April 6, 2021

Center for Medicaid and CHIP Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Baltimore, MD 21244

Re: Rescinding the Interim Final Rule "Temporary FMAP Increase During the Public Health Emergency for COVID-19," codified at 42 C.F.R. § 433.400

Dear Acting Deputy Director Costello,

In the interest of ensuring timely access to quality health care during the public health emergency, the undersigned organizations respectfully request that you act immediately to rescind the Interim Final Rule, 42 C.F.R. § 433.400, which weakens the beneficiary protections in the Families First Coronavirus Response Act (FFCRA) maintenance of effort (MOE) provision. The undersigned 162 organizations ask that you instead affirm that Section 6008(b)(3) of the FFCRA prohibits states from reducing the amount, duration, and scope of enrollees' Medicaid benefits until the end of the month in which the public health emergency ends.

Our request is urgent because states have already begun implementing cuts and reductions to Medicaid services and eligibility following the Interim Final Rule creating confusion and inconsistent policy changes across the country. A growing number of individuals are losing access to critical health care, including access to Medicaid home and community-based services that they depend on to remain in their homes and communities, and to avoid institutional congregate settings, during the pandemic.

The Interim Final Rule Weakens the FFCRA's Maintenance of Effort Provision

Section 6008 of the FFCRA offers states enhanced federal funding if they comply with certain requirements. One requirement is that states "provide that an individual who is enrolled for benefits" in a state's Medicaid program during the public health emergency "shall be treated as eligible for *such* benefits through the end of the month" in which the public health emergency ends. *See* FFCRA § 6008(b)(3) (emphasis added). Every state has chosen to claim the enhanced federal funding.

This phrasing affirms that the Families First MOE language protects much more than enrollment; it ensures that services available to enrollees at the start of the pandemic remain available to them as long as the state continues to receive the enhanced match. At a time when many doctors' offices are closed, access to case management is minimal, and enrollees are often left to navigate the health care system on their own, the MOE protects enrollees and ensures their access to services by maintaining the

"status quo." 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." *Id.*

Despite the clear language of the statute, on October 28, 2020, the Centers for Medicare & Medicaid Services (CMS) published an Interim Final Rule (IFR) that created several new exemptions from Section 6008(b)(3)'s protections that are not described in the statute and contrary to its intent. Specifically, the IFR permits states to reduce the amount, duration, and scope of benefits for, among others:

- Individuals who become eligible for Medicare and qualify for a Medicare Savings Program
- Individuals who are lawfully residing immigrants that reach adulthood or the end of their post-partum period; and
- Any individuals receiving optional services that a state decides to reduce or cut completely.

There is no statutory basis for these exemptions.

States are Implementing Cuts to Benefits Now

These new exceptions were immediately effective. Several states have already begun to impose benefit cuts or reductions, with other states poised to follow suit. Thus, even as the US continues to lose over 1,000 people per day to COVID-19, states are raising additional barriers to accessing health care and home and community-based services (HCBS) for the very populations that are most at risk during the pandemic.

Cuts to Benefits for Dual-Eligible Enrollees

The IFR expressly permits states to transition enrollees from full-scope Medicaid 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. Thus, in the midst of the pandemic, older adults who may have been relying on Medicaid coverage for HCBS, for dental care, for non-emergency medical transportation and for many other services that are critical to their well-being, can suddenly lose access. Further, individuals who only qualify for Specified Low-income Beneficiary (SLMB) or Qualifying Individual (QI) coverage could also be subject to Medicare deductibles and co-insurance, and thus would not even be receiving their basic medical care without cost. This is exactly the result that the statute was designed to prevent and specifically prohibits.

Permitting these eligibility changes could affect hundreds of thousands of people nationwide. In 2019, there were 3.6 million individuals eligible for MSPs but not full-scope Medicaid, and the category added an average 85,200 people every year from 2014-2019.[1] Advocates have long pointed out the coverage cliff people face when they shift from Medicaid's benefit package to Medicare, and its effect on access to needed care.[2] Congress, through its language in the Families First MOE, clearly intended for states to avoid these difficult coverage transitions during the public health emergency for older adults and people with disabilities who have elevated risk of serious COVID-19 complications. Yet, we are already seeing these shifts occur in some states.[3]

Rhode Island, for example, after implementing changes permitted 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). Rhode Island has also been implementing benefit cuts to individuals in the following groups: Complex Medicaid, Modified Adjusted Gross Income, Community Medicaid (ABD), Long Term Services and Supports, and Medicare Premium Payment (MPP).

