

PsychRights®

Law Project for
Psychiatric Rights, Inc.

Senator Scott Brown
United States Senate
359 Dirksen Senate Office Building
Washington, DC 20510

December 2, 2011

via Fax (202) 228-2646

Re: The Financial And Societal Costs Of Medicating
America's Foster Children

Dear Senator Brown:

It was with great interest that I watched yesterday's hearing on The Financial And Societal Costs Of Medicating America's Foster Children. I was particularly impressed with your concern about the horrific problem of the psychiatric drugging of foster children and youth. Your question regarding what can be done about the situation has prompted me to write.

At the hearing, you assured Ke'onte that his testimony was going to help many other foster children avoid being inappropriately given psychotropic drugs. The tools to do this are already in hand and in my view the Department of Health and Human Services (DHHS), and the Department of Justice should be required to enforce the already enacted restriction on outpatient drug coverage under Medicaid to those that are for a medically accepted indication.

The DHHS representative, Bryan Samuels, testified that it has no authority to do anything but give the states guidance. This is not true. As succinctly stated by the court in *US ex rel Rost v. Pfizer*, 253 F.R.D. 11, 13-14 (D.Mass. 2008):

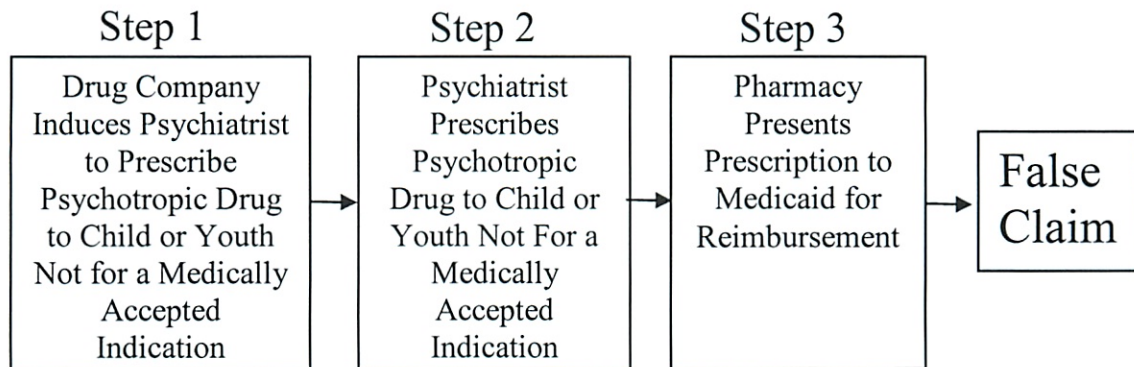
Medicaid can only pay for drugs that are used for a "medically accepted indication," meaning one that is either approved by the FDA or "supported by citations" in one of three drug compendia, including DRUGDEX. See 42 U.S.C. § 1396r8 (k)(3), (6); 42 U.S.C. § 1396r-8 (g)(1)(B)(I).

The Department of Justice agrees that prescriptions not for a medically accepted indication are not legally reimbursable under Medicaid and has extracted billions of dollars in settlements with drug companies under the False Claims Act for inducing doctors to write prescriptions for psychotropic drugs to children and youth that are not for a medically accepted indication.¹

Such recoveries from drug companies are completely ineffective because the doctors continue to prescribe these uncovered drugs in the drug company inspired fraudulent scheme that can be depicted as follows:

¹ I can supply the following documents for this, but didn't want to make this fax too long: September 24, 2010, United States' Statement of Interest in *U.S. ex rel Polansky v. Pfizer, Inc.*, Case 1:04-cv-00704-ERK-ALC, USDC EDNY; September 2, 2009, Department of Justice News Release regarding settlement agreement in *United States of America ex rel Stefan Kruszewski et al., v. Pfizer, Inc.*, Case No. 07-CV-4106, USDC EDPA; Settlement Agreement in *United States ex rel Wetta v. Atrazenaca*, USDC EDPA, Case No. 04-3479, United States Complaint in Intervention and Settlement Agreement and Release in *United States ex rel Gobble v. Forest Laboratories*, USDC Mass, Case No. 03-10395-NMG.

Fraudulent Scheme



In the related context of the psychiatric drugging of the elderly in nursing homes, last May, the Inspector General of DHHS acknowledged that going after the drug companies is insufficient:

The drug companies have paid billions to resolve these civil and criminal liabilities under federal health and safety laws. But money can't make up for years of corporate campaigns that market drugs with questionable benefits and potentially deadly side effects. . . .

Doctors should base prescribing decisions on their best medical judgments, weighing scientific evidence and an especially careful analysis when they are prescribing drugs for off-label use.²

The doctors engaging in the horrific prescribing practices described in yesterday's hearing are clearly betraying the trust placed in them by our system as described by the Inspector General.

However, even if certain doctors continue to prescribe these drugs when they are not medically indicated, Medicaid should not continue to pay for them. In his Report, the Inspector General notes that the Center for Medicare and Medicaid Services (CMS) takes the position that it does not have the statutory authority to refuse to pay for drugs that Congress directed not be covered. This does not appear to be true and I think is cause for inquiry by the Congress.

There are many other details to this situation, on which I will be pleased to work with you, the committee, and your staff if you so desire.

Yours truly,

James B. (Jim) Gottstein, Esq.,
President

cc: Sen. Thomas R. Carper (202) 228-2190
Sen. Mark Begich (202) 224 - 2354

² May 9, 2011, Statement accompanying May, 2011, Inspector General Report, "Medicare Atypical Antipsychotic Drug Claims For Elderly Nursing Home Residents."