120

McKinley Community Health Alliance

P.O. Box 1726
Gallup, NM 87305

"It is the goal of the McKinley Community Health Alliance to affect change in systems (i.e. health care, schools, business, government, etc.) that perpetuate health, education, economic, and environmental disparities by engaging individuals and agencies to understand and address the underlying "root" causes of poverty/income inequity, institutional racism, and multi-generational trauma."

8 August 2006

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-2257-IFC
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, Maryland 21244-1850

Subject: Comments to Interim Final Rule: Medicaid Program: Citizenship Documentation Requirements, 71 Federal Register 39214 (July 12, 2006); File Code: CMS-2257-IFC

To Whom It May Concern:

The McKinley Community Health Alliance is a working partnership of more than 100 citizen activists, educators, human service providers, and health-care workers from throughout McKinley County, New Mexico and the neighboring region. We are the comprehensive health council for the McKinley area. Over 75% of us / our citizens are Native American.

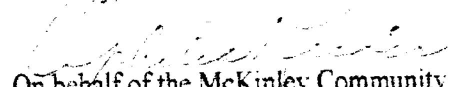
We implore you to amend the new documentation requirements of the Deficit Reduction Act to allow states to accept tribal enrollment cards and Certificates of Degree of Indian Blood as legitimate proof of U.S. citizenship and identity for Native Americans.

- Per capita expenditures for Indian health care are approximately one third that for other Americans.
- Health indicators for Indian people in the United States are consistently much worse, in almost every area, than those for the general population.
- Here in McKinley County the Native population is largely poor, rural, and lacking in basic infrastructure (e.g. running water, telephones, paved roads).
- Ours has been a "health professional shortage area" since that designation was created.

The DRA, as it stands, creates further barriers to Medicaid enrollment for First Americans.
It has already increased the administrative burden on states, tribes and the Indian Health Service to obtain other types of evidence of citizenship, especially for elders. It has the potential to increase costs for uncompensated care in our struggling community hospital, and to reduce revenues to the chronically underfunded Indian Health Service.
We fear that the dramatic health disparities we are working to address will only widen.

Please authorize the use of tribal enrollment cards and CDIB cards as documents proving U.S. citizenship for Native Americans.

Sincerely,



On behalf of the McKinley Community Health Alliance
Ophelia Reeder, Coordinator

121

MATERNAL AND CHILD HEALTH ACCESS

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Los Angeles, CA 90017-1800
Tel 213.749.4261
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August 7, 2006

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2257-IFC
P.O. Box 8017
Baltimore, MD 21244-8017

Re: Medicaid Citizenship Documentation Interim Final Rule,
71 Fed.Reg. 39214 (July 12, 2006)

Dear CMS:

For nearly 20 years, Maternal and Child Health Access has worked to promote the health and well being of low-income families throughout Los Angeles County, California as well as to improve the policies and procedures that govern enrollment into and utilization of publicly funded health care programs for the poor and working poor. Health insurance and access to health care are fundamental to independence and self-sufficiency in our society. Many of the families we work with have fallen into poverty as the result of a medical catastrophe; many others have avoided a similar fate by getting coverage and being able to use health services when needed.

In recent years, we have focused on the policies and practices in California for enrolling newborn babies into the state's Medicaid program (known as Medi-Cal). Among our goals has been to educate county eligibility workers, providers and consumer advocates about the long-standing special federal rules for automatically enrolling newborns continuously for the first year of life when the mother had Medicaid for the delivery, the newborn remains a member of her household, and the mother remains eligible for Medicaid, or would if pregnant remain eligible. Such broad-based education has proved very effective in promoting early and continuous Medi-Cal enrollments for newborns during the critical first year of life.

Babies are at their most vulnerable during the first year of life and consequently need a minimum of six medical visits before reaching age one year, accessed according to a time schedule specified by the American Academy of Pediatrics (see enclosed Periodicity Schedule) for immunizations and screening, testing and diagnosis of potentially disabling or even life-threatening diseases and conditions. Of course, when babies are sick, they also need timely access to treatment as well. Whether healthy or sick, babies need, from the very first day of life, medical coverage to promote access to vital preventative care and treatment.

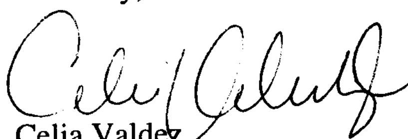
It is therefore with grave concern that we read the statement in the Preamble to the Interim Final Rule on Citizenship Documentation purporting to deny automatic and continuous eligibility to babies born here in the United States whose mothers had Medicaid only for labor and delivery or

other emergency services (71 Fed. Reg., No. 133, 39214, 39216 (July 12, 2006). This position reflects a radical departure from the previous federal administrative position, is contradictory to the plain meaning of the federal law establishing the criteria for automatic and continuous, or "deemed", eligibility, and violates equal protection. **We urge CMS to withdraw the statement in the Preamble and clarify to the states that an infant born in the U.S. whose mother had Medicaid, including emergency Medicaid, is automatically and continuously eligible for Medicaid throughout the first year of life if the infant otherwise meets the criteria for this eligibility category.**

We applaud the CMS clarification in the Preamble that U.S. born infants who have met the criteria for automatic and continuous eligibility do *not* need to provide citizenship documentation during the first year of life (*Id.*) This is the only possible logical conclusion, since this group of infants, by definition, was born in the U.S. and the Medicaid agency paid for these deliveries in U.S. hospitals. However, concern arises from the CMS statement that infants "deemed eligible" for Medicaid at birth will later have to provide documentation of citizenship in order to successfully renew Medicaid eligibility after age one year (*id.*). CMS' position is internally inconsistent: the very rationale underlying the CMS position that these infants satisfy the citizenship documentation requirement during the first year of life is that this group is comprised of U.S. born babies whose deliveries occurred in U.S. hospitals, as reflected in payments by the state's Medicaid agency. Those facts are immutable and do not change when the infant turns age one year. Moreover, as the Interim Final Rules themselves confirm, once citizenship has been proved, it need never be proved for Medicaid purposes again (42 C.F.R. § 435.407(h)(5), 71 Fed. Reg. at 39228). **We therefore urge CMS to clarify that states with systems in place for tracking a newborn's initial enrollment into Medicaid under the provisions for automatic and continuous enrollment when the mother had Medicaid for the delivery need not provide further proof of citizenship at any age.**

Finally, for infants who do not meet the criteria for "deemed eligibility" at birth (for example, because the mother did not have Medicaid for the delivery, or the mother did have Medicaid but the newborn did not reside with her in the birth month), **we urge CMS to adopt the rule that the state's record of Medicaid payment or any other proof of payment for the birth in a U.S. hospital or for neonatal services in the U.S. for the newborn constitute satisfactory documentary evidence of both citizenship and identity when the child applies for Medicaid at any age.**

Sincerely,



Celia Valdez
Acting Executive Director

Enc.

