Health Care Reform in Indian Country
Self-Governance Communication & Education
Self-Governance Tribes Striving Towards Excellence in Health Care

Summary of How the End of the Public Health Emergency Affects Pandemic-Era Medicare and Medicaid Flexibilities

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This TSGAC issue brief provides an overview of what will happen to various pandemic-era Medicare and Medicaid flexibilities that were introduced in connection with the COVID-19 Public Health Emergency (PHE) now that the PHE is ending. This brief provides an overview of how the end of the PHE will affect selected Medicare and Medicaid program flexibilities that tribal health programs have relied upon over the past few years. This brief assumes the PHE will end on May 11, 2023 as predicted by HHS. If the end date of the PHE changes, some dates provided in this brief would likely change.

Overview

On January 31, 2020, the U.S. Department of Health and Human Services (HHS) used its authority under section 319 of the Public Health Service Act[1] to declare a public health emergency (PHE) in response to the COVID-19 pandemic. The PHE declaration triggered the ability to use certain existing flexibilities in Medicare and Medicaid program requirements, as did subsequent statutes, regulations, waivers, and other legal and administrative actions that contained measures tied to the PHE.

According to HHS, the PHE is expected to end on May 11, 2023.[2] Some PHE-related flexibilities will expire at the end of the PHE or shortly thereafter, while others have since been extended through various mechanisms either on a temporary or permanent basis. For example, in the Consolidated Appropriations Act, 2023 (CAA 2023), Congress required States to begin making Medicaid eligibility redeterminations by April 1 instead of after the end of the PHE. The CAA 2023 also extended important Medicare telehealth flexibilities that originally applied only during the PHE until 2024.

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[1] 42 U.S.C. § 247d.

[2] *See, e.g.*, Centers for Medicare & Medicaid Services, *Fact Sheet: CMS Waivers, Flexibilities, and the Transition Forward from the COVID-19 Public Health Emergency* (Feb. 27, 2023), https://www.cms.gov/files/document/what-do-i-need-know-cms-waivers-flexibilities-and-transition-forward-covid-19-public-health.pdf/.

Medicaid: Ending the Continuous Enrollment Requirement

- *The end of the PHE is no longer relevant to Medicaid continuous enrollment, and Medicaid beneficiaries who are no longer eligible may be disenrolled as soon as April 1, 2023.*

In March 2020, Congress passed the Families First Coronavirus Response Act (FFCRA), P.L. 116-172. Section 6008 of the FFRCA provided a temporary increase in the federal match that state Medicaid programs would receive, but it required states meet certain conditions. States could not make their Medicaid programs more restrictive or increase premiums. States also had to meet what is referred to as the "continuous enrollment" requirement, meaning they were required to keep all Medicaid beneficiaries enrolled in the Medicaid program through the end of the PHE unless a beneficiary wished to voluntarily terminate their Medicaid benefits.

The CAA 2023 delinked the continuous enrollment requirement from the end of the PHE. Instead, states were allowed to begin disenrolling Medicaid beneficiaries on April 1, 2023 and must complete disenrolling ineligible Medicaid beneficiaries by April 30, 2024.[3]

If they have not already done so, states will be sending out letters to current beneficiaries to request verification of personal information in order to perform the required eligibility redeterminations. It is important that beneficiaries timely respond to these requests for information.

Tribal Actions: Tribal Health programs should work with their states and their patients to ensure that beneficiaries respond to requests for information from state Medicaid plans. Beneficiaries could potentially lose their eligibility if they fail to respond to these requests.

Extension of Telehealth Flexibilities

- *Medicare telehealth flexibilities will end the later of December 31, 2024 or the end of the PHE.*
- *Medicaid telehealth flexibilities will remain in place unless a state Medicaid plan specifies that they are to end at a certain time or terminate with the end of the PHE.*

Medicare. The CAA 2023 extended certain telehealth flexibilities through the later of the end of the PHE or December 31, 2024. The following Medicare telehealth flexibilities will be in place until at least December 31, 2024.

[3] CMCS Informational Bulletin, *Key Dates Related to the Medicaid Continuous Enrollment Condition Provisions in the Consolidated Appropriations Act, 2023* (Jan. 5, 2023) https://www.medicaid.gov/federal-policy-guidance/downloads/cib010523.pdf.

- Medicare services were expanded to include care at any site in the United States, including a home, where the eligible individual is located at the time telehealth services are furnished.[4] (The "originating site" flexibility.)
- Medicare telehealth services were expanded to include care furnished by qualified occupational therapists, qualified speech-language pathologists, and qualified audiologists, in addition to services already-permitted such as those provided by physicians, physician assistants, nurse practitioners, and clinical social workers.
- Medicare services were expanded to permit federally qualified health centers and rural health clinics to serve as distant sites. (The "distant site" flexibility.)
- Suspension of the in-person practitioner visit requirement for mental health telehealth services.
- Availability of audio-only technology for certain telehealth services.
- Flexibility permitting hospice physicians and nurse practitioners to use telehealth encounters to recertify beneficiaries for hospice care.

