



JUSTICE IN AGING
FIGHTING SENIOR POVERTY THROUGH LAW



STINSON

March 15, 2023

By Electronic Delivery

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Dear State Medicaid Director Peterson,

We are class counsel for the certified nationwide plaintiff class in *Carr v. Becerra*, in which the plaintiffs are challenging the legality of the Interim Final Rule (IFR) issued in November 2020 by the U.S. Department of Health and Human Services (HHS) under the Families First Coronavirus Response Act (FFCRA).

By now you should have received from HHS, through the Center for Medicare and Medicaid Services (CMS), copies of two court orders issued against HHS by United States District Court Judge Michael P. Shea: the nationwide class certification and preliminary injury order issued on January 31, 2023 and a clarifying order issued on March 2, 2023.

In the first preliminary injunction order, the Court, among other things, ordered HHS to reinstate all of its "previous guidance" under the FFCRA with respect to all class members in all states. 2023 WL 1280172 *17. The class 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. *Id.*

In its second order, the Court clarified its January 31 order by incorporating CMS's own previous guidance:

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 [Federal Medical Assistance Percentage], 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.***

March 2, 2023 Order Clarifying January 31, 2023 Preliminary Injunction, at page 3 (attached), *quoting* Families First Coronavirus Response Act – Increased FMAP FAQs, Updated as of 4/13/20, FAQ #B.7. at page 5 (emphasis added by the Court). This order and the guidance should have been provided to you by CMS on or about March 7, 2023.

It is now federal policy that, **in order for states to receive the enhanced federal match** under the FFCRA, they must immediately reinstate all class members who were terminated from Medicaid benefits because of the IFR to their pre-termination benefits, retroactive to their respective dates of termination. See March 2, 2023 court order at page 3. Accordingly, we assume that your agency has already reinstated all members of the class in your state or is in the process of doing so. Per federal policy, only if a state cannot identify all

class members should it send out a letter to individuals inviting re-enrollment: all others who can be identified as being in the class should be reinstated without being asked. Of course, those who are automatically reinstated should be promptly apprised of this in writing.

Although the court order adopting this previous guidance did not specify an exact date by which these reinstatements must be completed, immediacy was clearly intended in the CMS Guidance and the court order adopting and enforcing it. In addition, in light of the impending termination of the continuous enrollment requirements under the FFCRA on March 31st, it is imperative that the mandatory reinstatements be completed by the end of this month. We are aware of several states, both large and small, which are diligently working to complete all of their reinstatements by that date.

Recognizing that this is an additional administrative burden for your state, it may warrant delaying the beginning of terminations under the unwinding to ensure that reinstatements are completed first. If this requires changing your previous unwinding plans, you should advise CMS. Per both practice and the Court's clarifying order, if you have any questions about the previous Guidance or the Court's orders, HHS is required to promptly answer those questions. In any event, please let us know what your plans are for completing compliance with the Court orders and reinstated CMS guidance by March 31st.

We thank you for your cooperation in this matter. Please let us know your plans for compliance with the Court's orders or if you have any questions, through Attorney Sheldon Toubman at the below contact information.

Respectfully,

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PLAINTIFFS' COUNSEL IN *CARR V. BECERRA*

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.

No. 3:22cv988(MPS)

ORDER CLARIFYING JANUARY 31 INJUNCTION

On January 31, 2023, I granted the Plaintiffs' motion for class certification, certified a class of Medicaid enrollees, and issued the following injunction on behalf of the class:

The Defendant is ordered to refrain from enforcing the [Interim Final Rule] 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*. Defendant is further ordered *to inform* (within 7 days of this order) *the relevant state agencies of this revised position* as to the class members.

ECF No. 100 at 36 (emphases added) (the "January 31 Ruling"). The January 31 Ruling made clear that the injunction would expire at the close of business Eastern Time on March 31, 2023.

On February 28, 2023, the Plaintiffs filed an "emergency motion for enforcement of preliminary injunction" (ECF No. 102), to which the Government responded today at noon. I held a telephonic discussion of these filings with counsel at 5pm today and now issue this order.

I assume the reader's familiarity with the January 31 Ruling. During the discussion on the call today, it became apparent that the Government found the statement in the January 31 Ruling that it must "reinstate its previous guidance" with respect to the class to be unclear.

Although the Government properly provided Medicaid officials in each State with a copy of the January 31 Ruling and copies of its previous guidance and properly informed those officials by letter that its previous guidance was “reinstate[d] ... with respect to the class members,” today on the call the Government’s attorney stated that it was not clear that certain aspects of its previous guidance continued to have effect. Further, the Plaintiffs have submitted correspondence with Connecticut Medicaid officials suggesting that those officials were “awaiting guidance from [the Secretary]” as to his position on whether States must restore coverage to Medicaid beneficiaries whose benefits were terminated during the pandemic back to the date of termination, including in cases when that date fell before the January 31 Ruling. At the end of the call, the Government’s attorney requested that I issue a clarification on these matters.

In line with the Government’s request and to clear up any confusion on the matter, I issue the following clarification. Reinstating the Secretary’s previous guidance as to the class means that the guidance the Secretary issued in the few months immediately following the enactment of the FFCRA, that is, his position as to the obligations of State Medicaid agencies before the Interim Final Rule (“IFR”) was adopted in November 2020, is now, once again, the Secretary’s guidance and is in full force and effect. To “reinstate,” according to the Merriam-Webster dictionary, means “to place again (as in possession or in a former position)” and “to restore to a previous effective state.” Merriam-Webster.com/Dictionary/Reinstate; *see also* The American Heritage Dictionary of the English Language, 5th Ed. (defining “reinstate” as “To bring back into use or existence”; “to restore to a previous condition or position”; and “to place again in possession, or in a former state; to restore to a state from which one had been moved; to instate again”). Therefore, the current position of the Secretary on the scope and effect of the FFCRA must reflect – as to the members of the class – the position the Secretary took in the guidance

issued in the few months following the enactment of the FFCRA. More specifically, the Secretary must now take the same positions— and must inform State Medicaid agencies that he takes the same positions – as those reflected in the “Frequently Asked Questions” “Updated as of 4/13/2020,” ECF No. 104-1 at 18-28 and ECF No. 104-2 at 29-48, and “Last Updated June 30, 2020,” ECF No. 104-1 at 50-148. These three documents, which are the same ones the Secretary properly sent to State Medicaid officials along with the January 31 Ruling on February 6, 2023, include, among many other pieces of guidance, the following “frequently asked question” and the following answer by the Secretary:

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.*

ECF No. 104-1 at 22 (emphasis added). That guidance, along with the rest of the guidance in the FAQs, now reflects the position of the Secretary, because that is what it means to “reinstate previous guidance,” which is what I ordered the Secretary to do. The Secretary shall communicate this order, its “previous guidance” as reflected in the three FAQs cited above, and my January 31 ruling to State Medicaid officials by close of business Eastern time on March 7, 2023. Further, if asked, the Secretary (and his designees and agents) shall, as long as the

injunction in the January 31 Ruling remains in effect, inform the States that these FAQs, including the answer to Question 7 above, reflect the current guidance of the Secretary as to the scope and meaning of the FFCRA.

IT IS SO ORDERED.

_____/s/_____
Michael P. Shea, U.S.D.J.

Dated: Hartford, Connecticut
March 2, 2023