STATE OF IOWA

THOMAS J. VILSACK, GOVERNOR
SALLY J. PEDERSON, LT. GOVERNOR

DEPARTMENT OF HUMAN SERVICES
KEVIN W. CONCANNON, DIRECTOR

AUG 1 0 2006

Christine Poe
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2257-IFC
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: CMS-2257-IFC

Dear Ms. Poe:

Please find enclosed Iowa's comments addressing the regulations concerning documentation of citizenship issued by the Secretary pursuant to Section 6036 of the Deficit Reduction Act of 2005 ("DRA"). The regulations, found at 71 Fed. Reg. 39214 (2006), are hereafter referred to in the attached document as the Interim Final Rule.

Iowa is already seeing an impact of the additional burden these strict policies put on families in reduced Medicaid approvals for children. It's imperative these regulations are revised to ensure our most vulnerable populations receive the critical health care they need.

If you have any questions or concerns, please contact Mike Baldwin at 515-281-8785 or at mbaldwi@dhs.state.ia.us.

Sincerely,

Kevin W Concannon

Kevin W. Concannon
Director

Enclosures

1305 E WALNUT STREET - DES MOINES, IA 50319-0114

Iowa's Comments to the
Interim Final Rule Concerning Documentation of Citizenship

WHO MUST DECLARE AND DOCUMENT CITIZENSHIP?

Issue #1:

Under federal Medicaid law, not all individuals who receive Medicaid based upon their U.S. citizenship actually declare their citizenship. Rather, one member of a family or household can apply for the household. In addition, a family or household member can declare on behalf of a child born into a covered family.

The DRA citizenship documentation requirements only attach to an individual who makes the citizenship declaration, not to everyone who received Medicaid based on U.S. citizenship. The Secretary has chosen to rewrite and expand the reach of the statutory provision. By expanding the statutory obligation, the Secretary has exceeded his authority. *See Aid Ass'n for Lutherans v. U. S. Postal Serv.*, 321 F.3d 1166, 1175 (D.C. Cir. 2003) (stating that "[a]n agency construction of a statute cannot survive ... if a contested regulation reflects an action that exceeds the agency's authority."); *Morrill v. Jones*, 106 U.S. 466, 466 (1883) (noting that an administrative agency may not alter or amend a statute through regulation); *Friends of Richards-Gebaur Airport v. F.A.A.*, 251 F.3d 1178, 1195 (8th Cir. 2001), *rehearing and rehearing en banc denied* (Sep 19, 2001) *cert. denied* 535 U.S. 927 (2002) (noting that "[a] statute is the command of the sovereign," and an agency implementing a statute may not ignore, or provide its own substitute for, a standard articulated in the statute) *citing Sokol v. Kennedy*, 210 F.3d 876, 880 (8th Cir. 2000)).

Although the Secretary has authority to interpret and fill in blanks in legislation, the Secretary may not legislate and alter statutory provisions. *Terran ex rel. Terran v. Secretary of Health and Human Services*, 195 F.3d 1302, 1312 (Fed. Cir. 1999) (stating that the Constitution does not authorize members of the executive branch to enact, amend, or repeal statutes; instead, this legislative power is vested exclusively in Congress, and the exercise of such legislative power must follow the procedures set forth in the Constitution), *citing Clinton v. New York*, 524 U.S. 417, 438 (1998)). To the extent that the interim final rule exceeds or rewrites the legislative mandate, the regulation is void.

The Secretary must abide by the rule of law, adhere to the constitutional separation of power doctrine, and not take on the role of the legislature. *See Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 363 (1949) (cautioning that allowing an administrative agency to override the legislature's policy with its own would permit it "under the guise of administration to put limitations in the statute not placed there by [the legislature]"); *Rich v. Delta Air Lines, Inc.*, 921 F. Supp. 767, 774 (N.D. Ga. 1996) (executive agency "cannot make substantive rules of law unless it has been so empowered by Congress") *citing Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)); *Haitian Centers Council, Inc. v. Sale*, 823 F.Supp. 1028, 1046 (E.D.N.Y. 1993) (noting that courts will invalidate executive action that is unsupported by express statutory authority), *citing Jean v. Nelson*, 472 U.S. 846 (1985), *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389-90 (10th Cir. 1981); *Bertrand v. Sava*, 684 F.2d 204, 210, 212 & n. 12 (2d

Cir. 1982); *American Baptist Churches v. Meese*, 712 F. Supp. 756, 774 (N.D. Cal. 1989)).

The DRA provided that federal funding is not available "with respect to amounts expended for medical assistance *for an individual who declares under section 1137(d)(1)(A) to be a citizen or national of the United States* for purposes of establishing eligibility for benefits under this title [Title XIX], unless the [documentation] requirement of subsection (x) [1903(x)] is met." (See section 1903(i)(22) of the Social Security Act, as added by the DRA (emphasis added)). Thus, documentation of citizenship is required only "for an individual who declares under section 1137(d)(1)(A) to be a citizen or national of the United States." The section referenced here, 1137(d)(1)(A), is part of the Medicaid Income and Eligibility Verification System (IEVS) requirements. That provision does not require that all individuals applying for or receiving Medicaid benefits make a declaration regarding their citizenship. Rather, it requires a declaration regarding citizenship:

(i) by the individual,
(ii) in the case in which eligibility for program benefits is determined on a family or household basis, by any adult member of such individual's family or household (as applicable), or
(iii) in the case of an individual born into a family or household receiving benefits under such program, by any adult member of such family or household no later than the next redetermination of eligibility of such family or household following the birth of such individual.

Thus, where Medicaid eligibility is determined on a family or household basis, a declaration of citizenship is required only from one adult member of the family or household. As noted above, the DRA requires documentation of citizenship "for an individual who declares under section 1137(d)(1)(A) to be a citizen or national of the United States." Because only one adult member of a family or household is required to make a declaration of citizenship under 1137(d)(1)(A), only that individual should be required to document their citizenship.

In a couple of places, the preamble to the interim final rule follows the DRA by indicating that the individuals required to document their citizenship are those who have declared U.S. citizenship under section 1137(d)(1)(A). 71 Fed. Reg. 39215-16. Further, the new section 435.1008 refers, in its title, to "individuals who have declared United States citizenship or nationality under section 1137(d) of the Act" and to "individuals declaring themselves to be citizens or nationals." However, the interim final rule otherwise amends the regulation to read as follows:

(a) The [state Medicaid] agency must provide Medicaid to otherwise eligible residents of the United States who are—
(1) Citizens: (i) Under a declaration required by section 1137(d) of the Act that the individual is a citizen or national of the United States; and
(ii) The individual has provided satisfactory documentary evidence of citizenship or national status, as described in §435.407.

(iii) An individual for purposes of the citizenship requirement is a Medicaid applicant or recipient or an individual receiving any services under a section 1115 demonstration for which States receive Federal financial participation in their expenditures as though they were medical assistance, for example, family planning demonstrations or Medicaid demonstrations.

(iv) Individuals must declare their citizenship and the state must document the individual's citizenship in the individual's eligibility file on initial applications and initial redeterminations effective July 1, 2006.

