

FLORIDA HEALTH JUSTICE PROJECT, INC.

May 5, 2020

Miriam Harmatz, Esq.
Executive Director

Katherine DeBriere, Esq.
Legal Director

Matt Childers, Ph.D.
Director of Research & Policy

Alison Yager, Esq.
Director of Policy Advocacy

Joseph Schieffer
Technology Director

Board of Directors

Fred Anderson, M.D.
Shawn Boehringer, Esq.
Marian Griffiths, M.D.
Brian Larson, J.D.
Gabriela Ruiz, Esq.
Paul Nathanson, Esq.
Carolina Lombardi, Esq.

Advisory Board

Gordon Bonnyman, Esq.
Shani King, Esq.
Jane Perkins, Esq.
Anne Swerlick, Esq.
Janet Varon, Esq.

Javier Enriquez, General Counsel
Department of Children and Families
1317 Winewood Boulevard, Bldg. 2, Rm. 204F
Tallahassee, Florida 32399
javier.enriquez@myflfamilies.com

Via email

Re: DCF Policy & Process to Continue Eligibility Under Former Foster Care Medicaid Category Violates Federal Medicaid Law

Dear Mr. Enriquez:

We represent ██████████ a 22-year-old Former Foster Care youth. In our representation of ██████████ we have identified that the policy adopted by the Florida Department of Children and Families (“DCF” or “the Agency”) and used to determine eligibility under the category of “Former Foster Care Medicaid” violates federal law. We request that the Agency immediately cease reliance on this policy and establish a new policy and process to conduct timely *ex parte* reviews of continued eligibility prior to terminating a former foster care youth’s Medicaid eligibility completely.¹ We also ask that the Agency immediately reinstate ██████████ Medicaid eligibility as DCF did not conduct an *ex parte* review on behalf of ██████████ Had it done so, DCF would have found that ██████████ continued to qualify for Medicaid until age 26 under the Former Foster Care

¹ While this letter relates to concerns outside the subgroups identified in the Settlement Agreement our organizations entered into on February 12, 2020, the basic legal claims are identical to those raised in *Harrell, et al. v. DCF, et al.*, 3:19-cv-00912 (M.D. Fla. August 7, 2019).

Medicaid category. We ask that you provide written response to these requests no later than May 12, 2020. If your agencies continue to require all children eligible for Former Foster Care Medicaid to file a new application instead of automatically continuing their existing Medicaid eligibility, we will pursue all legal remedies.

Federal Medicaid Law Requires an *Ex Parte* Review of All Medicaid Categories Prior to Termination of Eligibility

Under the federal Medicaid statute, states must provide medical assistance “with reasonable promptness to all eligible individuals” and make medical assistance available to all qualifying individuals 42 U.S.C. §§1396a(a)(8), (a)(10). States are required to re-determine Medicaid eligibility “to the maximum extent practicable” based on electronic matching and other third-party data, rather than by asking the applicant or recipient to prove their eligibility with paper documents. 42 U.S.C. §1396w-3; 42 U.S.C. §18083(c)(3); 42 C.F.R. §§435.916(a)(2), .952(c). The agency may not require Medicaid beneficiaries to provide information not needed to re-determine their eligibility. 42 C.F.R. §435.907(e). If an individual continues to be entitled to another category of Medicaid, then the state must continue the individual’s enrollment under the new category rather than terminate the individual; a process that is referred to as an *ex parte* review. 42 C.F.R. §§ 435.930(b), 431.916(f)(1). Courts have repeatedly enforced the state’s obligation to provide an *ex parte* review before Medicaid can be terminated. *See Crippen v. Kheder*, 741 F.2d 102, 106-07 (6th Cir. 1984), rev’g *Crippen v. Dempsey*, 549 F. Supp. 643 (W.D. Mich. 1982); *Mass. Ass’n of Older Ams. v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983); *Stenson v. Blum*, 476 F. Supp. 1331, 1339-42 (S.D.N.Y. 1979), aff’d mem., 628 F.2d 1345 (2d Cir. 1980); *Crawley v. Ahmed*, 2009 WL 1384147 at *21 (E.D. Mich., May 14, 2009).

DCF's Policy and Process for Assessing Eligibility Under the Former Foster Care Medicaid for
Medicaid Eligible Foster Care Youth Violates Federal Medicaid Law

Florida's Medicaid coverage groups for children and young adults who are in out of home care include: children receiving adoption assistance under Title IV-E² and non-Title IV-E³ Medicaid. When these children turn 21 when in foster care,⁴ they lose eligibility under these categories but often remain eligible for Medicaid under a category established by the Affordable Care Act and referred to as "Former Foster Care Medicaid."⁵ Under DCF's current policy, for a young adult to retain eligibility for Former Foster Care Medicaid in Florida, when a "young adult turns 21, it is the responsibility of the young adult...to complete their Medicaid application and respond accordingly to the question about former foster care involvement."⁶

