

**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.

Civil Action No. 3:22-cv-988 (MPS)

February 28, 2023

**PLAINTIFFS' EMERGENCY MOTION FOR ENFORCEMENT OF
PRELIMINARY INJUNCTION**

Pursuant to 28 U.S.C. § 1651 and Rule 7 of the Federal Rules of Civil Procedure, Plaintiffs move for enforcement of this Court's January 31, 2023 preliminary injunction in this case. As discussed below, by: (1) removing the "previous guidance" regarding the implementation of the Families First Coronavirus Response Act (FFCRA) from its website and (2) refusing to answer state inquiries about that "previous guidance," Defendant failed to comply with its obligation under this Court's injunction to "reinstate its previous guidance." Accordingly, Plaintiffs seek an order directing Defendant through the Centers for Medicare & Medicaid Services (CMS) to immediately provide the states with copies of that "previous guidance" and to highlight the key provisions of that prior guidance that: (1) no further terminations of Medicaid coverage should occur, (2) persons erroneously dropped from coverage should have that coverage restored "automatically, if feasible," and (3) coverage should be restored retroactively to the date it was erroneously dropped.

Given that the preliminary injunction expires on March 31st, Plaintiffs ask that the Court schedule a status conference as soon as possible and consider taking Defendant's response orally at such status conference. The requested relief is required and straightforward.

First, this Court's January 31, 2023 Order was unambiguous that the Defendant was: enjoined (1) from "enforcing the IFR [Interim Final Rule],"¹ (2) to apply the "previous guidance" regarding the FFCRA with respect to the class members,² and (3) to inform all state Medicaid agencies promptly that the former guidance was in effect.³ The Order also noted the power Defendant has to ensure its rules are followed, i.e., that all states "must comply with federal [Medicaid] regulation" to continue to receive Medicaid reimbursement.⁴

Second, plainly implicit in the Court's January 31 order was that CMS had an obligation to explain to states *what* that "previous guidance" was, particularly, since the agency had stripped the previous guidance from its website so that such guidance is recoverable only from cached website records.

Third, CMS, by its own account, has received "quite a bit of outreach" from state Medicaid offices asking about the effect of the injunction, yet has not re-posted the guidance. Instead, when asked about the injunction and "how best to interpret the direction of the court," it told the states in a February 14 All States Call "to consult with your own counsel" about the meaning of CMS's previous guidance.⁵ This contrasts sharply with CMS's response to other inquiries from state Medicaid agencies about the operation of federal rules related to the Public

¹ Slip. Op. at 36.

² Id.

³ Id.

⁴ Id. at 3, 22.

⁵ Tuesday, February 14, 2023 CMS COVID-19 Medicaid & CHIP All-State Call at pp. 3-4.

Health Emergency. With respect to another “hot question for states,” it noted only a week earlier that “we are working feverishly on getting specific guidance.”⁶

Fourth, as the Commissioner of Connecticut's Department of Social Services put it yesterday: “*Like every other state*, we are also awaiting guidance from CMS regarding the of [sic] compliance.” Attachment A (emphasis added). This was followed up with another response later yesterday stating that the Connecticut Medicaid agency, while working to reinstate individuals cut off under the IFR, is reinstating them retroactive only to February 1, 2023, and “will await any additional guidance from CMS, as might be forthcoming, regarding any retroactive application of the District Court’s order so that Connecticut’s actions remain in compliance with CMS guidance and federal expectations” Attachment B.

Fifth, the prior guidance was unambiguous: states were to restore persons erroneously stripped of Medicaid coverage “automatically if feasible,” and to do so retroactively to the date they were dropped from the Medicaid rolls. March 24, 2020 CMS Guidance, at page 5 (ECF #3-5, at 8).

