

February 2, 2024

Submitted via regulations.gov

Administrator Chiquita Brooks LaSure
Centers for Medicare & Medicaid Services,
Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD 212-44-1859

Re: Enforcement of State Compliance with Reporting and Federal Medicaid Renewal Requirements under the Social Security Act (CMS-2447-IFC)

Dear Administrator LaSure:

The undersigned members of the Consortium for Constituents with Disabilities (CCD) Health Care and Long-Term Services and Supports (LTSS) task forces write to comment on the Interim Final Rule (IFR)- Enforcement of State Compliance with Reporting and Federal Medicaid Renewal Requirements under the Social Security Act. CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of children and adults with disabilities in all aspects of society, free from racism, ableism, sexism, and xenophobia, as well as LGBTQIA+ based discrimination and religious intolerance.

As of January 16, 2024, more than 15 million people have been terminated from Medicaid, with approximately 71% terminated for procedural reasons.¹ Data on call center barriers are also troubling, since Medicaid enrollees rely on call centers to aid with their renewals, especially people with disabilities and Limited English Proficiency.² In Florida, Spanish-language callers waited an average of 2.5 hours, while English-language callers averaged 36 minutes.³ Additionally, nearly all calls to call centers are answered by an automated phone system instead of a live person which can be inaccessible for people with various disabilities. Most states do offer the option to speak to a live person, but several states have an average wait time of 15

¹ Kaiser Family Foundation, "Medicaid Enrollments and Unwinding Tracker," <https://www.kff.org/report-section/medicaid-enrollment-and-unwinding-tracker-overview/>, (Last visited Jan. 30, 2024).

² National Health Law Program, "Unwinding Call Center Data Shows Ongoing Problems," <https://healthlaw.org/resource/unwinding-call-center-data-shows-ongoing-problems/>, (Last visited Jan. 30, 2024).

³ Unidos US, "At Florida's Medicaid Call Center, Long and Discriminatory Delays Prevent Eligible Families from Keeping their Health Care," <https://unidosus.org/publications/long-and-discriminatory-delays-at-floridas-call-center/> (Aug. 17, 2024).

minutes or more to speak to a live person, while seven states do not offer access to a live person.⁴

Although Medicaid enrollees have significant protections against improper disenrollments under the Consolidated Appropriations Act of 2023 (CAA), states too often disregard these protections. Many of the issues impacting enrollees are systemic and long-standing. For example, insufficient technology and limited oversight have plagued enrollees long before the PHE leading to delay or loss of crucial coverage.⁵ These problems have only been magnified during the unwinding, and require significant enforcement actions by CMS to provide systemic solutions. These solutions are especially important for the millions of people with disabilities who rely on Medicaid coverage, including people with disabilities who face intersectional discrimination on the basis of race, ethnicity, language, LGBTQIA+, age, and other identities. To ensure health equity and improve health outcomes for these individuals, CMS must work to ensure that states are not improperly disenrolling them from Medicaid.

Overview of CMS' Enforcement Authority

We generally support CMS' enforcement actions under the IFR and encourage CMS to maximize its authority under the CAA to ensure states comply with the statute. CMS is given significant discretion as to when the agency can issue sanctions. The only required sanction under the statute for noncompliance is the FMAP reduction when states fail to meet reporting requirements. Otherwise, CMS can choose if and when to apply other enforcement mechanisms like requiring suspension of procedural disenrollments, Corrective Action Plans (CAPs), or Civil Money Penalties (CMPs).

We recognize unwinding has been very complex for states, but there is still little excuse outside of the extraordinary circumstances discussed in the IFR (e.g. natural disaster or widespread systems outage) for states to fail to provide basic protections during Medicaid redeterminations. States have always been required to apply many of the unwinding mechanisms even prior to the PHE. For example, states always had to conduct ex parte renewals, language and disability accommodations, individualized redeterminations, and eligibility determinations for other Medicaid programs prior to disenrollment. States also had ample time to prepare for unwinding, with several states even insisting on ending the

⁴ Kaiser Family Foundation, "A 50-State Review of Access to State Medicaid Program Information for People with Limited English Proficiency and/or Disabilities Ahead of the PHE Unwinding," <https://www.kff.org/medicaid/issue-brief/a-50-state-review-of-access-to-state-medicaid-program-information-for-people-with-limited-english-proficiency-and-or-disabilities-ahead-of-the-phe-unwinding/> (Aug. 26, 2022).

⁵ See e.g., Response from Consortium for Constituents with Disabilities to the "Access to Coverage and Care in Medicaid and CHIP" Request for Information, https://www.c-c-d.org/fichiers/CCD-HealthLTSSCoChairComments-CMS-Access-RFI_4-18-22.pdf.

continuous coverage protections sooner so they can begin redeterminations.⁶ States should have prepared to have sufficient staff and technical systems in place to conduct accurate and compliant redeterminations. Yet millions of enrollees are experiencing loss of health coverage and essential services due to states' failures to comply with Medicaid requirements. CMS must apply strong enforcement actions to ensure states are acting properly and prevent harm to beneficiaries.

Reporting Requirements §435.927

We generally support CMS' application of the reporting requirements, but suggest some improvements. Advocates have expressed significant concerns regarding call centers, particularly that wait times are significantly higher than the average amount reported to CMS. Additionally, the required reported data does not include other issues around call centers. For example, many call centers have very long English prompts before offering prompts in other languages.⁷ More than a dozen states do not even offer any language prompts beyond English and Spanish.⁸ LEP callers may likely abandon the call if they do not understand the English prompts but this may not be captured in the reported data. As stated above, inability to provide information to call center staff could result in more procedural disenrollments.

