



The Leadership Conference
on Civil and Human Rights

January 4, 2021

Seema Verma, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9912-IFC
P.O. Box 8016
Baltimore, MD 21244-8016

Submitted via regulations.gov

**RE: Comments on CMS-9912-IFC
Center for Medicare and Medicaid Services Interim Final Rule: Additional Policy and
Regulatory Revisions in Response to the COVID-19 Public Health Emergency**

Dear Administrator Verma:

On behalf of The Leadership Conference on Civil and Human Rights (The Leadership Conference), we write in response to the Centers for Medicare and Medicaid Services (CMS) Interim Final Rule “Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency.” This interim final rule would allow states to cut Medicaid services during the pandemic and could reduce the availability of COVID vaccines for people enrolled in Medicaid limited benefit programs. The Leadership Conference strongly opposes CMS’s efforts to take away health care from vulnerable communities during a global pandemic and make it more difficult for individuals who rely on Medicaid for health care to access life-saving COVID-19 vaccines. We urge the U.S. Department of Health and Human Services (HHS) to withdraw these provisions that would create barriers to accessing health care at a time when the health and well-being of all people in America must be prioritized.

The Leadership Conference is a coalition charged by its diverse membership of more than 220 national organizations to promote and protect the rights of all persons in the United States. Central to our work is the understanding that economic justice and civil rights are inextricably linked, and that health care is a human right. Ensuring that people have access to health care is one of the most important mechanisms we have to fight the COVID-19 pandemic. Medicaid provides critically important health coverage and access to care for communities of color. Nearly 57 percent of Medicaid enrollees are people of color, many of whom have encountered systemic barriers and financial challenges when trying to access health care.¹ People of color, especially Black and Latino individuals, make up a significant share of essential and frontline workers who have provided critical services throughout the pandemic.² These communities have also been more likely to be hospitalized and to die as a

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result of complications related to contracting COVID-19.³ Given the disproportionate impact that COVID-19 has had on these communities, and the rates at which these communities rely on Medicaid for access to health care, The Leadership Conference is opposed to any changes that would cut Medicaid services.

The Leadership Conference is deeply concerned about several provisions of this Interim Final Rule (IFR). In a reversal of CMS's stated policy from March to October 2020, this IFR would now allow states to impose numerous types of coverage restrictions on individuals who are enrolled in Medicaid. The IFR will also result in wrongful terminations for some individuals at a time when access to health coverage is more important than ever. These changes would have a particularly harmful impact on communities of color and their families that have already been disproportionately impacted by the COVID-19 crisis.⁴ We also oppose allowing states to circumvent required transparency procedures for ACA Section 1332 waivers and receive enhanced funding despite refusing to cover COVID-19 vaccination for some Medicaid enrollees. We recommend that CMS withdraw these provisions.

The Medicaid program is particularly important in providing access to health care for traditionally underserved communities, including low-income people, people of color, women, seniors, and people with disabilities. Medicaid serves as a critical source of health coverage for many low-income individuals, now insuring one of every five people in the United States, including one of every three children. Since the beginning of the COVID-19 pandemic, states have taken advantage of Medicaid's flexibility to make it easier for people to obtain affordable health care during the public health crisis. The Leadership Conference is deeply concerned about the proposed changes included in this IFR, which would permit states to make changes to the amount, duration, and scope of services available to Medicaid enrollees. At this pivotal moment, we should avoid any actions that reduce or restrict people's ability to access the health care services they need.

This IFR would allow states to change the amount, duration, and scope of services, which could have deeply harmful impacts as people in America battle both the health and economic impacts of the COVID-19 pandemic. As we saw when states faced budget constraints after the Great Recession, some states placed numerical caps on benefits like physician visits and hospital days.⁵ While these capped services may have been adequate for some enrollees, in many cases they were likely not sufficient for other populations, such as some people with chronic illnesses and disabilities.

Congress has already weighed in on the scope of Medicaid during the pandemic. The Families First Coronavirus Response Act (FFCRA), signed into law in early 2020, included an option for states to receive enhanced federal Medicaid funding. In exchange for the additional funds, states had to agree to comply with maintenance of effort (MOE) protections. These protections help ensure that individuals who rely on Medicaid were able to get and stay covered during the crisis and receive needed services. The FFCRA included an explicit requirement to preserve enrollees' existing benefits – both their enrollment in Medicaid overall, and the services for which they have been eligible. At a time of such turmoil, Congress chose to protect enrollees and ensure access to services by requiring that states comply with MOE protections.

As of January 4, 2021, more than 349,246 people in the United States have died as a result of COVID-19, with almost 15 million confirmed cases.⁶ Public health experts agree that widespread use of a safe and effective preventive vaccine will be essential to curb this deadly virus. Although COVID-19 vaccines have just started to be approved and disseminated in the United States, Congress recognized the vital importance of coverage and access to COVID-19 vaccines when it enacted the FFCRA. Congress provided that state Medicaid programs will receive enhanced federal funding if they cover approved COVID-19 vaccines, and provide access without cost sharing, during the period of the public health emergency.