Sixth, the agency's refusal to give this guidance has delayed relief to those entitled to restoration of coverage and even put at risk class members who may *newly* be dropped from coverage under the enjoined IFR. This failure on the part of CMS has so disturbed the Connecticut Congressional delegation that its members have written a February 21, 2023 letter to the head of CMS urging her “to immediately issue affirmative guidance to all the states that clarifies their responsibility to provide benefits to all members of the affected class of beneficiaries and to reinstate terminated members of the beneficiary class retroactive to the date of their termination.” Attachment C. “The states,” the letter added, “should also be affirmatively

⁶ Tuesday, February 7, 2014 [CMCS Medicaid and CHIP All State Calls - 2023 | Medicaid](#), at p. 13.

advised, per your existing guidance, to conduct these reinstatements automatically wherever possible, with no action being required by involuntarily terminated individuals to be so reinstated." *Id.*

Requested Relief

The agency's recalcitrance on these implicit obligations leaves the impression that it is hoping to run out the clock on the preliminary injunction. Accordingly, we urge the Court to issue clarification of the injunction to provide that the Defendant, through CMS, must immediately: (1) inform states by letter and in its next All-State Call that they may not drop anyone covered by the class certification order from Medicaid coverage during the preliminary injunction, (2) prominently re-post its prior guidance on the agency's website, (3) highlight in its new letter and in the next All-State Call where this information has been posted on its website and the obligation of states to restore coverage automatically where feasible and retroactively, and (4) remind states in the letter, the website and in the next All-State Call that their eligibility for supplemental Medicaid funding is contingent on compliance with the agency's previous guidance for implementing the FFCRA, including the duty to retroactively reinstate class members to their dates of termination.

Dated: February 28, 2023

Respectfully submitted,

/s/Sheldon V. Toubman

SHELDON V. TOUBMAN

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Fax: (202)572-9968

PLAINTIFFS' COUNSEL

Certificate of Service

I hereby certify that on February 28, 2023, a copy of the foregoing document was filed electronically and served by overnight delivery to anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by overnight delivery to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

s/Sheldon V. Toubman
Sheldon V. Toubman

Attachment A

From: [Woolston, William Gui](#)
To: [Sheldon Toubman](#)
Cc: [Hadler, Peter B.](#); [Antonetti, Matthew S](#); [Deborah Dorfman](#); [Reeves, Andrea](#)
Subject: RE: Implementation of Federal Court Order Partially Invalidating HHS Interim Final Rule in Carr v. Becerra
Date: Monday, February 27, 2023 5:20:14 PM
Attachments: [DRCT response -draft-.docx](#)

CAUTION: EXTERNAL SENDER.

Sheldon,

Please see a note, attached, with our reply.

Cheers,

Gui

From: Reeves, Andrea <Andrea.Reeves@ct.gov>
Sent: Monday, February 27, 2023 3:30 PM
To: Sheldon Toubman <sheldon.toubman@disrightsct.org>
Cc: Woolston, William Gui <William.Woolston@ct.gov>; Hadler, Peter B. <Peter.Hadler@ct.gov>; Antonetti, Matthew S <Matthew.S.Antonetti@ct.gov>; Deborah Dorfman <deborah.dorfman@disrightsct.org>
Subject: RE: Implementation of Federal Court Order Partially Invalidating HHS Interim Final Rule in Carr v. Becerra

Sheldon,

There is no basis to assume we will not be in compliance. We have never indicated that to any one or any entity.

Gui acknowledged your request and he and our team are formulating a response that is indeed forthcoming. Like every other state, we are also awaiting guidance from CMS regarding the of compliance. You will receive a response.

Andrea Barton Reeves

From: Sheldon Toubman <sheldon.toubman@disrightsct.org>
Sent: Monday, February 27, 2023 2:45 PM
To: Woolston, William Gui <William.Woolston@ct.gov>
Cc: Reeves, Andrea <Andrea.Reeves@ct.gov>; Antonetti, Matthew S <Matthew.S.Antonetti@ct.gov>; Deborah Dorfman <deborah.dorfman@disrightsct.org>
Subject: RE: Implementation of Federal Court Order Partially Invalidating HHS Interim Final Rule in Carr v. Becerra

EXTERNAL EMAIL: This email originated from outside of the organization. Do not click any links or open any attachments unless you trust the sender and know the content is safe.

Gui-

I did not hear back from you last week about implementation of the Court order and the previous CMS guidance reinstated by the order, which requires all states to promptly reinstate all class members retroactive to their dates of termination. If we do not hear from you by noon tomorrow, we will assume your agency is NOT reinstating the thousands of terminated Medicaid enrollee class members and will be bringing this non-compliance to the attention of other authorities.

