

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

DEBORAH CARR, BRENDA MOORE,
MARY ELLEN WILSON, MARY SHAW,
and CAROL KATZ, on behalf of themselves
and those similarly situated,

Plaintiffs,

v.

XAVIER BECERRA, SECRETARY,
UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendant.

Civil Action No. 3:22-cv-988 (MPS)

February 28, 2023

**PLAINTIFFS' EMERGENCY MOTION FOR ENFORCEMENT OF
PRELIMINARY INJUNCTION**

Pursuant to 28 U.S.C. § 1651 and Rule 7 of the Federal Rules of Civil Procedure, Plaintiffs move for enforcement of this Court's January 31, 2023 preliminary injunction in this case. As discussed below, by: (1) removing the "previous guidance" regarding the implementation of the Families First Coronavirus Response Act (FFCRA) from its website and (2) refusing to answer state inquiries about that "previous guidance," Defendant failed to comply with its obligation under this Court's injunction to "reinstate its previous guidance." Accordingly, Plaintiffs seek an order directing Defendant through the Centers for Medicare & Medicaid Services (CMS) to immediately provide the states with copies of that "previous guidance" and to highlight the key provisions of that prior guidance that: (1) no further terminations of Medicaid coverage should occur, (2) persons erroneously dropped from coverage should have that coverage restored "automatically, if feasible," and (3) coverage should be restored retroactively to the date it was erroneously dropped.

Given that the preliminary injunction expires on March 31st, Plaintiffs ask that the Court schedule a status conference as soon as possible and consider taking Defendant's response orally at such status conference. The requested relief is required and straightforward.

First, this Court's January 31, 2023 Order was unambiguous that the Defendant was: enjoined (1) from "enforcing the IFR [Interim Final Rule],"¹ (2) to apply the "previous guidance" regarding the FFCRA with respect to the class members,² and (3) to inform all state Medicaid agencies promptly that the former guidance was in effect.³ The Order also noted the power Defendant has to ensure its rules are followed, i.e., that all states "must comply with federal [Medicaid] regulation" to continue to receive Medicaid reimbursement.⁴

Second, plainly implicit in the Court's January 31 order was that CMS had an obligation to explain to states *what* that "previous guidance" was, particularly, since the agency had stripped the previous guidance from its website so that such guidance is recoverable only from cached website records.

Third, CMS, by its own account, has received "quite a bit of outreach" from state Medicaid offices asking about the effect of the injunction, yet has not re-posted the guidance. Instead, when asked about the injunction and "how best to interpret the direction of the court," it told the states in a February 14 All States Call "to consult with your own counsel" about the meaning of CMS's previous guidance.⁵ This contrasts sharply with CMS's response to other inquiries from state Medicaid agencies about the operation of federal rules related to the Public

¹ Slip. Op. at 36.

² Id.

³ Id.

⁴ Id. at 3, 22.

⁵ Tuesday, February 14, 2023 CMS COVID-19 Medicaid & CHIP All-State Call at pp. 3-4.

Health Emergency. With respect to another “hot question for states,” it noted only a week earlier that “we are working feverishly on getting specific guidance.”⁶

Fourth, as the Commissioner of Connecticut's Department of Social Services put it yesterday: “*Like every other state*, we are also awaiting guidance from CMS regarding the of [sic] compliance.” Attachment A (emphasis added). This was followed up with another response later yesterday stating that the Connecticut Medicaid agency, while working to reinstate individuals cut off under the IFR, is reinstating them retroactive only to February 1, 2023, and “will await any additional guidance from CMS, as might be forthcoming, regarding any retroactive application of the District Court’s order so that Connecticut’s actions remain in compliance with CMS guidance and federal expectations” Attachment B.

Fifth, the prior guidance was unambiguous: states were to restore persons erroneously stripped of Medicaid coverage “automatically if feasible,” and to do so retroactively to the date they were dropped from the Medicaid rolls. March 24, 2020 CMS Guidance, at page 5 (ECF #3-5, at 8).

Sixth, the agency's refusal to give this guidance has delayed relief to those entitled to restoration of coverage and even put at risk class members who may *newly* be dropped from coverage under the enjoined IFR. This failure on the part of CMS has so disturbed the Connecticut Congressional delegation that its members have written a February 21, 2023 letter to the head of CMS urging her “to immediately issue affirmative guidance to all the states that clarifies their responsibility to provide benefits to all members of the affected class of beneficiaries and to reinstate terminated members of the beneficiary class retroactive to the date of their termination.” Attachment C. “The states,” the letter added, “should also be affirmatively

⁶ Tuesday, February 7, 2014 [CMCS Medicaid and CHIP All State Calls - 2023 | Medicaid](#), at p. 13.

advised, per your existing guidance, to conduct these reinstatements automatically wherever possible, with no action being required by involuntarily terminated individuals to be so reinstated." *Id.*

Requested Relief

The agency's recalcitrance on these implicit obligations leaves the impression that it is hoping to run out the clock on the preliminary injunction. Accordingly, we urge the Court to issue clarification of the injunction to provide that the Defendant, through CMS, must immediately: (1) inform states by letter and in its next All-State Call that they may not drop anyone covered by the class certification order from Medicaid coverage during the preliminary injunction, (2) prominently re-post its prior guidance on the agency's website, (3) highlight in its new letter and in the next All-State Call where this information has been posted on its website and the obligation of states to restore coverage automatically where feasible and retroactively, and (4) remind states in the letter, the website and in the next All-State Call that their eligibility for supplemental Medicaid funding is contingent on compliance with the agency's previous guidance for implementing the FFCRA, including the duty to retroactively reinstate class members to their dates of termination.

Dated: February 28, 2023

Respectfully submitted,

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s/Sheldon V. Toubman
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