A man with a beard and glasses and a woman are sitting at a desk, looking at a laptop. There is a white coffee cup on the desk. The background is a blurred office setting. A thin yellow vertical line is on the right side of the image, ending in a small yellow square.

Congress's Medicaid funding increase creates massive legal uncertainty for states during the COVID-19 crisis

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KEY FINDINGS

1



STATES THAT RECEIVE COVID-19
MEDICAID FUNDING CANNOT REMOVE
INELIGIBLE ENROLLEES.

2



THE MEDICAID STATUTE PROHIBITS FUNDING
FOR INELIGIBLE ENROLLEES, CREATING LEGAL
UNCERTAINTY OVER FFCRA REQUIREMENTS.

3



LEGAL UNCERTAINTY COMES AT A TIME
WHEN STATES CAN LEAST AFFORD IT.

BOTTOM LINE:

CONGRESS SHOULD ALLOW STATES TO RECEIVE COVID-19
FUNDING WITHOUT SACRIFICING PROGRAM INTEGRITY.

Overview

On March 18, 2020, Congress passed the Families First Coronavirus Response Act (FFCRA) as part of the federal government's response to the COVID-19 public health emergency.¹ Section 6008 of the FFCRA temporarily increases the Federal Medical Assistance Percentage (FMAP)—the portion of Medicaid costs paid by the federal government to states—by 6.2 percent.² The FMAP increase is expected to provide states with an additional \$9 billion to 10 billion in Medicaid funding per quarter.³

This extra funding comes with major strings attached. In order to receive the FMAP bump, states must meet several conditions, such as not removing ineligible enrollees from the program.⁴ However, these misguided restrictions also create significant legal uncertainty, at a time when states can least afford it.

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States that receive COVID-19 Medicaid funding cannot remove ineligible enrollees

In exchange for the additional Medicaid funding, states must agree not to remove individuals who are either currently enrolled in Medicaid or will enroll during the declared emergency period unless they request their cases be cancelled or they move out of state.⁵ In other words, to receive this additional funding, states must provide continuous Medicaid coverage to **every current and incoming enrollee**—including individuals that are ineligible. The Centers for Medicare and Medicaid Services (CMS) has already issued guidance confirming that states must provide this continuous coverage notwithstanding normal requirements and procedures to disenroll ineligible beneficiaries.⁶

This condition creates several problematic legal conflicts at both the state and federal level. Many states, for example, have laws requiring their Medicaid agencies to remove ineligible enrollees on a regular basis.⁷⁻¹⁵ Considering that states often report that more than 30 percent of cases reviewed at redetermination are cancelled, and enrollees' circumstances frequently change throughout the year, this is a sensible approach.¹⁶ But these states are being asked to make an impossible choice: ignore state laws and keep ineligible enrollees on the program—crowding out resources for the truly needy—or forgo the extra funding altogether.

If that were not bad enough, sloppy drafting in FFCRA has created massive legal uncertainty over whether states can receive any reimbursement for the ineligible individuals they are forced to keep on the program.



The Medicaid statute prohibits funding for ineligible enrollees, creating legal uncertainty over FFCRA requirements

Congress's tool to provide Medicaid funding—FMAP—is narrowly defined, as is the “medical assistance” it may reimburse. As federal courts have explained, FMAP is a “separate term of art with its own definition” that limits its uses.¹⁷ That definition is tied to a specific formula which, in turn, is limited to what constitutes “medical assistance” under the statute.¹⁸

“Medical assistance” is defined as the payment for some or all of the treatment for individuals who meet certain eligibility standards.¹⁹ **Providing benefits for individuals who are not eligible under the statute does not qualify as “medical assistance.”** This means that states are not legally entitled to federal funding for ineligible enrollees.

