October 25, 2022

Center for Medicaid and CHIP Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Baltimore, MD 21244
Attn: Director Chiquita Brooks-LaSure

Re: Medicaid Program; Temporary Increase in Federal Medical Assistance Percentage (FMAP) in Response to the COVID–19 Public Health Emergency (PHE); Reopening of Public Comment Period

Dear Director Brooks-LaSure:

The undersigned organizations, working on behalf of low income and underserved individuals and families, request that you fully rescind 42 C.F.R. § 433.400, which was promulgated in the final days of the Trump administration as an Interim Final Rule (IFR). The IFR largely gutted the continuous coverage protections for Medicaid enrollees during the COVID-19 Public Health Emergency (PHE) passed under Section 6008 of the Families First Coronavirus Response Act (FFCRA). These protections have been critical for the most vulnerable, particularly elderly and disabled individuals, who continue to be most impacted by COVID.

The Trump IFR is directly contrary to the statutory protections Congress put in place to prevent health coverage losses during the Public Health Emergency (PHE) and the Centers for Medicare and Medicaid Service's (CMS) original interpretation of that provision. See CMS, Families First Coronavirus Response Act Increased FMAP FAQs, 6 (Mar. 24, 2020). Moreover, it has been disastrous for Medicaid enrollees who have lost health coverage or experienced a reduction in benefits amid the ongoing COVID-19 pandemic. We agree that changed circumstances warrant the prompt rescission of the IFR and urge CMS to ensure the immediate and automatic restoration of health benefits relied upon by Medicaid enrollees, without requiring them to jump through any hoops to have their benefits restored.

The IFR Impermissibly Weakened the Statutory Protections

The FFCRA Section 6008 provides states an option to preserve health coverage for the duration of the PHE. In exchange for a 6.2% increase in federal Medicaid reimbursements, states must cease involuntary terminations or benefit reductions for anyone enrolled in Medicaid on March 18, 2020 or later (except if the person moved out of the state). All states have taken up this option and, to date, no state has withdrawn.

The statute's plain language requires states to continue providing individuals with the same amount, duration, and scope of services throughout the public health emergency, regardless of changes in an individual's circumstances that would otherwise affect eligibility. The only exceptions provided in the statute are for an individual who "requests a voluntary termination of eligibility or . . . ceases to be a resident of the State." See FFCRA § 6008(b)(3).

Notwithstanding the unambiguous language of the statute, on November 6, 2020, CMS published the IFR creating several new exemptions from Section 6008's protections that permit states to terminate or reduce Medicaid benefits, including for:

- Individuals who become eligible for a Medicare Savings Program (despite the fact that Medicare does not cover many critical benefits provided by Medicaid, such as home and community-based services (HCBS) and long-term supports and services, and that Medicare premiums, costs, and deductibles can be significant);
- Individuals who are lawfully residing immigrants who reach adulthood or the end of their post-partum period during the five-year bar (despite the fact that these individuals then lose access to all health services except those necessary to treat an emergency medical condition);
- Any individuals receiving optional services that a state decides to reduce or cut completely.

There is no statutory basis for these exemptions. In our view, 42 C.F.R. § 433.400 is unlawful and should be rescinded, effective immediately.

The IFR Harms Medicaid Enrollees

As a result of the misguided and unlawful IFR, Medicaid enrollees have lost benefits or seen their coverage terminated amid the ongoing COVID pandemic. We welcome CMS's acknowledgement that the Trump IFR "has negatively affected some Medicaid beneficiaries." (87 Fed. Reg. 58457).

The Trump IFR permits states to drop enrollees from full-scope Medicaid and move them to Medicare Savings Program (MSP) eligibility groups without additional Medicaid benefits. MSPs provide enrollees with financial assistance to pay for Medicare out-of-pocket costs including Medicare premiums, co-pays, deductibles, and co-insurance. MSPs do not provide Medicaid coverage. Subsequently, many older adults and adults with disabilities who had been relying on Medicaid coverage for HCBS, dental care, non-emergency medical transportation, and for many other services that are critical to their well-being, suddenly lost access to crucial services when they were transitioned to MSPs and their Medicaid benefits were terminated.

Medicaid enrollees in states throughout the country are being harmed by the implementation of the Trump IFR. For example, as a result of the IFR:

Rhode Island, after implementing changes required by the IFR, reported at a Medicaid Advisory Committee meeting that an estimated 530 individuals lost full-scope Medicaid after the state transitioned them to Medicare Premium Payment (the state's category for the MSP eligibility groups).

Pennsylvania outlined plans to reduce or terminate coverage in numerous categories of individuals, including "for lawfully residing non-citizens turning age 21 and pregnant women at the end of the postpartum period," and has terminated full benefit Medicaid coverage for older adults and disabled individuals who qualify for a MSP.

