Policy Recommendations for the Biden Administration: Address Disparities and Inequities

Medicare Rights urges the administration to address disparities and inequities in order to improve health care and coverage for all.

Medicare has long been a powerful tool to reduce injustice and inequality. The program played a pivotal role in "forc[ing] the desegregation of every hospital in America virtually overnight" and continues to offer coverage to all who qualify.[1] But inequities remain. Every day, we see the destructive and persistent effects of institutionalized racism, individual bias, and systemic oppression. Medicare Rights welcomes the Biden administration's commitment to addressing these problems directly, in ways that advance equity, justice, and access to care—including by strengthening Medicare, Medicaid, and the Affordable Care Act.

Prohibit Discrimination in Health Care

Reverse Harmful Rules and Orders. The interdependent nature of the nation's health care system means that improving coverage and care will not only help individual people and programs, but the system as a whole. The Biden administration must roll back discriminatory policies that perpetuate or widen health disparities and inequities in all programs.

- **Reverse Rules that Permit or Promote Discrimination**. The Trump administration weakened important health care nondiscrimination protections for people with limited English proficiency (LEP) and LGBTQ+ people,[2] and has attempted to roll back rules prohibiting discrimination based on sex, gender identity, sexual orientation, and religion within HHS-funded entities.[3] These harmful changes detrimentally limit care for older adults and people with disabilities of all ages. We ask the Biden administration to rescind these rules as quickly as possible, and to promote access to high-quality care that respects the worth and dignity of all people. Additionally, we ask HHS to engage in new rulemaking that builds on and strengthens the prior interpretation of Section 1557 of the Affordable Care Act[4] and request that the Office of Civil Rights (OCR) clearly

[1] Steve Sternberg, "Desegregation: The Hidden Legacy of Medicare" (July 29, 2015), https://www.usnews.com/news/articles/2015/07/30/desegregation-the-hidden-legacy-of-medicare.
[2] CMS Final Rule, "Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority" (June 2020), https://www.federalregister.gov/documents/2020/06/19/2020-11758/nondiscrimination-in-health-and-health-education-programs-or-activities-delegation-of-authority.
[3] HHS Proposed Rule, "Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation" (November 2019), https://www.federalregister.gov/documents/2019/11/19/2019-24385/office-of-the-assistant-secretary-for-financial-resources-health-and-human-services-grants.
[4] Medicare Rights Center, "Comments on Nondiscrimination in Health and Health Education Programs or Activities" (August 13, 2019), http://medicarerights.org/pdf/081319-health-care-rights-law-comments.pdf.

vacate its religious conscience rules to ensure that non-discrimination mandates may be enforced.[5]

- **Withdraw Proposed Changes to Social Security Disability Reviews**. The Social Security Administration (SSA) should withdraw its pending rules that would adopt stricter standards for SSI Continuing Disability Reviews (CDRs).[6] There is no acceptable policy rationale for these changes; they would simply make it harder for people with disabilities to obtain and maintain benefits and could limit Medicaid eligibility.[7]

- **Rescind Public Charge Rules**. A new public charge rule greatly expands the government's ability to refuse green cards or visas for legal immigrants who are deemed likely to use public programs including Medicaid, food assistance, and public housing.[8] These changes make it much more difficult for immigrants—especially older adults and people with disabilities—to pursue citizenship, reunite with their families, and access the supports they need to thrive. On our Helpline, we have heard from people that the rule has had a chilling effect, frightening individuals and families away from needed health care and public services even if they are not subject to it. This is dangerous at any time, and even more so during a pandemic. HHS should collaborate with the Department of Homeland Security (DHS) to immediately rescind the public charge rule and other discriminatory policies.[9]

Enforce Prohibitions on Discrimination. In many cases, reversing damaging policies is not enough. Additional, new guidance is needed to best clarify and enforce anti-discrimination responsibilities and practices across health programs.

