February 9, 2023

Dear State Medicaid Advocate:

We write to ask for your immediate help to ensure the timely implementation of a nationwide preliminary injunction (PI) requiring reinstatement on Medicaid of hundreds of thousands of individuals. Because of the specific relief ordered only against the U.S. Department of Health & Human Services (HHS) in that class action case, and the lack of ready access to essential guidance which is incorporated into the relief, states may not move expeditiously on these reinstatements without your state-level enforcement efforts.

The affected class consists of individuals who were enrolled in a Medicaid program on or after March 18, 2020 and then lost that coverage after November 6, 2020 while also qualifying for a Medicare Savings Program (MSP, which includes Qualified Medicare Beneficiaries, Supplemental Low Income Medicare Beneficiaries and Additional Low Income Medicare Beneficiaries or QI).

In expansion states, many of these people were on full-scope Modified Adjusted Gross Income (MAGI) Medicaid coverage and lost their coverage when they turned 65 or otherwise qualified for Medicare because of having been on Social Security Disability Insurance (SSDI) for two years (either of which disqualifies them from coverage under the Medicaid expansion). For all of these individuals, per HHS's instructions, their state disenrolled them from their Medicaid coverage and enrolled or maintained them only in the MSP for which they then qualified. In accordance with the Court's ruling, states should promptly and retroactively re-enroll these individuals in their previous full-scope Medicaid coverage (and also continue their MSP coverage), or in the previous MSP in which they were enrolled at the time of being moved to a lower tier MSP.

Background

Under the Families First Coronavirus Response Act's (FFCRA), during the COVID-19 Public Health Emergency (PHE), states could receive increased federal funding if they kept people who were enrolled in Medicaid as of March 18, 2020 continuously enrolled with the same level of benefits. The only two exceptions were if the person moved out of state or voluntarily disenrolled. This is known as the "continuous coverage" requirement. In several guidance documents issued by HHS after the passage of the FFCRA, it made clear that these two were the only exceptions for as long as the PHE continued.

However, on November 6, 2020, HHS promulgated an Interim Final Rule (IFR) that created several additional exceptions to the continuous coverage requirement not in the FFCRA, including a requirement that states shift Medicaid enrollees from full-scope Medicaid for which they were deemed to be no longer eligible to a Medicare Savings Program (MSP) if they became Medicare-eligible during the PHE and also qualified for an MSP. The plaintiffs in the case, *Carr v. Becerra*, filed suit in the U.S. District Court for the District of Connecticut challenging the IFR as unlawful under the Administrative Procedures Act. They also sought a nationwide preliminary injunction in light of the ongoing lack of access to services covered by Medicaid but not by Medicare, such as dental, vision and home care/PCA services needed to avoid institutionalization.

The Court Ruling

On January 31, 2023, U.S. District Judge Michael P. Shea issued a nationwide PI in *Carr v. Becerra* against HHS. 2023 WL 1280172 (slip opinion attached for your convenience). Previously, on November 7, 2022, the Court issued injunctive relief just for the named plaintiffs in Connecticut, Delaware, and Nebraska. Now, however, HHS has been ordered to stop enforcing the IFR nationwide through March 31, 2023, *and* to reinstate its earlier interpretation of the FFCRA's protections against involuntary termination of Medicaid, with respect to members of the class. Specifically, the order requires HHS "to refrain from enforcing the IFR with respect to the members of the certified class through the close of business on March 31, 2023," and "*to reinstate its previous guidance* with respect to these individuals," as well as "to inform . . . the relevant state agencies of this revised position as to the class members." 2023 WL 1280172 *17 (emphasis added).

The class, certified in the same ruling as that granting the preliminary injunction, is defined as:

> All individuals who were enrolled in Medicaid in any state on March 18, 2020 or later and, as a result of the adoption of the IFR on November 6, 2020, either had their Medicaid eligibility reduced to a lower level of benefits and were determined to be eligible for a Medicare Savings program or will have their Medicaid eligibility reduced to a lower level of benefits and be determined to be eligible for a Medicare Savings Program prior to a redetermination conducted after March 31, 2023.

The Court did not expressly require the state Medicaid agencies to reinstate individuals since they were not before the Court. However, its order effectively required this because the "previous guidance" which was required to be reinstated includes a series of pre-November 6, 2020 guidance documents from the agency, including this Q and A under the heading "Requirements for States to Receive Increased FMAP":

> **7. If a state has already terminated coverage for individuals enrolled as of March 18, 2020, what actions should the state take? Must those individuals have their coverage reinstated?**
>
> To receive the increased FMAP, states may not terminate coverage for any beneficiary enrolled in Medicaid during the emergency period effective March 18, 2020, unless the beneficiary voluntarily requested to be disenrolled, or is no longer a resident of the state**. *States that want to qualify for the increased FMAP should make a good faith effort to identify and reinstate individuals whose coverage was terminated*** *on or after the date of enactment for reasons other than a voluntary request for termination or ineligibility due to residency.* ***At a minimum****, states are expected to inform individuals whose coverage was terminated after March 18, 2020 of their continued eligibility and encourage them to contact the state to reenroll.* Where feasible, states should automatically reinstate coverage for individuals terminated after March 18, 2020 and should suspend any terminations already scheduled to occur during the emergency period. ***Coverage should be reinstated back to the date of termination*****.**

CMS Guidance document issued March 24, 2020, Q and A #7, p. 5 (emphasis added).

