Planned Parenthood®
Orange and San Bernardino Counties

44-1

August 10, 2006

Administrator Mark B. McClellan, M.D., Ph.D
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-2257-IFC
P.O. Box 8017
Baltimore, MD 21244-8017

Re: 42 CFR Parts 435, 436, 440, 441, 457, and 483
Medicaid Program; Citizenship Documentation Requirements

Dear Administrator McClellan:

We are writing to comment on the interim final rule, published in the Federal Register on July 12, to implement section 6036 of the Deficit Reduction Act of 2005 (DRA). Section 6036 requires that all U.S. citizens applying for or receiving Medicaid benefits produce documentation proving citizenship. We are deeply concerned about the impact this provision will have on millions of Medicaid eligible citizens.

Planned Parenthood of Orange and San Bernardino Counties (PPOSBC) is a non-profit organization providing family planning and other preventive health care to nearly 50,000 patients each year. Many of these patients rely on Medi-Cal to pay for their health care services. We are deeply concerned that several of the proposed interim rules regarding documentation requirements could keep countless citizens from obtaining health care coverage for the services they so desperately need.

We are disappointed that the Centers for Medicare and Medicaid Services (CMS) did not capitalize on the opportunity to lessen the negative impact of section 6036. Actually, in several instances, the interim final rule sets forth requirements that are more burdensome than what the statute calls for. Below, we highlight areas where CMS should modify the interim final rule to more effectively ensure that patients have timely access to the health care services they are eligible for and need.

We are especially concerned about the impact the interim final rule will have on individuals seeking family planning services. Nationwide, Medicaid is a significant source of funding for family planning and other preventive health care services we provide to our patients. This critical program is the largest source of public funding for family planning services, accounting for more than 60% of all publicly-funded care.

In California, over four million women are in need of contraceptive services or supplies, and more than half of those need publicly supported services because they have incomes below 250% of the federal poverty level or are sexually active teenagers. Each year, publicly funded family planning clinics in California help women prevent 236,500 unintended pregnancies. Furthermore, every public dollar spent on family planning services saves the federal and state governments three dollars in Medicaid costs for prenatal and newborn care.

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Individuals receiving benefits under section 1115 family planning demonstration programs should be exempt from the citizenship documentation requirements.

Since 1993, twenty-four states have expanded access to family planning services through 1115 family planning demonstration programs, including California's Family PACT. Under these programs, states have received CMS approval to extend Medicaid-covered family planning services to individuals who do not meet the requirements for standard Medicaid enrollment in order to prevent unintended pregnancies. Streamlining enrollment and extending coverage are fundamental to the continued success of these programs, which have assisted millions of low-income people who would otherwise have no source for family planning services. For many states, family planning demonstration programs are at the cornerstone of improvements in quality of health care. Unfortunately, the citizenship documentation requirements strike at the core of how family planning demonstration programs are designed and could ultimately render them meaningless.

The interim final rule completely threatens the viability and impact of these programs by requiring individuals who receive these services to produce citizenship documentation. The preamble of the interim final rule states that "individuals who are receiving benefits under a section 1115 demonstration project approved under title XI authority are also subject to the provision" (71 Fed. Reg. 39216 and 42 CFR 435.406(a)(1)(iii)).

This inclusion of family planning demonstration programs is entirely counterproductive. The point of these programs is to expand coverage and streamline access to critical services by waiving certain federal requirements under the Medicaid program. Services provided under the family planning demonstration programs are limited in scope, but their impact is tremendous. Each year, millions of women rely on these programs to prevent unintended pregnancies and to access other crucial health care services.

In addition to expanding access to such vital health care services, family planning demonstration programs save money. Here in California, every dollar spent through Family PACT saves an estimated $4.48 in public expenditures, including medical, social service and education costs. A 2003 study commissioned by CMS showed that in each of the states studied, the program actually saved money by averting unintended pregnancies. For instance, South Carolina realized a savings of $56 million over a three-year period while Oregon's program saved almost $20 million in a single year.

Requiring family planning demonstration program patients (who otherwise would not qualify for Medicaid coverage) to comply with a requirement for the broader Medicaid population completely undermines the programs by erecting unnecessary enrollment barriers. Furthermore, the citizenship documentation requirements would ultimately create a larger financial burden for the federal and state governments.

We strongly urge CMS to exempt this population from the documentation requirements in the final rule. Doing so will ensure that family planning waiver demonstration programs will continue to make important strides in enhancing access to time-sensitive services and reducing the rate of unintended pregnancies. Without such an exemption, states will be faced with the very real possibility that costs associated with requiring citizenship documentation will outweigh the savings the programs currently produce.

Individuals applying for Medicaid should receive benefits once they declare citizenship.

Section 6036 of the DRA applies to all individuals (with the exception of Medicare beneficiaries and most SSI beneficiaries) who apply for Medicaid. For those individuals who are already receiving Medicaid benefits, the interim final rule stipulates that they will continue to be eligible for services while they are in the process of producing the required documentation during a "reasonable opportunity" period allotted to them. However, for those individuals who are newly applying to the program, the interim final rule firmly establishes that they will not be eligible for services until citizenship is proven (see 71 Fed. Reg. at 39216 and 42 CFR 435.407(j)). As a result, U.S. citizens applying for Medicaid who have met all eligibility criteria and are in the process of producing the documentation will experience significant delays in Medicaid coverage. This will have a substantial impact on individuals in need of time-sensitive reproductive health care services.

As a result, in this year alone, approximately 10 million U.S. citizens applying for Medicaid will face the possibility of a gap in coverage while they are in the process of producing the required documentation. It should not be lost that the majority of these citizens will be low-income pregnant women, children, and other vulnerable Americans. Undoubtedly, this will result in delays in care, worsening health care problems and eventually placing a heavier burden on the health care system. This will have an especially negative impact on individuals in need of family planning services, cervical and breast cancer screening, and STI testing services. Some U.S. citizens who may get discouraged or are unable to produce the documents within the time allowed by the state will be denied coverage. Furthermore, because an active outreach program has not been implemented, many citizens are likely unaware of the documentation requirements and are not prepared to comply.

Surprisingly, this requirement was not required by the DRA statute. There is nothing in the DRA that requires any delay in providing coverage for health care services. Unfortunately, CMS freely incorporated this debilitating provision into the interim final rule.

Even still, delaying eligibility does not correspond with the statute. Under the DRA, documentation of citizenship is not a criterion of Medicaid eligibility. Instead, it is a criterion for states to receive federal financial participation (FFP). Once an applicant for Medicaid declares that he or she is a citizen and meets all eligibility requirements, he or she should be able to access Medicaid-covered services while attempting to produce the required documentation during the "reasonable opportunity" period.

We therefore urge CMS to revise the interim final rule at 42 CFR 435.407(j) to state that new Medicaid applicants who declare they are U.S. citizens or nationals and who meet the state's eligibility criteria must receive Medicaid-covered services while they are obtaining the necessary documentation during the "reasonable opportunity" period.

CMS should not require applicants and beneficiaries to submit originals or certified copies of documentation.

The interim final rule requires that individuals submit original or certified copies of documentation (see 42 CFR 435.407(h)(1)). This requirement creates an even larger burden for beneficiaries who will be faced with either the additional cost of purchasing a certified copy, making a face-to-face

visit with state offices, or with entrusting important documentation, such as an original birth certificate or passport, to the postal system and state Medicaid agencies.

Attaining the required documents presents its own challenges. In the state of California, obtaining a certified birth certificate copy costs $14 and takes an average of four weeks. Clearly, this calls into question CMS's estimate that it will take 10 minutes for applicants and beneficiaries to comply with the requirements (see 71 Fed. Reg. 39220). Of course, delays in care will occur as a result of the document acquisition process —an especially harmful issue for those who will have to forgo reproductive health care services while they are attempting to attain the required documentation.

While the regulations state that individuals can submit documents by mail, it is unlikely that many will be comfortable mailing in originals or certified copies of birth certificates, final adoption decrees, or medical/life insurance records. Moreover, it would be completely impractical to mail in proof of identity, such as a driver's license or school identification card.

The requirement that only original and certified documents can be accepted is unreasonable and will undermine efforts to streamline and optimize enrollment of eligible individuals into the Medicaid program. Not only is the requirement onerous, it is also unnecessary. The DRA does not require that applicants and beneficiaries submit original or certified copies to satisfy the new citizenship documentation requirement. Furthermore, in addition to the obstacle this creates for patients, this requirement makes it more likely that health care providers will experience delays in reimbursement as well as uncompensated care.

We strongly urge CMS to eliminate the requirement at 42 CFR 435.407(h)(1) that only originals or copies certified by the issuing agency can be accepted.

The final rule should allow states more flexibility to effectively implement the documentation requirements.

California should not be forced to implement a citizenship documentation process that is both burdensome and counterproductive. We recognize that the regulations are a significant improvement over the June 9th CMS guidance in that they explicitly allow states to use vital health databases to document citizenship and other state and federal databases to document identity (see 71 Fed. Reg. 39216 and 42 CFR 435.407(e)(10)). California's Department of Health Services has decided to provide the electronic match of birth records for California-born citizens who are beneficiaries of or applicants for Medi-Cal. This major improvement will reduce the number of citizens in our state that are forced to track down appropriate documentation.

At the same time, however, California is still bound by a proscriptive process that does not adequately allow it to respond to the unique needs of their population. In general, the hierarchy of document reliability that CMS chose creates a much larger burden than is necessary to implement section 6036. Specifically, there are several areas where CMS should amend the interim final rule.

While requiring states to help "special populations" in securing citizenship documentation is an important safeguard, it is unclear if this provision covers all individuals who may be in need of state assistance (see 42 CFR 435.407(g)). The provision applies to those who cannot acquire the documents because of "incapacity of mind or body." Conceivably, there are many groups of people who may be lost in this provision, such as victims of natural disasters and certain homeless

individuals. CMS should erect a clear safety net for these populations as well. Furthermore, CMS should ensure that for these populations, eligibility for services cannot be denied as a result of a state's incapacity to locate the documentation.

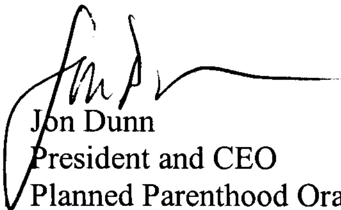
In the interim final rule, CMS solicits comments on whether individuals would have difficulty proving citizenship and identity if only primary or secondary level documents were permitted (see 71 Fed. Reg. 39220). Given that many beneficiaries and applicants will face significant hurdles in documenting citizenship according to the provisions of the interim final rule, it would be enormously detrimental if the regulations were limited so severely in the final rule. Instead, CMS should approach the final rule in terms of broadening the scope of acceptable documentation. For instance, section 435.407(a) should be amended to allow Native American tribal identification documents to be used to prove both citizenship and identity.

