

111TH CONGRESS
1ST SESSION

S. 957

To amend the Public Health Service Act to ensure that victims of public health emergencies have meaningful and immediate access to medically necessary health care services.

IN THE SENATE OF THE UNITED STATES

MAY 1, 2009

Mr. DURBIN (for himself, Mr. BINGAMAN, Mr. CASEY, and Mr. FEINGOLD) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Public Health Service Act to ensure that victims of public health emergencies have meaningful and immediate access to medically necessary health care services.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Public Health Emer-
5 gency Response Act of 2009”.

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) FINDINGS.—Congress finds the following:

1 (1) Since 2000, the Secretary of Health and
2 Human Services has declared that a public health
3 emergency existed nationwide in response to the at-
4 tacks of September 11th and in response to Hurri-
5 canes Katrina and Rita.

6 (2) In the event of a public health emergency,
7 compliance with recommendations to seek immediate
8 care may be critical to containing the spread of an
9 infectious disease outbreak or responding to a bio-
10 terror attack.

11 (3) Nearly 16 percent of Americans lack health
12 insurance coverage.

13 (4) Fears of out-of-pocket expenses may cause
14 individuals to delay seeking medical attention during
15 a public health emergency.

16 (5) A public health emergency may disrupt
17 health care assistance programs for individuals with
18 chronic conditions, exacerbating the costs and risks
19 to their health.

20 (6) The uninsured could place great financial
21 strain on health care providers during a public
22 health emergency.

23 (7) The Department of Health and Human
24 Services Pandemic Influenza Plan projects that a
25 pandemic influenza outbreak could result in

1 45,000,000 additional outpatient visits, with
2 865,000 to 9,900,000 individuals requiring hos-
3 pitalization, depending upon the severity of the pan-
4 demic.

5 (8) Hospitals in the United States could lose as
6 much as \$3,900,000,000 in uncompensated care and
7 cash flow losses in the event of a severe pandemic.

8 (9) Under current statute, no dedicated mecha-
9 nism exists to reimburse providers for uncompen-
10 sated care during a public health emergency.

11 (b) PURPOSES.—The purposes of this Act are—

12 (1) to provide temporary emergency health care
13 coverage for uninsured and certain otherwise quali-
14 fied individuals in the event of a public health emer-
15 gency declared by the Secretary of Health and
16 Human Services;

17 (2) to ensure that health care providers remain
18 fiscally solvent and are not overburdened by the cost
19 of uncompensated care during a public health emer-
20 gency;

21 (3) to eliminate a primary disincentive for unin-
22 sured and certain otherwise qualified individuals to
23 promptly seek medical care during a public health
24 emergency; and

1 (4) to minimize delays in the provision of emer-
 2 gency health care coverage by clarifying eligibility
 3 requirements and the scope of such coverage and
 4 identifying the funding mechanisms for emergency
 5 health care services.

6 **SEC. 3. EMERGENCY HEALTH CARE COVERAGE.**

7 (a) IN GENERAL.—Title III of the Public Health
 8 Service Act (42 U.S.C. 241 et seq.) is amended by insert-
 9 ing after section 319K the following new section:

10 **“SEC. 319K-1. EMERGENCY HEALTH CARE COVERAGE.**

11 “(a) ACTIVATION AND TERMINATION OF EMER-
 12 GENCY HEALTH CARE COVERAGE.—

13 “(1) BASED ON PUBLIC HEALTH EMER-
 14 GENCY.—

15 “(A) IN GENERAL.—The Secretary may
 16 activate the coverage of emergency health care
 17 services under this section only if the Secretary
 18 determines that there is a public health emer-
 19 gency.

20 “(B) DETERMINATION OF PUBLIC HEALTH
 21 EMERGENCY.—For purposes of this section,
 22 there is a ‘public health emergency’ only if a
 23 public health emergency exists under section
 24 319.

1 “(2) CONSIDERATIONS.—In making a deter-
2 mination under paragraph (1), the Secretary shall
3 consider a range of factors including the following:

4 “(A) The degree to which the emergency is
5 likely to overwhelm health care providers in the
6 region.