Pennsylvania, on December 7, 2020, issued an operations memorandum implementing the changes outlined in the IFR. Pennsylvania describes several of the changes as mandatory, for instance, explaining that individuals who become eligible for Medicare "must have their MA [medical assistance] changed if they become eligible for one of the following [Medicare Savings] programs."

The memorandum gives specific examples of individuals who will lose Medicaid benefits, for instance: "Mindy is a Medical Assistance for Workers with Disabilities (MAWD) recipient who turned age 65 and began receiving Medicare in November 2020. The [case worker] will allow her to transition to [Qualifying Individuals] based on CMS's new guidance."

Hundreds of thousands of beneficiaries risk losing benefits under this policy. Pennsylvania operates the Community Health Choices program, which is a mandatory managed care program for individuals who are dually eligible for Medicare. At the end of 2020, 377,621 Pennsylvanians were enrolled. Many of these individuals are now at risk for losing eligibility for HCBS, nursing facility services, and other Medicaid benefits due to Pennsylvania's change in policy. Among other things, that means shifting vulnerable

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[1] https://www.cms.gov/files/document/medicaremedicaiddualenrollmenteverenrolledtrendsdatabrief.pdf (calculation based on 3.6M x 5.3% average annual growth rate).
[2] Leo Cuello, Nat'l Health Law Program, "Understanding the Medicare Coverage Cliff," (2014) https://healthlaw.org/resource/health-advocate-understanding-the-medicare-coverage-cliff/.
[3] CDC, CDC Data Tracker, *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, (last visited Mar. 22, 2021) https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendsdeaths.

enrollees to a less comprehensive prescription drug plan and compelling them to face Medicare cost sharing.

The memorandum's examples also highlight the startling inequities that the IFR provisions create for people becoming eligible for Medicare. If an individual is eligible for any MSP, the state can meet its MOE obligations by dropping all Medicaid coverage other than the Part B Medicare premium payment and, in the case of the QMB program, the Medicare co-insurance payment protection. But if the individual is not eligible for any MSP, then the state must retain the individual in the adult coverage group because there is no other Medicaid program for which the individual qualifies**.** Thus, lower income individuals who qualify for MSPs lose full-scope Medicaid coverage while those with higher incomes or more resources keep it.

Cuts to Benefits for Lawfully Residing Immigrants

The IFR also requires states to terminate coverage for lawfully residing children and pregnant people who age out or reach the end of their post-partum period. Once terminated these individuals may only receive coverage for services to treat an emergency medical condition. The lawfully residing eligibility categories are important sources of coverage for immigrants across the country. Thirty-five states have opted to cover children through this pathway and 25 cover pregnant people under this option.[4] At the end of 2012, 62 percent of immigrant children had health coverage through Medicaid or CHIP in states that took this option.[5]

Exempting immigrants from the protections of the maintenance of effort provision is further exacerbating COVID-19's disparate effect on immigrant communities.[6]

As with the MSP transitions, states are already implementing these benefit cuts. For instance, **Pennsylvania's** December 7, 2020, memorandum outlines numerous categories of individuals whose medical assistance can be reduced or terminated, including "for lawfully residing non-citizens turning age 21 and pregnant women at the end of the postpartum period" and those the state considers not "validly enrolled."

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[4] *Medicaid/CHIP Coverage of Lawfully-Residing Immigrant Children and Pregnant Women*, Henry J. Kaiser Fam. Found. (Jan. 1, 2019), https://www.kff.org/health-reform/state-indicator/medicaid-chip-coverageof-lawfully-residing-immigrant-children-and-pregnant-women.

[5] *See* Georgetown Univ. Health Policy Inst., Ctr. For Children & Families, "Health Coverage for Lawfully Residing Children." (2018) https://ccf.georgetown.edu/wp-content/uploads/2018/05/ichia_fact_sheet.pdf.

[6] Eva Clark et al, *Disproportionate impact of the COVID-19 pandemic on immigrant communities in the United States*, 14 PLoS Negl. Trop. Dis. E0008484, (July 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7357736/.

Cuts to Benefits

The IFR permits states to cut or reduce any benefits that states are given the option to cover in their Medicaid programs, including Home and Community-Based Services. We have heard from several states that are planning to implement significant cuts.

Missouri, for example, has proposed amendments to its 1915(c) Home and Community Based Medicaid Waivers that would modify the state's eligibility criteria necessary to establish nursing facility level of care (LOC).[7] 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. One report on an earlier version of the state's proposed LOC tool suggested that almost one in five people currently receiving HCBS waiver services would lose eligibility for these services.[8] Implementing these draconian cuts in the midst of the public health emergency would cause exactly the widespread harm that the statute was meant to prevent.