- **Prohibit Discrimination, Including Rationing of Medical Care, Based on Age, Disability, or Other Cultural Characteristics**. In new guidance, we urge the Biden administration to clearly prohibit entities that contract with Medicare and Medicaid from denying medical care or services based on discriminatory grounds. The guidance should specify what constitutes unlawful discrimination on the basis of age, disability, or health condition; race, color, or ethnicity; national origin or English proficiency; sex or gender identity; sexual orientation; and religion in HHS-funded programs.

- **Clarify Nondiscrimination Authorities and Enforcements**. Additionally, we recommend that OCR remind contracting entities of their obligation to prohibit discrimination in the allocation of health care resources in accordance with the Americans with Disabilities Act of 1990,[10] Section

[5] Medicare Rights Center, "Comments on Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" (March 27, 2018), https://www.medicarerights.org/pdf/032718-conscience-rights-comments.pdf.
[6] Medicare Rights Center, "Comments on Rules Regarding the Frequency and Notice of Continuing Disability Reviews" (January 31, 2020), https://www.medicarerights.org/pdf/013120-SSDI-SSI-CDR-comments.pdf.
[7] MaryBeth Musumeci, *et al.*, "Medicaid Financial Eligibility for Seniors and People with Disabilities: Findings from a 50-State Survey," Kaiser Family Foundation (June 14, 2019), https://www.kff.org/medicaid/issue-brief/medicaid-financial-eligibility-for-seniors-and-people-with-disabilities-findings-from-a-50-state-survey/.
[8] 84 Fed. Reg. 41282 (August 14, 2019)
[9] Medicare Rights Center, "Comments on Proposed Rulemaking: Inadmissibility on Public Charge Grounds" (December 10, 2018), https://www.medicarerights.org/pdf/121018-2019-dhs-public-charge-rule-comments.pdf.
[10] *See* 42 U.S.C. 12101 *et seq*.

504 of the Rehabilitation Act of 1973,[11] the Age Discrimination Act of 1975,[12] and Section 1557 of the ACA.[13]

- **Reinforce Americans with Disabilities Act (ADA) Protections**. Some insurers may be relying on discriminatory methodologies to make benefit and reimbursement decisions, causing people with disabilities to be denied medical care.[14] Such discrimination is contrary to Title II of the ADA, which prohibits not only discrimination by any public entity, but also exclusion from the benefits of services, programs, or activities of any public entity. These provisions are applicable across the private and public sectors, including for insurance coverage and for programs administered by state and local governments. We ask that OCR issue guidance clarifying that the use of discriminatory assessments is not lawful under the ADA for state-run programs or the private market.

- **Collect Comprehensive Data**. The administration should collect robust data in a non-invasive way, across all health programs, in order to ensure the provision of appropriate, non-discriminatory care and coverage.

Restore and Improve Medicaid

Restore Medicaid Programmatic Integrity. Medicaid is a critical source of coverage for many Americans, including over 12 million people with Medicare.[15] It has long been associated with a range of positive health behaviors and outcomes, such as increased access to care; improved self-reported health status; higher rates of preventive health screenings; lower likelihood of delaying care because of costs; decreased hospital and emergency department utilization; and decreased mortality rates.[16] We urge the Biden administration to protect and strengthen the program.

- **Recall Medicaid Guidance Targeting State Funding and Reverse Waiver Approvals**. The Biden administration must rescind the January 2020 "Healthy Adult Opportunity Initiative" guidance and clarify its non-application.[17] Doing so is necessary to prevent states from using block grants, per-capita caps, and eligibility restrictions to cut Medicaid rolls and coverage. The administration must also reverse state waivers that were approved under this policy, like the "TennCare" application, which if left in place will lead to reductions in access to care for older adults and people with disabilities.[18]

- **Rescind Policies Burdening Medicaid Recipients**. CMS guidance released in January 2018, "Work and Community Engagement Requirements in Medicaid," allows states to mandate work