7 “(B) The opportunity to minimize mor-
8 bidity and mortality through intervention under
9 this section.

10 “(C) The estimated number of direct cas-
11 ualties of the emergency.

12 “(D) The potential number of casualties in
13 the absence of intervention under this section
14 (such as in the case of infectious disease).

15 “(E) The potential adverse financial im-
16 pacts on local health care providers in the ab-
17 sence of activation of this section.

18 “(F) Whether the need for health care
19 services is of sufficient severity and magnitude
20 to warrant major assistance under this section
21 above and beyond the emergency services other-
22 wise available from the Federal Government.

23 “(G) Such other factors as the Secretary
24 may deem appropriate.

25 “(3) TERMINATION AND EXTENSION.—

“(A) IN GENERAL.—Coverage of emergency health care services under this section shall terminate, subject to subsection (c)(2), upon the earlier of the following:

“(i) The Secretary’s determination that a public health emergency no longer exists.

“(ii) Subject to subparagraph (B), 90 days after the initiation of coverage of emergency health care services.

“(B) EXTENSION AUTHORITY.—The Secretary may extend a public health emergency for a second 90-day period, but only if a report to Congress is made under paragraph (4) in conjunction with making such extension.

“(4) REPORT.—

“(A) IN GENERAL.—Prior to making an extension under paragraph (3)(B), the Secretary shall transmit a report to Congress that includes information on the nature of the public health emergency and the expected duration of the emergency. The Secretary shall include in such report recommendations, if deemed appropriate, that Congress provide a further extension.

1 sion of the public health emergency period be-
2 yond the second 90-day period.

3 “(B) REPORT CONTENTS.—A report under
4 subparagraph (A) shall include a discussion of
5 the health care needs of emergency victims and
6 affected individuals including the likely need for
7 follow-up care over a 2-year period.

8 “(5) COORDINATION.—The Secretary shall en-
9 sure that the activation, implementation, and termi-
10 nation of emergency health care services under this
11 section in response to a public health emergency is
12 coordinated with all functions, personnel, and assets
13 of the Federal, State, local, and tribal responses to
14 the emergency.

15 “(6) MEDICAL MONITORING PROGRAM.—The
16 Secretary shall establish a medical monitoring pro-
17 gram for monitoring and reporting on health care
18 needs of the affected population over time. At least
19 annually during the 5-year period following the date
20 of a public health emergency, the Secretary shall re-
21 port to Congress on any continuing health care
22 needs of the affected population related to the public
23 health emergency. Such reports shall include rec-
24 ommendations on how to ensure that emergency vic-

1 tims and affected individuals have access to needed
2 health care services.

3 “(b) ELIGIBILITY FOR COVERAGE OF EMERGENCY
4 HEALTH CARE SERVICES.—

5 “(1) LIMITED ELIGIBILITY.—

6 “(A) IN GENERAL.—Eligibility for cov-
7 erage of emergency health care services under
8 this section for a public health emergency is
9 limited to individuals who—

10 “(i) are emergency victims who are
11 uninsured or otherwise qualified; or

12 “(ii) are affected individuals who are
13 uninsured.

14 “(B) DEFINITIONS.—For purposes of this
15 section with respect to a public health emer-
16 gency:

17 “(i) INSURED.—An individual is ‘in-
18 sured’ if the individual has group or indi-
19 vidual health insurance coverage or pub-
20 licly financed health insurance (as defined
21 by the Secretary).

22 “(ii) OTHERWISE QUALIFIED.—An in-
23 dividual is ‘otherwise qualified’ if the indi-
24 vidual is insured but the Secretary deter-
25 mines that the individual’s health care in-

1 surance coverage is not at least actuarially
 2 equivalent to benchmark coverage. In es-
 3 tablishing such benchmark coverage, the
 4 Secretary shall consider the standard Blue
 5 Cross/Blue Shield preferred provider op-
 6 tion service benefit plan described in and
 7 offered under section 8903(1) of title 5,
 8 United States Code.

9 “(iii) UNINSURED.—An individual is
 10 ‘uninsured’ if the individual is not insured.

