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CENTER FOR CHILDREN
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February 2, 2024

The Honorable Xavier Becerra
Secretary of Health and Human Services
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

The Honorable Chiquita Brooks-LaSure
Administrator, Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Re: CMS Enforcement of State Compliance with Reporting and Federal Medicaid Renewal Requirements Under Section 1902(tt) of the Social Security Act (CMS-2447)

Submitted electronically

Dear Secretary Becerra and Administrator Brooks-LaSure,

The Interim Final Rule with Comments was published and effective on December 6, 2023. The rule codifies provisions enacted by Congress in the Consolidated Appropriations Act of 2022 regarding the phase down of additional federal funding for Medicaid, data reporting requirements and targeted enforcement tools associated with the lifting of the COVID-19 continuous enrollment requirement in Medicaid that was in place from March 2020 through March 2023. Overall, we support the provisions of this rule and commend CMS efforts to provide technical assistance as the agency monitors and conducts oversight over the impact of the "unwinding" (as it's called) on public health coverage for low-income children, families, and adults. We believe there are a few areas in the rule that could be strengthened as discussed below.

§ 430.49 Corrective action plans, suspensions of procedural disenrollments, and civil money penalties.

CMS enforcement of Title XIX requirements is essential, and the enforcement authority under section 1902(tt) is critically important because it is precisely targeted to the related infractions, thus providing the agency with a practical and realistic tool. The proposed regulation has appropriately captured the statutory grant of authority without exceeding the scope of the statutory text. We support

section 1902(tt) and the proposed regulations and believe this is a formula for effective Medicaid enforcement that should be repeated.

We urge CMS to make full and proper use of the enforcement authority that it has been granted by statute and that will be established in these regulations. Congress will not see the value in providing CMS with such useful tools if CMS does not actually use them. It is CMS's responsibility to ensure that federal requirements are met when federal Medicaid dollars are spent – including the requirements at section 1902(tt). Congress has charged CMS with improving redetermination processes and provided CMS with the tools to accomplish that; it is CMS's duty to use the authority to accomplish its mission. Any reasonable enforcement efforts by CMS will be insulated by undeniable statutory authority and this uncontroversial regulatory interpretation.

Under section 1904 of the Social Security Act, CMS has broad enforcement authority to defer or disallow federal matching funds when states do not comply with the provisions of section 1902. These include the requirements at section 1902(tt)(1). Although section 1902(tt)(2) provides the Secretary with authorities to enforce the requirements of section 1902(tt)(1), these authorities are not exclusive, and they do not override the enforcement authorities under section 1904. We are concerned that the reference to the section 1904 enforcement authorities in section 430.49(c)(4) could be misinterpreted to imply that CMS's enforcement authority under section 1904 is available only in some circumstances if states are out of compliance with suspensions of disenrollments or civil money penalty payments imposed under section 430.49(c)(3).

> **RECOMMENDATION:**
> We urge CMS to clarify that the enforcement authorities in section 1902(tt)(2) do not reduce, alter, or supersede CMS's general enforcement authority under section 1904.

§ 430.49(d) Mitigating Circumstances

We understand CMS's desire to focus its enforcement resources on the most egregious violations of redetermination requirements where federal intervention is likely the only avenue to protect eligible people. Similarly, we are sympathetic to CMS resource constraints and agree that the CAA provides CMS with discretion to focus on the most serious and intransigent examples of noncompliance. However, we are concerned that the IFR creates more flexibility for CMS to identify mitigating circumstances than Congress intended.

We note CMS's discussion that the enforcement authorities outlined in the IFR may not be necessary because most states will come into voluntary compliance with both redetermination requirements, as defined, and with data reporting requirements. While we hope that is the case – and agree that to date states have generally responded positively and proactively when CMS has called issues to states' attention

– we are nevertheless concerned that the IFR suggests that CMS may be reluctant to use the authorities Congress gave it to enforce clear instances of noncompliance. be out of compliance with data reporting requirements and that only 5 states would be out of compliance with federal redetermination requirements under this rule and could thus be subject to CAPs and suspensions of procedural terminations and/or CMPs if they did not submit or implement an approvable CAP. (CMS also assumes that no states would actually be required to suspend procedural disenrollment or actually be subject to CMPs because they would come into compliance before such measures are taken.) Given the large number of states experiencing difficulties with their eligibility and enrollment systems, this estimate seems low and suggests that CMS is narrowly construing its authority.

We are concerned that the breadth of mitigating factors included in the IFR will diminish CMS's ability to utilize the enforcement authorities and could mire CMS in discussions with states about whether mitigating circumstances exist. We urge CMS to consider altering its starting presumption that more states do not need to be put on corrective action plans (CAPs); utilizing a CAP is an effective way to bring states into compliance. While it may be true that most states will indeed follow a CAP if one is required (and thus not be subject to pauses in procedural terminations or to CMPs), we urge CMS to send a stronger signal to states that it is serious about enforcing known violations.

> **RECOMMENDATION**:
> Consider narrowing the mitigating circumstances enumerated in section 430.49(d)(1)(i) to broaden the universe of states potentially required to submit a CAP to address violations of redetermination requirements, even if those violations do not immediately cause harm to enrollees. CMS should be sending the message that all states that are out of compliance with redetermination requirements are potentially subject to a CAP (again acknowledging that most states will take action to come into compliance before the remedies outlined in the CAA are necessary).
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> Provide more details about what might constitute "extraordinary circumstances", and also amend sections 430.49(d)(1)(ii) and 430.49(d)(2)(ii) to be clear (as CMS is in new section 430.49(d)(3)(i)(A)) that extraordinary circumstances must arise *after* the violation resulting in the enforcement action. For example, many states have been short staffed throughout the unwinding period. Inability to submit a corrective action plan for a violation of redetermination requirements or for a violation of reporting requirements due to being short staffed should not be considered an "extraordinary circumstance"; this is a foreseeable issue that states should be investing to address and should not be used to circumvent compliance activities.