However, with this IFR, CMS is inexplicably seeking to limit access to COVID-19 vaccines for some of the most vulnerable people in our nation, allowing states to exclude coverage of vaccinations for people enrolled in Medicaid limited benefit programs. These Medicaid limited benefit programs include programs focused on the treatment of breast and cervical cancer, tuberculosis, family planning programs, and some programs provided under § 1115 waiver authority.⁷ CMS does not provide any explanation or analysis of how it would determine which of the existing [57](#) Section 1115 waiver programs would be subject to the IFR limits on vaccine coverage.

Barring access to lifesaving COVID-19 vaccines would hamper efforts to combat the pandemic, and would harm tens of thousands of individuals who rely on Medicaid limited benefit programs. The coronavirus has demonstrated with devastating clarity that the health of every person in this country is impacted by the health of each and every one of us. The Leadership Conference believes that equitable development and distribution of the COVID-19 vaccine must be prioritized. This means that the COVID-19 vaccine must be made free and easily accessible to all persons in the United States, including all immigrants regardless of status, justice-impacted individuals, and people living in the territories. No ID should be required for medical treatment, testing, or vaccination. Future response legislation must also include provisions to expand access for uninsured people in America. Any exclusions for some communities leaves all communities at greater risk of being exposed to or contracting the virus. The IFR is inconsistent with the FFCRA statutory language and intent, relies on misreading of the Medicaid statute, and is harmful as a matter of health policy. It should be withdrawn.

The FFCRA makes no distinction between full and limited benefit Medicaid categories and specifically applies vaccination requirements to waiver programs. The obvious intent of the provision in the FFCRA was to ensure widespread access to COVID-19 vaccination. CMS should avoid creating confusion around the intent of this provision and avoid interpreting it contrary to the statute's overriding intent. Congress is familiar with limited scope benefits categories and would have carved out exceptions to FFCRA if it wanted to carve out such exceptions.

The IFR would also allow states to increase cost-sharing, which would harm communities of color who are bearing both the financial and health-related brunt of the COVID-19 crisis. People of color are overrepresented in many occupations within frontline industries and continue to risk their lives daily to ensure that people in America have access to essential goods and services.⁸ Yet these communities, specifically Black, Latino, and Native American people, continue to experience higher rates of coronavirus infections⁹ and have a death rate of triple or more than that of White people.¹⁰ Research over

the last four decades has concluded that the imposition of cost-sharing on low-income populations serves as a barrier to individuals receiving both necessary and unnecessary care and correlates with increased risk of poor health outcomes.¹¹ Over half of Medicaid enrollees are people of color who rely on Medicaid for access to quality, affordable health care.¹² Access to Medicaid is particularly important for these individuals, many of whom work low wage jobs and/or are not provided health care by their employers. Finally, the pandemic worsens the economic impacts of cost-sharing. The pandemic has significantly exacerbated financial hardship among low-income families and families of color. Any increases in cost-sharing will have negative impacts on the economic security of these communities.¹³

The IFR also permits states to modify their post-eligibility treatment of income (PETI) rules. This could leave communities of color enrolled in Medicaid and enrollees with disabilities who are institutionalized or using a home and community-based services (HCBS) waiver program with less money to meet their basic needs in the middle of a public health emergency. For example, if states do not allow HCBS waiver enrollees to keep enough money each month to cover their living expenses, they may be forced into institutions.¹⁴ This prospect is particularly frightening during the pandemic, given the devastating and disproportionate impact that coronavirus is having on people in congregate settings such as nursing facilities.¹⁵

Finally, The Leadership Conference does not believe CMS should have implemented these policies – which directly and materially limit access to health care for tens of millions of enrollees during a pandemic – as an interim final rule. The Administrative Procedures Act anticipates that government agencies will implement regulations only after receiving and considering public comment and that interim final rules will be used rarely and only out of necessity – for example when a comment period would be “contrary to the public interest.” There is no significant exigency to expedite the notice and comment period for the policy contained in this IFR, whereas reducing health care eligibility, decreasing benefits, and increasing costs during a pandemic without an opportunity to comment will lead to immediate harm and is clearly contrary to the public interest. These policies will cause substantial harms before CMS has time to finalize the rule, many of which could have been avoided had CMS solicited public comments before enacting the rule.


Congress took unprecedented measures under the Families First Coronavirus Response Act to ensure that Medicaid enrollees can access the services they need during this devastating global pandemic. The aforementioned provisions of the Interim Final Rule present a number of procedural and administrative concerns. More importantly, the provisions of this Interim Final Rule would take health care away from people at a time when access to health care is critical. We strongly oppose these provisions of the Interim Final Rule, and urge HHS to withdraw them immediately.

Thank you for the opportunity to comment on this important issue. If you have further questions, please contact Arielle Atherley, policy analyst, at atherley@civilrights.org.

January 4, 2021
Page 5 of 5



Sincerely,



Vanita Gupta
President and CEO