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SUPREME COURT
STATE OF WASHINGTON
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NO. 84325-2

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Appellant,

v.

SAMANTHA A.,

Respondent.

STATEMENT OF ADDITIONAL AUTHORITIES

ROBERT M. MCKENNA
Attorney General

EDWARD J. DEE, WSBA # 15964
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ORIGINAL

FILED AS
ATTACHMENT TO FMA

Pursuant to RAP 10.8, Appellant Washington State Department of Social and Health Services submits the attached authorities (Steve Eiken, Kate Stredl, Brian Burwell, And Lisa Gold, *Medicaid Long-Term Care Expenditures In FY 2009*, Thompson Reuters, August 17, 2010, available at <http://hcbs.org/moreInfo.php/doc/3325> (last visited November 2, 2010), which are offered in support of Appellant's issue No. III.1. [*Does the children's personal care rule violate the requirements of the EPSDT program under Medicaid by not specifically requiring the Department to "meaningfully consider and weigh physician's recommendations," even though 42 U.S.C. § 1396d(a)(24) provides that, at a state's discretion, personal care services may be entirely authorized by the state?*] and issue No. III.2. [*Does the children's personal care rule violate federal Medicaid law requiring comparability of amount, duration, and scope of services, even though reductions in personal care service hours are based*

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*first on developmental stage, not disability, and second on the normal
responsibility of parents?]*

RESPECTFULLY SUBMITTED this 3rd day of November 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in cursive script that reads "Bruce Work".

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10 NOV -3 PM 3:05

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PROOF OF SERVICE

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I certify that I served a copy of this document, **STATEMENT OF**

ADDITIONAL AUTHORITIES, on all parties or their counsel of record

on the date below as follows:

Name/Address of Party Served:

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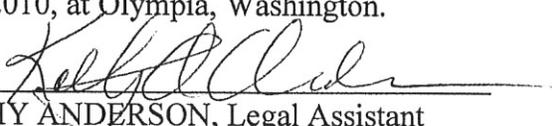
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 3rd day of November 2010, at Olympia, Washington.


KATHY ANDERSON, Legal Assistant

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RESEARCH PAPER

MEDICAID LONG-TERM CARE EXPENDITURES IN FY 2009

STEVE EIKEN, KATE SREDL, BRIAN BURWELL AND LISA GOLD
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AUGUST 17, 2010



THOMSON REUTERS®

MEDICAID LONG-TERM CARE EXPENDITURES

This report presents Medicaid long-term care expenditures for Federal Fiscal Year 2009 (October 2008 through September 2009) and is the latest in a series of annual reports on Medicaid long-term care expenditures. Table 1 presents national expenditures data for FY 1997 – FY 2009. Tables A through T present state-by-state expenditures data for FY 2004 – FY 2009 for specific categories of service. Tables U, V, and W present the distribution of each state's long-term care expenditures among institutional and community-based services.

TOTAL LONG-TERM CARE EXPENDITURES

Reported Medicaid long-term care expenditures in FY 2009 were \$114.1 billion, an increase of 4.5 percent over FY 2008. Based on a review of previous years' reports, we expect reported long-term care spending to increase an additional 1.5 to 2.0 percent after states submit all prior period adjustments, as described in the Use of Prior Period Adjustments section. As a result, we estimate FY 2009 expenditures will have increased 6.0 to 6.5 percent from FY 2008. This increase is greater than the 4.4 percent average annual increase in long-term care spending between FY 2004 and FY 2008. The enhanced Federal matching funds authorized in the American Recovery and Reinvestment Act of 2009 (ARRA) enabled states to continue funding for long-term care and other Medicaid services. The maintenance of eligibility requirement in ARRA also restricted state options for reducing eligibility for services.

Long-term care accounts for 32% of total Medicaid expenditures. Reported total Medicaid expenditures were \$360.9 billion in FY 2009, an increase of 6.9 percent from FY 2008. After all adjustments are submitted, we estimate total Medicaid expenditures will have increased by 8.0 to 8.5 percent.