Medicaid. In contrast to the Medicaid telehealth benefit, states have long had significant flexibility in determining the contours of the telehealth benefits included in their Medicaid state plans. For states that submitted Medicaid state plan amendments (SPAs) to increase Medicaid telehealth availability, those SPAs will remain in place and will not be affected by the end of the PHE. Increased availability of Medicaid telehealth, therefore, will not be affected by the end of the PHE unless a SPA specifically tied a certain telehealth flexibility to the duration of the PHE.

Other COVID Flexibilities

The following summarizes the end dates of a number of selected pandemic-era flexibilities. These end dates vary because some flexibilities have been made permanent by rule or policy, some remain tethered to the end of the PHE, and some will remain in effect until the end of the calendar year in which the PHE expires. There are hundreds of pandemic-era waivers, so only certain of them are summarized here.

[4] Please note that Medicare telehealth does not cover facility fees for care from originating sites added during the pandemic (i.e. sites that are not qualifying health care facilities) and only covers facility fees if the telehealth services provided in the patient's home are for telehealth services covered prior to the pandemic, such as for End State Renal Disease and Substance Use Disorder treatment.

Providers

- CMS will reconsider the Medicare Telehealth Services List through notice and comment rulemaking. Services added to the list during the pandemic will remain available **through the end of 2023**, at a minimum.
- As of **May 11, 2023,** clinicians must once again have established relationships with patients prior to providing remote physiologic monitoring services.
- Visit frequency requirements for certain Medicare telehealth services will once again take effect on **May 11, 2023**, to require telehealth visits once every three days for subsequent inpatient visits, to require telehealth visits once every 14 days for subsequent skilled nursing facility visits, and to limit critical care consult codes to once per day.
- Flexibility permitting the "virtual presence" of the supervising physician or practitioner through real-time audio and video technology is set to **expire December 31, 2023** (the end of the calendar year that the Public Health Emergency ends).
- Flexibility to not require direct supervision at the initiation of non-surgical extended duration therapeutic services has been **made permanent** and will remain in effect.
- The flexibility permitting nurse practitioners, clinical nurse specialists, certified nurse-midwives, physician assistants, and registered nurse anesthetists to supervise diagnostic tests was **made permanent.**
- The flexibility for treating physical or occupational therapists to delegate the performance of maintenance therapy services to a therapy assistant as appropriate has been **made permanent**.
- The provider enrollment hotlines will be shut down on **May 11, 2023**.
- The flexibility to permit practitioners to provide telehealth services from their home without reporting their home address on their Medicare enrollment will **continue through December 31, 2023**.
- The "Stark Law" waivers that temporarily permitted physicians to make referrals for services payable by Medicare to an entity which the physician (or an immediate family member) has a financial relationship will **terminate on May 11, 2023**.

Hospitals and Critical Access Hospitals

- The flexibility that permitted Medicare patients in a hospital to be under the care of a physician assistant, nurse practitioner, or practitioner other than a physician will **expire on May 11, 2023**.
- The flexibility that permitted hospitals to provide hospital services at sites through temporary expansion sites or at sites that are not considered part of a hospital facility will **expire on May 11, 2023.** (The "Hospitals Without Walls" initiative.) Relatedly, ambulatory surgical centers must decide whether to seek certification as a hospital or return to an ambulatory surgical center **on May 11, 2023**, thus ending the flexibility that

permitted ambulatory surgical centers to temporarily enroll as hospitals to provide hospital services.

- The Acute Hospital Care at Home initiative was **extended through December 31, 2024.**
- Off-site patient screening flexibilities for hospitals, psychiatric hospitals, and critical access hospitals will **expire on May 11, 2023**.
- Flexibilities waiving paperwork requirements for hospitals confronting an outbreak of COVID-19 will **expire on May 11, 2023.**
- The skilled nursing facility swing bed waiver will **expire on May 11, 2023.**
- The flexibility which permitted critical access hospitals to have more than 25 beds and to allow stays longer than 96 hours will **expire on May 11, 2023**.
- The flexibility permitting the establishment of critical access hospitals in areas not considered rural will **expire on May 11, 2023**.
- The flexibility permitting the provision of telemedicine services to hospital patients through an agreement with an off-site hospital will **expire on May 11, 2023**.
- The flexibility that waived requirements for nursing staff to develop care plans for each patient and for hospitals to have policies and procedures establishing which outpatient departments are not required to have a registered nurse present will **expire on May 11, 2023.**
- The flexibility waiving minimum personnel qualifications for clinical nurse specialists, nurse practitioners, and physician assistants in critical access hospitals will **expire on May 11, 2023.**
- CMS' decision to defer to state law for licensure, certification, and registration of staff for critical access hospitals will **expire on May 11, 2023.**