42 C.F.R. § 435.406 (as amended by the interim final rule). The interim final rule refers to section 1137(d) with regard to the declaration of citizenship but appears to treat the documentation requirement as separate. Other provisions of the preamble appear to state that all individuals to whom medical assistance is provided must both declare and document their citizenship or satisfactory immigration status. 71 Fed. Reg. 39217-18, 39220. The Secretary attempts to justify this action by claiming in the preamble that "[s]ince enactment of the Immigration Reform and Control Act of 1986 (Pub. L. 99-163, enacted on November 6, 1986), Medicaid applicants and recipients have been required by section 1137(d) of the Social Security Act (the Act) to declare under penalty of perjury whether the applicant or recipient is a citizen or national of the United States." 71 Fed. Reg. 39215, 39217. This statement is not at all accurate.

The Immigration Reform and Control Act of 1986 amended section 1137 of the Social Security Act by adding subsection (d), as follows:

> (d) The requirements of this subsection, with respect to an income and eligibility verification system of a State, are as follows:
>
> (1)(A) The State shall require, as a condition of an individual's eligibility for benefits under any program listed in subsection (b), a declaration in writing by the individual (or, in the case of an individual who is a child, by another on the individual's behalf), under penalty of perjury, stating whether or not the individual is a citizen or national of the United States.

Pub. L. 99-603, § 121(a)(1)(C), 100 Stat. 3359, 3384-85. This statutory provision does not require that all individuals to whom medical assistance is provided must make a declaration of their citizenship status. Rather, it explicitly provides that for children, the declaration may be made by another on the child's behalf. Further, this provision was amended by the Social Security Act Amendments of 1994, Pub. L. 103-432, § 231, 108 Stat. 4398, 4462. As amended in 1994, section 1137(d)(1)(A) (referenced by the DRA) currently provides as follows:

> The State shall require, as a condition of an individual's eligibility for benefits under a program listed in subsection (b), a declaration in writing, under penalty of perjury—
>
> (i) by the individual,

(ii) in the case in which eligibility for program benefits is determined on a family or household basis, by any adult member of such individual's family or household (as applicable), or

(iii)in the case of an individual born into a family or household receiving benefits under such program, by any adult member of such family or household no later than the next redetermination of eligibility of such family or household following the birth of such individual, stating whether the individual is a citizen or national of the United States, and, if that individual is not a citizen or national of the United States, that the individual is in a satisfactory immigration status.

As discussed above, the DRA requires documentation of citizenship only "for an individual who declares under section 1137(d)(1)(A) to be a citizen or national of the United States." (See section 1903(i)(22) of the Social Security Act, as added by the DRA.) This requires documentation only for the individual making the declaration, not for others on whose behalf a declaration may be made. And it should be read as referring to the current version of section 1137(d)(1)(A), which requires a declaration by only one adult member of a family or household, not by each member of the family or household.

Requested Amendment:

The Secretary has no authority to expand the declaration requirement beyond what is required by section 1137(d)(1)(A) or to require documentation for individuals not required to make a declaration. Therefore, the regulation should be amended to require a declaration of citizenship only as required by section 1137(d)(1)(A) and to clarify that only individuals making a declaration under section 1137(d)(1)(A) are required to document their citizenship.

Without question, not all U.S. citizens who receive Medicaid because of their citizenship must declare that they are citizens. The Interim Final Rule fails to take this into account and now extends documentation requirements to a population that does not need to declare citizenship under the relevant statutory provisions. This action constitutes more than "gap filling" the legal tapestry with regulations. The Secretary's actions amount to creating new statutory requirements from whole cloth. Accordingly, the actions exceed the authority of this executive branch agency and run counter to the rule of law.

RESTRICTIONS ON THE CITIZENSHIP AND IDENTITY DOCUMENTATION PROVIDED FOR BY THE DRA

Issue #2:

In addition to inappropriately expanding the reach of the legislative mandate, the Secretary in the interim final rule has also placed restrictions on the use of documents set forth by Congress in the DRA. Congress expressly granted the secretary authority to *add to* the list of acceptable documents to prove citizenship. Congress did not grant the Secretary authority under the law to restrict statutory provisions. The Secretary's acts exceed the statutory grant of authority.

The interim final rule is more restrictive than the DRA in a number of ways, particular with respect to the acceptable documentation of citizenship and identity. First, the interim final rule employs what the preamble calls "a hierarchy of reliability" for documentation of citizenship, providing that documents deemed to be of lesser reliability may be used only if documents of greater reliability are not available. 71 Fed. Reg. 39218-19 and section 435.407(b)-(d) of the interim final rule. There is no basis in the DRA for these levels of documentation. To the extent the DRA allows for additional forms of documentation specified by the Secretary, the Secretary may have authority to say when such documents can be used. But the use of documents specified in the statute cannot be limited to situations where those deemed by the Secretary to be more reliable are unavailable. Thus, the statute provides that the following documents are sufficient to establish citizenship, though they must be combined with a document to establish identity:

(i) A certificate of birth in the United States.
(ii) Form FS-545 or Form DS-1350 (Certification of Birth Abroad).
(iii) Form I-97 (United States Citizen Identification Card).
(iv) Form FS-240 (Report of Birth Abroad of a Citizen of the United States).

(See section 1903(x)(3)(C) of the Social Security Act, as added by the DRA.) But the interim final rule provides that these documents can be used only if what it calls "primary" evidence (a passport, certificate of naturalization, or certificate of citizenship) are unavailable. (See section 435.407(a)-(b) of the interim final rule.)

Requested Amendment:

The Secretary has no authority to rewrite the legislation so that restrictions and hierarchies are placed on documents identified in the statute. Therefore, the hierarchy established by the interim final rule should be eliminated.

Issue #3:

Aside from the hierarchy, the interim final rule also imposes other limits or restrictions on documents listed as acceptable in the DRA and fails to include all of the documents referenced in the DRA. The DRA allows the Secretary to expand the list of acceptable documents; the Secretary has no authority to exclude or restrict documents

specified in the statute. For example, the DRA lists one acceptable document proving citizenship as "[a] certificate of birth in the United States." (See section 1903(x)(3)(C)(i) of the Social Security Act, as added by the DRA.) But the interim final rule states with respect to a birth certificate that it "must have been issued before the person was 5 years of age." (See section 435.407(b)(1) of the interim final rule.) There is no basis in the statute for this restriction. Further, the interim final rule provides that a birth certificate issued before five years of age but amended after five years of age cannot be used as secondary evidence of citizenship but must be treated as fourth level evidence of citizenship. In such a case, the birth certificate can be used only if it was created at least five years before application for Medicaid. (See section 435.407(b)(1), (d)(2)(iv) of the interim final rule.) Therefore, a seven-year-old applicant who had a birth certificate issued at birth but amended at age six cannot use the amended birth certificate to establish citizenship. Such a birth certificate does not qualify as secondary evidence of citizenship because it was amended after age five, and it does not qualify as fourth level evidence because it was not created five years before application for Medicaid. Again, there is no basis in the statute for this restriction.

Requested Amendment:

The interim final rule should be amended to allow any birth certificate, as provided by the DRA, regardless of when it was issued or amended.

In addition, we would note that the terms used by in the interim final rule are vague and capable of multiple interpretations, potentially subjecting the states to arbitrary enforcement activity by the Secretary. The term "amended" is not defined. We are informed that Iowa never "amends" any birth certificate but does attach copies of court orders that impact the record. In addition, the term "issued" is undefined and subject to multiple interpretations.