We strongly urge CMS not to limit the accepted documentation to the primary and secondary level of documents. If the true goal of the provision is simply to require the proof of citizenship and identity of Medicaid-eligible U.S. citizens, then it is only natural that CMS would accept a variety of documents to reflect the varied circumstances of Medicaid-eligible citizens' lives.

Conclusion

The citizenship documentation requirements set forth by the Deficit Reduction Act will have a profound impact on the way Medi-Cal operates. Because of this, we emphatically encourage CMS to use its full authority to lessen the severity of the section 6036.

Thank you for your attention to these comments.



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August 11, 2006

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RE: Medicaid Program; "Citizenship Documentation Requirements" CMS-2257-IFC

Dear Administrator McClellan:

The American Psychiatric Association (APA), the national medical specialty society representing more than 36,000 psychiatric physicians, appreciates the opportunity to submit these comments concerning regulations relevant to citizenship documentation requirements for Medicaid applicants and recipients. This rule, concerning 45 C.F.R. Parts 435, 436, 440, 441, 457, and 483 was published in the Federal Register on July 12, 2006, with the title, "Citizenship Documentation Requirements."[1]

APA's comments on several aspects of this proposed rule are elaborated, below. The truncated rulemaking process and other procedural issues are a major concern. APA's other concern centers on the potential for the hasty adoption of these rules to delay, disrupt or terminate benefits, especially for mental health care, in highly vulnerable Medicaid populations. It is these individuals who will likely have the most difficulty complying with whatever state requirements ensue as a result of these rules. This problem will be heightened if CMS does not adhere to proper rulemaking procedures that are designed to forestall potential hazards in the process. States need sufficient time both to respond to proposed rules with their comments and to implement effective, efficient procedures to enable citizenship status documentation to be accomplished.

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[1] CMS Interim Final Rule: "Citizenship Documentation Requirements;" CMS-2257-IFC [Federal Register, July 12, 2006 (Volume 71, No. 133)].

Rulemaking Procedural Issues

A major APA concern is CMS's departure on multiple fronts from the conventional rulemaking process: 1) the shortened 30-day comment period from the usual 60-day period; 2) a retroactive effective date for the interim final rule of July 6, 2006, that *precedes* by six days its publication in the Federal Register on July 12, 2006; 3) publishing an interim final rule, instead of a proposed rule;[2] 4) now rushing the rulemaking process that CMS started five months after the federal statutory change was enacted on February 8, 2006; and 5) waiving rulemaking procedures on the basis that further delay could result in Medicaid recipients being unable to demonstrate their citizenship, thus lose benefits.[3] This rationale is not supported by the facts.

Since 1986, states have had federal statutory authority to document applicants' citizenship for purposes of Medicaid eligibility through self-declarations by citizens and nationals. Aliens have also been allowed to declare themselves to be in a satisfactory immigration status for Medicaid eligibility.[4] As CMS noted, "(t)he new provision under section 6036 of the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109-171, enacted on February 8, 2006) effectively requires that the State obtain satisfactory documentation of a declaration of citizenship." In the absence of more specific CMS regulations, states have legitimately used their own discretion to determine what constituted compliance with the statutory requirement that declarants under Sec. 1137(d)(1)(A) present satisfactory documentary evidence," per Sec. 6036.[5] This Sec. 6036 state documentation mandate applies to new Medicaid applicants and to eligibility redeterminations for existing beneficiaries, as of July 1, 2006.[6]

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[2] CMS Interim Final Rule: "Citizenship Documentation Requirements;" CMS-2257-IFC [Federal Register, July 12, 2006 (Volume 71, No. 133)], at 39214-39215.

[3] CMS Interim Final Rule: "Citizenship Documentation Requirements;" CMS-2257-IFC [Federal Register, July 12, 2006 (Volume 71, No. 133)], at 39220-39221.

[4] CMS Interim Final Rule: "Citizenship Documentation Requirements;" CMS-2257-IFC [Federal Register, July 12, 2006 (Volume 71, No. 133)], at 39215:

"Since 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, and if not a citizen or national, that the individual is an alien in a satisfactory immigration status."

[5] Deficit Reduction Act of 2005 (DRA); (Pub. L. 109-171, enacted February 8, 2006):

Section 6036(x)(1) "For purposes of subsection (i)(23), the requirement of this subsection is, with respect to an individual declaring to be a citizen or national of the United States, that, subject to paragraph (2), there is presented satisfactory documentary evidence of citizenship or nationality (as defined in paragraph (3)) of the individual."

[6] CMS Interim Final Rule: "Citizenship Documentation Requirements;" CMS-2257-IFC [Federal Register, July 12, 2006 (Volume 71, No. 133)], at 39215.

Since July 1, 2006, states have continued to accept self-declarations of citizenship status but have also had a federal statutory mandate that such declarations be supported by documentation. CMS's interim final rule implements specific details as to this citizenship documentation process, including reliability tiers for proof. CMS' retroactive effective date for the interim final rule is July 6, 2006, five days after the July 1st statutory date for the documentation requirement. CMS' imposition of a retroactive effective date shortens the time frame for providing citizenship status documentation. That works to the disadvantage of applicants and beneficiaries. States must now scramble to request or obtain documentation in accordance with these CMS rules on claims processed after July 6th even though July 12th was the date the public first received notice of the interim final rule and its July 6th effective date.

However, Medicaid claims and redeterminations processed between July 1st and July 6th do not fall under these new CMS rules. That means that this effective date creates two classes of Medicaid determinations to which different state documentation requirements and federal rules apply. One class of determinations was processed in the absence of CMS regulations (July 1-5); the other class (processed on or after July 6th) falls under the new interim final rule, although federal statutory provision Sec. 6036 applies to both classes of cases.

The absence of regulations related to this statutory mandate for states has not prevented states from obtaining the citizenship documentation since July 1st. Implementation of the interim final rule will require states to adopt conforming policies and procedures, which may take time to institute. It is also important for CMS to review comments prior to finalizing rules on documentation, in order to ensure that CMS' goal of protecting vulnerable populations from lapses or delays in Medicaid coverage is met. Shortening the rulemaking process and instituting a retroactive effective date for these rules may lead to hastily adopted state procedures that may impede applicants from receiving or continuing to receive healthcare benefits through Medicaid.

CMS Interpretation of Section 6036

APA is concerned about CMS articulating its legal interpretation that the word "alien" in Sec. 6036(x)(2) is a Congressional error and applying doctrines of "absurd result" and "scrivener's error" to this section.[7] Inasmuch as CMS is not a court of law, it does not have the authority to make a binding legal interpretation of the language in a federal statute, nor can it contravene explicit statutory language in its rulemaking. CMS has not set forth a binding court interpretation of this new statutory Section 6036 that CMS could use to support its opinion of that section's meaning. Therefore, CMS cannot contravene Congressional language for the purpose of rulemaking.

The clearly stated purpose of Sec. 6036 is to require "satisfactory documentary evidence" of "citizenship" or "nationality" for Medicaid eligibility where an individual

[7] CMS Interim Final Rule: "Citizenship Documentation Requirements;" CMS-2257-IFC [Federal Register, July 12, 2006 (Volume 71, No. 133)], at 39215-39216.

claimed to be a "citizen" or "national" under Section 1137(d) of the Social Security Act. Formerly, a written self-declaration of status under Section 1137(d) sufficed, which also provides for self-declaration for "aliens" in satisfactory immigration status.[8]

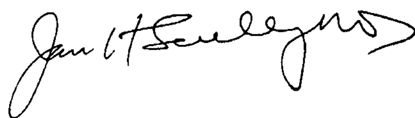
It would be logical to require documentation for all categories for which a self-declaration was previously accepted and which conferred Medicaid eligibility: 1) U.S. citizen; 2) U.S. national; and 3) alien in satisfactory immigration status. Taken at face value, Sec. 6036(x)(2) carves out an exception for aliens to further document their satisfactory immigration status, where it had already been established by the government by eligibility for Title XVII benefits, Supplemental Security Income (SSI); or where there was previous evidence of citizenship or nationality that is inconsistent with alien status. CMS does not explain sufficiently why it will not adopt the plain meaning and purpose of the statute for the purpose of the implementing rules. APA believes that is appropriate for CMS to adopt regulations that are consistent with federal statutory language, in the absence of binding legal authority to the contrary.

Conclusion and Recommendations

APA urges CMS to follow the usual rulemaking process, in order to allow time to consider comments as to procedural and policy issues, as well as to allow states more time to adapt to whatever new documentation requirements they must implement. APA remains concerned about the impact of documentation rules that may be difficult for certain groups to comply with quickly, due to documentation barriers. These groups include persons with psychiatric disorders, foster children, homeless persons, those with language barriers, and those displaced by Hurricane Katrina or other disasters. APA highly recommends that CMS take ample time to consider all aspects of any new documentation rules and their impact on vulnerable populations. It is important to ensure that healthcare, especially mental health care, is provided without undue delay or disruption to those who most need it.

In addition, APA notes that Sec. 6036(c) requires the Secretary of Health and Human Services to establish an outreach program for individuals likely to be affected by the new documentation requirements. Ideally, this process should be in place prior to instituting the effective date for these regulations. Thank you for your consideration of these comments.

Sincerely,



James H. Scully Jr., M.D.
Medical Director and C.E.O., American Psychiatric Association

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[8] CMS Interim Final Rule: "Citizenship Documentation Requirements;" CMS-2257-IFC [Federal Register, July 12, 2006 (Volume 71, No. 133)], at 39215.

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July 11, 2006

Dennis G. Smith, Director
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7500 Security Boulevard, Mail Stop S2-26-12
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Re: **Comments of the Washington Legal Foundation Regarding CMS's June 9, 2006 Letter to State Medicaid Directors Concerning Improved Documentation of Citizenship**

Dear Mr. Smith:

The Washington Legal Foundation (WLF) is writing in response to the June 9, 2006 guidance letter sent to State Medicaid Directors by the Centers for Medicare and Medicaid Services (CMS), through its Center for Medicaid and State Operations, regarding acceptable means of establishing U.S. citizenship when initially applying for Medicaid. WLF approves of the interim guidelines and applauds the agency for taking steps to implement the new proof-of-citizenship requirements established by the Deficit Reduction Act of 2005 (DRA). However, before proposed regulations are published in the Federal Register, WLF wishes to comment on the current state of the guidelines. Large portions of the guidelines are appropriate and necessary for carrying out documentation of citizenship as required by the DRA; but, as we explain in more detail below, we do ask that certain changes be made before CMS issues proposed regulations. In particular, we believe that certain features of the guidelines are not in accord with Congress's directives in this area.