[11] *See* 29 U.S.C. 794
[12] *See* 42 U.S.C. 6101 *et seq*.
[13] *See* 42 U.S.C. 18116
[14] National Council on Disability, "Quality-Adjusted Life Years and the Devaluation of Life with Disability" (November 2019), https://ncd.gov/sites/default/files/NCD_Quality_Adjusted_Life_Report_508.pdf.
[15] Centers for Medicare & Medicaid Services, "People Dually Eligible for Medicare and Medicaid" (March 2020), https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/Downloads/MMCO_Factsheet.pdf.
[16] Robert Wood Johnson Foundation, "Medicaid's Impact on Health Care Access, Outcomes and State Economies" (February 1, 2019), https://www.rwjf.org/en/library/research/2019/02/medicaid-s-impact-on-health-care-access-outcomes-and-state-economies.html#:~:text=Of%20all%20types%20of%20health,and%20taxes%20paid%20as%20adults.
[17] Centers for Medicare & Medicaid Services, "State Medicaid Director Letter, RE: Healthy Adult Opportunity" (January 30, 2020), https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/smd20001.pdf.
[18] Medicare Rights Center, "Comments on TennCare Demonstration" (December 27, 2019), https://www.medicarerights.org/policy-documents/comments-tenncare-demonstration-amendment-42.

or other community engagement activities as a condition of Medicaid eligibility.[19] These damaging requirements are administrative obstacles that prevent people from accessing needed care. As such, they have been found by several courts to be contrary to the purpose of the Medicaid program.[20] Yet, CMS has continued to approve these waivers, allowing states to put their residents at risk.[21] The Biden administration must correct this by rescinding the 2018 guidance, rejecting any pending or future waiver applications that seek to implement Medicaid work requirements, remedying or withdrawing approval of existing waivers, and supporting federal legislation that would clarify states' inability to impose such burdens.

- **Reverse Policies that Cut Benefits**. In recent years, HHS has approved 1115 waivers that sanction state efforts to increase out-of-pocket costs for Medicaid enrollees and limit their coverage. These policies—including those that eliminate retroactive eligibility, allow states to charge premiums coupled with lockouts, and require more frequent eligibility redeterminations—must not be permitted to continue.[22] Such provisions create barriers to care, undercutting Medicare's core protections and primary purpose.

- **Revoke Changes to Medicaid Maintenance of Effort (MOE) Requirements**. The Families First Coronavirus Response Act (FFCRA) authorized a temporary 6.2% federal medical assistance percentage (FMAP) increase for states that meet certain MOE conditions.[23] CMS originally interpreted those obligations as precluding states from maneuvering people within Medicaid tiers. But the agency recently, and starkly, reversed itself in the fourth COVID-19 Interim Final Rule (IFC).[24] Under the new policy, states may move people from one Medicaid eligibility category to another and remain in compliance with the FFCRA MOE, even if those changes restrict the enrollee's benefits or increase their costs. We oppose this deeply flawed reinterpretation and urge the administration to reverse course.[25]

- **Promote Continuous Medicaid Eligibility**. Many states have made enrolling in or maintaining Medicaid coverage unnecessarily difficult, leading to churn as individuals and families get coverage, miss an arbitrary deadline or filing, lose coverage, and then, often, regain it.[26] This cycle burdens and costs both individuals and providers, and appears designed solely to make it difficult for people to access needed coverage. We ask the Biden administration to work with states to promote a reduction of churn through fewer and more streamlined determination and redetermination processes and annual continuous eligibility.