Thank you for noting this.

Sheldon

Sheldon V. Toubman
Litigation Attorney
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he/him/his

Disability Rights Connecticut
846 Wethersfield Avenue
Hartford, CT 06114
www.disrightsct.org

From: Sheldon Toubman
Sent: Wednesday, February 22, 2023 9:49 AM
To: Woolston, William Gui <William.Woolston@ct.gov>
Cc: Reeves, Andrea <Andrea.Reeves@ct.gov>; Antonetti, Matthew S <Matthew.S.Antonetti@ct.gov>; Deborah Dorfman <deborah.dorfman@disrightsct.org>
Subject: RE: Implementation of Federal Court Order Partially Invalidating HHS Interim Final Rule in Carr v. Becerra

Thanks, Gui. But at this point I think it is reasonable to ask for more than just another acknowledgement of receipt from your agency, since the letter to you from CMS instructing that the previous pre-Interim Final Rule guidance has been reinstated per the *Carr* Court order was received on February 6th and our

th

letter was sent to you on February 9 . I also note that the CT Congressional delegation has weighed in on the need for all states to promptly reinstate *Carr* class members, retroactively to the date of termination, per the reinstated guidance. See attached letter dated yesterday from all Members addressed to CMS.

We request that you get back to us by the end of this week to indicate what your agency has done or will do to comply with the reinstated CMS guidance per the court order.

Thank you for your continued cooperation in this matter.

Sheldon

Sheldon V. Toubman
Litigation Attorney
Sheldon.toubman@disrightsct.org
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From: Woolston, William Gui <William.Woolston@ct.gov>
Sent: Tuesday, February 21, 2023 1:33 PM
To: Sheldon Toubman <sheldon.toubman@disrightsct.org>
Cc: Reeves, Andrea <Andrea.Reeves@ct.gov>; Antonetti, Matthew S <Matthew.S.Antonetti@ct.gov>; Deborah Dorfman <deborah.dorfman@disrightsct.org>
Subject: RE: Implementation of Federal Court Order Partially Invalidating HHS Interim Final Rule in Carr v. Becerra

CAUTION: EXTERNAL SENDER.

Sheldon,

As is my custom, I'm shooting you a quick email to acknowledge receipt.

More soon...

Gui

From: Sheldon Toubman <sheldon.toubman@disrightsct.org>
Sent: Tuesday, February 21, 2023 12:27 PM
To: Woolston, William Gui <William.Woolston@ct.gov>
Cc: Reeves, Andrea <Andrea.Reeves@ct.gov>; Antonetti, Matthew S <Matthew.S.Antonetti@ct.gov>; Deborah Dorfman <deborah.dorfman@disrightsct.org>
Subject: RE: Implementation of Federal Court Order Partially Invalidating HHS Interim Final Rule in Carr v. Becerra

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Gui-

I just wanted to follow up and check on the status of your agency reinstating all of the class members in this certified class action, retroactive to their respective dates of termination, as required by the court's order reactivating the previous guidance by CMS under the Families First Act -- including the duty to retroactively reinstate individuals erroneously terminated (here, because of CMS's rule issued in November 2020, now invalidated as to the members of the certified class).

Thank you for letting us know.

Sheldon

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Sheldon.toubman@disrightsct.org
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From: Woolston, William Gui <William.Woolston@ct.gov>
Sent: Thursday, February 9, 2023 7:44 PM
To: Sheldon Toubman <sheldon.toubman@disrightsct.org>
Cc: Reeves, Andrea <Andrea.Reeves@ct.gov>; Antonetti, Matthew S <Matthew.S.Antonetti@ct.gov>; Deborah Dorfman <deborah.dorfman@disrightsct.org>
Subject: RE: Implementation of Federal Court Order Partially Invalidating HHS Interim Final Rule in Carr v. Becerra

CAUTION: EXTERNAL SENDER.

Dear Sheldon,

I'm acknowledging receipt. I look forward to reviewing this letter.