I. *Interests of WLF*

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to promoting national security, including efforts to reduce the flow of illegal immigrants into this country. WLF believes that one effective method of reducing that flow (as well as preventing an unauthorized drain on government treasuries) is to strengthen measures designed to ensure that illegal aliens are denied access to Medicaid and other public benefits. Accordingly, WLF has appeared in numerous State and federal court proceedings to oppose judicial challenges to such measures. *See, e.g., Friendly House v. Napolitano*, 419 F.3d 930 (9th Circ. 2005) (representing intervening defendants opposing challenge to Arizona's Proposition 200); *Cubas v. Martinez*, No. 04/112371 (N.Y. App. Div., dec. pending) (challenge to documentation requirements for those seeking New York driver's licenses). WLF supports efforts to ensure that only eligible individuals receive Medicaid benefits, by requiring those claiming eligibility on the basis of citizenship to provide adequate documentary evidence of their claim.

II. BACKGROUND

Medicaid was established in 1965 as part of the amendments to the Social Security Act and provides medical benefits to those who qualify.[1] To be eligible for Medicaid, an applicant must fall within an eligibility group, either the categorically needy or the medically needy.[2] In

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[1] Social Security Act of 1935, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of 42 U.S.C.); Medicaid at-a-Glance, http://www.cms.hhs.gov/MedicaidGenInfo/Downloads/MedicaidAtAGlance2005.pdf.

[2] Medicaid at-a-Glance, at 5.

addition, the applicant must be a U.S. citizen, a national of the U.S., or a qualified alien.[3]

CMS has previously allowed states to accept self-declaration as adequate proof of citizenship as suggested under § 1137(d)(1)(A) of the Social Security Act.[4] This method of proof allowed a Medicaid applicant simply to declare, under penalty of perjury, that he or she was a national or citizen of the United States or was in satisfactory immigration status. Self-declaration required no further documentary evidence or proof to support such a claim. Although federal statutes have not required government agencies to accept self-declaration, CMS has nonetheless encouraged it in order to expedite the Medicaid application process.[5] Indeed, CMS issued a proposed rule that would have made it clear to the States that self-declaration of citizenship was acceptable, but the rule was later withdrawn before it became final.[6] Regardless, as of July 2005, 46 out of 50 States, plus the District of Columbia, allowed self-declaration of citizenship when applying for Medicaid.[7] Thirty-two of the 46 States that accepted self-declaration of citizenship had a written "prudent person policy" which required the applicant to provide documentation if the self-declaration seemed questionable. Twelve of the States had informal or non-written prudent person policies and three States had no policy at all. Only 20 of the 46 States performed quality control activities to verify the self-attested statements of U.S. citizenship as required by

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[3] Dep't of Health & Human Servs., Office of Inspector Gen., OEI-02-03-00190, *Self-Declaration of U.S. Citizenship for Medicaid* (2005); *see* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 8 U.S.C.A. and 42 U.S.C.A.).
[4] 42 U.S.C.A. § 1320b-7(d)(1)(A) (2006); *Self-Declaration of U.S. Citizenship for Medicaid*, at 1.
[5] *Id.*
[6] Self-Declaration of Citizenship, 67 Fed. Reg. 74527 (proposed Dec. 9, 2002) (withdrawn).
[7] *Self-Declaration of U.S. Citizenship for Medicaid*, at 11.

federal regulations.[8]

III. THE DEFICIT REDUCTION ACT ADDED A REQUIREMENT THAT MEDICAID APPLICANTS SHOW PROOF OF CITIZENSHIP

Such self-declaration of citizenship has led to fraud and abuse of Medicaid and the payment of benefits to illegal immigrants, who are not eligible for Medicaid. For example, Georgia has estimated that such abuse is costing it a minimum of $100 million annually.[9] In response to such concerns, Congress adopted § 6036 of the Deficit Reduction Act of 2005 (DRA), which requires an applicant claiming citizenship or nationality to provide documentation both of that claim and of his or her identity.[10] That requirement was intended to close the self-declaration loophole, which often "result[ed] in inaccurate eligibility determinations for applicants who provide false citizenship statements."[11] It was just such behavior that Congress was attempting to prevent in enacting § 6036 of the DRA. By requiring citizenship documentation, Congress established a uniform application process among the States with the intention of creating a more dependable and efficient Medicaid system. Additionally, in taking steps to ensure that Medicaid is provided only to those who meet the statutory eligibility requirements, Congress has adopted a cost-cutting measure that will save an estimated "$220 million between 2006 and 2010."[12]

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[8] *Id.*; 42 C.F.R. §§ 431.800-22 (2005).
[9] Lorraine Schofield, *House Provision on Medicaid Citizenship Test Prompts State Unease*, Nov. 17, 2005, http://www.aphsa.org/News/Doc/Article%20in%20Inside%20CMS%20_11-17-2005_%20on%20Medicaid%20Citizenship.pdf.
[10] Deficit Reduction Act of 2005 § 6036, 42 U.S.C.A. § 1396b (2006).
[11] *Self-Declaration of U.S. Citizenship for Medicaid*, at 2.
[12] Tony Pugh, *Rule Could Pull Plug on Medicaid for some Rightful Recipients*, Centre Daily Times, June 4, 2006, at A1.

IV. THE CMS GUIDELINES

Overall the June 9, 2006 guidelines issued by CMS to the State Medicaid Directors ("Guidelines") provide sufficient standards and protocols to verify the claims of Medicaid applicants that they are U.S. citizens, while providing alternatives for applicants who are unable to obtain unimpeachable evidence of their citizenship. The Guidelines properly carry out Congress's intent that safeguards be implemented to ensure that Medicaid is limited to those who are eligible: U.S. citizens, U.S. nationals, and qualified aliens. Although WLF agrees with most of the Guidelines as issued on June 9, 2006, we are concerned that some could be manipulated and abused. We request that when CMS issues the statutorily mandated regulations that will supersede the Guidelines, it make revisions in order to provide additional assurance that Medicaid is provided only to citizens, nationals, and qualified aliens in accordance with Congress's intent when it adopted the DRA.

WLF wishes to highlight several features of the Guidelines that it strongly applauds. First, the Guidelines's hierarchical or tiered approach to document acceptance is important; it follows Congress's intent in § 6036 and should remain a feature of the regulations ultimately adopted. If applicants have access to any of the primary documents, they should be required to provide such documentation before being allowed to provide secondary documentation; and if there is access to secondary or third-tier documentation, it should be mandated before fourth-level documentation is accepted. This approach ensures that the most reliable documentation is provided to prove citizenship, and there is less chance of fraud or abuse of the Medicaid system.

It is also important that CMS include, in the regulations, the requirement that an applicant's citizenship documentation be an original or a copy certified by the issuing agency. While some State Medicaid directors said that requiring documentation would be too burdensome or expensive for applicants, that was a minority view (21 States).[13] Any such burden would be outweighed by the significant benefits of ensuring an applicant's citizenship through the verified documentation.

Requiring applicants to provide proof of identity to supplement second, third, or fourth-tier citizenship documentation not only is mandated by Congress but also serves important programmatic goals. This requirement provides assurance that the documentation actually belongs to the person who is using it. Moreover, the requirement should not cause significant administrative difficulties, because the great majority of applicants who are citizens already have driver's licenses or identity cards. If not, such documents can be easily obtained at the applicant's local Department of Motor Vehicles.

WLF approves of the Guidelines' monitoring mechanisms and encourages CMS to hold States to the requirement that the most reliable evidence is required. WLF encourages CMS to work with other agencies to establish the technological capabilities that would allow States to verify an applicant's lower-level citizenship documentation. Such actions will continue to promote the intent of Congress and help to protect the Medicaid system from fraud and abuse.

Violations of the DRA. However, WLF respectfully submits that the section of the

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[13] *Self-Declaration of U.S. Citizenship for Medicaid*, at 11.

Guidelines covering identity documentation does not comply with the Secretary's statutory mandate in several respects. The DRA limits acceptable identity documents to those "described in section 274A(b)(1)(D) of the Immigration and Nationality Act" and any other identity documentation "the Secretary finds, *by regulation*, provides a reliable means of identification."[14] Contrary to the requirements of the DRA, the Guidelines permit acceptance of identity documents that do not fit into either one of those two categories.

The only identity documents "described" in INA § 274A(b)(1)(D), 8 U.S.C. § 1324a(b)(a)(D), are an individual's "driver's license or similar document issued for purpose of identification by a State." The provision goes on to provide that the Attorney General may, "by regulation," determine that other documents adequately establish identity; but no such documents are actually enumerated in § 274A(b)(1)(D)(i), and thus no such document can be said to be "described" therein. Accordingly, in the absence of regulations issued by the *Secretary*, the *only* documents that the DRA allows to be used in establishing identity are driver's licenses and state-issued identity cards. Contrary to that limitation, the Guidelines attempt to invoke the Attorney General's findings in 8 C.F.R. § 274a.2(b)(1)(v)(B)(1), which lists several other documents which may be used to establish identity. The DRA does not permit such incorporation by reference, because the documents listed in the Attorney General's regulation are nowhere listed in INA § 274A. DRA § 6036(a)(2) limits identity documentation to those documents specifically listed in the INA and does not encompass regulations promulgated by the Attorney General.[15] If

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[14] Deficit Reduction Act of 2005 § 6036, 42 U.S.C.A. § 1396 (2006) (emphasis added).
[15] 42 U.S.C.A. § 1396b(x)(3)(D)(i).

Congress had really intended to incorporate the Attorney General's regulations into the DRA, it would have said so explicitly. Additionally, the CMS Guidelines inappropriately approve the use of affidavits for children under the age of 16 to establish identity, if no other acceptable documents are available. An affidavit is unacceptable not only under the INA and the DRA but even under the Attorney General's regulations; the Guidelines's approval of such affidavits should be eliminated.