11 “(iv) EMERGENCY VICTIM.—An indi-
 12 vidual is an ‘emergency victim’ with re-
 13 spect to a public health emergency if the
 14 individual needs health care services due to
 15 injuries or disease resulting from the pub-
 16 lic health emergency.

17 “(v) AFFECTED INDIVIDUAL.—An in-
 18 dividual is an ‘affected individual’ with re-
 19 spect to a public health emergency if—

20 “(I) the individual—

21 “(aa) resides in an assist-
 22 ance area designated for the
 23 emergency (or whose residence
 24 was displaced by the emergency);
 25 or

1 “(bb) in the case of such an
2 emergency constituting a pan-
3 demic flu or other infectious dis-
4 ease outbreak, resides in the area
5 affected by the outbreak (or
6 whose residence was displaced by
7 the emergency); and

8 “(II) the individual’s ability to
9 access care or medicine is disrupted
10 as a result of the emergency.

11 “(2) PROCESS.—The Secretary shall establish a
12 streamlined process for determining eligibility for
13 emergency health care services under this section. In
14 establishing such process—

15 “(A) the Secretary shall recognize that in
16 the context of a public health emergency, indi-
17 viduals may be unable to provide identification
18 cards, health care insurance information, or
19 other documentation; and

20 “(B) the primary method for determining
21 eligibility for such services shall be an attesta-
22 tion provided to the health care provider by the
23 recipient of the services that the recipient meets
24 the eligibility criteria established under para-
25 graph (1)(A), with a standard alternative for

1 unattended minors and adults without the ca-
2 pacity to sign such an attestation form.

3 “(3) SERVICE DELIVERY.—Providers may com-
4 mence provision of emergency health care services
5 for an individual in the absence of any centralized
6 enrollment process, if the provider has collected
7 basic information, specified by the Secretary, includ-
8 ing the individual’s name, address, social security
9 number, and existing health insurance coverage (if
10 any), that establishes a prima facie basis for eligi-
11 bility, except that such information shall not be re-
12 quired in cases where the individual is unable to pro-
13 vide the information due to disability or incapacita-
14 tion.

15 “(c) EMERGENCY HEALTH CARE SERVICES.—

16 “(1) IN GENERAL.—For purposes of this sec-
17 tion, the term ‘emergency health care services’—

18 “(A) means items and services for which
19 payment may be made under parts A and B of
20 the Medicare program;

21 “(B) includes prescription drugs (not cov-
22 ered under such part B) specified by the Sec-
23 retary under subsection (g), based on the
24 formularies of the two or more prescription

1 drug plans under part D of the Medicare pro-
2 gram with the largest enrollment;

3 “(C) may include drugs, devices, biological
4 products, and other health care products, if
5 such products are authorized for use by the
6 Food and Drug Administration pursuant to an
7 alternate authority, including the emergency
8 use authority under section 564 of the Federal
9 Food, Drug, and Cosmetic Act (21 U.S.C.
10 360bbb–3); and

11 “(D) for an affected individual, is limited
12 to those items and services described under sub-
13 paragraphs (A), (B), or (C) that a third-party
14 payor, such as a government program or chari-
15 table organization, reimbursed or otherwise pro-
16 vided to an affected individual during the 90
17 days prior to the declaration of the public
18 health emergency.

19 “(2) NOT MEDICARE, MEDICAID, OR SCHIP BEN-
20 EFITS.—The emergency health care services pro-
21 vided under this section are not benefits under Medi-
22 care, Medicaid or SCHIP. Nothing in this section
23 shall be interpreted as altering or otherwise con-
24 flicting with titles XVIII, XIX, or XXI of the Social
25 Security Act.

1 “(3) COMPLETION OF TREATMENT FOR EMER-
 2 GENCY VICTIMS.—Notwithstanding termination of
 3 the coverage of emergency health care services pur-
 4 suant to subsection (a)(3), the Secretary may iden-
 5 tify a subgroup of emergency victims on a case-by-
 6 case basis or otherwise to continue receiving cov-
 7 erage of emergency health care services for up to an
 8 additional 60 days. Such emergency health care
 9 services provided after the termination date shall be
 10 limited to services and items that are medically nec-
 11 essary to treat an injury or disease resulting directly
 12 from the public health emergency involved.