These statutory definitions may tie the hands of federal officials seeking to disburse the extra COVID-19 aid. For example, CMS is explicitly barred from reimbursing payments made on behalf of ineligible enrollees when those payments exceed three percent of Medicaid spending.²⁰ **States also already face penalties for payments made on behalf of ineligible individuals under the Medicaid statute.**²¹ In the few states that have adopted continuous eligibility rules, CMS has reduced federal matching funds to these states in order to account for individuals who are ineligible.²²⁻²³

States also often use various waivers during natural disasters or declared emergencies to receive funding not covered under existing Medicaid state plan amendments.²⁴ However, these types of waivers do not explicitly give states the authority to shut down their program integrity efforts, nor do they absolve them of the responsibility to remove ineligible individuals.

Absent binding precedent and greater clarification from Congress, states can only speculate about the consequences of this uncertainty. Do Medicaid officials in Ohio and Missouri—who have clear statutory requirements to disenroll ineligible beneficiaries—need to find a way to ignore their own state laws? Must they forego the FMAP bump altogether? If they accept the extra funding, can CMS even reimburse them for ineligible recipients, especially when improper payment rates exceed statutory limits? The uncertainty contained in the FFCRA leaves the answers to all of these questions unclear.

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Legal uncertainty comes when states can least afford it

Even before the COVID-19 public health emergency, states were struggling with the financial burden of Medicaid.²⁵ In 2000, Medicaid spending accounted for less than one-fifth of state budgets.²⁶ By 2018, Medicaid had grown to consume nearly one in three dollars in state budgets.²⁷

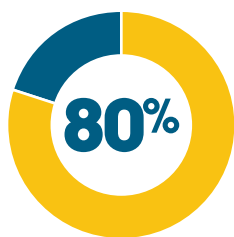
Worse yet, improper spending is on the rise. In 2019, taxpayers paid out nearly \$100 billion in improper Medicaid spending, nearly four times the \$26 billion improperly spent in 2013.²⁸⁻²⁹ That means more than one out of every seven dollars spent on Medicaid is improper.³⁰ Eligibility errors account for the lion's share of that improper spending.³¹

Needless to say, the fallout from the COVID-19 public health emergency has made the situation even worse. The outbreak has already begun to increase Medicaid enrollment and starve state budgets of needed revenue as unemployment rises.³² Between March 15 and April 11, more than 22 million Americans filed claims for unemployment benefits, more than wiping out all job growth since the Great Recession ended.³³⁻³⁵

The Federal Reserve Bank of St. Louis estimates as many as 50 million Americans could soon become unemployed.³⁶ At the same time millions of these unemployed workers are walking through the front door of state Medicaid programs, state tax revenues are plummeting.

New York, for example, projects its revenues will fall by up to \$15 billion as a result of the COVID-19 emergency.³⁷ Likewise, Illinois budget officials are estimating a single-year loss of nearly \$5 billion.³⁸ Moody's Analytics warned that states should expect general fund revenues to fall by up to 20 percent on average, with some states facing revenue losses as high as 80 percent.³⁹

The financial risk to states' Medicaid programs and budgets in general is difficult to overstate. However, the legal issues surrounding the FFCRA funding restrictions may force states to carry an even greater financial burden.



**GENERAL FUND
REVENUES COULD
FALL BY AS MUCH
AS 80 PERCENT
IN SOME STATES**

Congress should allow states to receive COVID-19 funding without sacrificing program integrity

Congress temporarily boosted states' FMAP rates to help them weather the storm created by the COVID-19 public health emergency. But that funding boost comes with major strings attached that limit its effectiveness. Worse yet, sloppy drafting has created substantial uncertainty around whether states can even legally receive funding for those ineligible enrollees they must keep on the program in order to qualify for the COVID-19 funding.

These restrictions and misguided requirements will force states into making impossible choices of accepting COVID-19 aid and putting their Medicaid programs at immediate risk of insolvency or attempting to make their way through the crisis without any of the additional federal funds.

All states have an interest in focusing limited public resources on the truly needy during this crisis. They cannot do so with confidence as long as these legal questions remain pending.

Congress should provide states with certainty during this public health and economic crisis and allow states to receive COVID-19 funding without sacrificing program integrity.



**RESTRICTIONS
AND MISGUIDED
REQUIREMENTS
FORCE STATES TO
MAKE IMPOSSIBLE
CHOICES BETWEEN
AID AND PROGRAM
INTEGRITY**

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