Second, the Guidelines improperly approve use of a Certificate of Degree of Indian Blood, or other U.S. American Indian/Alaska Native Tribal document as acceptable identification documentation. While Congress did give the Secretary leeway to accept other forms of identity documentation besides those described in the INA, this acceptance was limited by Congress's requirement that the Secretary may only do so by issuing formal regulations. Issuing regulations requires providing notice of the Secretary's proposed action and an opportunity for the public to comment before the proposed regulations are made final. In the absence of such regulations, the Guidelines' acceptance of U.S. American Indian documents to establish identity violates the DRA.

Other Changes Proposed by WLF. WLF also recommends that CMS amend the definition of "available evidence," a term that plays a major part in determining the sufficiency of proffered citizenship documentation. The Guidelines provide, "Available evidence is evidence

that exists and can be obtained within your State's reasonable opportunity period."[16] WLF requests that this definition be broadened by eliminating the time limitation on the gathering of documentation; evidence should be deemed "available" if it is known to exist. For several documentation categories, an applicant is allowed to use a lower form of documentation if evidence is unavailable within the State's reasonable opportunity period. This provision simply encourages dilatory tactics by those who may not wish to undertake a document search. All applicants should be required to comply with the same standards in providing citizenship documentation and should not be allowed to provide a less trustworthy form of documentation if a more dependable one is available. Once a document is determined to exist, the burden should be on the applicant to acquire this documentation, and no leeway should be given to applicants who claim it would be too burdensome or take too long to obtain the document.

Although some may see this as a harsh rule for those who have difficulty complying with such a strict standard, the Guidelines provide assistance to certain applicants who would otherwise be treated unfairly. The Guidelines require States to assist applicants or recipients in finding citizenship and identity documentation for homeless, amnesia victims, the mentally impaired, and the physically incapacitated that lack someone who can act for them.[17] This assistance will prevent eligible individuals in need from going without Medicaid and at the same time will ensure that they are properly eligible and are in compliance with the citizenship

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[16] Letter from Dennis G. Smith, Director of Center for Medicaid and State Operations, to State Medicaid Directors (June 9, 2006) *available at http://www.cms.hhs.gov/MedicaidEligibility/downloads/SMD%20Letter%20 Improved%20Documentation%20of%20Citizenship.pdf.*
[17] *Id.*, at 11.

requirements.

The proposed regulations, when published, should also make clear when fourth-level documentation is permissible to prove citizenship. The Guidelines say that "[f]ourth level evidence should ONLY be used in the rarest of circumstances" but do not explain these circumstances.[18] Based on the Guidelines, it is WLF's understanding that these rare circumstances occur when primary, secondary, and third-level evidence is not available during the reasonable opportunity period, and the applicant alleges a U.S. place of birth.[19] WLF suggests that CMS limit the definition of "the rarest of circumstances" to instances in which primary, secondary, and third-level documentation does not exist. If documentation exists that would verify whether an applicant is a citizen, then this documentation should be required to be shown. Congress required that applicants for Medicaid show proof of citizenship in *all* instances, not just when they deem that they have the time to obtain that documentation. By limiting the fourth-tier documentation to situations where higher-tier documentation does not exist, the purpose of Congress will not be undercut.

Finally, WLF believes that a written affidavit is not an acceptable proof of citizenship and should not be countenanced in the proposed regulations. The intent of Congress was to move away from self-attestation of citizenship; but by allowing an applicant to prove citizenship through a written affidavit, CMS is taking one step back. The guidelines set out 19 methods of

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[18] *Id.*, at 6.
[19] *Id.*

proving eligibility for Medicaid without the written affidavit.[20] If an applicant cannot prove citizenship based on one of these 19 methods, that is a strong indication that this person is not a citizen. Additionally, acceptance of written affidavits would promote procrastination and delay in applicants who do not wish to obtain official documentation and hope to slide by through use of the lowest level of documentation.

In the alternative, if CMS reaffirms its commitment to the written affidavit in its forthcoming proposed regulations, WLF suggests several additional requirements. First, the regulations should specify that a written affidavit should *only* be used if higher-tier documentation does not exist, not merely if documentation cannot be obtained. The burden of complying with the requirements for receiving Medicaid benefits should be on the applicant; if documentation can be obtained, then it should be required, and the alternative of submitting a written affidavit should not be available to that applicant. Furthermore, a second affidavit explaining why documentary evidence does not exist *should be required*, not merely requested. This additional requirement is essential if State Medicaid Offices are to keep track of who is relying on the written affidavit, to keep track of why they are doing so, and possibly to help verify the applicant's citizenship.

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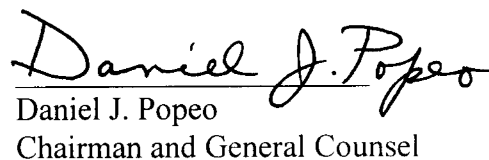
[20] *Id.*, at 3-7.

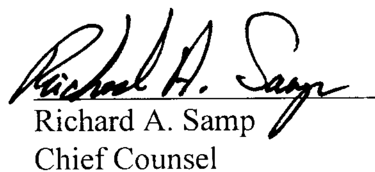
CONCLUSION

The Washington Legal Foundation requests that the Centers for Medicare and Medicaid Services adopt WLF's requested changes to the citizenship Guidelines and to carry those changes forward into the regulations that (presumably) will be forthcoming soon.

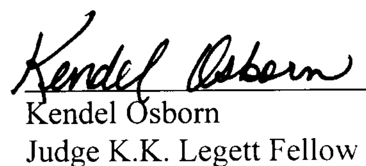
Respectfully submitted,



Daniel J. Popeo
Chairman and General Counsel



Richard A. Samp
Chief Counsel



Kendel Osborn
Judge K.K. Legett Fellow

Washington Legal Foundation
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cc:

Jean Sheil, Director
Family and Children's Health Programs Group

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LISA MURKOWSKI
ALASKA
MAJORITY DEPUTY WHIP

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June 30, 2006

The Honorable Michael Leavitt
Secretary
Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. Secretary:

I write to express my concern that the Department's current interpretation of Section 6036(b) of the Deficit Reduction Act of 2005 will not allow the States to consider evidence of eligibility for programs and services that the federal government makes available to our Native people in determining eligibility for Medicaid. This will unjustly require that my State of Alaska and other states declare Native people who have historically received Medicaid benefits ineligible for the program simply because they cannot produce the proper documents. I urge the Department to issue additional guidance that allows tribal enrollment documentation to be used to establish citizenship and identity for persons applying for Medicaid.

Virtually all Alaska Natives with a blood quantum of ¼ or more alive on December 17, 1971, who are citizens of the United States, were enrolled by the US Department of the Interior to participate in the Alaska Native Claims Settlement Act and their names appear on an official federal roll. Moreover, many if not all Alaska Natives and their eligible descendants possess Certificates of Indian blood which are required to access the Alaska Native health care delivery system.

I am deeply troubled that the Department's present interpretation of Section 6036(b) will not allow any of this official government information to be utilized in determining eligibility for Medicaid even though Section 6036(b) affords you significant discretion in permitting alternative documentation to be used for purposes of establishing nationality and identity.

I would urge that you consult with our federally recognized Indian tribes and with your own Intradepartmental Council on Native American Affairs (ICNAA) to determine whether the very same documentation used to establish eligibility for federal Indian programs can be relied upon by the States to establish eligibility for Medicaid. I fear that the financial stability of our Indian health care delivery system as well as the health of our Native people will be jeopardized if we continue down the present path.

I thank you for your consideration of this request, and look forward to continuing to work with you to improve our nation's access to health care.

Sincerely,

Lisa Murkowski
United States Senator

HOME PAGE AND WEB MAIL
MURKOWSKI.SENATE.GOV

Congress of the United States
Washington, DC 20515

June 22, 2006

The Honorable Michael O. Leavitt
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, D.C. 20201

Dear Secretary Leavitt:

We are writing to express our grave concern about the recent guidance issued regarding citizenship guidelines for Medicaid eligibility. We strongly believe this guidance has the potential to devastate the health coverage and status of U.S. citizens who are eligible for the Medicaid program.

Large numbers of U.S. citizens, for a variety of reasons, simply do not have a valid birth certificate or passport readily available. While 5.7 percent of all adults at all income levels report they lack birth certificates or passports, the percentage is larger for certain groups, including African American adults (9%), senior citizens 65 or older (7%), adults without a high school diploma (9%) and adults living in rural areas (9%). These figures do not include many groups who would also experience difficulty in securing these documents, such as Native Americans born in home settings, nursing-home residents, Hurricane Katrina survivors, homeless individuals, and individuals born outside of the mainstream health care system who might not have ever obtained birth certificate documents. Recent data indicate that eight percent of U.S. born adults age 18 or older with incomes below $25,000 do not have a U.S. passport or U.S. birth certificate in their possession. Furthermore, 10 percent of U.S. born adults with incomes below $25,000 do not have a birth certificate or passport for at least one of their children.

Requiring the hierarchy of documentation described in the June 9th guidance will place an insurmountable burden on many of those in our most vulnerable populations and puts at risk the health of millions. Under the recent guidance, 1.7 million U.S.-born adults enrolled in Medicaid would lose their healthcare coverage. Between 1.4 and 2.9 million children enrolled in Medicaid would lose their access to much needed care or have it seriously delayed. This is simply not an acceptable plan for a society that already leaves 46 million of its citizens without health care coverage each year.

We are also concerned about the impact this new guidance will have on our already strained community health providers. Disproportionate share hospitals and community health centers are the primary sources of care for much of our country's Medicaid population. With minimal resources to provide care, the undue burden of checking documentation can interrupt an already stressed process. In addition, as providers of last resort, they will have to continue to serve all those citizens who prove unable to meet the unnecessarily restrictive demands that June 9

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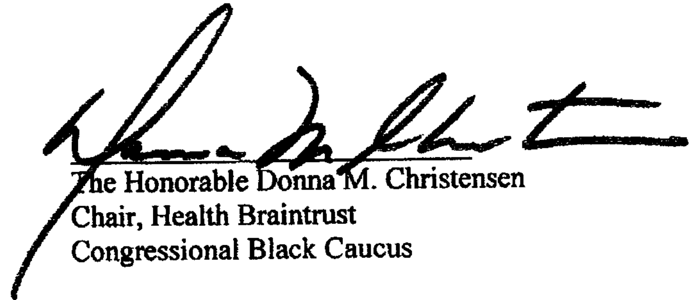
guidance has now placed on them. This means that already overburdened facilities will simply no longer be reimbursed for much of the care they provide. Ultimately, while we believe the intent of this guidance was not to hinder access to care, by placing this additional burden on local providers we believe that is exactly what is likely to happen.