Missouri proposed amendments to its Home and Community Based Medicaid Waivers that would modify the state's eligibility criteria necessary to establish nursing facility level of care (LOC). The proposed HCBS eligibility LOC changes will terminate tens of thousands of people from HCBS eligibility, which may force many individuals into institutional care settings. Almost one in five people currently receiving HCBS waiver services would lose eligibility for these services. Implementing these draconian cuts in the midst of the PHE would cause exactly the widespread harm that the statute was meant to prevent.

These and other health coverage losses prompted a putative class action, *Carr v. Becerra*, brought on behalf of five plaintiffs and thousands of enrollees throughout the U.S. who are losing access to critical health care during the PHE. CMS should take immediate action to end these tragic losses of health coverage and restore benefits.

Changed Circumstances Warrant Rescinding the IFR

In finalizing the Trump IFR, CMS predicted that state budgets would be adversely impacted by the COVID-19 pandemic, which, CMS argued, justified cutting Medicaid benefits and coverage. (85 Fed, Reg. 71161). CMS now says that changed circumstances warrant "a different approach" and states that "some of the reasons underlying the approach taken in the IFR may no longer apply." (87 Fed. Reg. 58457). We agree that CMS's prediction of the adverse impact of COVID-19 on state budgets has not been realized, in part due to the increased federal Medicaid match provided under FFCRA, as well as other federal relief, including the American Rescue Plan Act (APRA). However, even if state budget pressures did occur, that would not justify terminating coverage and reducing benefits contrary to the FFCRA.

According to a survey by the Kaiser Family Foundation, states received $100.4 billion in fiscal relief due to the enhanced federal matching funds under FFCRA as of May 2022, which is more than double the total estimated state costs due to the enrollees under the FFCRA's maintenance of effort requirement ($47.2 billion) from FY 2020 – FY 2022.

In *American Rescue Plan's Fiscal Recovery Funds Are Helping Produce a Stronger Recovery*, the Center on Budget and Policy Priorities (CBPP) describes the tremendous impact of the APRA, FFCRA, and the Coronavirus Aid, Relief, and Economic Security (CARES) Act providing billions of dollars to states and localities. In *The Resilience of State and Local Government Budgets in the Pandemic*, a researcher from the University of San Diego documented how flawed assumptions led to dire predictions of state budget shortfalls resulting from the pandemic, when in fact "by the spring of 2021, however, many states were awash with surplus cash."

As these and other studies show, concerns raised by states over "growing budgetary constraints and developing fiscal challenges during the COVID–19 PHE" have proved to be unfounded (87 Fed. Reg. 58457). Given these realities, CMS should rescind the Trump IFR and immediately restore benefits.

Conclusion

We strongly support CMS rescinding 42 C.F.R. § 433.300 and replacing that provision with a final rule that implements FFCRA Section 6008 consistent with the plain meaning of the statute and CMS's original interpretation.

Given the ongoing COVID-19 pandemic and challenges already faced by older adults, persons with disabilities, and other adversely affected by the Trump IFR, we urge CMS to require states to immediately and automatically reinstate Medicaid coverage and benefits to enrollees who lost coverage and to provide those individuals with timely notice of such reinstatement.

We disagree with the approach CMS describes of allowing enrollees to "reapply" for restored benefits. This is too little, too late relief for those who have experienced coverage losses, and will further exacerbate health challenges for people who unlawfully lost benefits. We further recognize that HHS may soon end the PHE, making immediate reinstatement even more urgent.

For this same reason, we urge CMS to rescind 42 C.F.R. § 433.400 and return to its original interpretation of FFCRA Section 6008 without delay, after 30-day notice and comment period had concluded and that it be made immediately effective upon issuance.

We have included numerous direct links to supporting research, state and federal policies, and legal documents including the amended complaint in *Carr v. Becerra*. We direct CMS to each of the materials we have cited and made available through active links, and we request that the full text of each of the studies and articles cited, along with the full text of our comment, be considered part of the formal administrative record for purposes of the Administrative Procedure Act. If CMS is not planning to consider these materials part of the record as we have requested here, we ask that you notify us

and provide us an opportunity to submit copies of the studies and articles into the record.

Thank you for the opportunity to comment on these important issues. If you have further questions, please contact Amber Christ at achrist@justiceinaging.org or Miriam Delaney Heard at heard@healthlaw.org.

