Senate Democrats push for stronger rules around AI in Medicare Advantage

By [Bob Herman](#) and [Casey Ross](#)Feb. 8, 2024

Sen. Elizabeth Warren (D-Mass.)KENT NISHIMURA/GETTY IMAGES

Senate Democrats on Thursday said Medicare should take more urgent and aggressive action to prevent health insurance companies from using artificial intelligence to unlawfully deny medical services.

The Biden administration's latest efforts to increase transparency into AI tools don't go far enough to protect patients, the lawmakers said at a Senate Finance Committee hearing.

Sen. Elizabeth Warren (D-Mass.), citing a STAT investigation, took particularly sharp aim at the use of algorithms to deny care within Medicare Advantage. STAT's stories had found repeated denials of desperately ill patients by the nation's largest insurers.

"Until CMS can verify that AI algorithms reliably adhere to Medicare coverage standards, by law, then my view on this is CMS should prohibit insurance companies from using them in their MA plans for coverage decisions," Warren said, referring to the Centers for Medicare and Medicaid Services that oversees Medicare. "They've got to prove they work before they put them in place."

That would go farther than new rulesthat continue to allow insurers to use algorithms and AI tools to make coverage decisions, as long as they disclose more detail about how they work and rely on humans to make final decisions about coverage.

UnitedHealth used secret rules to restrict rehab care for seriously ill Medicare Advantage patients

Experts who testified before the Senate committee said just requiring humans to review recommendations of AI systems is not sufficient to ensure the AI tools are applied fairly and equitably. They said oversight also needs to focus on how AI is incorporated into work processes and the training given to the workers applying it.

A STAT investigation found that UnitedHealth Group, the largest Medicare Advantage insurer in the country, pressured its clinical employees to cut off care for seriously ill patients in lockstep with an algorithm that predicted how long they would need to stay in rehab facilities. The algorithm was developed by NaviHealth, a subsidiary of UnitedHealth. It was applied to the care of tens of millions of Medicare Advantage beneficiaries nationwide, potentially running afoul of federal law that requires Medicare Advantage plans to provide the same benefits as the traditional Medicare program. That algorithm also wasn't only used on UnitedHealth beneficiaries, but those with plans sold by Humana and other large insurers.

"It is clear that these companies are not playing by the rules," said Warren, adding that the denials have left patients without care for fast-spreading cancers and illnesses that led to amputations. "We need a lot more to protect patients."

UnitedHealth and Humana are now facing class action lawsuits accusing them of using NaviHealth's algorithm to illegally deny care.

This week, Medicare attempted to clarify how AI and algorithms should be used in Medicare Advantage plans by telling insurers patients' needs should come first, and the technology should come second. Michelle Mello, a law and health policy professor at Stanford University, told lawmakers she was "heartened" to see Medicare be more explicit about the use of AI within Medicare Advantage, and to see that the government will more rigorously audit the use of these tools. But she said more needs to be done.

"Additional clarification is needed to the plans about what it means to use algorithms properly or improperly," Mello said. "For example, for electronic health records, [the government] didn't just say, 'Make meaningful use of those records.' It laid out standards for what meaningful use was."

The finance committee's chairman, Ron Wyden (D-Ore.) and other lawmakers also want AI regulated within private Medicaid plans, which cover the nation's poorest residents. Mello said low-income people are especially unlikely to appeal denials based on algorithmic tools because they don't have the time or money to fight those battles.

"I'm even more concerned about [Medicaid] beneficiaries than I am about Medicare beneficiaries, because we know for a variety of reasons that they have difficulty challenging those decisions," Mello said. "They just simply don't have the social capital to do that."

Ziad Obermeyer, a health policy professor at the University of California, Berkeley, who has studied how AI systems work in health care and the biases they reinforce, agreed state Medicaid programs need guardrails. But it's also difficult to research and audit algorithms in those programs because data needs to be gathered from each individual state.

"There's a huge opportunity to use AI to identify exactly those abuses that are happening in these Medicaid managed care plans," Obermeyer said. "All of that requires access to the data and the ability to do that work."

Several senators focused on the need for federal legislation to bolster the authority of government agencies to address the potential harms of AI. Wyden said new safeguards proposed by the FDA and the Office of the National Coordinator for Health Information Technology offer inadequate protection.

"I don't think these rules go far enough," he said, adding that "flawed [AI systems] can and will directly affect the health care" received by patients in communities across the country.

In the next breath, Wyden said the committee is working on a bipartisan basis to address the shortcomings in AI oversight. But the hearing displayed a wide gap in priorities of the parties. While Democrats called for tougher regulation of AI, Republicans focused on the need to support innovation, save money, and ensure businesses can get paid by the government for AI tools that improve care.

One Republican, Rep. Marsha Blackburn (R-Tenn.), also asked Mello, the Stanford professor, how to strike the right balance between supporting AI innovation and ensuring patients are protected. Mello replied that the government could require companies to demonstrate rigor in the development and use of AI as a condition of participating in Medicare.

Warren added later in the hearing that without such standards, and a strong enforcement mechanism behind them, the financial motivations of health care businesses are likely to trample the needs, and legal rights, of patients.

"The point here is we need guardrails," said Warren, who also has been deeply critical of the overpayments within Medicare Advantage. "And without significant guardrails in place, these algorithms…are going to accelerate the problems that we've got, and pad private insurers' profits, which gives them even more incentive to use AI in this way."

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