Given the overwhelming numbers of individuals which would be impacted by this guidance, we request that issuance of an interim final rule only be done if it is determined that individuals otherwise eligible for Medicaid will not face increased barriers to quality healthcare that they deserve. Those who are eligible for Medicaid should not be denied needed care for reasons beyond their control. Thank you for your consideration.

Sincerely,

The Honorable Hilda L. Solis
Chair, Health Task Force
Congressional Hispanic Caucus



The Honorable Donna M. Christensen
Chair, Health Braintrust
Congressional Black Caucus

The Honorable Michael M. Honda
Chair,
Congressional Asian Pacific American Caucus

The Honorable Frank Pallone, Jr.
Vice-Chair,
Congressional Native-American Caucus

#8

CWLA
CHILD WELFARE LEAGUE OF AMERICA

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

August 4, 2006

Medicaid Program; Citizenship Documentation Requirements
Interim Final Rule

The Child Welfare League of America (CWLA) submits the following comments on the interim rule to implement section 6036 of the Deficit Reduction Act of 2005 (DRA), which was published in the Federal Register on July 12. Section 6036 governs the citizenship documentation requirements as they apply to children in our nation's foster care system. Specifically, CWLA is concerned about the application of the rule to children in foster care (§435.1008), and encourage CMS to add an exemption at 42 CFR 435.1008 for foster children.

CWLA represents nearly 900 public and private nonprofit, child-serving member agencies across the country. Our members have responsibility for many of the 523,000 children in foster care in this country as well as many of the 50,000 adoptions that take place each year.

CWLA reiterates its comments issued earlier this year voicing concern over the failure to exempt foster children from the new citizenship documentation requirements. These comments were made pertaining to CMS' initial guidance and now extend to the interim final rule, which continues to mandate unfair and unrealistic requirements to be met by one of the most vulnerable groups in our society – abused and neglected children living in foster care. These new requirements to prove U.S. citizenship or nationality and identity will create a critical burden on foster children, foster families, and an already overburdened child welfare system. Furthermore, the new requirements are duplicative in the case of foster children, as according to federal law, foster children already must have documented citizenship to receive Title IV-E assistance.

The unnecessary burden of duplicating proof of citizenship, subject to stringent new requirements that only original or officially certified copies of birth

certificates be accepted, could result in the delay or denial of important health care to children in foster care, many of whom enter state custody in poor health. If Medicaid is not available due to these new mandates and the child welfare agency is then forced to cover the cost of care normally paid by Medicaid, the end result will be a shift of financial resources from one part of the child welfare system to another, potentially denying needed prevention, intervention and support services in other parts of the child welfare system.

We strongly recommend that CMS carefully evaluate the impact of these regulations in light of the compelling health care needs of the foster care population. As we have stated in the *CWLA Standards for Health Care Services for Children in Out-Of-Home Care:*

"Children in foster care today demonstrate a marked increase in the prevalence of chronic health problems. The frequency of these problems is most likely related to health conditions existing prior to placement. The management of these conditions requires the commitment of extensive time by both the agency responsible for the child and the physician. It also demands the expertise of many disciplines and thus requires the coordination of efforts of a variety of professionals...Once a child with a chronic health problem is in placement, the responsibility for the care of these conditions shifts from the parents to the child welfare agency..."

In addition, as the American Academy of Pediatrics noted in 2002, "Compared with children from same socioeconomic background, they [children in foster care] have much higher rates of serious emotional and behavioral problems, chronic physical disabilities, birth defects, developmental delays and poor school achievement."[1] Other research has shown that children in foster care have 8-11 times the levels of service use of other Medicaid-enrolled children.[2]

Research also suggests that access to care, especially in the first days of placement, is important. A process that hinders, denies, or slows down access to such needed services can only serve to worsen the situation for children who have already suffered from abuse and neglect. Nearly 250,000 children in care have a goal of being reunified with their families, and access to health and mental health care, both for the family and the child is typically an essential component of reaching that goal successfully.

Yet despite the pressing health care needs of foster children, which are unique in both quantity and quality compared to children outside of the child welfare system, these new citizenship documentation regulations will further impede access to health care, including access to critical mental health services, that

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[1] "Health Care of Young Children in Foster Care." American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care. *Pediatrics* Vol. 109 No. 3 March 2002.
[2] Harman, et al. *Archives of Ped Adol Medicine*, 154(11): 2000; Halfon, et al. *Pediatrics*, 89(6): 1992.

may already be limited and fragmented. Rather than improving the necessary coordination of efforts between Medicaid and child welfare services to ensure that children receive adequate and medically necessary health care services that states are obligated to provide, these new requirements set forth barriers to such collaboration.

Approximately 65 percent of children in care reside with non-relative families or are in institutional or group settings. Family history and documentation of citizenship and identity may not be readily available for these children. In cases where children are in placements with relatives, the challenges for these relative caregivers are already high. Establishing and re-establishing access to Medicaid will be one more burden on a group of family caregivers who are already being called upon to provide a critical source of help for these children.

Over 150,000 of these 523,000 children in foster care are age five or younger. We believe it is safe to assume they will not have a passport, which is the primary document called for by CMS to establish both identity and citizenship. As one of our member agencies informed us:

"Applying [this] Medicaid application and eligibility determination process to foster children who have been removed from the custody of abusive parents does not make any sense...Abusive parents are not always the most cooperative parents. The lack of cooperation will pose problems for many IV-E children in securing the necessary proof of citizenship [to satisfy the new CMS requirements]."

In addition, for the more than 20,000 youth who leave or "age-out" of the system each year, this clearly creates an additional barrier to health care, as many older youth will not have access to the necessary documents. These youth are faced with enormous challenges including already limited access to services. To truly make a transition to independence and adulthood, access to supports for these foster youth needs to be made easier, not more difficult.

CWLA urges you to address this situation by recommending that foster and adoptive children be exempt from these requirements. Children who receive federal IV-E foster care payments are categorically eligible for Medicaid, and children not determined as eligible for Title IV-E but in foster care are covered by Medicaid in virtually every state. Children in foster care do not make an application for Medicaid due to their status as foster children. CWLA believes that this reality places children in care in a situation similar to children and adults who are eligible for the Supplemental Security Income (SSI) program, a group of Medicaid recipients you have now clarified as being exempt from the citizenship identity mandates.

CWLA urges CMS to consider the fact that foster children must have their citizenship documented to receive Title IV-E assistance. Furthermore, many

states' systems make this citizenship determination for all children who enter foster care, not just those who are IV-E eligible. In regard to the narrower issue of establishing identity, we also highlight the fact that these children are considered wards of the state and as a result a court in that state has recognized that child's identity.

If CMS fails to make this exemption, CWLA then urges the Center to state in written guidance that children entering the foster care system be considered as current recipients, rather than applicants, thereby allowing them to receive immediate Medicaid services while child welfare agencies attempt to obtain the necessary documentation of citizenship within a "reasonable opportunity period," as specified in the statute. We understand that CMS officials have offered this definition in a public forum of state child welfare and Medicaid directors. We also want to assure that youth 17 and younger are treated as minors, rather than the current proposals that apply to age 16 and younger, if these overall exemptions are not carried out.

It is our hope that at the conclusion of your review of the comments offered in response to this interim rule you will remedy this situation. We thank you for your attention to this matter and look forward to working with you in a way that can assist these children in obtaining the crucial health services they need.

Sincerely,

Shay Bilchik
President/CEO
Child Welfare League of America

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SOUTH DAKOTA

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United States Senate

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August 3, 2006

The Honorable Michael O. Leavitt
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: File Code CMS-2257-IFC

Dear Mr. Secretary,

I write to express my concern regarding the interim final regulations issued by the Department interpreting Section 6036(b) of the Deficit Reduction Act of 2005, and their impact on American Indians and children in my state of South Dakota.

The interim final regulations issued by the Centers for Medicare and Medicaid Services (CMS) on June 9, 2006, do not allow States to consider evidence of eligibility for programs and services that the federal government makes available to Native populations in determining eligibility for Medicaid. I am very concerned that these regulations will require States to declare Native people, who have historically received Medicaid benefits, ineligible for Medicaid simply because they are unable to provide the documents listed in the regulation. I urge you to issue additional guidance allowing the use of Tribal enrollment cards or Certificates of Degree of Indian Blood (CDIB) as primary documentation to establish the identity and citizenship of Medicaid applicants.

Nearly all American Indians living in South Dakota possess a Tribal enrollment card or a CDIB. These documents, issued only to members and descendents of Federally Recognized tribes who are born in the U.S. or born to persons descended from individuals born in the U.S., legitimately prove U.S. citizenship. Documentation confirming this is often obtained through birth certificates but also through genealogy charts dating back to original Tribal membership rolls established by Treaty or pursuant to Federal statute. The Tribal membership rolls officially confer unique Tribal status to receive land held in trust, land settlements, and other benefits from the Federal government.

I was pleased to read that States may also document citizenship and identity through data matches with government agencies. However, the regulations do not specify the government agencies with which states may attempt to make data matches. I urge you to clarify this issue, and to accept data matches with the Indian Health Service as documentation of citizenship and identity.

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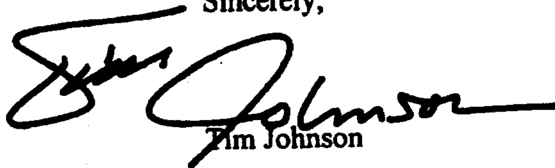
In addition, I am very concerned about the affect of these regulations on children in my state. As you are likely aware, States have the flexibility to use their SCHIP allotment either as an expansion of title 19 of the Social Security Act or as a separate program under title 21 of the Act. In Fiscal Year 2004, South Dakota covered the overwhelming majority of its CHIP population (more than 10,000 children) through an expansion of title 19. I strongly request that you study the impact of these regulations on these children, who I believe are unintended targets of the citizenship documentation requirement.

Finally, I urge you to exempt from these documentation requirements children who are automatically eligible for Medicaid as recipients of Title IV-E Foster Care and Adoption Assistance, and to clarify this exemption in your final regulations. We must not expect children in the foster care system to produce a certified copy of their birth certificate, and I would think the majority of such children do not have a U.S. Passport. These children are already experiencing crisis in their family life; let us not also revoke their access to health care.

Thank you for your consideration of this request, and I look forward to your feedback.