INSTITUTIONAL AND COMMUNITY LONG-TERM CARE EXPENDITURES

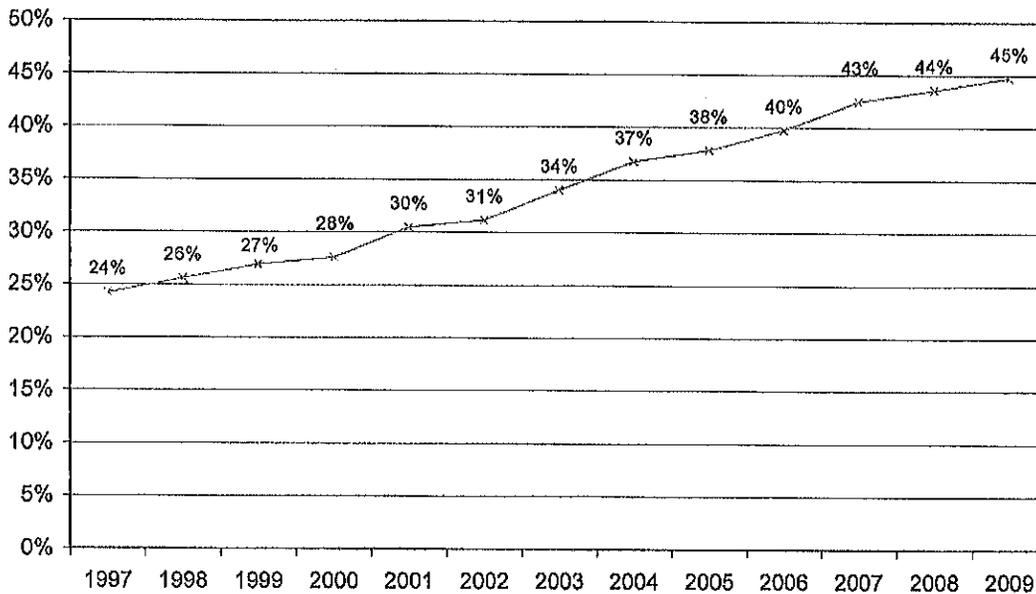
Expenditures for home and community-based services (HCBS) continue to increase more rapidly than expenditures for institutional care. Reported institutional long-term care spending increased 2.4% in FY 2009, from \$61.6 billion to \$63.0 billion. Medicaid nursing home expenditures increased 2.3% in FY 2009, from \$49.0 billion to \$50.1 billion. We expect prior period adjustments to have little impact on national nursing facility expenditures. Reported expenditures for services provided in intermediate care facilities for people with mental retardation (ICF/MR)¹ increased 2.5%, from \$12.6 billion

¹ The authors prefer to use the phrase "intellectual disabilities" instead of "mental retardation". When describing ICF/MR, the authors use "mental retardation" to reflect the name for these facilities in Federal law and regulation.

to \$12.9 billion. When all adjustments are submitted, we expect ICF/MR expenditures to increase by 5.5 to 6.5 percent.

Total HCBS spending increased by 7.2% to \$51.1 billion. Spending for community-based long-term care services rose to 45% of all Medicaid long-term care costs. As shown in Figure 1, this distribution has changed by one to three percentage points each year since 1997 as states have invested more resources in alternatives to institutional services.

Figure 1: HCBS as a Percentage of Medicaid Long-Term Care Expenditures, FY 1997 - 2009



Source: Thomson Reuters analysis of CMS 64 reports

Most Medicaid community-based long-term care is provided within the State Plan personal care service, the State Plan home health service, and HCBS waivers authorized under Section 1915(c) of the Social Security Act. HCBS waivers accounted for 66 percent of all Medicaid community-based long-term care spending. HCBS waiver expenditures increased 9.6 percent in FY 2009 to \$33.5 billion. After states have submitted all adjustments, we expect HCBS waivers will have increased 10 to 11 percent. Reported expenditures under the Medicaid personal care services benefit decreased 1.7 percent to \$11.7 billion. However, we expect personal care services to show an *increase* after all adjustments have been reported. In previous years, reported personal care expenditures have increased 5 to 10 percent after the original data were published. Medicaid home health care expenditures increased 8.2 percent to \$4.5 billion.