Issue #4:

The statute also refers to documentation of identity described in section 274A(b)(1)(D) of the Immigration and Nationality Act. (See section 1903(x)(3)(D)(i) of the Social Security Act, as added by the DRA.) That section of the Immigration and Nationality Act incorporates by reference regulations that are promulgated at 8 C.F.R. § 274a.2(b)(1)(v). Among other things, those regulations list voter's registration cards and Canadian drivers licenses as forms of identification. 8 C.F.R. § 274a.2(b)(1)(v)(B)(1)(iii), (ix). For individuals under 18 who are unable to produce other identification, the Immigration and Nationality Act regulations list the following as acceptable:

i. School record or report card;
ii. Clinic doctor or hospital record;
iii. Daycare or nursery school record.

8 C.F.R. § 274a.2(b)(1)(v)(B)(2). However, the interim final rule specifically states that voter's registration cards and Canadian drivers licenses may not be used as identification. (See section 435.407(e)(8) of the interim final rule.) Moreover, regarding the additional

documentation that can be used by children under the INS regulations, the interim final rule changes age 18 to 16 and refers only to nursery and daycare records, stating that "school records may include nursery or daycare records." (See section 435.407(f) of the interim final rule.) This purported expansion of "schools records," which are not permissible evidence of anything in the interim final rule, to include daycare and nursery records is incredibly ambiguous. More fundamentally, the Secretary lacks authority to limit the identity documents referenced in the statute, which includes the INS regulations.

Requested Amendment:

The interim final rule should be amended to allow all identification documents specified in the Immigration and Nationality Act regulations at 8 C.F.R. § 274a.2(b)(1)(v)(B)(1)-(2).

Issue #5:

The interim final rule provides that states must match applicant's names against social security numbers provided and that in the future, additional verification of citizenship and identity may be required for individuals using any documentation of citizenship or identity, including the documents in the statute. (See section 435.407(h)(6) of the interim final rule.) We do not believe that the Secretary has any authority to require additional verification of citizenship or identity where documents specified in the statute have already been provided. Therefore, these provisions of the interim final rule should be eliminated.

Requested Amendment:

Eliminate the requirement of additional verification of citizenship or identity where documents specified in the statute have already been provided.

MANDATING THAT STATE WORKERS COMMIT FELONIOUS ACTS

Issue #6:

The Secretary has directed via the interim final rule that states must document compliance with the regulation by making photocopies of the citizenship evidence presented by Medicaid applicants. Two of the documents that can be used to prove citizenship are the Certificate of Nationality and the Certificate of Citizenship. It is a felony under federal law to copy these documents. *See* 18 U.S.C. § 1425(b) (2005). We are attaching a de-identified copy of a Certificate of Citizenship to illustrate our concern.

In addition, many states print warnings on their birth certificates that copying or reproducing the document is a felony. We are attaching a de-identified copy of a Wisconsin birth certificate provided by an Iowa Medicaid applicant to prove the applicant's citizenship to further illustrate the issue.

Iowa's Comments (continued)

The Secretary has no authority to interpret laws outside of his purview. The Secretary has no authority to pass regulations contrary to statutory criminal law. The Secretary has no authority to require others to break the law.

Rather than overreaching in such a drastic manner, the Secretary should simply permit a state to rely on the written statement of a worker regarding the proof of citizenship that the Medicaid applicant presented. This would avoid the copying concern entirely.

Requested Amendment:

Amend the rule to permit a state to rely on the written statement of a worker regarding the proof of citizenship that the Medicaid applicant presented.

THE SECRETARY'S SELECTIVE RELIANCE ON SOCIAL SECURITY ADMINISTRATION EVIDENTIARY REQUIREMENTS.

Issue #7:

The Secretary's representatives have stated verbally in teleconferences that the documentation requirements in this interim final rule mirror the Social Security Administration ("SSA") evidentiary requirements. This is only partially true.

Citizenship evidentiary requirements for the Social Security Administration can be found at 20 C.F.R. § 422.107. In terms of proving identity, SSA permits use of any of the following for social security purposes:

- a driver's license,
- an identification card,
- a school record,
- a medical record,
- a marriage record,
- a passport
- a Department of Homeland Security document, or
- "other similar document serving to identify the individual."

20 C.F.R. § 422.107(c). Although the Secretary purports to mirror this regulatory provision, the Secretary has only identified half of the above documents in the current interim final rule. Nothing in the interim final rule permits the use of school records, medical records, a marriage record, or other documents to prove identity.

In terms of the documents permitted to prove citizenship, the Secretary has again elected to present a shortened list of acceptable documents when compared to the SSA evidentiary requirements. The SSA regulations permit the use of any of the above documents to prove citizenship when the document(s) set forth a U.S. place of birth. 20 C.F.R. § 422.107(d). Such proof may also include a hospital record of birth, a religious

record of birth, or a court record confirming citizenship. 20 C.F.R. § 422.107(a)-(d). Most of these documents are invalid under the interim final rule to prove citizenship.

Clearly, the Secretary has elected to not follow the SSA evidentiary requirements and has instead chosen to place heavier burdens on Medicaid applicants than the Social Security Administration places on citizens applying for a social security number. The Secretary should truly follow the SSA evidentiary requirements and permit the use of all of the above documents to prove identity and citizenship.

Requested Amendment:

Amend the rules to follow all of the SSA evidentiary requirements and permit the use of all of the documents listed below to prove identity and citizenship

RESTRICTIONS ON THE CITIZENSHIP AND IDENTITY DOCUMENTATION ADDED BY THE INTERIM FINAL RULE

Issue #8:

The interim final rule exercises the Secretary's authority under the DRA to provide for additional documents of citizenship and identity. However, the interim final rule imposes various restrictions and limits on the additional documents (in addition to the hierarchy). Some of these restrictions and limitations are unnecessary and unreasonable.

For example, the interim final rule requires that various documents be created five years before the initial application for Medicaid. (See section 435.407(c)(1)-(2), (d)(2), (4) of the interim final rule.) The preamble to the interim final rule does not explain the perceived need for this requirement. Presumably, it is to assure that documents are not fraudulently created to establish citizenship for Medicaid eligibility purposes. We find it extremely unlikely that hospitals, insurance companies, state vital statistics officials, physicians, and other issuers of these documents would be cooperating in a creation of fraudulent documents to establish U.S. citizenship. To the extent the timing is relevant, we find it extremely unlikely that anyone would be creating fraudulent documents to establish citizenship for Medicaid eligibility purposes up to five years before an initial Medicaid application is filed, particularly when that time period predates the new requirement that Medicaid applicants or recipients document their citizenship. We suggest that the requirements that various documents be created five years before the date of the initial Medicaid application be eliminated.

Requested Amendment:

Eliminate the requirements that various documents be created five years before the date of the initial Medicaid application.

Iowa's Comments (continued)

Issue #9:

The interim final rule requires two affidavits, both by individuals with personal knowledge of the events establishing citizenship who can prove their own citizenship, at least one of whom is not related to the applicant or recipient. (See section 435.407(d)(5)(i)-(iii) of the interim final rule.) We believe that these requirements are unduly restrictive and will make documentation of citizenship by affidavit virtually impossible. The event establishing citizenship will usually be birth in the United States. Typically, very few people would actually have personal knowledge of that event. For example, a younger sibling could never have personal knowledge of an older siblings place of birth. We suggest that anyone with knowledge of an individual's history and circumstances should be able to sign an affidavit attesting to any facts that establish U.S. citizenship by a preponderance of the evidence—such as continuous residence in the U.S., consistently claiming birth in the U.S., etc.

