Stronger Policy, Less Medication for Kids in Foster Care

Health Equity

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Since we started our blog over half a year ago, we have written about the issue of over-prescription of psychotropic medications for Medicaid-enrolled children upon many different occasions. Psychotropic medications[1] are prescribed for about one in five of the over 400,000 children in foster care in the United States – about ten times more than children in the general population.[2] The problem was not a sudden one but the result of practice and policy changes (or lack thereof) at the local and national level that occurred over many years. While it would be unrealistic for us to believe that policymakers would agree upon and implement a solution overnight, we think solutions are within our reach and so we continue to write about and urge progress on this issue.

Despite several calls to action by Congress for states to address this problem through the 2008 Fostering Connections to Success and Increasing Adoptions Act and the 2011 Child and Family Services Improvement and Innovation Act, state policy activities in this area have been mixed, at best. Last month, PolicyLab published an article in the University of California *Hastings Law Review* – "Fostering Transparency: A Preliminary Review of "Policy" Governing Psychotropic Medications in Foster Care" – that analyzed monitoring policies put in place by a sample of state child welfare departments to address the issue of over-prescription of psychotropic medications. Our findings suggest that there is much that states can do to strengthen their policymaking and monitoring.

We define "monitoring policies" to include pre-authorization policies (which can be formal state regulations) which require "physicians to obtain pre-approval (sometimes from a court) before a patient can receive coverage for non-preferred, and typically more expensive, medications"[3] and "red flag" policies which identify

"[p]atterns that may signal that factors other than clinical need are impacting the prescription of psychotropic medications" such as the use of psychotropic medications for young children, dosage level, and multiple medications prescribed simultaneously.[4]

Our study found that what we call "informal policies" are the primary type of policy used by states for monitoring psychotropic medications use by children. Generally speaking, informal policies are non-binding, not subject to any public notice or comment period, and offered no recourse for non-compliance. "Formal policies," by constrast, are found either in the form of statutes (laws enacted by a legislature) or agency rulemaking ("legislative rules" promulgated by an administrative agency), and are adopted through a public process resulting in a legally binding statute or rule. Moreover, where we found policies, they were largely under-developed and failed to include many of the "red flag" monitoring criteria that both experts and states identified as essential to protecting children.

Many legal scholars have argued that the benefits of, and need for, more transparency increases with the severity of a rule's potential effects.[5] Thus, policies that materially limit individual liberty rights – like the prescribing of psychotropic medications – should be more formal.[6] This may not be the right solution for every state, but we would propose that to the extent that states find that their informal policies are not resulting in targeted changes in prescribing rates for children in foster care – and many will – it is time for them to consider adopting stronger, more transparent policies.

The recommendation for states to adopt formal policies, including monitoring "red flag" policies, is just one potential solution to help address the issue of over-prescription of psychotropic medication to children and youth. There are many other solutions, both known and unknown, and we at PolicyLab will continue to research this issue and analyze best practices in order to highlight and disseminate further solutions.

1. Psychotropic medications, also sometimes called psychiatric or psychotherapeutic medications, refer to a broad category of medications that "treat mental disorders." Nat'l. Inst. of Mental Health, *NIH Publication No. 12-3929*, Mental Health Medications 2 (2010, *reprinted* 2012), *available at* http://www.nimh.nih.gov/health/publications/mental-health-medications/n…. However, individual state agencies, legislatures, or courts may also separately define psychotropic medications in either broader or more limited terms.

2. Estimates of psychotropic medication for children in foster care rates vary widely. Rates of medication are estimated between 13% and 37% of the percent of children in foster care, with wide variation among states. Ramesh Raghavan et. al., *Interstate Variations in Psychotropic Medication Use Among a National Sample of Children in the Child Welfare System,* 15 Child Maltreatment 121, 121 (2010).

3. Christine Y. Lu et al., *Association Between Prior Authorization for Psychiatric Medications and Use of Health Services Among Medicaid Patients With Bipolar Disorder*, 62 Psychiatric Serv. 186, 186 (2011).

4. *See, e.g.*, Laurel Leslie et al., Multistate Study on Psychotropic Medication and Oversight in Foster Care, at 1 (2010), *available at* http://bit.ly/1G5pmoE.

5. For example, if an agency regulation seeks to deny liberty or property, the Due Process Clause and all its protections will be implicated. *See, e.g.*, U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); Mark Seidenfeld, *Substituting Substantive Procedural Review of Guidance Documents*, 90 Tex. L. Rev. 331, 338–39 n.43 (2011) (noting that whenever liberty or property is limited by an agency order, the formalities and protections of the Due Process Clause are implicated). *C.f.* Sarah Jane Hughes, *A Case for Regulating Cyberpayments*, 51 Admin. L. Rev. 809, 832 (1999) (noting that transparency is even more important where consumers must evaluate competing choices and risks).

6. Thomas Sargentich, *The Future of Administrative Law: Rethinking Judicial Control of Bureaucracy*, 104 Harv. L. Rev. 769, 774 (1991).

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