Although terminations are a required reporting metric, it is unclear how states are reporting transitions between Medicaid programs, particularly transitions to Medicare Savings Programs (MSP). Many older adults and people with disabilities may have lost full-scope Medicaid, but if they were enrolled in an MSP, then the state may not be counting the MSP enrollees as terminations, even though they lost essential coverage. Additionally, the data does not disaggregate across crucial demographics like race, age, disability or even MAGI and non-MAGI enrollment. This makes it much harder to identify and systemically fix disparities. We understand the statutory limitations and CMS cannot enforce more than is authorized under the CAA. However, given these limitations, it is essential that all the other data points within CMS authority are accurately accounted for and, ideally, used to develop a more comprehensive data reporting mechanism for Medicaid enrollees.

We also urge CMS to continue the state-level reporting requirements beyond the end of the unwinding period. This data is critical for CMS to maintain its oversight authority of the state

⁶ Letter from U.S. Governors to Pres. Biden, <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/inline-documents/sonh/20221219-biden-letter-public-health-emergency.pdf> (Dec. 19, 2022).

⁷ National Immigration Law Center, "States Need to Improve Language Access for Medicaid Renewals," <https://www.nilc.org/2023/08/09/states-need-to-improve-language-access-for-medicaid-renewals/> (Aug. 9, 2023).

⁸ Id.

Medicaid programs. We also ask that the data include information on specific populations covered by Medicaid, including people with disabilities, people of color, and children.

Corrective Action Plans §430.49(b)

One enforcement tool is the requirement of CAP submissions that must then be approved by CMS prior to implementation. Sec 430.49(b)(3) states that the CAPs must “identify actions the state will immediately take, if feasible, to prevent further harm to beneficiaries while it implements CAP and detail steps the state will take to ensure compliance with federal redetermination and reporting requirements.” CAPs must also provide detailed timelines and milestones for compliance. We strongly support requiring detailed CAPs, but one concern is that states may only implement short-term measures to temporarily resolve the underlying noncompliance instead of a systemic fix. For example, a particular technical glitch may have led to improper procedural disenrollments. However, fixing that technical glitch alone may not be sufficient if the technology used is causing other problems during redeterminations. In this case, a systems upgrade may be necessary to ensure the glitch does not return. Although CMS has the authority for additional enforcement, including requiring another CAP, short-term solutions will still harm enrollees. We suggest CMS review CAPs to ensure the problem is truly resolved before approving the CAP.

Suspension of Procedural Disenrollment and Civil Money Penalties (CMP) §430.49(c)

We also encourage CMS to utilize suspending procedural disenrollments and CMPs when states are in noncompliance. The source of the underlying noncompliance issue may be difficult for states to identify and remedy. If the underlying problem cannot be adequately identified then the scope of those who are impacted may also be difficult to determine. Thus, CMS should consider defaulting to statewide suspensions unless it is exceptionally clear that the problem only impacts one population or region. We also encourage CMS to utilize CMP authority in addition to the suspension of procedural disenrollment. As stated above, states were aware of the impending unwinding period and had ample time to put measures in place to minimize disruptions to coverage. However, very often states use outdated systems or problematic third-party contractors to save costs at the expense of Medicaid enrollees. Issuing strong CMPs gives states even more financial incentives to conduct redeterminations properly.

Mitigating Circumstances §430.49(d)

Lastly, we recommend limiting mitigating circumstances only to extraordinary circumstances outside the state’s control, like a natural disaster. The IFR states CMS will not require or delay the submission of a CAP if the noncompliance presents no harm or substantial risk of harm to beneficiaries. However, this can be extremely hard to determine given the complex nature of

Medicaid renewals. Moreover, other crucial public benefits such as the Supplemental Nutrition Assistance Program and cash benefits often hinge on Medicaid enrollment, increasing the chance of harm from lost access to food and other life necessities when Medicaid enrollment is at risk and call centers are overwhelmed.⁹ At the very least, we suggest CMS presume that noncompliance presents a substantial risk of harm to beneficiaries unless information presents itself otherwise.

We appreciate this opportunity to comment on this important and timely issue. For any questions, please contact Gelila Selassie at gselassie@justiceinaging.org.

Respectfully,

The undersigned members of CCD Health and LTSS Taskforces

Access Ready Inc.

American Association of People with Disabilities

American Association on Health and Disability

Association of University Centers on Disabilities

Autism Society of America

Autistic Self Advocacy Network

Autistic Women & Nonbinary Network

Center for Law and Social Policy (CLASP)

Center for Medicare Advocacy

Cure SMA

Disability Rights Education and Defense Fund (DREDF)

Epilepsy Foundation

Family Voices

Huntington's Disease Society of America

Justice in Aging

Lakeshore Foundation

Muscular Dystrophy Association

National Association of Councils on Developmental Disabilities

National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)

National Disability Institute

⁹ NBC News, "Medicaid 'Unwinding' Clogs Call Centers, Blocking Access to Other Safety Net Programs," <https://www.nbcnews.com/health/health-news/medicaid-unwinding-clogs-call-centers-blocking-access-safety-net-progr-rcna126850> (Nov. 28, 2023).

National Disability Rights Network (NDRN)

National Health Law Program

National Women's Law Center

Paralyzed Veterans of America

The Arc of the United States

United Spinal Association