Several other funding authorities account for 3% of HCBS expenditures. The Program for All-Inclusive Care for the Elderly (PACE) had expenditures of \$683 million in FY 2009. Although PACE includes both acute and long-term care services, we have added it to our definition of long-term care because Congress identified it as a community long-term care program in Section 10202 of the Affordable Care Act, which authorizes Balancing Incentive Payments. The Texas Community Assistance Services program authorized under Section 1929 of the Social Security Act accounts for an additional \$366 million.²

The remaining \$311 million in community-based services was authorized under Section 1115 Research and Demonstration Waivers or under the Section 1915(j) State Plan option for Self-Directed Personal Assistance Services. Sections 1115 and 1915(j) are included in a single table because five participant-directed programs moved from Section 1115 waivers to Section 1915(j) authority after the latter became available. Services authorized under Sections 1115 or 1915(j) are included when these supports can be identified based on a state's CMS 64 report. This table only includes data reported as home and community-based services. Data reported in other service categories are included in those service categories (e.g., nursing facility, personal care, or home health). We were not able to identify all states' expenditures under 1915(j). We also were not able to identify state expenditures authorized under Section 1915(i), the State Plan HCBS option.

STATE AND TARGET POPULATION VARIATION

The use of institutional and community services varies among states, as shown in Tables U, V, and W. These tables rank states according to the percentage of long-term care expenditures spent on community services for all population groups (Table U), for older adults and people with physical disabilities (Table V), and for people with intellectual and other developmental disabilities (Table W). As noted in each table, we did not rank states for which we were aware of missing data that could affect the state's ranking.

State systems for older adults and people with physical disabilities rely on institutional services more than state systems serving people with developmental disabilities. In FY 2009, community-based services accounted for 34% of expenditures for older adults and people with physical disabilities. For this population group, only six states spent more than 50% of long-term care expenditures on community-based services. The opposite was true for services to persons with developmental disabilities: HCBS accounted for 66% of total long-term care spending and only six states spent *less* than 50% of their long-term care expenditures on community-based services. One reason for this difference is that HCBS waivers for people with developmental disabilities are more likely to provide support 24-hours a day.

² The Texas Community Assistance Services benefit provides an entitlement to personal care - and no other Medicaid services - for people with incomes under 300% of the Supplemental Security Income benefit.



State variation in the balance between institutional and community services received particular attention in the Affordable Care Act (ACA). Section 10202 of the ACA authorizes Balancing Incentive Payments, an enhanced Federal matching rate available from FY 2012 through FY 2015 for states that apply for these payments and ensure their long-term care systems include a no-wrong door or single entry point system of access; conflict-free case management services; and core standardized assessment instruments. An additional two percentage points in Federal funds are available for states that spend less than 50 percent of long-term care expenditures on community services. Five percentage points are available for states where community services comprise less than 25 percent of long-term care spending. Tables U, V, and W may be informative for states considering the Balancing Incentive Payments initiative. However, CMS has not yet decided how institutional and community-based services will be defined under the Balancing Incentive Payments provision or what data sources will be used to determine eligibility for Balancing Incentive Payments.

TECHNICAL INFORMATION

The data presented in Table 1 and Tables A through W are based upon CMS 64 reports, which states submit to the Centers for Medicare & Medicaid Services (CMS). States use the CMS 64 report to claim Federal Financial Participation (FFP) for state Medicaid outlays, and the Federal government audits these reports. It is therefore considered one of the more reliable sources of information on state Medicaid spending. The "Expenditures Per Capita" number that appears in the final column of each table is simply expenditures divided by the total state population estimated by the U.S. Census Bureau Current Population Estimates for July 1, 2009. As always, we appreciate any comments which you may have about these data.

Two tables summarize data reported on other tables:

- Table F, Total Home Care, is the sum of Personal Care (Table C), HCBS Waivers (Table D), Home Health (Table E), HCBS authorized under Sections 1115 or 1915(j) (Table J), PACE (Table S), and Section 1929 (Table T)
- Table G, Total Long-Term Care, is the sum of Nursing Facility (Table A), ICF/MR (Table B), and Table F

USE OF PRIOR PERIOD ADJUSTMENTS

We continue to include data from CMS on *prior period adjustments* for the following services for the following years:

- HCBS waiver data for all years included in the tables
- State plan personal care services since FY 2002 (starting in FY 2001 for California)



- Nursing facility, ICF/MR, inpatient hospital, mental health hospital, and Disproportionate Share Hospital (both acute and mental health) since FY 2002
- Program of All Inclusive Care for the Elderly (PACE) since FY 2004
- Home health and all other services starting in 2009

The HCBS waiver and personal care adjustments correct historical underreporting for community-based services in California that occurred largely because state agencies other than the Medicaid agency administer the personal care services benefit and certain HCBS waivers. We included adjustments on several types of facility services and for PACE programs after we learned that several states report a significant portion of these expenditures through prior period adjustments. We plan to continue including such adjustments in future years.