Sincerely,

National Health Law Program
Justice In Aging

National Organizations

Access Ready
AIDS Alliance for Women, Infants, Children, Youth & Families
Alzheimer's Association
American Academy of HIV Medicine
American Academy of Pediatrics
American Association of People with Disabilities
American Association of Service Coordinators
American Association on Health & Disability
American College of Obstetricians & Gynecologists
American Diabetes Association
American Lung Association
American Society on Aging
Asian & Pacific Islander American Health Forum (APIAHF)
Association of Asian Pacific Community Health Organizations (AAPCHO)
Association of Assistive Technology Act Programs
Association of People Supporting Employment First (APSE)
Autistic People of Color Fund
Autistic Self Advocacy Network
Autistic Women and Nonbinary Network
Bazelon Center for Mental Health Law
Be A Hero
Cancer Support Community
CareQuest Institute for Oral Health
Caring Across Generations
Center for American Progress
Center for Law and Social Policy
Center for Medicare Advocacy
Coalition on Human Needs
Community Catalyst
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
Disability Rights Education and Defense Fund (DREDF)
Diverse Elders Coalition
Families USA

Family Voices
Health Care Voices
Hispanic Federation
Hispanic Federation
Human Rights Campaign
Integrated Community Solutions, Inc.
Keeping It REAL Caregiving
Lakeshore Foundation
Medicare Rights Center
NASTAD
National Adult Day Services Association (NADSA)
National Advocacy Center of the Sisters of the Good Shepherd
National Association of Councils on Developmental Disabilities
National Association of Social Workers
National Association of State Head Injury Administrators
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)
National Consumer Law Center, on behalf of our low-income clients
National Consumer Voice for Quality Long-Term Care
National Council of Jewish Women
National Domestic Workers Alliance
National Health Care for the Homeless Council
National Hispanic Council on Aging
National Immigration Law Center
National Indian Council on Aging
National Partnership for Women & Families
National Women's Law Center
Network Lobby for Catholic Social Justice
Our Mother's Voice
Physicians for Reproductive Health
Protect Our Care
SAGE
SEARAC
Service Employees International Union
Sojourners
Spina Bifida Association
The AIDS Institute
The Arc of the United States
The Gerontological Society of America
UnidosUS
United Church of Christ Justice and Local Church Ministries
United Way of Greater Los Angeles

State Organizations

Aging Services Collaborative of Santa Clara County
AIDS Foundation Chicago
Alpha Terrace Apartments
Area 1 Agency on Aging
Area 12 Agency on Aging
Area Agency on Aging Dist 7 Inc
Asian Resources, Inc.
Bilingual International Assistant Services
California Advocates for Nursing Home Reform
California Foundation for Independent Living Centers (CFILC)
California Health Advocates
CCWRO
Center for Elder Law & Justice
Center for Independence of the Disabled, New York
Charlotte Center for Legal Advocacy
Colorado Center on Law and Policy
Connecticut Legal Rights Project, Inc.
Connecticut Legal Services, Inc.
Detroit Disability Power
Disability Policy Consortium
Disability Rights California
Disability Rights Florida
Disability Rights New Jersey
Disability Rights Texas
Disability Services and Legal Center
Downstate New York ADAPT
Equality California
Equitable Resilience & Sustainability
Florida Health Justice Project
Georgians for a Healthy Future
GMWSDC
Greater Hartford Legal Aid
Health Law Advocates
Healthy House Within A MATCH Coalition
Homage
Kentucky Equal Justice
Kodiak Care Management
Law Foundation of Silicon Valley
Legal Action Chicago
Legal Council for Health Justice
Legal Services of Eastern Missouri
Linc, Inc.
Mary's House for Older Adults, Inc.
Massachusetts Law Reform Institute
MassNAELA (Massachusetts Chapter of the National Academy of Elder Law Attorneys)
Metro New York Health Care for All

Metropolitan Interfaith Council on Affordable Housing
Michigan Disability Rights Coalition
NC Justice Center
New Haven Legal Assistance Association
New York Legal Assistance Group
NJ LTCO
Northwest Harvest
Northwest Health Law Advocates
Pennsylvania Association of Area Agencies on Aging (P4A)
Pisgah Legal Services
Public Justice Center
Santa Barbara Health Psychology
Senior Citizens' Law Office
Seniors First, Auburn California
Shriver Center on Poverty Law
Silicon Valley Independent Living Center
Silver State Equality
South Carolina Appleseed Legal Justice Center
SPAN Parent Advocacy Network (SPAN)
Staten Island Center for Independent Living
Tennessee Justice Center
The Arc Minnesota
Virginia Coalition of Latino Organizations
Virginia Poverty Law Center
Western Center on Law & Poverty
William E. Morris Institute for Justice
Worley's Place
Yoga For Peace, Justice, Harmony With the Planet