Requested Amendment:

Amend the rule regarding affidavits of citizenship to allow anyone with knowledge of an individual's history and circumstances be able to sign an affidavit attesting to any facts that establish U.S. citizenship by a preponderance of the evidence—such as continuous residence in the U.S., consistently claiming birth in the U.S., etc.

Issue #10:

Regardless of what knowledge is required to sign an affidavit of citizenship, those who would have such knowledge (and who could be found and bothered to sign an affidavit) will often be related. Therefore, an affidavit from an unrelated party should not be required. Likewise, we do not see how the ability to document an affiant's own citizenship is relevant to an individual's veracity regarding another's place of birth.

The regulations otherwise require that affidavits be signed under penalty of perjury. (See section 435.407(d)(5)(vi) of the interim final rule.) Non-citizens can be prosecuted for perjury as for any other crime. Moreover, a mother is certainly a credible witness regarding the place of birth of her child, even if the mother cannot document her citizenship. For all these reasons, we suggest that you reconsider the strict requirements imposed on affidavits of citizenship.

The interim final rule allows affidavits of identity only for children under 16, requires that such affidavits be signed by a parent or guardian stating the date and place of birth of the child, and provides that they cannot be used if an affidavit of citizenship was provided. (See section 435.407(f) of the interim final rule.) We find all these requirements and limitations to be unreasonable. We do not see why an affidavit of identity is any less reliable for an individual age 16 or older than for an individual under that age. Nor do we see why an affidavit of identity is less reliable if citizenship was established by affidavit. Individuals other than parents or guardians could be credible witnesses regarding identity.

In addition, knowledge of place and date of birth is not necessarily relevant to knowledge of identity. In particular, the requirement that affidavits of identity be signed

by parents or guardians is unduly restrictive. Children or others may not have parents or legally appointed guardians available to sign affidavits but may be living with grandparents, aunts or uncles, siblings, children, or others who could identify them. Therefore, these restrictions should be eliminated, and affidavits of identity should be allowed for any applicant or recipient, signed by anyone who can show knowledge of identity.

Requested Amendment:

Amend the rule by eliminating the excessive restrictions on affidavits of citizenship and identity.

Issue #11:

The interim final rule provides the option to document citizenship and identity through a match with the State Data Exchange (SDX) maintained by the Social Security Administration, but only "*for States which do not provide Medicaid to individuals by virtue of their receiving SSI*" when they are documenting the citizenship and identity of "Supplemental Security Income recipients." (See section 435.407(a)(5) of the interim final rule.) Based on the clear wording of this provision, states such as Iowa that *do* provide Medicaid by virtue of the individual's receipt of SSI may not use the SDX match.

We would note that individuals sometimes lose eligibility for SSI for various reasons. Former recipients of SSI are not exempt from documenting their citizenship and identity, regardless of whether the state provides Medicaid by virtue of receipt of SSI. All states, including those that provide Medicaid by virtue of receipt of SSI, have a need to use the SDX for former recipients of SSI. The SDX may still contain reliable citizenship and identity information regarding a former SSI recipient. Therefore, all states should be allowed to use the SDX to document the citizenship and identity of former SSI recipients.

Requested Amendment:

Allow all states to use the SDX to document the citizenship and identity of former SSI recipients by amending the interim final rule so as not to restrict use of an SDX match to SSI recipients or to states that do not provide Medicaid by virtue of receipt of SSI.

ADDITIONAL CITIZENSHIP AND IDENTITY DOCUMENTATION

The preamble to the interim final rule specifically solicits comments on additional documents, additional data matches, and whether individuals would have difficulty proving citizenship and identity if only primary or second level documents were permitted.

Issue #12:

Despite the exclusion of Medicare and SSI recipients from these requirements, we believe that a significant number of individuals will have difficulty proving citizenship if only primary and second level documents were permitted.

Requested Amendment:

The State of Iowa would also respectfully request that the Medicare/SSI exclusion be expressly included in section 436.406 as well as section 436.1004 to clearly establish that these populations are excluded from the documentation requirement.

Issue #13:

As noted above, the DRA provides for identity documents described in section 274A(b)(1)(D) of the Immigration and Nationality Act. (See section 1903(x)(3)(D)(i) of the Social Security Act, as amended by the DRA.) Other than tribal documents, cross matches, and affidavits for children, the identity documents allowed by the interim final rule appear to be based on the regulations promulgated under that section of the Immigration and Nationality Act. We would note that those regulations deal with employment. Thus, the documents described in those regulations are appropriate for persons in the workforce—driver's licenses, other state ID cards, school ID cards, U.S. military ID cards or draft records, etc.

While individuals in the workforce may be likely to have the above documents, Medicaid applicants or recipients who are elderly, disabled, or young children are less likely to have such documents. For example, Iowa has already encountered cases of elderly Medicaid recipients in nursing facilities who do not have driver's licenses or any of the other identity documents specified in the interim final regulations, and who cannot leave the nursing facility to get such documents. If they are not exempt as Medicare or SSI recipients, they have no way to document their identity under the interim final rule. The Immigration and Nationality Act statute and regulations were not written to accommodate such cases, because they deal with identification for employment. Thus, there is a particular need for the Secretary to provide, by regulation, for other documentation of identity appropriate for the elderly, the disabled, and young children.

Requested Amendment:

Regarding documentation of identity, we believe that there is a particular need to provide for additional documents appropriate to the elderly, the disabled, and young children. The Secretary should allow all of the identification documents permitted under the Social Security Administration regulations found at 20 C.F.R. § 422.107.

Issue #14:

The preamble to the interim final rule states that "children born outside the United States and adopted by U.S. citizens may establish citizenship using the process established by the Child Citizenship Act of 2000 (Pub. L. 106-395, enacted on October

30, 2000)." 71 Fed. Reg. 39218. However, this is not reflected in the interim final rule itself.

Requested Amendment:

We would urge that the rule regarding documentation of citizenship be amended to reflect the process established by the Child Citizenship Act. In addition, the Secretary should adopt the Social Security Administration evidentiary requirements found at 20 C.F.R. § 422.107.

States should also be allowed to rely on a judicial finding of citizenship as documentation of citizenship. Such reliance would be rare, but it may provide a last resort to establish citizenship and obviously should be considered reliable.

Issue #15:

We find it unlikely that individuals and religions institutions would use religious records to fraudulently establish citizenship.

Requested Amendment:

As previously suggested by CMS, states should be able to rely on religious records, such as records of baptism, to establish birth in the United States and citizenship.

Issue #16:

Obviously, evidence of birth in the United States is evidence of U.S. citizenship. Medicaid agencies, health insurers, and medical care providers have a wealth of such evidence that could be easily accessible to state Medicaid agencies in the form of claims made in connection with births in the United States. Such evidence is reliable because it is unlikely that providers would submit fraudulent claims to help an individual establish their citizenship. Medicaid agencies should be allowed to use this wealth of accessible and reliable information to establish citizenship.