Historically, prior period adjustments typically have increased national Medicaid expenditures reported in prior years. Adjustments for FY 2002 through FY 2008 increased expenditures by less than five percent for HCBS Waivers, ICF/MR, nursing facilities, and inpatient hospitals. Adjustments have had a larger impact on personal care (5 to 12 percent), acute hospital DSH (0 to 9 percent), mental health hospitals (7 to 16 percent), mental health Disproportionate Share Hospital (DSH) expenditures (0 to 18 percent), and PACE (-4 to 9 percent). For a few states, especially California and New York, the effect of prior period adjustments on state Medicaid expenditures has often been significant.

CAVEATS

We wish to note several caveats regarding CMS 64 data. First, CMS 64 data are by date of payment, not date of service. Thus, rates of change in state Medicaid spending for specific services, as reported on the CMS 64, can be due to factors related to state payment policies as well as to real changes in service utilization by Medicaid beneficiaries. For example, simply by delaying one month's payments to nursing home providers from September 30th to October 1st, a state can push 13 months of nursing home spending into a later fiscal year, leaving only 11 months of nursing home payments in the earlier year. These kinds of "bill paying" practices definitely occur in some states, usually in response to budgetary pressures.

Second, CMS 64 reports represent state *claims* to the Federal government of health care expenditures that states believe are eligible for Federal matching funds under the Medicaid program. As a result of its audit process, CMS may disallow some of these claims as not eligible for Federal matching funds, which are then adjusted on future CMS 64 reports. These adjustments are not reported by type of service and therefore cannot be used to adjust previously-reported data on Medicaid spending by type of service.

Third, CMS 64 reports on Medicaid spending by type of service often do not identify long-term care spending provided through capitated managed care programs. In most

states, long-term care recipients and/or long-term care benefits are exempt from Medicaid managed care programs. However, Arizona's entire long-term care system (called ALTCS) is capitated, and the accompanying tables only include fee-for-service expenditures in Arizona's long-term care system (persons newly eligible for long-term care services in Arizona may receive long-term care services on a fee-for-service basis before enrolling in a managed care plan). In addition, several states (e.g. Hawaii, Massachusetts, New Mexico, Wisconsin, and Texas) have implemented relatively large managed care programs that pay for long-term care benefits on a capitated basis. Also, increased enrollment of TANF-related recipients and SSI recipients who are not dual eligibles into managed care programs may be affecting reported spending on the CMS 64 for the Medicaid State Plan personal care and home health benefits. There are a few states with managed long-term benefits that are included in these data because the state reported the spending within a 1915(c) waiver (Florida, Michigan, Minnesota, North Carolina, and Utah).

Finally, the CMS 64 categorizes expenditures into several service categories. This report presents data for those services that are clearly long-term care services. Many states provide long-term care within service categories that include both acute and long-term care, such as targeted case management and rehabilitative services. Several states, such as Georgia, have large case management programs specifically focused on people with long-term care needs.

ACKNOWLEDGEMENTS

We would like to thank Melissa Hulbert, Christopher Kessler, and Abraham John in the CMS Center for Medicaid, CHIP, and Survey and Certification for their assistance in making these data available and for assisting us in their interpretation.



