best practices approved by a State in  
3 accordance with section 3(a) of the Improved Med-  
4 ical Decision Incentive Act of 2009.

5 “(2) REGULATIONS.—Not later than March 31,  
6 2010, the Secretary shall promulgate regulations to  
7 carry out this subsection.

8 “(3) BUDGET NEUTRALITY.—The Secretary  
9 shall ensure that the procedures established under  
10 paragraph (1) do not result in overall expenditures  
11 for any year under this title that are more than the  
12 expenditures which would have been made if such  
13 procedures had not been established, taking into ac-  
14 count—

15 “(A) any savings anticipated as a result of  
16 the application of best practices to items and  
17 services covered under the program under this  
18 title; and

19 “(B) the net effects of reimbursement in-  
20 creases and decreases as a result of the dif-  
21 ferential in rates of payment established under  
22 such program.

23 “(4) EXCEPTION FOR CERTAIN ITEMS AND  
24 SERVICES.—Such procedures shall not apply to pay-

1       ment for items and services which the Secretary de-  
2       termines are provided—

3               “(A) as part of a clinical trial or study; or

4               “(B) in exceptional circumstances that re-  
5       quire non-standard care.

6       “(b) ADOPTION OF NATIONAL BEST PRACTICES.—

7               “(1) IN GENERAL.—Such procedures shall  
8       specify that, in any case where the Secretary finds  
9       a national standard for best practices to be appro-  
10      pate, the Secretary may adopt national best prac-  
11      tices. Subject to paragraph (2), such national best  
12      practices shall be applicable within a State as a  
13      qualifying best practice in accordance with section  
14      3(a) of the Improved Medical Decision Incentive Act  
15      of 2009 and the basis for the establishment of dif-  
16      ferential rates of payment under the program under  
17      this title.

18              “(2) LIMITATION.—In any case where the State  
19      health department has approved qualifying best  
20      practices in the State for a condition, illness, or pro-  
21      cedure in accordance with such section 3(a), national  
22      best practices adopted under paragraph (1) shall  
23      only be applicable within such State as a qualifying  
24      best practice and the basis for the establishment of  
25      such differential rates of payment if the Secretary

1 finds, after a hearing in the State that meets the  
 2 procedural requirements under paragraph (2) of  
 3 such section 3(a), that the national best practices  
 4 will improve health care outcomes and lower health  
 5 care costs in the State to a greater extent than the  
 6 qualifying best practices approved by the State  
 7 health department for that condition, illness, or pro-  
 8 cedure in accordance with such section 3(a).”.

9 (b) **EFFECTIVE DATE.**—The amendment made by  
 10 this section shall apply to items and services furnished on  
 11 or after March 31, 2010.

12 **SEC. 5. IMPLEMENTATION OF DIFFERENTIAL RATES OF**  
 13 **PAYMENT FOR QUALIFYING BEST PRACTICES**  
 14 **UNDER THE MEDICAID PROGRAM.**

15 (a) **STATE PLAN AMENDMENT.**—Section 1902(a) of  
 16 the Social Security Act (42 U.S.C. 1396a(a)) is amend-  
 17 ed—

18 (1) in paragraph (70)(B)(iv), by striking “and”  
 19 at the end;

20 (2) in paragraph (71), by striking the period at  
 21 the end and inserting “; and”; and

22 (3) by inserting after paragraph (71) the fol-  
 23 lowing new paragraph:

24 “(72) provide, in accordance with procedures  
 25 established by the Secretary under subsection (dd)

1 and after consultation with and upon the rec-  
 2 ommendation of the State health department (and  
 3 the approval of the Secretary), for differential rates  
 4 of payment for medical assistance under the plan  
 5 that favor treatment provided consistent with quali-  
 6 fying best practices approved by the State health de-  
 7 partment in accordance with section 3(a) of the Im-  
 8 proved Medical Decision Incentive Act of 2009, ex-  
 9 cept that in establishing such payment rates, the  
 10 State shall ensure that the amounts paid under such  
 11 rates do not exceed the amount the State would have  
 12 paid for such medical assistance under the plan if  
 13 such differential rates of payment had not been  
 14 made, taking into account any annual increases in  
 15 population and inflation.”.

16 (b) ESTABLISHMENT OF PROCEDURES.—Section  
 17 1902 of the Social Security Act (42 U.S.C. 1396a) is  
 18 amended by adding at the end the following new sub-  
 19 section:

20 “(dd) DIFFERENTIAL RATES OF PAYMENT FOR  
 21 QUALIFYING BEST PRACTICES AND ADOPTION OF NA-  
 22 TIONAL BEST PRACTICES.—

23 “(1) DIFFERENTIAL RATES OF PAYMENT FOR  
 24 QUALIFYING BEST PRACTICES.—

1           “(A) IN GENERAL.—Notwithstanding any  
2 other provision of law, subject to subparagraph  
3 (D), the Secretary shall establish procedures to  
4 provide differential rates of payment for med-  
5 ical assistance provided consistent with quali-  
6 fying best practices approved by a State in ac-  
7 cordance with section 3(a) of the Improved  
8 Medical Decision Incentive Act of 2009.