---

[19] Centers for Medicare & Medicaid Services, "State Medicaid Director Letter, RE: Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries" (January 11, 2018), https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf.
[20] Gresham v. Azar (February 14, 2020), https://www.cadc.uscourts.gov/internet/opinions.nsf/DDBA611EB31A1A218525850E00580F2D/$file/19-5094%20-%201828589.pdf.
[21] Centers for Medicare & Medicaid Services, "Nebraska 1115 Waiver Approval Letter" (October 20, 2020), https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ne-hha-ca.pdf.
[22] Paul Shafer, *et al.*, "Medicaid Retroactive Eligibility Waivers Will Leave Thousands Responsible For Coronavirus Treatment Costs" (May 8, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200506.111318/full/.
[23] Families First Coronavirus Response Act, 134 STAT. 208, Pub. Law 116-127 Sec. 6008, (March 18, 2020)
[24] Centers for Medicare & Medicaid Services, "[CMS-9912-IFC] Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency" (November 11, 2020), https://www.federalregister.gov/documents/2020/11/06/2020-24332/additional-policy-and-regulatory-revisions-in-response-to-the-covid-19-public-health-emergency.
[25] Medicare Rights Center, "Comments on Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency" (January 4, 2020), https://www.medicarerights.org/pdf/010421-comments-covid-ifr.pdf.
[26] Emmett Ruff and Eliot Fishman, "The Return of Churn: State Paperwork Barriers Caused More Than 1.5 Million Low-Income People to Lose Their Medicaid Coverage in 2018" (April 16, 2019), https://familiesusa.org/resources/the-return-of-churn-state-paperwork-barriers-caused-more-than-1-5-million-low-income-people-to-lose-their-medicaid-coverage-in-2018/.

Ensure Universal Access to Coverage

Protect the Affordable Care Act (ACA). As the COVID-19 public health emergency continues to reveal, the need for health care can arise at any moment and may be the difference between life and death. People without comprehensive health coverage may delay or forgo care, worsening their own and public health outcomes. Those who do seek treatment may face extreme financial hardships, impacting patient, program, and taxpayer costs. The ACA has a critical role in improving access to affordable coverage and care. The Biden administration must fortify the health law against all threats.

- **Safeguard the Affordable Care Act**. The administration must staunchly defend the Affordable Care Act in court and work with Congress to render *California v. Texas* moot.

- **Reverse Policies Promoting non-ACA Compliant Health Plans**. Recent rules have expanded the availability of insurance plans that are not required to comply with the ACA's consumer protections and coverage requirements. These plans can deny coverage for pre-existing conditions, place limits on care, offer benefit packages that exclude critical services. Such schemes threaten to weaken public health, damage insurance markets, and undermine individual health and economic security.[27] We ask the Biden administration to immediately reverse all changes that have made short-term[28] and association health plans[29] more widely available. Future rulemaking should focus on bolstering coverage and consumer protections within these policies.

- **Restore Weakened Affordable Care Act Standards**. In 2018, the Trump administration released guidance reinterpreting the ACA's Section 1332 waivers, encouraging states to pursue changes that could undermine access to comprehensive coverage and care.[30] The Notice of Benefit and Payment Parameters (NBPP) for 2022[31] seeks to codify that guidance.[32] We urge the Biden administration to reject this approach, by rescinding the regulatory language and the underlying State Relief and Empowerment Waivers guidance.

Strengthen the Marketplace and Medicaid. From expanding affordable care to preventing discrimination based on health status, the ACA made significant improvements to the nation's health care infrastructure. We ask the administration to build on the law's successes to further enhance enrollment, access, and affordability.

- **Promote Medicaid Expansion**. Medicaid expansion improves individual and public health—addressing social determinants, diminishing disparities, and improving coverage and access to

[27] "Short-Term, Limited-Duration Insurance," 83 Fed. Reg. 38212; "Certain Medical Care Arrangements," 85 Fed. Reg. 35398.
[28] Medicare Rights Center, "Comments on Short-Term, Limited-Duration Insurance" (April 23, 2018), https://www.medicarerights.org/pdf/042318-comments-cms-9924-p.pdf.
[29] Medicare Rights Center, "Comments on Definition of 'Employer' under Section 3(5) of ERISA—Association Health Plans" (March 6, 2018), https://www.medicarerights.org/pdf/Medicare-Rights-DOL-AHP-NPRM-comments.pdf.
[30] Centers for Medicare & Medicaid Services, "[CMS–9936–NC] State Relief and Empowerment Waivers" (October 24, 2018), https://www.govinfo.gov/content/pkg/FR-2018-10-24/pdf/2018-23182.pdf.
[31] Centers for Medicare & Medicaid Services, "[CMS-9914-P] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022 and Pharmacy Benefit Manager Standards; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations" (November 24, 2020), https://www.cms.gov/files/document/cms-9914-p.pdf.
[32] Medicare Rights Center, "Comments on Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022 and Pharmacy Benefit Manager Standards; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations" (December 29, 2020), https://www.medicarerights.org/pdf/122920-comments-notice-benefit-payment-parameters-2022.pdf.

care—while helping to stabilize state budgets.[33] The Biden administration must do all it can to encourage states that have not yet expanded Medicaid to do so.