13 “(d) COVERED PROVIDERS.—

14 “(1) IN GENERAL.—Subject to paragraph (2),
 15 health care services are not covered under this sec-
 16 tion unless they are furnished by a health care pro-
 17 vider that—

18 “(A) has a valid provider number under
 19 the Medicare program, the Medicaid program,
 20 or SCHIP;

21 “(B) is in good standing with such pro-
 22 gram; and

23 “(C) is not excluded from participation in
 24 a Federal health care program (as defined in

1 section 1128B(f) of the Social Security Act (42
2 U.S.C. 1320a–7b(f))).

3 “(2) WAIVER AUTHORITY.—

4 “(A) IN GENERAL.—The Secretary may by
5 regulation waive certain requirements for pro-
6 vider enrollment that otherwise apply under the
7 Medicare or Medicaid program or under SCHIP
8 to ensure an adequate supply of health care
9 providers (such as nurses and other health care
10 providers who do not typically participate in the
11 Medicare or Medicaid program or SCHIP) and
12 services in the case of a public health emer-
13 gency. Such requirements may include the re-
14 quirement that a licensed physician or other
15 health care professional holds a license in the
16 State in which the professional provides services
17 or is otherwise authorized under State law to
18 provide the services involved.

19 “(B) REPORT ON EMERGENCY SYSTEM
20 FOR ADVANCE REGISTRATION OF VOLUNTEER
21 HEALTH PROFESSIONALS (ESAR–VHP).—Not
22 later than 180 days after the date of the enact-
23 ment of this section, the Secretary shall submit
24 to Congress a report on the number of volun-
25 teers, by profession and credential level, en-

1 rolled in the Emergency System for Advance
 2 Registration of Volunteer Health Professionals
 3 (ESAR–VHP) that will be available to each
 4 State in the event of a public health emergency.
 5 The Secretary shall determine if the number of
 6 such volunteers is adequate for interstate de-
 7 ployment in response to regional requests for
 8 volunteers and, if not, shall include in the re-
 9 port recommendations for actions to ensure an
 10 adequate surge capacity for public health emer-
 11 gencies in defined geographic areas.

12 “(3) MEDICARE AND MEDICAID PROGRAMS AND
 13 SCHIP DEFINED.—For purposes of this section:

14 “(A) The term ‘Medicare program’ means
 15 the program under parts A, B, and D of title
 16 XVIII of the Social Security Act.

17 “(B) The term ‘Medicaid program’ means
 18 the program of medical assistance under title
 19 XIX of such Act.

20 “(C) The term ‘SCHIP’ means the State
 21 children’s health insurance program under title
 22 XXI of such Act.

23 “(e) PAYMENTS AND CLAIMS ADMINISTRATION.—

24 “(1) PAYMENT AMOUNT.—The amount of pay-
 25 ment under this section to a provider for emergency

1 health care services shall be equal to 100 percent of
2 the payment rate for the corresponding service
3 under part A or B of the Medicare program, or, in
4 the case of prescription drugs and other items and
5 services not covered under either such part, such
6 amount as the Secretary may specify by rule. Such
7 a provider shall not be permitted to impose any cost-
8 sharing or to balance bill for services furnished
9 under this section.

10 “(2) USE OF MEDICARE CONTRACTORS.—The
11 Secretary shall enter into arrangements with Medi-
12 care administrative contractors under which such
13 contractors process claims for emergency health care
14 services under this section using the claim forms,
15 codes, and nomenclature in effect under the Medi-
16 care program.

17 “(3) APPLICATION OF SECONDARY PAYER
18 RULES.—In the case of payment under this section
19 for emergency health care services for otherwise
20 qualified individuals who have some health insurance
21 coverage with respect to such services, the adminis-
22 trative contractors under paragraph (2) shall submit
23 a claim to the entity offering such coverage to re-
24 coup all or some of such payment, reflecting what-
25 ever amount the entity would normally reimburse for

each covered service. The provisions of section 1862(b) of the Social Security Act (42 U.S.C. 1395y(b)) shall apply to benefits provided under this section in the same manner as they apply to benefits provided under the Medicare program.