DCF's Former Foster Care Medicaid policy violates the state's legal obligation to provide an *ex parte* review to Medicaid recipients who lose eligibility under one category but may remain eligible under another category. 42 C.F.R. §§ 435.930(b), 431.916(f)(1); *Crippen* at 106-07 (6th Cir. 1984); *Mass. Ass'n of Older Ams.* at 753; *Stenson* at 1339-42 (S.D.N.Y. 1979); *Crawley* at *21. As set forth above, when DCF ends the young adult's eligibility for one Medicaid category, DCF is required to use all information available to the agency to determine whether the young adult qualifies for any other category of Medicaid, including Former Foster Care Medicaid; DCF

² 42 U.S.C. §1396a(a)(10)(A)(i)(I)

³ 42 U.S.C. §1396a(a)(10)(A)(ii)(VIII)

⁴ DCF policy continues foster care involved children age 18 to age 21 on Medicaid automatically pursuant to 42 U.S.C. §1396a(a)(10)(A)(ii)(XVII)

⁵ 42 U.S.C. §1396a(a)(10)(A)(i)(IX); 42 C.F.R. §435.150.

⁶ See "Medicaid Coverage for Young Adults Ages 18-26 being served by the Department of Children and Families." Office of Child Welfare, State of Florida, Department of Children and Families (April 7, 2015); *see also*, State of Florida, Department of Children and Families CFOP 170-15, Ch. 2 - Medicaid (December 30, 2019); and State of Florida, Department of Children and Families, Medicaid Coverage Map for Young Adults (August 2019).

may not require that a young adult file a new application. 42 U.S.C. §1396w-3; 42 U.S.C. §18083(c)(3); 42 C.F.R. §§435.916(a)(2), .952(c), .907(e). Given that these youth have been under DCF's extended supervision, it is presumable that DCF possesses all the information needed to continue Medicaid eligibility for Former Foster Care youth. As such, DCF should simply continue the eligible youth's Medicaid eligibility under the Former Foster Care Medicaid category pursuant to the state's *ex parte* review obligations as opposed to terminating eligibility and requiring a new Medicaid application.

Particularly egregious is that DCF's policy also requires young adults to answer correctly a single, specific question on DCF's Medicaid application in order to be screened for the Former Foster Care Medicaid eligibility. We believe this portion of the policy implicates separate federal Medicaid law and Due Process violations. *See Hamby v. Neel*, 368 F.3d 549, 563-64 (6th Cir. 2004)(where applicants provided a negative response to a single question on the state's Medicaid application, the court found that the state's failure to still assess the applicant's Medicaid eligibility under all potential eligibility categories violated Due Process). As such, we ask that, in addition to providing an *ex parte* review to those Former Foster Care youth transitioning out of one Medicaid category to Former Foster Care Medicaid, the state not require any Medicaid applicant to specifically identify under which category of Medicaid they may be eligible.

In the case of ██████████ she received Medicaid as a Supplemental Security Income (SSI) recipient until she turned age 18.⁷ When her SSI ceased, she continued to qualify for Medicaid

⁷ ██████████ was in the custody of the Florida Department of Corrections ("FDOC") at the time she turned age 18 so did not have an opportunity to participate in a redetermination of her disability in order to retain SSI as an adult. Since ██████████ was Medicaid eligible at the time she entered FDOC custody, the state was required to suspend, but not terminate, her eligibility. *See Fla. Stat. §409.9025*.

It should also be noted that, in addition to representing the concerns of the class of Florida residents eligible for, but who did not receive, an *ex parte* review regarding potential eligibility for Former Foster Care Medicaid, ██████████ is also a member of the Harrell Settlement Agreement Subgroup Two – representing former SSI recipients whose Medicaid was terminated without an *ex parte* review.

under the category of Former Foster Care Medicaid. *Proof of her Former Foster Care Medicaid eligibility is enclosed with this letter.* Rather than conduct an *ex parte* review with the abundant information DCF possesses about [REDACTED] former foster care status, DCF instead terminated [REDACTED] Medicaid outright. Without Medicaid, [REDACTED] has been unable to access health services which are particularly critical given her recent release from the FDOC. Thus, we reiterate our request that DCF take immediate action to reinstate [REDACTED] Medicaid eligibility as a Former Foster Care youth.

We appreciate your prompt written response to this letter. Your response may be sent via email to Katy DeBriere, Florida Health Justice Project at: debriere@floridahealthjustice.org. Thank you for your time and attention to this matter.

Sincerely,

/s/Katy DeBriere

Katy DeBriere, Esq.
Florida Health Justice Project, Inc.

Bernard P. Perlmutter, Esq.
Children and Youth Law Clinic
University of Miami – School of Law

Sarah Somers, Esq. & Miriam Heard, Esq.
National Health Law Program, Inc.

cc:

Rhonda Morris, Assistant General Counsel, Department of Children and Families

Stefan Grow, General Counsel, Agency for Healthcare Administration,
stefan.grow@ahca.myflorida.com