- **Increase and Expand Marketplace Subsidies**. We strongly urge working with Congress to make ACA plans more affordable, including by increasing Marketplace tax credits, fixing the "subsidy cliff," and easing access to coverage for families whose employer-based insurance is unaffordable.

- **Ensure Access to Healthcare.gov**. States must maintain strong ACA standards to ensure residents have access to coverage. The Notice of Benefit and Payment Parameters (NBPP) for 2022[34] and Georgia's approved "Georgia Access Model"[35] would do precisely the opposite. The waiver, and subsequent rule, permit states to deny their residents access to HealthCare.gov as a one-stop shop for unbiased health insurance information and enrollment and force them to rely on private plan and broker sites instead. The NBPP also further reduces Healthcare.gov user fees, which help finance the Marketplace and its consumer safeguards. We support swift action to terminate these harmful policies, as well as a reversal of the Trump administration's 2018 user fee cuts.

- **Restore Navigator Funding and Standards**. We urge increasing funding for navigator services for Healthcare.gov states to 2016 levels, at a minimum, in order to reverse recent cuts. Similarly, we support restoring the minimum number of navigator programs in each federal Marketplace state to two, along with the requirement that navigators maintain a physical presence in their service area.

- **Align Enrollment Periods**. We encourage the Biden administration to ease Marketplace enrollment by aligning the annual open enrollment period start date with that of Medicare's Annual Coordinated Election Period (October 15) and allowing both to run through December 15, and by shifting Medicare's General Enrollment Period to this fall timeline.

- **Strengthen Guardrails for Online Brokers**. In 2017, the Trump administration reduced standards for web brokers that sell Marketplace and non-ACA compliant plans.[36] Recent investigations found that some of these broker sites did not correctly screen for Medicaid eligibility or display plan information in non-biased ways.[37] We recommend tightening both standards and oversight, to ensure that web-broker sites adhere to the same consumer protections and information requirements as Healthcare.gov.

---

[33] Hailey Mensik, "Medicaid expansion key indicator for rural hospitals' financial viability" (June 2, 2020), https://www.healthcaredive.com/news/medicaid-expansion-rural-hospitals-health-affairs/579005/ and Jonathan Gruber, *et al*., "Paying for Medicaid—State Budgets and the Case for Expansion in the Time of Coronavirus" (June 11, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2007124.

[34] Centers for Medicare & Medicaid Services, "[CMS-9914-P] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022 and Pharmacy Benefit Manager Standards; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations" (November 24, 2020), https://www.cms.gov/files/document/cms-9914-p.pdf.

[35] Medicare Rights Center, "Comments on Georgia's modified State Relief and Empowerment Waiver proposal under Section 1332 of the Affordable Care Act (ACA)" (September 16, 2020), https://www.medicarerights.org/pdf/091620-comments-georgia-proposed-1332-waiver.pdf.

[36] Centers for Medicare & Medicaid Services, "The Centers for Medicare and Medicaid Services (CMS) announces streamlined direct enrollment process for consumers seeking Exchange coverage" (May 17, 2017), https://www.cms.gov/newsroom/press-releases/centers-medicare-and-medicaid-services-cms-announces-streamlined-direct-enrollment-process-consumers.

[37] Tara Straw, "Direct Enrollment" in Marketplace Coverage Lacks Protections for Consumers, Exposes Them to Harm" (March 15, 2019), https://www.cbpp.org/research/health/direct-enrollment-in-marketplace-coverage-lacks-protections-for-consumers-exposes.