“(4) PAYMENTS FOR EMERGENCY HEALTH CARE SERVICES AND RELATED COSTS.—Payments to provide, and costs to administer, emergency health care services under this section shall be made from the Public Health Emergency Fund, as provided under subsection (f)(1).

“(5) ATTESTATION REQUIREMENT.—No payment shall be made under this section to a provider for emergency health care services unless the provider has executed an attestation that—

“(A) the provider has notified the administrative contractor of any third-party payment received or claims pending for such services;

“(B) the recipient of the services has executed an attestation or otherwise satisfies the eligibility criteria established under subsection (b); and

“(C) the services were medically necessary.

“(f) PUBLIC HEALTH EMERGENCY FUND; FRAUD AND ABUSE PROVISIONS.—

1 “(1) THE PUBLIC HEALTH EMERGENCY
2 FUND.—There is authorized to be appropriated to
3 the Public Health Emergency Fund (established
4 under section 319(b)) such sums as may be nec-
5 essary under this section for payments to provide
6 emergency health care services and costs to admin-
7 ister the services during a public health emergency.

8 “(2) NO USE OF MEDICARE FUNDS.—No funds
9 under the Medicare program shall be made available
10 or used to make payments under this section.

11 “(3) FRAUD AND ABUSE PROVISIONS.—Pro-
12 viders and recipients of emergency health care serv-
13 ices under this section shall be subject to the Fed-
14 eral fraud and abuse protections that apply to Fed-
15 eral health care programs as defined in section
16 1128B(f) of the Social Security Act (42 U.S.C.
17 1320a–7b(f)).

18 “(g) RULEMAKING.—The Secretary may issue regu-
19 lations to carry out this section and shall use a negotiated
20 rulemaking process to advise the Secretary on key issues
21 regarding the implementation of this section.

22 “(h) PUBLIC HEALTH EMERGENCY PLANNING AND
23 THE EDUCATION OF HEALTH CARE PROVIDERS AND THE
24 GENERAL POPULATION.—

1 “(1) PLANNING FOR COVERAGE OF EMERGENCY
2 HEALTH CARE SERVICES IN PUBLIC HEALTH EMER-
3 GENCIES.—The Secretary shall, not later than 90
4 days after the date of the enactment of this section,
5 initiate planning to carry out this section, including
6 planning relating to implementation of the payments
7 and claims administration under subsection (e), in
8 the event of activation of emergency health care cov-
9 erage.

10 “(2) OUTREACH AND PUBLIC EDUCATION CAM-
11 PAIGN.—The Secretary shall conduct an outreach
12 and public education campaign to inform health care
13 providers and the general public about the avail-
14 ability of emergency health care coverage under this
15 section during the period of the emergency. Such
16 campaign shall include—

17 “(A) an explanation of the emergency
18 health care coverage program under this sec-
19 tion;

20 “(B) claim forms and instructions for
21 health care providers to use when providing cov-
22 ered services during the emergency period; and

23 “(C) special outreach initiatives to vulner-
24 able and hard-to-reach populations.

1 “(3) AUTHORIZATION OF APPROPRIATIONS.—

2 There are authorized to be appropriated for each fis-
 3 cal year (beginning with fiscal year 2009)
 4 \$7,000,000 to carry out paragraphs (1) and (2) dur-
 5 ing the fiscal year.

6 “(i) APPLICATION OF POLICIES UNDER OTHER FED-
 7 ERAL HEALTH CARE PROGRAMS.—As specified in sub-
 8 sections (c) through (e), the Secretary may adopt in whole
 9 or in part the coverage, reimbursement, provider enroll-
 10 ment, and other policies used under the Medicare program
 11 and other Federal health care programs in administering
 12 emergency health care services under this section to the
 13 extent consistent with this section.”.

14 (b) APPLICATION OF PUBLIC HEALTH EMERGENCY
 15 FUND.—Section 319(b)(1) of such Act (42 U.S.C.
 16 247d(b)(1)) is amended—

17 (1) by inserting “and section 319K–1” after
 18 “subsection (a)”; and

19 (2) by striking “such subsection” and inserting
 20 “subsection (a)”.

○