Requested Amendment:

Finally, we suggest that state Medicaid agencies be allowed to document citizenship using evidence from their own records, other Medicaid programs or health insurance carriers, or medical care providers showing that a claim was submitted or paid in connection with a birth in the United States. This should be considered third level documentation of citizenship, and electronic data matches should be allowed.

AMBIGUITIES IN THE INTERIM FINAL RULE

There are a number of ambiguities in the interim final rule that need to be amended for clarity.

Birth Certificate Date of Issuance:

In the discussion of birth certificates as second level documentation of citizenship, the interim final rule states that they "must have been issued before the person was 5 years of age" and that "[a]n amended birth record document that is amended after 5 years of age is considered fourth level evidence of citizenship." (See section 435.407(b)(1) of the interim final rule.)

Under fourth level documentation, the interim final rule lists "[a]n amended U.S. public birth record that is amended more than 5 years after the person's birth" (if created at least five years before the application for Medicaid). (See section 435.407(d)(2)(iv) of the interim final rule.) It is unclear whether these references to a "birth record" or "birth record document" amended after five years of age are intended to refer to a birth certificate "issued" before five years of age and "amended" thereafter, or to a birth certificate initially "issued" (as an amendment of the public birth record) after five years of age.

As discussed above, we believe that birth certificates should be allowed as documentation of citizenship regardless of the date they were issued or amended. *But if the regulation is not going to follow the statute, this ambiguity should be clarified to allow birth certificates initially "issued" after five years of age as fourth level documentation of citizenship.*

Adoption Decrees as Second Level Documentation of Citizenship:

In the discussion of adoption decrees as second level documentation of citizenship, the interim final rules provides as follows:

> In situations where an adoption is not finalized and the State in which the child was born will not release a birth certificate prior to final adoption, a statement from a State approved adoption agency that shows the child's name and U.S. place of birth is acceptable. *The adoption agency must state in the certification that the source of the place of birth information is an original birth certificate.*

(See section 435.407(b)(8) of the interim final rule (emphasis added)). It is unclear what would constitute "an original birth certificate" for this purpose. *It should be clarified that the source of the place of birth information provided by the adoption agency can be any birth certificate information the Medicaid agency could rely on pursuant to 435.407(b)(1), (d)(2)(iv), or (h)(1) of the interim final rule, including a match with a state vital statistics agency.*

Medical Records as Fourth Level Documentation of Citizenship:

The interim final rule states that "[a]n immunization record is not considered a medical record for purposes of establishing U.S. citizenship." (See section 435.407(d)(4) of the interim final rule.) It is not clear what would be considered an "immunization record" for purposes of this exclusion. *It should be clarified that immunization records maintained by parents, schools, etc. are not considered to be medical records but that*

immunization records maintained by a clinic, doctor, or hospital are considered to be medical records.

Affidavits as Fourth Level Documentation of Citizenship:

1. The interim final rule provides that at least one of the individuals signing an affidavit cannot be "related" to the applicant or recipient. (See section 435.407(d)(5)(ii) of the interim final rule.) *If this requirement is retained, the regulations should specify a degree of relationship and address relationships by marriage.*

2. The interim final rule also provides that "[t]he State must obtain a separate affidavit from the applicant/recipient or other knowledgeable individual (guardian or representative) explaining why the evidence does not exist or cannot be obtained." (See section 435.407(d)(5)(v) of the interim final rule.) It is not clear whether the knowledgeable individual must be a "guardian or representative," or how "representative" would be defined for this purpose. The State submits that limiting knowledgeable individuals for this purpose to a "guardian or representative" (however defined) would be unduly restrictive, as others may in fact be knowledgeable. *Therefore, the State suggests that the parenthetical reference to "guardian or representative" be eliminated, requiring simply that this affidavit be signed by "the applicant/recipient or other knowledgeable individual."*

Evidence of Identity:

1. It is unclear whether various documents such as driver's licenses, school identification cards, etc. must be currently valid for the purpose for which they were originally issued. (See section 435.407(e) of the interim final rule.) The State submits that such documents, containing a photograph or other identifying information, are reliable proof of identity even if they are expired for the particular purpose for which they were issued. *Therefore, the regulation should clarify that identity documents do not have to be currently valid.*

2. The interim final rule lists "[i]dentification card issued by the Federal, State, or local government with the same information included on driver's licenses." (See section 435.407(e)(4), (8)(iv) of the interim final rule.) It is unclear whether these identification cards issued by the federal, state, or local government must have the same information as is actually included on some unidentified drivers licenses, or whether they must simply have the same information as is required by the interim final rule for drivers licenses as documentation of identity. We would suggest the latter.

   We doubt that many identification cards issued by federal, state, or local governments actually have the same information as is typically included on driver's licenses. For example, Iowa driver's licenses include name, photo, date of birth, gender, height, and eye color. But Iowa state employee identification cards include only name and photo. Thus, Iowa state employee identification cards do not contain the same information as is included on Iowa driver's licenses. But they do include the name and a photo, which would be sufficient for a driver's license as a form of identification under the interim final rule. And we would submit that the name and

photo alone make the Iowa state employee identification card a reliable form of identification.

A requirement that other government-issued identification cards contain the same information as is actually included on driver's licenses would also be confusing and difficult for states to administer. Is a state to compare all government-issued identification cards to its own driver's licenses? Or must Iowa compare an identification card issued by Illinois or by the city of Chicago to an Illinois driver's license? And to which driver's licenses are federal identification cards to be compared?

Finally, the regulations promulgated under the provision of the Immigration and Nationality Act referenced in the DRA, on which the interim final rule is apparently based, clearly require only that other government identification cards contain the same information as is required for drivers licenses, not the same information as is actually included on drivers licenses. (See 8 C.F.R. 274A.2(b)(1)(v)(B)(1)(i), (v)). *The interim final rule should be amended to clarify that other government identification cards must contain the same information as is required for drivers licenses, not the same information actually included on drivers licenses. As in the Immigration and Nationality Act regulations, this could be done simply by repeating the same requirement for driver's licenses and other government identification cards, rather than referring to driver's licenses in the requirement for other government identification cards.*

Documentary Evidence as a One Time Activity:

The interim final rule provides as follows:

Presentation of documentary evidence of citizenship is a one time activity; once a person's citizenship is documented and recorded in a State database subsequent changes in eligibility should not require repeating the documentation of citizenship unless later evidence raises a question of the person's citizenship. The State need only check its databases to verify that the individual already established citizenship. (See section 435.407(h)(5) of the interim final rule.) However, the preamble states as follows:

- We specify in paragraph (i) that once a person's citizenship is documented and recorded in the individual's permanent case file, subsequent changes in eligibility should not ordinarily require repeating the documentation of citizenship unless later evidence raises a question of the person's citizenship, or there is a gap of more than 3 years between the individual's last period of eligibility and a subsequent application for Medicaid. We use a record retention period of 3 years throughout the Medicaid program as provided in 45 C.F.R. § 74.53. To require a longer retention period would be an unreasonable imposition on State resources.