Maryland, for example, had proposed to decrease the number of slots under their 1915(c) waiver for older adults and people with disabilities from the current 6,348 authorized slots to 3,500 slots despite having a registry of over 20,500 individuals waiting to receive services.[9] After strong stakeholder opposition, the state has indicated it would amend the proposal, but the state still plans to decrease the total number of slots available to 5,489 in 2022.

Other states, such as **Wyoming**, whose economies were in recession before the pandemic hit are considering major cuts to health programs including HCBS. For example, the Wyoming Department of Health was instructed to cut its budget by almost 14%.[10] The proposed budget provided to the legislature includes cuts to HCBS

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[7] *See* MO HealthNet Alerts & Public Notices, 01/12/21 "Public Notice regarding the submission of the Adult Day Care Waiver, Aged and Disabled Waiver, AIDS Waiver, Brain Injury Waiver, Independent Living Waiver and Structured Family Caregiving Waiver LOC amendments," https://dss.mo.gov/mhd/alerts~public-notices.htm

[8] Mercer, Missouri Department of Health & Human Services: Nursing Facility Level of Care Algorithm Analysis 3 (Jan. 4, 2020).

[9] Maryland Application for a 1915(c) Home and Community Based Options Waiver, dated January 12, 2021, available at https://mmcp.health.maryland.gov/waiverprograms/SiteAssets/Pages/Home/Community%20Options%20Waiver%20renewal%202021%2001.28.21%20REDLINE.pdf

[10] *See* Wyo. Dept. of Health, "Department of Health Describes Difficult Budget Reductions," (Aug. 26, 2020), https://health.wyo.gov/department-of-health-describes-difficult-budget-reductions/; Better Wyo., "Elderly, disabled, suffering: Proposed Wyoming healthcare cuts will hurt struggling people across the state," (Feb. 9, 2021), https://betterwyo.org/2021/02/09/elderly-disabled-suffering-proposed-wyoming-healthcare-cuts-will-hurt-struggling-people-across-the-state/#:~:text=The%20state%20budget%20proposed%20by,14%20percent%20of%20its%20

programs, including reducing individual budget amounts and provider reimbursement, and freezing new enrollment of individuals on waiting lists.[11] On top of this, Wyoming has also ended its PACE program and proposed severely reducing funding for its Wyoming Home Services program. These cuts will increase the need for Medicaid HCBS waiver services, but those services are at risk of being scaled back too.

Florida is also proposing cuts to critical services. A recent proposed bill would eliminate coverage for 19 and 20 year olds and eliminate dental, vision, hearing, podiatric and chiropractic services for adults.[12]

Conclusion

Maintenance of effort provisions to protect eligibility methodologies have been included in previous legislation, including the American Recovery and Reinvestment Act of 2009 (ARRA)--the legislative response to the Great Recession. Historically, under these provisions, state agencies have prioritized administering medical assistance during a time of national crisis. Congress's additional strong protections in § 6008(b)(3) along with substantial financial incentives signal a clear intent to secure continued access to covered services for the duration of this public health emergency. The Interim Final Rule guts the statutory protections, and subsequent state responses are already harming enrollees. These harms are ongoing, with more cuts imminent, and more individuals harmed every day. Accordingly, we urge you to take swift action to rescind 42 C.F.R. § 433.400 and to reaffirm the MOE protections Congress clearly intended with the passage of Families First.

If you have questions or would like to discuss in further detail please contact Sarah Grusin at NHeLP grusin@healthlaw.org and Amber Christ, Justice in Aging, achrist@justiceinaging.org.

Sincerely,

ADAP Advocacy Association
Advocates for Youth
AfricanAmericansAgainstAlzheimer's
AIDS Action Baltimore
AIDS Alabama
AIDS Foundation Chicago

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budget.&text=The%20rejection%20of%20federal%20Medicaid,a%20billion%20dollars%20to%20date.

[11] *See, e.g.,* Wyo. Dept. of Health, *2021-2022 Step Two COVID 19 Reductions*, at 120-124 https://www.wyoleg.gov/InterimCommittee/2020/02-20201214048-DepartmentofHealth.pdf.

[12] *See* Fla. Senate, Proposed Bill SBP 2518, https://www.flsenate.gov/Session/Bill/2021/2518/BillText/pb/PDF.