PERSONAL CARE

TABLE C

RANK 2009	RANK 2008	STATE	FY 2004 EXPENDITURES	FY 2005 EXPENDITURES	PERCENT CHANGE 04-05	FY 2006 EXPENDITURES	PERCENT CHANGE 05-06	FY 2007 EXPENDITURES	PERCENT CHANGE 06-07	FY 2008 EXPENDITURES	PERCENT CHANGE 07-08	FY 2009 EXPENDITURES	PERCENT CHANGE 08-09	FY 2009 EXPENDITURES PER CAPITA
1	2	Washington DC	\$1,238,972	\$777,725	-37.2	\$52,340,442	4068.3	\$55,643,583	72.1	\$76,184,733	36.9	\$88,718,590	16.5	\$147.95
2	1	New York	\$2,265,249,838	\$2,415,103,881	6.6	\$2,428,916,383	0.6	\$2,866,119,684	18.0	\$2,943,132,648	2.7	\$2,721,249,447	-7.5	\$139.26
3	3	California	\$2,562,964,338	\$3,296,206,219	28.6	\$3,627,191,374	10.0	\$4,089,111,574	12.7	\$4,625,120,257	13.1	\$4,403,014,003	-4.4	\$119.12
4	5	Alaska	\$69,817,279	\$82,207,937	17.7	\$83,221,719	1.2	\$75,291,547	-9.5	\$71,996,780	-4.4	\$82,371,964	14.4	\$117.93
5	6	Massachusetts	\$334,281,989	\$413,497,826	23.7	\$440,058,114	6.4	\$470,352,082	6.9	\$539,173,649	14.6	\$638,285,871	18.6	\$96.96
6	7	Minnesota	\$203,187,662	\$250,262,983	23.2	\$281,614,143	12.5	\$314,147,867	11.8	\$370,981,302	18.1	\$409,853,665	11.5	\$77.83
7	8	Washington	\$245,968,173	\$242,064,627	-1.6	\$276,087,647	14.1	\$320,522,233	16.1	\$374,649,617	16.9	\$416,984,159	10.3	\$62.57
8	9	North Carolina	\$362,126,229	\$450,484,528	24.4	\$448,928,365	-0.3	\$449,359,538	0.1	\$474,524,179	5.6	\$525,600,917	10.8	\$56.03
9	10	Louisiana	\$1,445,239	\$47,860,444	3211.6	\$80,787,703	68.8	\$139,415,976	72.6	\$209,337,021	50.2	\$246,412,380	17.7	\$54.85
10	11	Missouri	\$208,873,425	\$220,262,502	5.5	\$226,763,637	3.0	\$240,658,195	6.2	\$267,171,467	10.9	\$317,985,287	19.0	\$53.11
11	4	New Mexico	\$178,168,419	\$160,183,165	-10.1	\$178,704,336	11.6	\$206,377,019	15.5	\$226,009,489	9.5	\$82,925,708	-63.3	\$41.26
12	13	New Jersey	\$319,284,973	\$322,589,560	1.0	\$309,468,029	-4.1	\$318,487,596	2.9	\$325,370,615	2.2	\$343,722,339	5.6	\$39.47
13	12	Maine	\$42,160,665	\$35,038,213	-16.9	\$52,140,112	48.8	\$45,658,023	-12.4	\$51,460,434	12.7	\$80,823,033	-1.2	\$38.55
14	15	Montana	\$23,574,684	\$24,182,827	2.6	\$26,186,256	8.3	\$26,303,548	0.4	\$28,686,920	12.9	\$35,885,239	20.9	\$36.81
15	14	Wisconsin	\$127,359,909	\$160,755,832	26.2	\$191,192,355	18.9	\$202,962,895	6.2	\$196,545,792	-3.2	\$179,328,014	-8.8	\$31.71
16	18	Arkansas	\$60,139,312	\$67,237,684	11.8	\$64,680,024	-3.8	\$68,287,052	5.6	\$69,696,998	2.1	\$79,089,738	13.5	\$27.37
17	17	Michigan	\$212,087,814	\$217,274,387	2.4	\$196,082,473	-8.8	\$230,836,138	17.7	\$252,905,363	9.6	\$261,855,273	3.5	\$26.27
18	16	Nevada	\$37,198,671	\$43,465,895	16.8	\$56,321,939	29.9	\$67,194,151	19.3	\$74,618,306	11.0	\$88,257,353	-8.5	\$25.82
19	21	North Dakota	\$859,666	\$2,048,196	138.3	\$6,951,994	239.4	\$7,152,796	2.9	\$12,526,312	75.1	\$13,981,476	11.7	\$21.63
20	22	Texas	\$420,562,754	\$457,560,896	8.8	\$482,864,314	5.5	\$447,053,841	-7.4	\$451,963,581	1.1	\$531,132,044	17.5	\$21.43
21	19	West Virginia	\$20,581,968	\$25,910,371	25.9	\$34,084,674	31.5	\$37,722,272	10.7	\$37,922,294	-0.5	\$38,238,959	1.9	\$21.01
22	23	Idaho	\$25,547,242	\$26,403,609	3.4	\$24,123,065	-8.6	\$25,087,459	4.0	\$25,463,683	5.5	\$22,650,057	-14.4	\$14.65
23	24	Nebraska	\$10,605,880	\$11,624,684	9.6	\$12,172,737	4.7	\$13,826,288	13.5	\$14,800,741	7.0	\$15,538,889	5.0	\$8.65
24	20	Oregon	\$25,320,228	\$34,136,172	34.8	\$54,693,946	60.2	\$72,681,155	32.9	\$75,264,324	3.5	\$73,074,671	-2.7	\$31.73
