



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

RE: **Comments on CMS-9912-IFC; CMS 2020-0129-0002-RIN 1210-AB98**
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:

Below please find comments submitted 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” at 85 F.R. 71142, published November 6, 2020, on behalf of the Asian Pacific Institute on Gender-Based Violence (API-GBV). The API-GBV is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander and immigrant communities, and serves a national network of advocates; community-based service programs; federal agencies; national and state organizations; legal, health, and mental health professionals; researchers; and policy advocates from social justice organizations. API-GBV analyzes critical issues, promotes culturally relevant evidence-informed intervention and prevention, provides consultation, technical assistance and training; develops resources, conducts and disseminates research, and impacts systems change through administrative advocacy and policy analysis.

The Families First Coronavirus Response Act (FFCRA)¹, signed into law on March 18, includes an option for states to receive enhanced federal Medicaid funding. In exchange for the additional funds, states must agree to comply with maintenance of effort (MOE) protections. These protections help ensure individuals, including many Asian American and Pacific Islander (AAPI) and immigrant survivors of gender-based violence, eligible for Medicaid, are able to get and stay covered during the crisis and receive needed services. The FFCRA includes an explicit requirement to preserve enrollee’s existing benefits – both their enrollment in Medicaid overall, and the services for which they have been eligible.

¹ Families First Coronavirus Response Act, Public Law No. 116-127 (Mar. 18, 2020)

API-GBV 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 for individuals who are enrolled in Medicaid. These provisions could particularly have a negative impact on AAPI and immigrant survivors and their families.

Immigrants are essential workers, and many fulfill critical roles at the frontlines of the pandemic.² Our healthcare system in particular relies heavily on immigrant workers, who account for nearly one in five³ health care staff and are overwhelmingly people of color. For example, Filipino and Filipino American nurses are dying from COVID-19 at disproportionately high rates in California, accounting for more than 30 percent of the 205 U.S. nurses who have died, though the group makes up just 4 percent of the total nurse workforce.⁴

API-GBV also opposes permitting states to receive enhanced funding while refusing to cover COVID-19 vaccination for some Medicaid enrollees, which could significantly impact the ability of pregnant immigrant women enrolled in the Children's Health Improvement Program (CHIP) to obtain the COVID vaccine. API-GBV strongly recommends that CMS withdraw these provisions.

Reductions in Services

The IFR would allow states to change the amount, duration, and scope of Medicaid services. For example, when states faced budget constraints after the Great Recession, some states imposed 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 immigrant survivors with chronic illnesses and disabilities.

Access to Medicaid and other health care programs provide a critical lifeline for survivors of domestic violence, sexual assault, and human trafficking for treating the significant health consequences of abuse including: acute injury, chronic pain, sexually transmitted infections, gastrointestinal problems, diabetes, hypertension, and traumatic brain injury, among others.⁶

² J. Gelatt, *Immigrant Workers; Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable* (March 2020), Available at: <https://www.migrationpolicy.org/research/immigrant-workers-us-covid-19-response>

³ D. Renwick & S. Dubnow, *Many People of Color, Immigrants Among Over 1000 US Health Workers Lost to COVID*, (2020), Available at: <https://khn.org/news/many-people-of-color-immigrants-among-1080-us-health-workers-lost-to-covid/>

⁴ F. Kelliher, *California's Filipino American nurses are Dying from COVID-19 at Alarming Rates* (2020), Available at: <https://www.mercurynews.com/2020/10/04/californias-filipino-american-nurses-are-dying-from-covid-19-at-alarming-rates/>

⁵ Kaiser Family Foundation, *Moving Ahead Amid Fiscal Challenges: A Look at Medicaid Spending, Coverage and Policy Trends* (2011), Available at: <https://www.kff.org/wp-content/uploads/2013/01/8248.pdf#page=93>

⁶ M.J. Breiding, M.C. Black, GW Ryan, *Chronic Disease and Health Risk Behaviors Associated with*

Service providers report that Medicaid is valuable to the recovery of survivors as it is a benefit many survivors cannot afford, with 76% of providers reporting that healthcare assistance consistently helps the survivors with whom they work. New CDC data found the lifetime per-victim cost of intimate partner violence was \$103,767 for women victims with 59% going to medical costs.⁷ It is clear that Medicaid coverage helps survivors access care: when looking at trauma care alone, Kaiser Family Foundation found that Medicaid increased coverage of individuals with traumatic injuries for acute and post-acute care and protects against unexpected medical bills.⁸ Survivors of gender-based violence are also more likely than others to need health, mental and behavioral health services because of increased risk for suicide, depression, anxiety, posttraumatic stress disorder, and substance abuse. Ensuring they can get the care they need, when they need it, can improve their health and well-being for the rest of their lives.