Alabama Disabilities Advocacy Program
Allergy & Asthma Network
American Academy of Pediatrics
American Academy of Physical Medicine and Rehabilitation
American Association on Health and Disability
American Association on Intellectual and Developmental Disabilities (AAIDD)
American Council of the Blind
American Heart Association
American Lung Association
American Network of Community Options and Resources (ANCOR)
American Occupational Therapy Association (AOTA)
American Speech-Language-Hearing Association
American Therapeutic Recreation Association
Arab Community Center for Economic and Social Services (ACCESS)
Arizona Center for Disability Law
Asian & Pacific Islander American Health Forum
Asian Pacific American Labor Alliance, AFL-CIO
Asian Pacific Institute on Gender-Based Violence
Asian Resources, Inc
Association of Asian Pacific Community Health Organizations (AAPCHO)
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Brain Injury Association of America
CAEAR Coalition
Cancer Support Community
Cardozo Bet Tzedek Legal Services
Center for Civil Justice
Center for Elder Law & Justice
Center for Law and Social Policy (CLASP)
Center for LGBTQ Economic Advancement & Research (CLEAR)
Center for Medicare Advocacy
Center for Public Representation
CenterLink: The Community of LGBT Centers
Charlotte Center for Legal Advocacy
Chronic Disease Coalition
Coalition on Human Needs
Colorado Center on Law and Policy
CommunicationFIRST
Community Access National Network (CANN)
Community Legal Aid Society Inc.

Community Legal Services of Philadelphia
Consumers for Affordable Health Care
CPCA
Cystic Fibrosis Foundation
Disability Law Center of Alaska
Disability Law Center of Utah
Disability Law Colorado
Disability Rights California
Disability Rights Center - NH
Disability Rights Center of Kansas
Disability Rights Education and Defense Fund (DREDF)
Disability Rights Florida
Disability Rights Maine
Disability Rights Maryland
Disability Rights New Jersey
Disability Rights New York
Disability Rights Oregon
Disability Rights Pennsylvania
Disability Rights South Carolina
Disability Rights Tennessee
Disability Rights Vermont
Easterseals
Empire Justice Center
End the Wait Kansas
Epilepsy Foundation
Equality California
Families USA
Family Voices
First Focus on Children
Florida Health Justice Project
Florida Policy Institute
Georgia Advocacy Office
Georgians for a Healthy Future
Greater Boston Legal Services
Health Care For All - Massachusetts
Health Care Voices
Health Law Advocates
Hemophilia Federation of America
Illinois Coalition for Immigrant and Refugee Rights
Intermountain Fair Housing Council, Inc.

International Association of Providers of AIDS Care
JASA Legal Services for Elder Justice
Justice in Aging
Kentucky Voices for Health
Lakeshore Foundation
LatinosAgainstAlzheimer's
Legal Aid Justice Center, Virginia
Legal Aid Society of the District of Columbia
Legal Council for Health Justice
Long Term Care Community Coalition
Massachusetts Law Reform Institute
Maternal and Child Health Access
Medicaid Matters New York
Medicare Rights Center
Mississippi Center for Justice
MSBA Elder Law and Disability Rights Section
Muscular Dystrophy Association
National Academy of Elder Law Attorneys
National Academy of Elder Law Attorneys, MD/DC Chapter
National Adult Day Services Association (NADSA)
National Alliance on Mental Illness
National Association of Area Agencies on Aging (n4a)
National Association of Councils on Developmental Disabilities
National Association of Pediatric Nurse Practitioners
National Association of Social Workers (NASW)
National Association of State Head Injury Administrators
National Center for Law and Economic Justice
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)
National Coalition for Latinxs with Disabilities
National Consumer Voice for Quality Long-Term Care
National Consumers League
National Council of Jewish Women
National Council on Aging
National Health Law Program
National Immigration Law Center
National Indian Council on Aging
National Multiple Sclerosis Society
National Organization for Rare Disorders
National Partnership for Women & Families

National Patient Advocate Foundation
National Viral Hepatitis Roundtable
National Working Positive Coalition
Nebraska Appleseed
New York Legal Assistance Group (NYLAG)
New York StateWide Senior Action Council
NH Legal Assistance
Northeast Justice Center
Northwest Health Law Advocates
Office of the Health Care Advocate, Vermont Legal Aid
Partnership for America's Children
Pennsylvania Health Law Project (PHLP)
Personal Disability Consulting, Inc.
Physicians for Reproductive Health
Planned Parenthood Federation of America
Power to Decide
Public Justice Center
RCHN Community Health Foundation
RESULTS
SC Appleseed Legal Justice Center
Senior Citizens' Law Office, Inc.
Silver State Equality-Nevada
Southwest Women's Law Center
SPAN Parent Advocacy Network (SPAN)
TASH
Tennessee Health Care Campaign
Tennessee Justice Center
The AIDS Institute
The Arc
The Partnership for Inclusive Disaster Strategies
The Workers Circle
Union for Reform Judaism
University of Mississippi School of Law
Virginia Poverty Law Center
Western Center on Law & Poverty
Whitman-Walker Institute
William E. Morris Institute for Justice (Arizona)