~Gui

From: Sheldon Toubman <sheldon.toubman@disrightsct.org>
Sent: Thursday, February 9, 2023 7:40 PM
To: Woolston, William Gui <William.Woolston@ct.gov>
Cc: Reeves, Andrea <Andrea.Reeves@ct.gov>; Antonetti, Matthew S <Matthew.S.Antonetti@ct.gov>; Deborah Dorfman <deborah.dorfman@disrightsct.org>
Subject: Implementation of Federal Court Order Partially Invalidating HHS Interim Final Rule in Carr v. Becerra

EXTERNAL EMAIL: This email originated from outside of the organization. Do not click any links or open any attachments unless you trust the sender and know the content is safe.

Director Woolston-

Attached please find our letter concerning state Medicaid agency implementation of the Federal District Court's Order issued January 31, 2023 in the pending case of *Carr v. Becerra*, along with relevant supporting documents. Your agency was very responsive with respect to the implementation of the earlier preliminary injunction for the named plaintiffs, so we anticipate the same for all of the class members in Connecticut now that the nationwide class has been formally certified and preliminary injunctive relief has been granted to all of its members. We also appreciate your agency's cooperation throughout this litigation, which of course was directed not at state action but at the interpretation of the Families First Coronavirus Response Act which was

being imposed on it by HHS.

Thank you for your attention to this matter and, as noted, please let me know if you have any questions about this.

Sheldon

Sheldon V. Toubman
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Attachment B

Good afternoon Sheldon:

I am pleased to report that the Department of Social Services (DSS) has taken several affirmative measures to address CMS' guidance, dated February 6, 2023, in response to the District Court's January 31, 2023, order in *Carr v. Becerra*, No. 22-CV-0098 (D. Conn.). As of February 1, 2023, DSS has taken steps to stop the Medicaid termination of any class member currently on Medicaid who, prior to March 31, 2023, would no longer meet eligibility requirements for Medicaid but would otherwise be eligible for a Medicare Savings Program (MSP). DSS has also directed its IT contractors to engage in database report generation to identify any defined class member terminated from Medicaid, but continued on MSP, as a result of agency compliance with HHS/CMS' November 6, 2020, Interim Final Rule. That database report configuration and class member identification and verification is currently ongoing, with results and member identification anticipated to be completed within the next 7 to 10 days.

Once said class members are appropriately identified and verified, reinstatement shall be completed retroactive to February 1, 2023 without, to the greatest extent possible, a requirement that individuals affirmatively request to re-enroll. Said members will be sent notice of such reinstatement, provided the opportunity to disenroll, and advised of the upcoming redetermination process. Lastly, and as both you and Connecticut's Congressional delegation note, questions remain with respect to CMS' guidance regarding the District Court's preliminary injunction and potential retroactive application prior to issuance of the District Court's order on January 31, 2023. DSS will await any additional guidance from CMS, as might be forthcoming, regarding any retroactive application of the District Court's order so that Connecticut's actions remain in compliance with CMS guidance and federal expectations. It should be noted that awaiting any additional guidance regarding retroactive application to a date of prior termination shall not delay the reinstatement of class members to February 1, 2023 as noted above.

I trust this information is helpful.

Best regards,

Gui

Attachment C

Congress of the United States
Washington, DC 20510

February 21, 2023

Ms. Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services (CMS)
7500 Security Blvd
Baltimore, MD 21244

Dear Ms. Brooks-LaSure,

Recently, the U.S. District Court in Connecticut issued a nationwide preliminary injunction in a pending case against the U.S. Department of Health and Human Services (HHS), ordering HHS to stop enforcing an Interim Final Rule that had taken away Medicaid benefits from hundreds of thousands of older adults and people with disabilities. *Carr v. Becerra*, 3:22CV988 (MPS). This injunction provides that all states “must comply with federal [Medicaid] regulations” to continue to receive substantial federal Medicaid reimbursement (slip op. at 3, 22).