Although HHS deleted this guidance after issuance of the IFR, the Court referenced it in its ruling. 2023 WL 1280172 *2 (referencing "ECF No. 3-5 at 8," which corresponds to page 5 of the March 24, 2020 guidance). The full March 24, 2020 guidance is available here and the relevant excerpt is attached for your convenience. The complete set of guidance documents issued by CMS before the IFR was issued in November of 2020 is available here.

HHS's Letter to State Medicaid Agencies Per the Injunction

On February 6, 2022, pursuant to the Court's order, HHS sent letters to all state Medicaid directors advising them that HHS was reinstating its "previous guidance" (example attached). While accurate, the letter leaves out the critical information that the "previous guidance" includes: the March 24, 2020 requirement that individuals already erroneously cut off of Medicaid should be immediately reinstated, and that this reinstatement should be **retroactive**. That guidance is no longer available online because HHS removed all references to it on its website after adopting the unlawful IFR.

Because HHS removed this guidance document and HHS did not reference it in its letter to state Medicaid directors, it also is unlikely that a state Medicaid agency would be able to find it on its own, even if it wanted to review all of the guidance reactivated by the Court's order. By writing to your state agency now using our model letter and providing it with the earlier guidance to supplement HHS's letter, you can provide the state with the necessary tools to facilitate prompt reinstatement of affected individuals. *See* attached model letter.

Other Actions for Advocates

In addition to writing to your agency using our model letter, you may be able to interest local media outlets in this issue, perhaps tied to the impending unwinding which has gotten a fair bit of coverage. Your letter to the agency, when linked to the Court's order and HHS's letter complying with it, and in light of the impact of the relief on thousands of people throughout the state, could be newsworthy. Some reporters might be persuaded to cover it as a public service given that the guidance requiring reinstatement is buried and almost no one will know what the Court's nationwide order really means without publicity.

Also, while reenrollment under the Court's order should be automatic, and we hope that will be what happen in the vast majority of states, in some states, where identification of beneficiaries is difficult, letters will likely go out to affected larger groups inviting affirmative re-enrollment. In general, there is no downside to being reenrolled on Medicaid, as further coverage is gained and nothing is lost, even if it is only for a few months. Nevertheless, there potentially may be reasons that a client might not want to be reenrolled, even though they were involuntarily terminated. You can be a valuable resource for clients who ask for guidance about what to do if they receive a letter about re-enrollment.

One particular issue that a person who receives such a letter may be concerned with is that, if they are moved back to full Medicaid, potentially they could then be disenrolled from their MSP program during that reenrollment, which could then mean being responsible for Medicare Part B premiums during the period of reinstatement. However, another FAQ from CMS which has been reinstated per the Court order, *see* COVID-19 FAQs for State Medicaid and CHIP Agencies (Q and A No. 20. Page 52), indicates that a person who, while on the protection of the continuous enrollment requirement, qualifies for an MSP is entitled to **both** kinds of coverage. In any event, if, despite this reactivated FAQ, a state sought to terminate MSP coverage, the termination could not occur without advance notice and the right to aid pending a hearing. You may be able to help guide them through the decision-making process with respect to this specific issue as well.

Conclusion

We acknowledge that your state agency may be occupied with implementing the unwinding and that this will likely be seen as a major headache. And some of you may yourselves have a lot on your plates educating both policy-makers and enrollees about the unwinding. Please remember that it was wrong that these individuals were terminated in the first place. Helping to reenroll these individuals now will be extremely important to many of them, not just to get back on Medicaid for a few months, and, for some, to get reimbursement for expenditures made during a retroactive period. It also ensures them that, as with all others kept on due to the FFCRA's continuous enrollment requirements, a full review will be

conducted before another potential termination — during which circumstances may have been changed or an error in the prior termination may be discovered, making them Medicaid-eligible once again.

We hope you, or you in conjunction with colleagues in other organizations in your state, will take immediate action to send a letter to your agency based on the model letter provided. This will help the thousands of people in your state to get reinstated on benefits to which they were entitled. If you have any questions about anything in this letter, the Court's ruling, or what to say in your letter to your state Medicaid agency, please do not hesitate to contact us through Sheldon Toubman at Disability Rights Connecticut, sheldon.toubman@disrightsct.org or (475)345-3169.

Thank you.

Sincerely,

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