71 Fed. Reg. § 39219. The paragraph (i) referencing the preamble provides only that "[t]he State must retain documents in accordance with 45 C.F.R. § 74.53." (See section 435.407(i) of the interim final rule.) As quoted above, the paragraph of the

interim final rule that does address documentation of citizenship as a one-time activity contains no exception for a three-year gap between the latest period of eligibility and a subsequent application for Medicaid. We would note that states can retain records beyond the three years generally required by the federal Medicaid regulations. As long as a state retains the information that an individual has documented their citizenship, the state should not be required to document citizenship again, regardless of any gap between the last period of eligibility and a subsequent application for Medicaid. *No change in the regulation is required, but the Secretary should clarify that states are not required to repeat the documentation of citizenship as long as they retain the information that an individual has documented their citizenship, regardless of any gap in Medicaid eligibility.*

In addition, the regulation needs to specify how situations are to be handled when a person applying for Medicaid in State A has previously provided proof of citizenship and identity pursuant to this regulation in State B. Since providing proof is a one-time activity, State A cannot request the person to again provide proof. And, the regulation requires that states maintain copies of the proof in their Medicaid case files. But, if State A accepts copies from State B of the proof State B has in their case file, State A could be at risk for accepting copies instead of originals or copies certified by the issuing agency.

Emergency Care:

The Secretary should clarify the citizenship documentation requirements applicable to emergency care situations. Section 1903(v)(2) of the Social Security Act provides an exception to the general prohibition of federal funding for care of undocumented aliens. The law permits Medicaid agencies to pay for emergency care for such individuals. It is unclear whether or not Medicaid agencies can pay for such emergency care for undocumented individuals who are either U.S. citizens or who do not identify themselves as undocumented aliens.

THE UNITED STATES OF AMERICA

No. A810XXX

CERTIFICATE OF CITIZENSHIP

Application No. ____

·ORIGINAL·

Personal description of holder as of date of issuance of this certificate: Sex Female ; date of birth June ____ ;
country of birth ____ ; complexion ____ ; color of eyes 1 ____ ; color of hair ____ ;
height ____ feet 0 inches; weight ____ pounds; visible distinctive marks None
____ Marital status ____

I certify that the description above given is true, and that the photograph affixed hereto is a likeness of me.

childe

Father

(Complete and true signature of holder)

Be it known, that ____
now residing at ____
having applied to the Commissioner of Immigration and Naturalization for a certificate of citizenship pursuant to Section 341 of the Immigration and Nationality Act, having proved to the satisfaction of the Commissioner, that (s)he is now a citizen of the United States of America, became a citizen thereof on March 4, 1988 and is now in the United States.

Now Therefore, in pursuance of the authority contained in Section 341 of the Immigration and Nationality Act, this certificate of citizenship is issued this Eighteenth day of March in the year of our Lord nineteen hundred and Eighty-eight, and the seal of the Department of Justice affixed pursuant to statute.

Seal

IT IS PUNISHABLE BY U. S. LAW TO COPY, PRINT OR PHOTOGRAPH THIS CERTIFICATE.

Alan C. Nelson

COMMISSIONER OF IMMIGRATION AND NATURALIZATION

RECEIVED FEB 23 200_

DEPARTMENT OF JUSTICE

FORM N-560 (REV 12-1-89)

WARNING: IT IS A FELONY TO COPY OR REPRODUCE THIS CERTIFICATE - STATE STATUTE 69.24(1)

STATE OF WISCONSIN
DEPARTMENT OF HEALTH AND SOCIAL SERVICES

STATE FILING DATE

STATE BIRTH NO.

CERTIFIED COPY

123

August 10, 2006

Dr. Mark McClellan, Administrator, Centers for Medicare and Medicaid Services

Subject: Ease Citizenship Requirements for Medicaid Recipients

Re: CMS—2257—IFC

jjtgq@strangefolk.com
jean sienkewicz

Millions of Americans eligible for Medicaid could face significant delays or lose coverage altogether because they simply do not have access to the birth certificate, passport, or similar documents required under new rules issued by the Bush administration. * The Medicaid program plays a vital role in preventing unintended pregnancies and ensuring women have access to the care they need. Medicaid provides health insurance coverage for one in 10 women of reproductive age and pays for more than one-third of all births in the United States * The citizenship documentation requirements erect unnecessary barriers by requiring Medicaid-eligible citizens to produce a birth certificate, passport, or similar documentation. * CMS should ensure that new Medicaid applicants receive care while they are making a good faith effort to attain the required documentation. * CMS should eliminate the current requirement that Medicaid recipients and applicants submit original or certified documentation. * CMS should exempt individuals who receive services under a Medicaid family planning demonstration project from the documentation requirements. Through these programs, millions of individuals who do not meet the requirements for standard Medicaid receive family planning services to help them prevent unintended pregnancies.

Sincerely,
Jean M. Sienkewicz

124

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August 10, 2006

OVERNIGHT DELIVERY

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Attention: CMS –2257-IFC
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: Medicaid Citizenship Documentation
Provisions of the Interim Final Rule with Comment Period
71 FR 39214 (July 12, 2006)

Dear Secretary Leavitt:

Legal Services of New Jersey (LSNJ) is an independent, non-profit organization that coordinates a statewide system that strives to ensure equal access to justice by providing civil legal assistance to low-income New Jersey residents. LSNJ's Health Care Access Project seeks to ensure that indigent New Jersey residents have full access to quality health care by direct representation of clients, information dissemination, legal analysis, and policy advocacy. There are currently approximately one million Medicaid recipients in New Jersey. Many of the clients who consult our Health Care Access Project do so with issues related to Medicaid eligibility.

There are several aspects of the Department's Interim Final Rule on Medicaid Citizenship Documentation that concern us. We want to highlight a few for your consideration.

Denial or Delay for New Applicants

One aspect of the Rule in particular seems fundamentally incorrect and contrary to the intent of the Medicaid program. Specifically, we are very concerned that while the Rule appropriately allows current Medicaid recipients to remain eligible for Medicaid during a reasonable time period necessary to obtain newly required documents, it prevents new applicants who have attested to their citizenship status from becoming eligible until they have gathered the new

documentation required by the Rule. This means that many new applicants for Medicaid *who are citizens* will be deprived of often desperately needed medical care to which they are entitled by law while they search for documents that sometimes will be difficult and expensive to obtain.

This approach is not required by statute; there is nothing in Section 6036 of the Deficit Reduction Act of 2005 that supports such a harsh result. Moreover, the intent of Congress in mandating new requirements for documentation of citizenship was to stop persons who are not citizens from receiving Medicaid benefits to which they are not entitled by fraudulently claiming citizenship, not to prevent persons who are citizens and who do qualify for Medicaid from receiving benefits simply because they experience delays in obtaining specific documents that prove their citizenship.

This approach also misinterprets the documentary requirements of Section 6036 as a new eligibility requirement, which they are not. CMS has recognized elsewhere that section 6036 instead imposes a new condition of federal financial participation (FFP). The eligibility requirement for Medicaid remains "a declaration in writing, under penalty of perjury . . . whether the individual is a citizen or national of the United States." 42 U.S.C. § 1320b-7(d)(1)(A). Once an otherwise eligible Medicaid applicant has made this declaration, she is eligible for Medicaid and should be given benefits and allowed a reasonable opportunity to provide necessary documentation of citizenship. Indeed, to deny such an individual benefits conflicts with another section of the Medicaid statute that requires the Secretary of HHS to reject any State plan that imposes, as a condition of eligibility, "any citizenship requirement that excludes any citizen of the United States." 42 U.S.C. § 1396a(b)(3).