Sincerely,



Tim Johnson

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APPROPRIATIONS
INTELLIGENCE

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August 8, 2006

Dennis Smith
Director
Center for Medicaid and State Operations
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850

RE: Medicaid Citizenship Documentation for Foster Children
Interim Final Rule, 71 Fed. Reg. 39214 (July 12, 2006)

Dear Dennis:

As you know, I have invested a significant amount of effort and leadership during my Congressional career to improve our outcomes and protections for abused and neglected children needing safety, and stable, permanent families.

CMS recently issued the interim final rule on Medicaid Citizenship documentation for comment. I am concerned the interim rule poses unnecessary new documentation requirements for Medicaid eligibility for foster children. The child welfare system is an already stressed system, and it appears your new rule, as it applies to foster children, will cause increased bureaucracy and paperwork, with no safety benefit to our country's abused and neglected children. Furthermore, I do not see how it will save taxpayer funds (but will cause new costs), because this is a population that already requires significant eligibility processes for Title IV-E.

I urge you to use the authority granted you in the Deficit Reduction Act to exempt children in Title IV-E foster care. State child welfare agencies already verify the citizenship status of foster care children, in the process of determining their eligibility for Title IV-E payments. Creating new, bureaucratic documentation requirements is duplicative and unnecessary. Our state and local child protective agencies should be focusing their resources on services to keep children safe, and ensure they have permanent families in which to grow.

Expecting child protection agencies to easily access the list of acceptable proofs of identify included in the new rule, for the purpose of ensuring health care for these maltreated children, is unrealistic These families are in crisis. Expecting a parent to sign an affidavit is unrealistic, as bringing a child into agency custody is usually due to the unavailability of the parent, uncooperativeness of the parent, personal crisis of the parent, etc. Our nation's foster children will not have a driver's license, military ID, many will not even have a school photo ID. Even if these items existed, children often arrive in foster care with a trash bag containing precious few personal items. School enrollment is already a challenge, and I do

not support a policy to add new burdens on either the child welfare system or our schools to require this additional documentation.

As a member of Congress, I urge you to consider efficiency and effectiveness in federal regulations – exempt foster children from the new requirements.

Very respectfully yours,

MIKE DeWINE
United States Senator

RMD/ma

Legal Services of Eastern Missouri, Inc.

4232 Forest Park Avenue
St. Louis, Missouri 63108

JOEL D. FERBER
(314) 534-4200, Ext. 1202 **Facsimile (314) 534-1028**

51

August 3, 2006

Dr. Mark McClellan, Administrator
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 Dr. McClellan:

Legal Services of Eastern Missouri (LSEM) is a nonprofit legal services organization whose mission is to deliver high-quality, free, civil legal assistance and equal access to justice to low-income residents in 21 counties of Eastern Missouri. Medicaid and access to health care are high priorities for LSEM. We have represented many thousands of Medicaid recipients in negotiations, in administrative hearings, and in state and federal courts. We also engage in administrative advocacy and work with the Missouri Department of Social Services (DSS) to improve practices and procedures in the Missouri Medicaid program. On a daily basis, we help low-income Missouri *citizens* obtain access to health care through the Medicaid program. These efforts will become much more difficult under the new regulations unless significant modifications are made in the final regulations. The current interim final rule goes well beyond the DRA requirements in imposing new barriers on low-income citizens who qualify for the Medicaid program.

We are extremely concerned that the interim final rule, which was published in the Federal Register on July 12 to implement section 6036 of the Deficit Reduction Act of 2005 (DRA), will result in significant barriers for many Missouri Medicaid applicants and recipients and, therefore, are writing to submit our comments on the interim final rule. This provision of the DRA became effective on July 1 and requires that U.S. citizens and nationals applying for or receiving Medicaid document their citizenship and identity.

We commend CMS for ameliorating the impact of the new documentation requirements by recognizing the "scrivener's error" in the statute and exempting individuals on SSI or Medicare from the new documentation requirements, by allowing the use of the SDX and state vital records databases to cross-match citizenship records,

Daniel K. Glazier, Executive Director and General Counsel

LSC

United Way

by allowing states to use state and federal databases to conduct identity cross-matches, and by clarifying that the new documentation requirements do not apply to "presumptively eligible" pregnant women and children in the Medicaid program. These important steps will alleviate the burden of the documentation requirements for millions of vulnerable citizens across the country. They are also a significant improvement over the June 9th Guidance on the citizenship documentation requirement.

However, we are deeply disappointed that CMS has not acted to further minimize the likelihood that U.S. citizens applying for or receiving Medicaid coverage will face delay, denial, or loss of Medicaid coverage. Our comments below highlight several provisions that CMS should modify in the final rule. Among our greatest concerns are:

(1) the requirement that individuals produce original documents or certified copies to prove citizenship;

(2) the inability of *applicants* to obtain coverage while citizenship is being documented;

(3) the failure to exclude foster children from the documentation requirement;

(4) the lack of safeguards for individuals who cannot produce the required documentation;

(5) the imposition of unnecessary and burdensome requirements that newborns document their citizenship *even where the State paid for their births --* ***in Missouri;***

(6) the inclusion of a hierarchy of documents that is *not* included in the DRA; and

(7) the lack of any meaningful outreach requirements or initiatives from CMS.

Aside from these policy concerns, the regulations go well beyond the requirements of the DRA and violate other provisions of the Medicaid Act and the United States Constitution, in particular by denying benefits to individuals who meet the *eligibility requirements* of the Medicaid program.

A. U.S. citizens applying for benefits should *receive benefits* once they declare they are citizens and meet all eligibility requirements.

Under the DRA, the new citizenship documentation requirement applies to all individuals (other than Medicare beneficiaries and, in most states, SSI beneficiaries) who apply for Medicaid. The preamble to the rule states that applicants "should not be made eligible until they have presented the required evidence." 71 Fed. Reg. at 39216. The rule itself states that states "must give an applicant or recipient a reasonable opportunity to submit satisfactory documentary evidence of citizenship before taking action affecting the individual's eligibility for Medicaid." 42 CFR 435.407(j).

Under the DRA, documentation of citizenship is *not* a condition of Medicaid eligibility. Once an applicant for Medicaid declares that he or she is a citizen and meets all eligibility requirements, eligibility should be granted. **There is nothing in the DRA that requires a delay in providing Medicaid coverage pending documentation of citizenship and identity**. Yet CMS has prohibited states from granting coverage to eligible citizens until they can obtain documents such as birth certificates. This denial of Medicaid coverage to individuals *who meet the program's eligibility requirements* violates the federal Medicaid Act and the due process rights of low-income people who are denied coverage under this provision.[1]

This year, about 10 million U.S. citizens are expected to apply for Medicaid across the country. Most of these applicants will be children, pregnant women and parents who will be subject to the new citizenship documentation requirement. The net effect of the prohibition on granting these individuals coverage until they provide documentation of their citizenship will be to delay Medicaid coverage for large numbers of eligible, low-income pregnant women, children and other vulnerable Americans. Thousands of these adversely impacted Americans are Missouri citizens who will suffer delays in receiving medically necessary health medical care and diminished health status. Meanwhile, the increase in uncompensated care will create financial losses for health care providers in Missouri.

While the statutory logic of this policy is elusive, the real-world consequences are crystal clear. U.S. citizens who have applied for Medicaid, who meet all of the state's eligibility criteria, and who are trying to obtain the necessary documentation, will experience significant delays in Medicaid coverage. Some U.S. citizens who get discouraged or cannot get the documents they need within the time allowed by the state will never get coverage. **Because there has been no outreach program (either by CMS or the State of Missouri) to educate Missouri citizens about the new requirement, most applicants are likely to be unaware of it. Therefore, there are likely to be significant delays in assembling the necessary documents.**

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[1]The interim final regulation ignores the plain language of 1137(d)(1)(A), specifically referenced by § 6036 of the DRA, which makes the "condition of eligibility" for Medicaid "a declaration in writing, under penalty of perjury" that the individual "is a citizen or national of the United States . . .." Nothing in § 6036 purports to change this eligibility requirement, as all the amendments to the Medicaid Act in that section are made to 42 U.S.C. § 1396b, **which deals with financial reimbursement to the states, not individual eligibility for benefits**. Indeed, 42 U.S.C. § 1396a, which *does* deal with individual eligibility, continues to provide that in § 1396a(b) that:

> The Secretary . . . shall not approve any plan which imposes,
> as a condition of eligibility for medical assistance under
> the plan – . . . (3) any citizenship requirement which excludes
> any citizen of the United States.

The interim final rule as proposed ignores all of this statutory language and makes the provision of evidence of citizenship an eligibility requirement for receiving Medicaid.

In fact, the consequences of the new documentation requirements could be devastating. Doctor visits may be delayed for lack of Medicaid coverage, and essential life-saving health care services, e.g. cancer treatments or dialysis, could end up not being provided for lack of Medicaid coverage. These documentation requirements will also have terrible consequences for children. **We are concerned that families will forego preventive care as a result of these documentation requirements and children will end up in an emergency room when a crisis arises.**

We urge CMS to revise 42 CFR 435.407(j) to state that *applicants* who declare they are U.S. citizens or nationals and who meet the state's Medicaid eligibility criteria are eligible for Medicaid, and that states must provide them with Medicaid coverage while they have a "reasonable opportunity" period to obtain the necessary documentation. *This is the procedure that the law allows and states now use for lawfully present non-citizens*, and it makes sense to apply that policy across the board, rather than apply one set of requirements (that are more restrictive) for United States Citizens and another set of requirements for lawfully present non-citizens). It is also consistent with the plain language of the DRA and other applicable Medicaid laws.

The interim final rule also unconstitutionally deprives *citizen applicants* for Medicaid of the equal protection of the law. Under the current rule, an applicant for Medicaid who claims *qualified alien status* will get Medicaid benefits during the reasonable opportunity period available to acquire verification of qualified alien status. This is required by § 1137(d)(4), which provides in relevant part that:

> (A) the State – (i) shall provide a reasonable opportunity to submit . . . evidence indicating satisfactory immigration status, and (ii) may not delay, deny, reduce or terminate the individual's eligibility for benefits under the program on the basis of . . . immigration status until such reasonable opportunity has been provided;

If, on the other hand, an applicant for Medicaid claims to be a *U.S. citizen* or national rather than a qualified alien, s(he) will not get Medicaid benefits during the reasonable opportunity period available to acquire verification of citizenship. This irrational result is entirely the creation of CMS, as it certainly is not required by § 6036 of the DRA. Indeed, the cross-reference to § 1137(d) in § 6036 strongly suggests that Congress intended that citizens now be treated under that section as qualified aliens always had been, perhaps no longer better, but certainly not worse. But, as it stands in the proposed Rule, citizen applicants are indeed irrationally treated worse than qualified alien applicants. The statute does not require this result and the equal protection component of the Fifth Amendment of the U.S. Constitution does not allow it.