9           “(B) REGULATIONS.—Not later than  
10 March 31, 2010, the Secretary shall promulgate  
11 regulations to carry out this subsection.

12           “(C) BUDGET NEUTRALITY.—The Sec-  
13 retary shall ensure that the procedures estab-  
14 lished under subparagraph (A) do not result in  
15 overall expenditures for any year under a State  
16 plan that are more than the expenditures which  
17 would have been made if such procedures had  
18 not been established, taking into account—

19                   “(i) any savings anticipated as a re-  
20 sult of the application of best practices to  
21 medical assistance provided under the  
22 State plan; and

23                   “(ii) the net effects of reimbursement  
24 increases and decreases as a result of the

1 differential rates of payment established  
2 under such plan.

3 “(D) EXCEPTION FOR CERTAIN ITEMS AND  
4 SERVICES.—Such procedures shall not apply to  
5 payment for medical assistance which the Sec-  
6 retary determines is provided—

7 “(i) as part of a clinical trial or study;

8 or

9 “(ii) in exceptional circumstances that  
10 require non-standard care.

11 “(2) ADOPTION OF NATIONAL BEST PRAC-  
12 TICES.—Such procedures shall specify that, in any  
13 case where the Secretary adopts national best prac-  
14 tices in accordance with section 1899(b), subject to  
15 the limitation under paragraph (2) of such section,  
16 such national best practices shall be—

17 “(A) applicable within a State as a quali-  
18 fying best practice in accordance with section  
19 3(a) of the Improved Medical Decision Incentive  
20 Act of 2009; and

21 “(B) the basis for the establishment of dif-  
22 ferential rates of payment under the State  
23 plan.”.

24 (c) EFFECTIVE DATE.—

1           (1) IN GENERAL.—Except as provided in para-  
2 graph (2), the amendments made by this section  
3 shall apply to medical assistance furnished on or  
4 after March 31, 2010.

5           (2) EXTENSION OF EFFECTIVE DATE FOR  
6 STATE LAW AMENDMENT.—In the case of a State  
7 plan under title XIX of the Social Security Act (42  
8 U.S.C. 1396 et seq.) which the Secretary of Health  
9 and Human Services determines requires State legis-  
10 lation in order for the plan to meet the additional  
11 requirements imposed by the amendments made by  
12 this section, the State plan shall not be regarded as  
13 failing to comply with the requirements of such title  
14 solely on the basis of its failure to meet these addi-  
15 tional requirements before the first day of the first  
16 calendar quarter beginning after the close of the  
17 first regular session of the State legislature that be-  
18 gins after the date of enactment of this Act. For  
19 purposes of the previous sentence, in the case of a  
20 State that has a 2-year legislative session, each year  
21 of the session is considered to be a separate regular  
22 session of the State legislature.

23 **SEC. 6. OVERSIGHT BY THE CENTERS FOR MEDICARE &**  
24 **MEDICAID SERVICES.**

25           (a) REVIEW AND REPORT.—

1 (1) REVIEW.—

2 (A) IN GENERAL.—The Secretary shall  
3 conduct an annual review of the efficacy of all  
4 qualifying best practices approved pursuant to  
5 section 3(a) and, if applicable, any national best  
6 practices adopted pursuant to section 1899(b)  
7 of the Social Security Act, as added by section  
8 4(a).

9 (B) CONSIDERATIONS.—The review con-  
10 ducted under subparagraph (A) shall con-  
11 sider—

12 (i) the effect of such best practices  
13 with respect to improving outcomes and  
14 lowering the cost of care; and

15 (ii) the effect and efficacy of differen-  
16 tial rates of payment under the Medicare  
17 and Medicaid programs under titles XVIII  
18 and XIX, respectively, of the Social Secu-  
19 rity Act (42 U.S.C. 1395 et seq.; 1396 et  
20 seq.) under procedures established pursu-  
21 ant to the amendments made by sections 4  
22 and 5.

23 (2) REPORT.—The Secretary shall submit an  
24 annual report to Congress containing the results of  
25 the review conducted under paragraph (1)(A), to-

1       gether with recommendations for such legislation  
2       and administrative actions as the Secretary deter-  
3       mines appropriate.

4       (b) ANNUAL CONFERENCE.—The Secretary shall  
5       host an annual conference of all State health directors,  
6       and any State medical societies and medical specialty  
7       groups that have filed best practices for approval with a  
8       State health department in accordance with subparagraph  
9       (A) of section 3(a)(2) and any health insurers and advo-  
10      cacy groups that have participated in any administrative  
11      proceeding to approve best practices in accordance with  
12      subparagraphs (C) and (D), respectively, of such section,  
13      to provide—

14               (1) for the exchange of information; and

15               (2) an opportunity to summarize the effects on  
16      health care costs, quality, and outcomes of quali-  
17      fying best practices approved in accordance with sec-  
18      tion 3(a) prior to the date on which the conference  
19      is held.

20       (c) AUTHORIZATION.—There are authorized to be ap-  
21      propriated such sums as may be necessary for the purpose  
22      of carrying out this section.

23       (d) DEFINITION OF SECRETARY.—In this section, the  
24      term “Secretary” means the Secretary of Health and

- 1 Human Services, acting through the Administrator of the
- 2 Centers for Medicare & Medicaid Services.