That the Interim Final Rule does appropriately allow current recipients to remain eligible for Medicaid while they are given a reasonable opportunity to obtain the newly required documents is also inconsistent with a different rule for new applicants. If the new documentary requirements were a condition of eligibility, then current applicants that did not provide them immediately should be declared immediately ineligible. Clearly the chaos and hardship that would be created by such an interpretation of Section 6036 was not intended by Congress, but nor is there any evidence that Congress intended to create the substantial hardship on new citizen applicants that the current Rule creates by treating new applicants differently.

Finally, the current Rule results in treatment of new applicants who are not citizens (i.e. qualified legal immigrants) better than new applicants who are citizens. Congress has specifically required that a State shall provide qualified immigrants "a reasonable opportunity to submit . . .evidence indicating a satisfactory immigration status, and . . . may not *delay*, *deny*, reduce, or terminate the individual's eligibility for benefits . . . until such reasonable opportunity has been provided." 42 U.S.C. § 1320b-7(d)(4)(A) (emphasis added). It would be hard to believe that Congress intended to treat citizens less favorably than immigrants by adopting a stricter requirement for citizens; therefore, the implementing regulations for the new Medicaid proof of citizenship requirements should also not do so.

For all of the above reasons, we urge you to modify 42 C.F.R. § 435.407 so that applicants for Medicaid who provide written attestation of their citizenship status, and who are otherwise eligible, are granted Medicaid benefits and are given a reasonable opportunity to provide required documentary proof of their citizenship status.

Requirement of Original or Certified Copies

The rule currently requires that only originals or certified copies of qualifying documents may be accepted to verify citizenship or identity. This requirement will create barriers to eligibility for recipients because it increases the expense and delay in obtaining necessary documents, and it will increase the administrative burden on states because it will make processing by mail nearly impossible. Furthermore, there is nothing in Section 6036 of the DRA that requires it.

Many people may already have copies of a birth certificate, but not certified copies. If copies were acceptable, these applicants could be approved expeditiously and without incurring additional expense. If certified copies are required, and the applicant was born out-of-state, he will first have to identify what out-of-state agency is responsible for maintaining birth certificates, contact that state agency to determine its requirements for ordering a birth certificate, come up with the money to order a certified copy, and determine a reliable method for sending this amount through the mail. *New Jersey charges a minimum of $25.00 for a certified copy of a birth certificate that will be mailed to the person within six to eight weeks.* These delays and costs are unnecessary and burdensome for a person who already has a copy of the birth certificate. Moreover, if an applicant were to apply for a passport instead, the cost would be at least $82. Because Medicaid recipients are indigent, any unnecessary costs should be avoided so as to avoid discouraging eligible citizens from applying.

In recent years, many states have reduced Medicaid administrative costs by adopting a mail-in application or re-determination process in lieu of time consuming face-to-face interviews. The adoption of a requirement for original or certified copies will significantly undermine this efficient cost-saving measure. Every applicant or current recipient who has to present citizenship documentation will effectively have to do so in person because it would be foolish for them to send originals or certified copies of a birth certificate, passport, or drivers license (a common way to prove identity) through the mail.

The new rule puts forth an estimate that it will take recipients and applicants 10 minutes to collect and present evidence of citizenship and identity to the state, and take a State 5 minutes to obtain, verify, and maintain this evidence. These estimates seem in general to be vastly over-optimistic; however, if originals or certified copies are required, they would seem to be an impossibility.

Children in Foster Care Under Title IV-E

Children who receive Medicaid because they qualify for foster care benefits under Title IV-E should not be subject to the new proof of citizenship documentation requirement at all. Section 6036 of the DRA only applies to "an individual declaring to be a citizen or national of the United States." 42 U.S.C. § 1396b(x)(1). This refers to the written declaration, under penalty of perjury, described above. However, Title IV-E is not a program to which the declaration process applies. See 42 U.S.C. § 1320b-7(b). Therefore, there is no basis in the text of the statute to impose this new requirement on foster children receiving Medicaid.

Moreover, given the enormously harsh impact, without clear evidence of intent in the language, we cannot assume that these children are meant to be subject to the new proof of citizenship requirement. Congress was concerned with individuals who may be swearing falsely that they were citizens, and as a matter of common sense foster children do not belong within the suspect group. In addition, Congress could not have intended to make it more difficult for these already extremely vulnerable children to obtain health

care, or to place a significant impediment in the way of families who want to take in foster children, who rely on the availability of medical benefits as a major factor in taking on this responsibility.

Even if the Department were to interpret Section 6036 to include children who receive benefits in Title IV-E foster care, CMS should use its statutory authority to exempt them from the citizenship documentation requirements just as it has exempted Medicare and SSI recipients. Eligibility for Title IV-E benefits automatically provide most children in foster care with concurrent eligibility for Medicaid as individuals "who are receiving aid or assistance under any plan of the State approved under …or Part A of E of Subchapter IV of this Chapter." 42 U.S.C. § 1396a(a)(10)(A)(i)(I)

It is our understanding that there is some verification of citizenship status that takes place in determining foster care eligibility under Title IV-E. However, the same as children who are made eligible for Medicaid because they are eligible for SSI, foster children are not separately required to apply for Medicaid or to declare citizenship for eligibility for Medicaid. To now prevent or delay Medicaid benefits for these children who, by definition, are at risk is a compelling reason to include them in the populations who are exempt from the new stringent citizenship documentation requirement.

Good Cause Exemptions

We find an absence in the Interim Rule for exemptions for applicants or recipients based on good cause. New §(g) of §435.407 specifically directs states to assist populations who are unable to comply with the evidence requirements for citizenship due to "incapacity of mind or body…" In addition, §(j) of this provision requires states to provide applicants and recipients with a "reasonable opportunity to present satisfactory documentary evidence of citizenship." However, neither of these provide for instances when an applicant or recipient is unable to produce U.S. citizenship documentation because the documentation is not accessible through no fault of the applicant or recipient.

We are thinking foremost of victims of domestic violence who are unable to access documentation for themselves and/or their children. For example, all too often the batterer in a domestic violence situation destroys personal papers that belong to the victim and/or the children in the family. We urge the inclusion of a good cause exemption for such populations who are otherwise eligible for Medicaid but have good cause for being unable to produce the evidence required.

Based on our experience representing Medicaid recipients in New Jersey, we believe the modifications we have suggested will help citizens who are legitimately entitled to these benefits obtain and maintain them while at the same time remaining true to the Congressional purpose of making sure that those who are not citizens do not participate by falsely claiming that they are. Thank you for the opportunity to comment on the Interim Final Rule.

Sincerely,

Melville D. Miller, Jr.
Joshua M. Spielberg
Linda M. Garibaldi

cc: Melissa Musotto, Office of Strategic Operations and Regulatory Affairs
Katherine T. Astrich, Office of Information and Regulatory Affairs