Long Term Care Facilities

- The waiver that permitted physicians and non-physician practitioners to perform in-person visits for nursing home residents via telehealth was **terminated.**
- New patient admission screening and annual resident review waivers will **expire on May 11, 2023.**
- The flexibility permitting physicians to delegate tasks in skilled nursing facilities as long as the tasks were performed under the supervision of the physician was **terminated.**
- The waiver that permitted physician assistants, clinical nurse specialists, and nurse practitioners to perform required physician visits was **terminated.**

Home Health Agencies

- The flexibility to use telecommunications technology within the 30-day period of care, provided that the services are within the patient's plan of care and do not replace needed in-person visits, has been **made permanent.**

- The flexibility waiving information-sharing requirements for expedited discharge and movement of residents among home health agencies, skilled nursing facilities, inpatient rehabilitation facilities, and long-term care hospitals will **expire on May 11, 2023.**
- The flexibility waiving the requirement of 12 hours of in-service training for home health aides in a 12-month period will **expire on December 31, 2023** (the end of the calendar year the Public Health Emergency terminates).

Medicare Advantage and Part D Plans

- The flexibility allowing Medicare Advantage plans to expand telehealth services beyond those articulated in approved bids will **continue until May 11, 2023.**
- The flexibility allowing for Part D Sponsors to waive prior authorization requirements for Part D drugs will **continue until May 11, 2023.**
- The flexibility relaxing the Part D "refill-too-soon" rules to permit enrollees to obtain the total 90-day supply of a drug provided other legal and safety requirements have been met will **expire on May 11, 2023.**
- The flexibility permitting mail or home delivery of Part D drugs contrary to plan-imposed policies will **continue until May 11, 2023.**

Ambulances

- The waiver permitting ambulance treatment in place for individuals meeting Medicare criteria who would have been transported for care but for whom such transport did not occur as a result of public health emergency protocols will expire **on May 11, 2023.**
- The flexibility expanding the list of allowable destinations for ground ambulance transports to include hospital alternative sites, critical access hospitals, skilled nursing facilities, community mental health centers, federally qualified health centers, physicians' offices, urgent care facilities, ambulatory surgery centers, locations furnishing dialysis services, and beneficiaries' homes has been **made permanent.**

End Stage Renal Disease

- As of **May 11, 2023**, Medicare patients with end-stage renal disease on home dialysis will no longer be permitted to receive monthly or trimonthly visits via telehealth.
- The flexibility waiving initial comprehensive assessments for new dialysis patients within 30 calendar days or 13 outpatient hemodialysis sessions will **expire on May 11, 2023**. Likewise, the waiver of the requirement for follow-up comprehensive reassessments within three months of the initial assessment will **expire on May 11, 2023**.
- The flexibility permitting the establishment of special purpose renal dialysis facilities will **expire on May 11, 2023.**
- The flexibility waiving the requirement that dialysis facilities provide services on their main premises will **expire on May 11, 2023**.

COVID-19 Testing & Vaccines

- CMS will continue to pay approximately $40 per dose for administering COVID-19 vaccines to Medicare beneficiaries in outpatient settings through the end of the calendar year in which the Emergency Use Authorization declaration for COVID-19 drugs and biologicals expires.
- In 2023, CMS will pay approximately $36 in addition to the standard administration amount ($40) to administer COVID-19 vaccines at home for certain Medicare patients.
- The Medicare Part B demonstration program providing up to eight COVID-19 tests per month will **expire on May 11, 2023**.

The End of the PHE Presents Unique Compliance Challenges That Require Close Attention

Since there are many waivers and flexibilities with varying expirations and durations, as well as numerous proposed and finalized rules extending and modifying the terms of pandemic-era waivers and flexibilities, tribal health programs need to pay close attention to the terms and conditions of operation for each type of service in each facility.

CMS has created a roadmap to transition away from the PHE, which contains information about the status of these PHE related flexibilities https://www.hhs.gov/about/news/2023/02/09/fact-sheet-covid-19-public-health-emergency-transition-roadmap.html

CMS has also created a fact sheet on the end of the PHE that it updates periodically: https://www.cms.gov/files/document/what-do-i-need-know-cms-waivers-flexibilities-and-transition-forward-covid-19-public-health.pdf

Other Resources:

The TSGAC provided a Webinar on some of these issues: September 21, 2022 - TSGAC/ACA Webinar - Medicaid Unwinding - Tribal Self-Governance (tribalselfgov.org)

The TSGAC will continue to track these developments moving forward and will provide Self-Governance Tribes will regular updates and information.