Increased Cost-Sharing

The IFR would allow states to increase cost-sharing, which would also harm immigrants. Research over the last four decades has consistently concluded that the imposition of cost-sharing on low-income populations reduces both necessary and unnecessary care and correlates with increased risk of poor health outcomes.⁹ Further, the pandemic increases the harm caused by cost-sharing. The pandemic has significantly increased financial hardship among low-income families and AAPI families making it less likely that they will be able to afford to pay additional cost-sharing.¹⁰

In particular, increased cost sharing will have significant impacts on immigrant survivors of domestic and sexual violence. Sufficient economic resources may mean the difference between a survivor being able to leave or staying in an abusive relationship. The Centers for Disease Control has concluded that improving financial security for individuals and families can help

Intimate Partner Violence-18 U.S. States/Territories, 18 *Annals of Epidemiology* 2008, 538-44 (2005)

⁷ C. Peterson, M.C. Kearns, W.L. McIntosh, L.F. Estefan, C. Nicolaidis, K.E. McCollister, A. Gordon, and C. Florence, *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults*, 55 *American Journal of Preventative Medicine* 4, 433-444 (2018). DOI: 10.1016/j.amepre.2018.04.049.

⁸ S. Goodman, *The Difference Between Surviving and Not Surviving: Public Benefits Programs and Domestic and Sexual Violence Victims' Economic Security* (2018), at 11, available at <https://vawnet.org/material/difference-between-surviving-and-not-surviving-public-benefits-programs-anddomestic-and>

⁹ D. Machledt & J. Perkins, *Medicaid Premiums and Cost Sharing* (2014), available at <https://healthlaw.org/resource/medicaid-premiums-and-cost-sharing/>

¹⁰ See, S. Horsley, 'Overlooked': Asian American Jobless Rate Surges But Few Take Notice. *NPR*. October, 2020. Retrieved from <https://www.npr.org/2020/10/01/918834644/overlooked-asian-american-jobless-rate-surges-but-few-take-notice?>; H Bernstein, J. Gonzalez, D. Gonzalez, & J. Jagannath, *Immigrant-Serving Organizations' Perspectives on the COVID-19 Crisis*, (August 2020), Available at: https://www.urban.org/sites/default/files/publication/102775/immigrant-serving-organizations-on-the-covid-19-crisis_0_0.pdf

reduce and prevent intimate partner violence.¹¹ Economic instability can exacerbate the physical health, mental health, and financial impacts of domestic violence and sexual assault due to, for example, lack of access to affordable counseling and health services, transportation, and/or legal assistance.¹² Access to economic resources and other safety net benefits, such as reduced Medicaid cost-sharing, therefore play a pivotal role in a victim's ability to escape and overcome domestic violence and sexual assault, helping victims afford the basics (such as food, housing, and healthcare) and rebuild their lives after violence.

General Eligibility Exceptions

Additionally, the IFR authorizes states to terminate coverage for individuals that should be protected under the FFRCA. This violates Congress' intent and should be rescinded. Under the Immigrant Children's Health Improvement Act (ICHIA) option, states can cover lawfully present immigrant children and pregnant women in Medicaid and CHIP without a 5 year wait. However, once these children turn 21 and these women finish their 60-day postpartum period, the IFR requires states to restrict their eligibility to only services covered through emergency Medicaid.

CMS is essentially saying that the MOE does not apply to these immigrants – an exclusion that is particularly troubling because immigrant communities have been disproportionately affected by COVID-19¹³. Depending on the state, COVID-19 testing and treatment may not be covered under emergency Medicaid¹⁴. Furthermore, affected immigrant survivors will not have coverage for the management of chronic conditions, worsening health outcomes¹⁵ and potentially increasing the risk of death from COVID-19.¹⁶

¹¹ Centers for Disease Control and Prevention. *Costs of Intimate Partner Violence Against Women in the United States*, (2003) Available at: <https://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>

¹² See, e.g., J.L. Postmus, S.B. Plummer, S. McMahon, N.S. Murshid, & M.S. Kim, *Understanding Economic Abuse in the Lives of Survivors*. 27 *Journal of Interpersonal Violence* 3,411–430 (2012); A. Adams, C. Sullivan, D. Bybee, & M. Greeson, *Development of the Scale of Economic Abuse*. 13 *Violence Against Women*, 563-588 (2008).

¹³ C.D.C., *COVID-19 Case Investigation and Contact Tracing among Refugee, Immigrant, and Migrant (RIM) Populations; Important Considerations for Health Departments* (Dec.4, 2020) Available at: <https://www.cdc.gov/coronavirus/2019-ncov/php/rim-considerations.html>

¹⁴ KFF, *Medicaid Emergency Authority Tracker: Approved State Actions to Address COVID-19* (2020), Available at: <https://www.kff.org/medicaid/issue-brief/medicaid-emergency-authority-tracker-approved-state-actions-to-address-covid-19/>

¹⁵ K. Wagnerman, *Reviewing the Evidence on the Value of Health Insurance* (2017), Available at: <https://ccf.georgetown.edu/2017/06/23/reviewing-the-evidence-on-the-value-of-health-insurance/>

¹⁶ E.g., L. Zhu et al, Association of Blood Glucose Control and Outcomes in Patients with COVID-19 and Pre-existing Type 2 Diabetes, *Cell Metabolism* 31, 1068-1077 (June 2, 2020), Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7252168/pdf/main.pdf>; J. Tesoriero et.al, *Elevated COVID-19 Outcomes Among Persons Living with Diagnosed HIV Infection in New York State: Results from a Population-level Match of HIV, COVID-19, and Hospitalization Databases*, medRxiv 2020, Available at: <https://www.medrxiv.org/content/10.1101/2020.11.04.20226118v1.full>

API-GBV also opposes the other eligibility exceptions under the maintenance of effort requirement.