25	26	Maryland	\$30,363,790	\$32,339,367	6.5	\$30,803,103	-4.8	\$32,046,324	4.0	\$33,257,781	3.8	\$35,070,139	5.4	\$6.15
26	27	New Hampshire	\$4,519,712	\$5,100,936	12.9	\$4,943,161	-3.1	\$5,167,642	4.5	\$5,087,465	-1.4	\$6,211,595	21.9	\$4.89
27	28	Oklahoma	\$30,263,481	\$15,584,422	-48.5	\$12,577,124	-19.3	\$10,608,204	-15.7	\$10,622,830	0.1	\$11,747,333	10.6	\$3.21
28	28	Florida	\$20,286,944	\$22,454,719	10.7	\$26,114,760	16.3	\$30,826,408	18.0	\$37,111,202	20.4	\$40,992,889	10.5	\$22.19
29	31	South Carolina	\$1,551,064	\$4,746,784	206.0	\$5,666,157	19.4	\$6,877,421	21.4	\$7,751,984	12.7	\$9,817,657	26.5	\$2.15
30	32	South Dakota	\$1,402,573	\$1,421,726	1.4	\$1,405,738	-1.1	\$1,475,064	5.0	\$1,509,701	9.8	\$1,706,709	13.0	\$2.10
31	32	Arizona	\$6,904,646	\$10,572,710	53.1	\$15,789,614	49.3	\$22,418,004	42.0	\$8,398,750	-62.5	\$7,919,299	-5.7	\$1.20
32	25	Kansas	\$13,564,681	\$17,283,103	27.0	\$17,583,997	2.0	\$17,728,078	0.8	\$18,442,579	4.0	\$2,786,929	-85.0	\$0.96
33	33	Utah	\$1,084,890	\$1,053,296	-2.9	\$1,324,122	25.7	\$1,394,164	5.3	\$1,902,382	-6.6	\$1,571,002	-20.6	\$0.56
34	34	Georgia	\$59,035,213	\$82,244	-101.0	\$4,296,503	637.9	\$13,473,158	213.6	\$895,734	-93.4	\$622,959	-30.5	\$0.06
35	35	Virginia	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$3,351	100.0	\$0.00
36	36	Alabama	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
37	37	Colorado	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
38	38	Connecticut	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
39	39	Delaware	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
40	40	Hawaii	\$0	\$298,844	100.0	\$0	-100.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
41	41	Iowa	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
42	42	Illinois	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
43	43	Indiana	\$91,383	\$0	-100.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
44	44	Kentucky	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
45	45	Mississippi	\$555,288	\$512	-99.9	\$3,441,340	672036.7	\$0	-100.0	\$0	0.0	\$0	0.0	\$0.00
46	45	Ohio	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
47	47	Pennsylvania	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
48	48	Rhode Island	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
49	49	Tennessee	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
50	50	Vermont	\$11,292,782	\$13,873,254	22.9	\$0	-100.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
51	51	Wyoming	\$0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0	0.0	\$0.00
		United States	\$7,821,472,228	\$9,132,382,060	16.8	\$9,739,521,299	6.6	\$10,932,411,885	12.2	\$11,921,425,391	9.0	\$11,721,400,948	-1.7	\$36.18

California's reported FY2009 expenditures will likely increase in future reports. Reported FY2005 through FY2008 expenditures increased \$400 - \$850 million after data were first presented. Data for Vermont do not include a program that covers both long-term and acute care because data specific to long-term care spending are not available. Data for Arizona, California, Florida, Massachusetts, Minnesota, New Mexico, New York, Texas, and Wisconsin do not include expenditures for managed care programs that provide long-term care. Please see the accompanying report for additional information regarding these data.