Making these changes would preserve more flexibility for CMS to take strong and effective actions to protect enrollees during unwinding.

§ 430.5 - Defining Federal Redetermination Requirements

Section 1902(tt)(2)(B)(i) of the CAA clearly states, "The Secretary may assess a State's compliance with *all Federal requirements applicable to eligibility redeterminations…*".[1] The IFR improperly confines federal redetermination requirements in new section 430.5 to those described in section 435.916.[2] This definition is overly limiting and not consistent with the statutory language.[3] Although section 435.916 includes many requirements of the redetermination process through its language or cross-references, it does not include all of the federal redetermination requirements. For example, section 435.916(g) references the accessibility of renewal forms and notices to those with limited English proficiency (LEP) and persons with disabilities, but the general requirements to provide assistance to ensure access for these populations in the redetermination process are not included in section 435.916. Therefore, although it is required by Federal law to provide interpreters and accommodations during the redetermination process, these rights are not explicitly included in section 435.916. It is also concerning that the due process rights of notice and fair hearing are only identified as federal redetermination requirements through a series of cross-references from section 435.916, which could lead to misinterpretation. These rights are critical to a redetermination process that meets all federal requirements and should be explicitly included.

Although it may seem fairly time limited because this section is related to the CAA enforcement authority, this narrow definition of "federal redetermination requirements" will remain in regulation. Therefore, the rule limits this definition until CMS has another occasion to define it again. This does not only limit CMS's authority but will impact advocacy that is trying to push states to comply with redetermination requirements. Other CMS authority for enforcement is broad, such as that in section 430.35, and this new authority regarding redetermination requirements should be similarly construed. The redetermination requirements at the very least include the regulatory section on "Redeterminations of Medicaid Eligibility" at sections 435.916 to 435.928 and the eligibility methods of administration found at sections 435.901 to 435.904. To define federal redetermination requirements in a way that limits CMS's authority to enforce requirements to not include protected classes such as people with disabilities and LEP fails CMS's own obligations under nondiscrimination statutes.

> **RECOMMENDATION -** The text of the IFR should be updated to clarify that: *Federal redetermination requirements* means, for the purposes of section 430.49, Federal requirements applicable to eligibility redeterminations

[1] Consolidated Appropriations Act, 2022, Pub. L. 117-328, 136 Stat. 5949-50 https://www.congress.gov/117/plaws/publ328/PLAW-117publ328.pdf (emphasis added).
[2] Interim Final Rule at 84733

outlined in sections 435.916 to 435.928 and in eligibility administration requirements found at sections 435.901 to 435.904.

§ 435.927 – Requirements for States to Submit Certain Data on Redeterminations

The IFR codifies specific state and federal data reporting requirements enacted by the 2022 CAA under section 1902(tt)(1). The public reporting of 50-state data has been invaluable in assessing how the unwinding of the continuous enrollment requirement is impacting Medicaid enrollees and in identifying problem areas in need of corrective action. We urge CMS to maintain CAA state reporting requirements including public posting of state-level data. Robust data reporting is necessary for state Medicaid agencies to make informed decisions that impact the access and quality of care enrollees receive. Reliable and comparable 50-state data is essential for CMS to conduct its oversight responsibility and to enhance accountability and transparency in our public coverage programs.

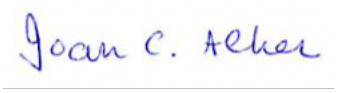
The agency has the authority to require states to report performance related data that pre-dates the CAA and extends beyond the unwinding period; data reporting is a required condition for states to claim enhanced federal funding for Medicaid IT systems (90% federal funding for system development and 75% for maintenance and operations). As CMS detailed in its April 2011 Enhanced Funding Requirements: Seven Conditions and Standards, "Medicaid IT systems should produce transaction data, reports, and performance information that would contribute to program evaluation, continuous improvement in business operations, and transparency and accountability." To advance these goals, renewal data reporting requirements should be transitioned to the Medicaid and CHIP Performance Indicators (PI). Additionally, CMS should embark on a public process to review, update, and further expand the performance indicators as the agency intended when it released the initial set of PI back in 2013.

Shortly after CAA 2022 enactment, CMS issued a State Health Official letter (SHO) noting that states could meet the reporting requirements in section 1902(tt)(1) through existing reports and reporting tools. These include the long-standing Medicaid and CHIP Performance Indicators, State-based Marketplace reports, and the renewal reporting requirements outlined by CMS in the renewal data report template released in the first quarter of 2022. Subsequently, CMS asked states to report the outcomes for pending renewals 90 days after the month in which the renewal was due. This requirement clearly falls under section 1902(tt)(1)(F) as "Such other information related to eligibility redeterminations and renewals during the period described in paragraph (1), as identified by the Secretary," but there is no corresponding regulation proposed in the IFR. We encourage CMS to amend the IFR to explicitly incorporate the Secretary's authority to require additional data reporting subject to mandatory financial penalties for states that fail to report the required elements.

RECOMMENDATION - Add a provision at section 435.927(d)(11) as follows: "Such other information related to eligibility redeterminations and renewals during the period as identified by the Secretary."

Thank you for considering our comments; if you need more information, please contact Tricia Brooks (pab62@georgetown.edu).

Sincerely,



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