CMS should, by amending 42 C.F.R. § 435.407(j) or otherwise, clarify that applicants for Medicaid who declare they are citizens or nationals of the United States

must, if otherwise eligible, be given Medicaid benefits during the reasonable opportunity period they have to acquire evidence of their status.

B. Children who are eligible for federal foster care payments should be exempt from the citizenship documentation requirement.

The interim final rule applies the DRA citizenship documentation requirements to *all* U.S. citizen children except those eligible for Medicaid based on their receipt of SSI benefits. Among the children subject to the documentation requirements are roughly one million children in foster care, including those receiving federal foster care assistance under Title IV-E. This contradicts the language of the DRA and is also bad policy. Congress was explicit in directing to whom the new documentation requirements would apply. It did not impose those requirements on all Medicaid recipients, but rather only on 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 [*i.e.*, Medicaid] . . .. 42 U.S.C. § 1396b(i)(22)

Children receiving foster care benefits under Title IV-E are simply *not covered* by the above language and therefore may not be subjected to the citizenship documentation requirements. Foster children do not declare under § 1137(d)(1)(A) of the SSA to be citizens or nationals of the United States for the purpose of getting Medicaid. Indeed, that section of the SSA does not require that they file any declaration at all in order to receive Title IV-E foster care benefits, for Title IV –E is not a program to which the declaration process applies. See § 1137(b) [42 U.S.C. § 1320b-7(b)].[2]

Even if the new regulation were legal, it serves no useful purpose and will deny necessary health care to foster children. State child welfare agencies already must verify the citizenship status of these children in the process of determining their eligibility for Title IV-E payments. It is our understanding that the Administration for Children and Families (ACF) requires state child welfare agencies to follow the Department of Justice interim guidelines on verification of citizenship. Nonetheless, the preamble to the rule states that these Title IV-E children receiving Medicaid "must have in their Medicaid file a declaration of citizenship ... and documentary evidence of the citizenship ... claimed on the declaration." 71 Fed. Reg. at 39216. (It has been reported that CMS takes the view that foster care children should be treated as current beneficiaries rather than

[2] When such children do demonstrate their citizenship (or have it demonstrated on their behalf), they do so for the purpose of getting foster care benefits. They then get Medicaid because they have been found to qualify for foster care, not because they independently meet all of the other Medicaid eligibility requirements. For example, if a state had an asset limit for foster care services that was higher than its asset limit for Medicaid, foster care children not meeting the lower Medicaid asset limit would nonetheless still receive Medicaid. Consequently, because foster children never declare to be citizens under 1137(d)(1)(A), they do not fall within the ambit of 42 U.S.C. § 1396b(i)(22) and may not legally be subjected to its documentation requirements.

applicants for this purpose, *but there is no language to this effect in either the rule itself or the preamble.*)

When Medicaid eligibility for children in foster care is delayed, foster parents may end up using emergency care as they will not have a Medicaid card. The child may not be able to receive essential non-emergency care — such as prescription drugs, psychological care, dental care or the purchase of medical supplies for conditions such as asthma — until the child's condition deteriorates to the point that it requires emergency care.

The DRA does not compel this result, which requires unnecessary duplication of state agency efforts and puts these children at risk of delayed Medicaid coverage. To the contrary, the DRA allows the Secretary to exempt individuals who are eligible for other programs that required documentation of citizenship. The IV-E program is precisely such a program, yet CMS, without explanation, elected not to exempt foster care children receiving such payments from the new documentation requirement, 71 Fed. Reg. at 39216. And, as indicated above, the DRA quite explicitly excludes this group from the list of individuals to whom the documentation applies.

We urge CMS to revise 42 CFR 435.1008 to add children eligible for Medicaid on the basis of receiving Title IV-E payments to the list of groups exempted from the documentation requirement.

C. The rule should exempt people eligible for Social Security Disability Benefits who do not qualify for Medicare, as well as former Medicare or SSI recipients.

CMS should use its authority under 42 U.S.C. §1396b(x)(2)(C), to exempt other categories of Medicaid recipients and applicants who have already established their citizenship for other government benefit programs. The most obvious group in this category are *former* beneficiaries of Medicare or SSI, *i.e.,* people who have been on either of those programs in the past (at least since 1996 and perhaps from some earlier date) but who no longer are for whatever reason. It is the fact of having already established citizenship that is the basis for exempting current Medicare and SSI recipients. That fact does not change simply because a person is now, for example, over the asset limit for SSI and therefore no longer eligible for that program. CMS should therefore clarify that proof of previous receipt of Medicare or SSI will also exempt a person from the citizenship documentation requirements.

Another category that should be exempted from the documentation requirements is people who have been found eligible for Social Security Disability payments, but have too large a benefit to qualify for SSI and are still in their two-year waiting period for the receipt of Medicare. Such people are in all meaningful ways indistinguishable from those that the Rule exempts, so extending the exemption to them is only fair.

D. A state Medicaid agency's record of payment for the birth of an infant in a U.S. hospital should be considered satisfactory documentary evidence of citizenship and identity.

Among the children subject to the documentation requirements are infants born in U.S. hospitals. Newborns will not have birth records on file with state Vital Statistics agencies. The rule provides that in such circumstances, extracts of a hospital record created near the time of birth could be used as proof of citizenship, 42 CFR 435.407(c)(1), and if this "third level" of evidence was not available, a medical (clinic, doctor, or hospital) record created near the time of birth could be used, but only in the "rarest of circumstances," 42 CFR 435.407(d)(4).

Under current law, infants born to U.S. citizens receiving Medicaid at the time of birth are deemed to be eligible for Medicaid upon birth and to remain eligible for one year so long as the child remains a member of the woman's household and the woman remains eligible for Medicaid (or would remain eligible if pregnant). The preamble to the interim final rule states that, in such circumstances, "citizenship and identity documentation for the child must be obtained at the next redetermination." 71 Fed. Reg. 39216. This makes no sense, since the **State Medicaid agency paid for the child's birth in a U.S. hospital** and the child is, by definition, a United States citizen.

In the case of a child born in a U.S. hospital to a mother who is either *a legal immigrant subject to the 5-year bar on Medicaid coverage or an undocumented immigrant*, the preamble states that, in order for the newborn to be covered by Medicaid, an application must be filed and the citizenship documentation requirements would apply. 71 Fed. Reg. 39216. Again, this makes no sense, since the state Medicaid agency paid for the child's birth in a U.S. hospital and the child is, by definition, a United States citizen. This provision thus denies health care to American children whom everyone already knows are citizens and requires completely unnecessary expenditure of administrative resources by providers and state agencies with no rational purpose.[3]

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[3] This is a purely arbitrary distinction that focuses on the wrong person. The Medicaid eligibility in question is that of the *child*, not the parent. As to the children, there is absolutely no meaningful, or legal, distinction between the children that CMS proposes to cover from birth and those that it does not. A child in either situation is by definition a U.S. citizen, a fact indisputably known to the Medicaid agency because it will have paid for the child's birth in a U.S. hospital. CMS should instruct states not only that they may, but that they must, accept a record of Medicaid (or other insurance) payment for a birth in a U.S. hospital as sufficient proof of citizenship. Any other approach with regard to any child is so arbitrary as to be a violation of the due process component of the Fifth Amendment. And a different approach that is applied only to some children and not to others, when all are demonstrably citizens simply by the known fact of their birth, also violates the equal protection component of the Fifth Amendment.

CMS should amend 42 C.F.R. § 435.407(a) or (b) to include a record of Medicaid payment for a child's birth as acceptable evidence of that child's citizenship, regardless of the immigration status of the child's mother.

Because the rule would prevent states from granting coverage until documentation of citizenship is provided, hospitals and physicians treating newborns will be at risk for delay or denial of reimbursement for the treatment of newborns who are low-birthweight, have post-partum complications, or simply need well-baby care and who must, under the interim final rule, meet the documentation requirements.

The risk to the health of newborns from delays in coverage and the potential for increased uncompensated care for providers are completely unnecessary. The state Medicaid agency has already made the determination, by paying for the birth, that the child was born in a U.S. hospital.

We strongly urge that 42 CFR 435.407(a) be amended to specify that the state Medicaid agency's record of payment for the birth of an individual in a U.S. hospital is satisfactory documentary evidence of both identity and citizenship.

E. CMS should adopt the approach taken by the Social Security Administration for U.S. citizens who lack documentation of their citizenship.

There are U.S. citizens who will not be able to provide any of the documents listed in the interim final rule. Among these are victims of hurricanes and other natural disasters whose records have been destroyed, and homeless individuals whose records have been lost. The rule directs states to assist individuals with "incapacity of mind or body" to obtain evidence of citizenship, 42 CFR 435.407(g), but it does not address the situation in which a state is unable to locate the necessary documents for such an individual. Nor does the rule address the situation in which an individual does not have "incapacity of mind or body" but his or her documents have been lost or destroyed and, despite the best efforts of the individual or a representative, the documents cannot be obtained. As a result, under the rule if such individuals apply for Medicaid they can never qualify, and if such individuals are current beneficiaries, they will eventually lose their coverage.

As a last resort, the interim final rule allows the use of written affidavits to establish citizenship, but only when primary, secondary, or third-level evidence is unavailable, and "ONLY ... in rare circumstances," 42 CFR 435.407(d)(5). The requirements for these affidavits are rigorous, and it is likely that in a substantial number of cases they cannot be met, because two qualified individuals with personal knowledge of the events establishing the applicant's or beneficiary's claim to citizenship cannot be located or do not exist. In short, the rule simply does not recognize the reality that there are significant numbers of U.S. citizens without documents proving citizenship and without any idea that they need documents proving citizenship. **This affidavit requirement is so onerous that Missouri has not even included it as an option in the State's policy manual.**

While some providers may continue to provide care to these individuals, they will not be reimbursed for the services provided to these applicants and beneficiaries who

cannot document their citizenship. **This will increase the amount of uncompensated care that providers already provide to people who are uninsured, thereby raising health care costs for everyone.** Of course, many thousands of Medicaid-eligible individuals will be denied health care altogether under these highly restrictive requirements.