Valid Enrollment

Under the IFR, CMS narrows the definition of “valid enrollment” to exclude some enrollees who should be considered properly enrolled and covered by the protections of the FFRCA.

CMS states that individuals eligible by presumptive eligibility are not “validly enrolled” for the purposes of the continuous coverage provision, on the theory that these individuals “have not received a determination of eligibility under the state plan.” However, the Medicaid statute consistently describes presumptive eligibility as (for example, under hospital presumptive eligibility) “*determining*, on the basis of preliminary information, whether any individual is eligible for medical assistance...” (emphasis added).¹⁷ CMS’s attempt to distinguish presumptively eligible populations is therefore inconsistent with the Medicaid statute. Moreover, pandemic-related circumstances are making it extremely difficult for many people to complete a full Medicaid application before their presumptive eligibility period ends.

For survivors of gender-based violence, presumptive eligibility would help those whose abusers may have confiscated their paperwork or documents in order to further manipulate, isolate, coerce, and punish them and prevent them from escaping or seeking help. A survivor might have to risk their safety trying to retain or regain control over documents or belongings that could serve to establish or renew eligibility for benefits.¹⁸ The agency and states should be expanding presumptive eligibility for everyone, including immigrants, during a pandemic.

Availability of COVID-19 Vaccines

Immigrants have been one of the groups hardest hit by the pandemic,¹⁹ with millions serving as frontline essential workers and often ineligible for many public programs or COVID relief. Public health experts agree that widespread use of a safe and effective preventive vaccine will be critical to curb this deadly pandemic.

¹⁷ 42 U.S.C. § 1396(a)(47)(B)

¹⁸ See, e.g., Anne L. Ganley, *Health Resource Manual* 37 (2018); Margaret E. Adams & Jacquelyn Campbell, *Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality*, 11 *Women’s Health & Urb. Life* 15, 21-24 (2012); Evan Stark, *Coercive Control, How Men Entrap Women in Personal Life*, New York, Oxford University Press (2007).

¹⁹ H. Bernstein, et al, note 10, *supra*.

Although no COVID-19 vaccine had yet been finally approved in the U.S., Congress recognized the vital importance of coverage and access to COVID-19 vaccines when it enacted the FFCRA. Congress provided that state Medicaid programs 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, CMS is inexplicably seeking to limit access to COVID-19 vaccines, allowing states to exclude coverage of vaccinations. To date, states that operate CHIP separate from their Medicaid programs have covered vaccines for all CHIP enrollees. This includes many pregnant immigrants who may obtain CHIP eligibility through their state's adoption of the Immigrant Children's Health Improvement Act (ICHIA) option or through coverage of the fetus of a pregnant immigrant. Yet the IFR says that states do not have to cover vaccines for pregnant and post-partum women in separate CHIP programs. If a state chose to do this, a very vulnerable population could not get a critical vaccine in the midst of a public health emergency.

Use of an Interim Final Rule

API-GBV does not believe CMS should have implemented these policies – which directly and materially impact access to health care for tens of millions of enrollees during a health pandemic – as an interim final rule. There is no significant exigency associated with a 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 harms to many immigrants and their families. These policies will cause substantial harms before HHS has time to finalize the rule – harms that could have been avoided had CMS solicited public comments, before the rule took effect.

Other Provisions

In addition to the provisions mentioned above, API-GBV also opposes the changes permitting states to:

- increase utilization management;
- modify the post-eligibility treatment of income rules;
- move enrollees from one tier of benefits in Medicaid to another tier;
- terminate coverage for people during the pandemic;
- determine individuals ineligible due to procedural issues; and
- allow modifications to the Section 1332 waiver process to reduce public input.

Conclusion

This is an unprecedented pandemic, and Congress took unprecedented measures under the Families First Coronavirus Response Act to ensure all Medicaid enrollees, including immigrants and immigrant survivors in particular, can access the services they need. HHS' IFR flies in the face of the law, and would dramatically impact immigrants and their families at a time when health care is more important than ever. API-GBV strongly opposes the discussed provisions of the IFR, and urges HHS to withdraw these provisions immediately. Thank you for the opportunity to comment on this important issue. Please contact me if you have any questions or concerns relating to these comments. Thank you.

Respectfully submitted,

**ASIAN PACIFIC INSTITUTE ON
GENDER-BASED VIOLENCE**



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