Critically, the order also required HHS to “reinstate its previous guidance with respect to these individuals” in the certified nationwide class (slip. op. at 36). That previous CMS guidance includes the March 24, 2020 guidance (referenced at slip op. 4) advising of the duty of states which have erroneously terminated individuals from Medicaid during the COVID-19 Public Health Emergency (PHE) to promptly reinstate them, retroactively, and to do so automatically whenever possible:

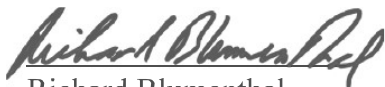
“States that want to qualify for the increased FMAP should make a good faith effort to identify and reinstate individuals whose coverage was terminated on or after the date of enactment for reasons other than a voluntary request for termination or ineligibility due to residency. At a minimum, states 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.”

Even prior to the January 31, 2023 court order, CMS’s post-Interim Final Rule guidance has provided for such automatic reinstatement where individuals have been erroneously terminated from Medicaid during the PHE, see January 6, 2021 COVID-19 FAQs for State Medicaid and CHIP Agencies (“Continuous Coverage” FAQ #2, at page 44).

We understand that some states have asked for further guidance from your agency concerning the reinstated guidance per the court order. We urge CMS to immediately issue affirmative guidance to all the states that clarifies their responsibility to provide benefits to all members of the affected class of beneficiaries and to reinstate terminated members of the beneficiary class retroactive to the date of their termination. The states should also be affirmatively advised, per your existing guidance, to conduct these reinstatements automatically wherever possible, with no action being required by involuntarily terminated individuals to be so reinstated. These reinstatements need to be completed before any terminations under the PHE unwinding begin.

Thank you for your prompt attention to this important request.

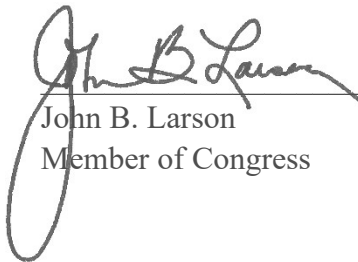
Sincerely,



Richard Blumenthal
United States Senate



Christopher Murphy
United States Senate



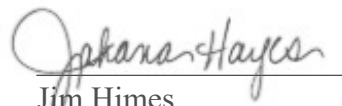
John B. Larson
Member of Congress



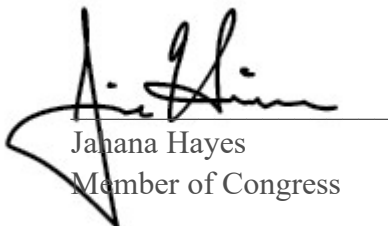
Joe Courtney
Member of Congress



Rosa DeLauro
Member of Congress



Jim Himes
Member of Congress



Jahana Hayes
Member of Congress

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

DEBORAH CARR, BRENDA MOORE,
MARY ELLEN WILSON,

Plaintiffs

v.

XAVIER BECERRA, SECRETARY,
UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Defendant

Civil Action No. 3:22-cv-988 (MPS)

March , 2023

**[PROPOSED] ORDER GRANTING PLAINTIFFS' EMERGENCY MOTION FOR
ENFORCEMENT OF PRELIMINARY INJUNCTION**

Upon review of Plaintiffs' Emergency Motion for Enforcement of Preliminary Injunction (ECF #), and upon conducting a status conference on March , 2023 in which the parties were able to set forth their views on the proposed relief contained therein, the Court GRANTS the motion and ORDERS as follows:

The Defendant, through the Centers for Medicare and Medicaid Services, must immediately: (1) inform states by letter and in its next All-State Call that they may not drop anyone covered by the class certification order from Medicaid coverage during the preliminary injunction, (2) prominently re-post its prior guidance on the agency's website, (3) highlight in its new letter and in the next All-State Call where this information has been posted on its website and the obligation of states to restore coverage automatically where feasible and retroactively, and (4) remind states in the letter, the website and in the next All-State Call that their eligibility for supplemental Medicaid funding is contingent on compliance with the agency's previous

guidance for implementing the Families First Coronavirus Response Act, including the duty to retroactively reinstate class members to their dates of termination.

Michael P. Shea, J.

Certificate of Service

I hereby certify that, on February 28, 2023, a copy of the foregoing document was filed electronically and served by overnight delivery to anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by overnight delivery to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

s/Sheldon V. Toubman
Sheldon V. Toubman