This result is both foreseeable and unnecessary. The DRA gives the Secretary discretion to expand on the list of documents included in the DRA that are considered to be "proof" of citizenship and a "reliable means" of identification. We urge that the Secretary use this discretion to acknowledge that state Medicaid agencies have the capacity to recognize when a U.S. citizen without documents is, in fact, a U.S. citizen for purposes of Medicaid eligibility.

The regulations for the SSI program allow people who cannot present any of the documents SSI allows as proof of citizenship to explain why they cannot provide the documents and to provide any information they do have. (20 CFR 416.1610) The Secretary should adopt a similar approach. Specifically, 42 CFR 435.407 should be revised by adding a new subsection (k) to enable a state Medicaid agency, at its option, to certify that it has obtained satisfactory documentary evidence of citizenship or national status for purposes of FFP under section 435.1008 if: (1) an applicant or current beneficiary, or a representative or the state on the individual's behalf, has been unable to obtain primary, secondary, third level, or fourth level evidence of citizenship during the reasonable opportunity period and (2) it is reasonable to conclude that the individual is in fact a U.S. citizen or national based upon the information that has been presented. This approach would ensure that low-income Missourians who are U.S. citizens, but cannot find or provide documentation, can continue to receive the health care services they need.

F. CMS should not require applicants and beneficiaries to submit originals or certified copies.

The DRA does *not* require that applicants and beneficiaries submit *original or certified copies* to satisfy the new citizenship documentation requirement. Yet CMS has added this as a requirement in the interim final regulations at 42 CFR 435.407(h)(1). This requirement adds greatly to the information collection burden of the regulations and calls into question the estimate that it will only take applicants and beneficiaries ten minutes and state agencies five minutes to comply.

Requiring original or certified copies adds to the burden of the new requirement for applicants, beneficiaries, and states and makes it more likely that health care providers will experience delays in reimbursement and increased uncompensated care.

Applicants and beneficiaries will have to make unnecessary visits to state offices with original and certified copies. While the regulations state that applicants and beneficiaries can submit documents by mail, it is not likely that many applicants and beneficiaries will be willing to mail in originals or certified copies of their birth

certificates. Moreover, they will definitely not be willing or able to mail in proof of identity such as driver's licenses or school identification cards (nor should they). The regulations must be revised to respond to this insurmountable problem for many beneficiaries.

Missouri does *not* require a face-to-face interview for children and parents applying for or renewing their Medicaid coverage. Missouri Income Maintenance Manual § 0105.025.00 (2006). Eliminating the face-to-face interview requirement was one of a number of steps Missouri took to simplify their eligibility processes and make it easier for eligible children and parents to enroll in Medicaid. Mail-in applications are also more efficient for DSS and other states' Medicaid agencies. Requiring originals and certified copies to document citizenship will make it harder for working families to enroll in Medicaid and increase the workload of DSS and other states' Medicaid agencies. This unnecessary requirement that goes beyond the requirements Congress imposed in the DRA will also delay coverage while applicants wait for appointments at state Medicaid agencies. In some cases, having to visit a state office will discourage applicants from completing the application process. Children and families will go without coverage and remain uninsured and providers will not get reimbursed. To the extent that the new regulations cause Missouri to reduce or eliminate the use of alternatives to face-to-face interviews, this will greatly strain state agency staff who are already overburdened when that workforce has already been significantly reduced due to state budget cuts.

Requiring originals or certified copies adds to the burden of the new requirement for children in foster care. Child welfare agencies will likely have copies of birth certificates for many of these children that were obtained as part of the process for determining whether the children are eligible for federal foster care payments. It would be simple for the child welfare agencies to make copies available to the Medicaid agencies, but this is precluded by the requirement for originals or certified copies.

We urge CMS to revise the regulation by modifying the requirement at 42 CFR 435.407(h)(1) to make it clear that a state has the option of accepting copies or notarized copies of documents in lieu of original documents or copies certified by the issuing state agency. States should be able to accept copies when the state has no reason to believe that the copies are counterfeit, altered, or inconsistent with information previously supplied by the applicant or beneficiary.

G. The Identity Requirements in the interim final regulation are more restrictive than allowed by the DRA.

The DRA specifies that **any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act is satisfactory documentary**

evidence of personal identity.[4] The new regulation inexplicably restricts the documentation that states can use to verify identity. 42 C.F.R. § 436.407 (e) (8) and (f). For example, the Immigration and Nationality Act and its implementing regulations allow the following forms of verification of identity that are not allowed under the new CMS regulations:

- For those who are disabled and unable to produce any of the documents above [for identity], the same types of alternative documentation of identity listed for those under the age of 18, except that a parent, legal guardian, representative of a nonprofit organization, association or rehabilitation program may sign the forms for the person. **This method is *not* included in the new CMS regulations. This is a serious problem because individuals with disabilities may need to have a nursing home administrator or other program director attest to their identity.**

- For individuals under age 18 who are unable to produce any of the documents above [for identity]:
  (a) School record or report card;
  (b) Clinic doctor or hospital record; or
  (c) Daycare or nursery school record.

But CMS inexplicably only allows the use of these records for children under 16. 42 C.F.R. § 436.407(f).

- The DRA allows the use of driver's license issued by a Canadian government authority **but new CMS regulations provide that this document *cannot* be used, even though this is acceptable proof of identify under the Immigration and Nationality Act).** 42 C.F.R. § 436.407(e)(8);

- The DRA allows the use of a voter's registration card **but new CMS guidance says this *cannot* be used, even though this is acceptable proof of identify under the Immigration and Nationality Act.** *Id.*

CMS should modify 42 C.F.R. § 436.407(e) and (f) to incorporate all forms of documentation of identity that are allowable under the Immigration and Nationality Act, and hence, allowable under the DRA.

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[4] The identity documentation items listed below are specified by the Department of Justice in final regulations that implement section 274A(b)(1)(D), found at 8 C.F.R. § 274a.2 (available at: http://www.access.gpo.gov/nara/cfr/waisidx_02/8cfr274a_02.html).

H. The final rule should not *further limit* the types of evidence that may be used to document citizenship.

CMS has asked for comments regarding whether the documentation that can be used to prove citizenship should be limited to only Tier 1 and 2. 71 Fed. Reg. at 39219-39220. We urge CMS not to limit in any way the types of documents that can be used to document citizenship status. Most Medicaid applicants and recipients will not have passports, or the financial means to obtain one. Birth certificates may also be difficult for some to obtain, especially for individuals who may have been born at home and do not have access to a birth certificate or official record of their birth, or for individuals who lost documents in natural disasters, such as Hurricane Katrina. There are many people who will only be able to provide documents that are listed in the third and fourth tiers of the documentary hierarchy established at 435.407(a)-(d), and others who will have none of the documents that are listed in the hierarchy at all.

I. CMS should not require that document be dated at least five years before the original Medicaid Application Date

A number of documents listed in 42 C.F.R. § 435.407(c) and (d) can only be accepted as proof of citizenship if they are dated at least five years before the applicant's or beneficiary's *original* application for Medicaid. CMS has offered no explanation for this extraordinarily restrictive requirement, but its existence will often work a great hardship on people, especially those who have been in a nursing home or other institution for many years. People often enter nursing homes following a stroke or other severe medical event, and are usually not on Medicaid when they are first admitted. If they then remain in the facility permanently, after the passage of years their nursing home admission papers may be the only document available that indicates their citizenship. But that document will rarely have been created five years before their original application for Medicaid.

While § 435.407(d) does not currently require that nursing home admission papers be dated five years before application, we understand that CMS considers that omission a mistake that it plans to correct with the final rule. Thus, numerous people who have been in nursing homes or other institutions for many years will have no way to retain their Medicaid coverage, despite the fact that they are clearly citizens and have a nursing home record that establishes that fact. Especially in the absence of any attempted explanation by CMS of what it believes it is accomplishing with such onerous requirement, the five year appears so arbitrary and capricious as to be in violation of the both the Administrative Procedures Act and the due process requirement of the Fifth Amendment.

CMS should amend 42 C.F.R. § 435.407(c) and (d) to remove any requirement that a document must have been created at least five years before a person's initial application for Medicaid in order to qualify as verification of citizenship.

J. Implement a Real Outreach and Education Program

We urge CMS to revise the rules to comply with its statutorily-mandated obligation to conduct outreach regarding the DRA citizenship provisions.

As you know, the DRA requires the Secretary of Human and Health Services to establish an outreach program "as soon as practicable" after the enactment of the DRA. DRA § 6036(c). That outreach program is supposed to educate Medicaid applicants and beneficiaries about the new citizenship and identity documentation requirements that were imposed by the DRA. *Id.* In addition, the June 9, 2006 Letter to State Medicaid Directors states that CMS will "implement an outreach plan to explain the requirements of section 1903(x)." (Section 1903(x) refers to the citizenship and identity documentation requirements for Medicaid programs.). The new rules do not describe or otherwise address any "outreach program" designed to inform and assist those affected by the new documentation requirements.

Although the DRA was enacted on February 8, 2006 and the citizenship documentation requirement became effective on July 1, 2006, there have been no outreach efforts from CMS in Missouri. Nor has the State of Missouri initiated an outreach program. The new requirements are already confusing for many Medicaid applicants and recipients and educating these individuals is essential to ensuring that *eligible* applicants are not needlessly denied Medicaid coverage upon application and that current beneficiaries are not needlessly terminated from Medicaid coverage. For example, **at least one county office has already sent out requests for information that ask recipients to produce very specific documents that they are not legally required to produce under the DRA, federal regulations or state policy (for example, when electronic birth records are available).**

CMS should begin its outreach program immediately or *suspend implementation* of the documentation requirement in Missouri pending the fulfillment of this important condition for implementation in the DRA. This outreach should occur across the State and should address the variety of constituencies that depend on Medicaid for their health insurance and/or long term care. Outreach should be tailored to address the needs of special populations, including persons with disabilities, consistent with state and federal obligations under Section 504 of the Rehabilitation Act or 1973 and the Americans with Disabilities Act.

We also encourage you to work with DSS in implementing necessary outreach regarding the new requirement. It should not fall on overburdened nonprofit agencies and low-income Medicaid recipients to implement the outreach that the federal law requires of CMS.

Detailed outreach requirements should be incorporated into the final regulations and outreach requirements should be communicated to the States in guidance while these regulations are being finalized.

K. Ensure That Outreach Efforts Include Information to help Avoid Spillover into the Food Stamp Program

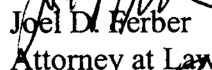
We urge CMS to undertake public education to ensure that state agencies, eligibility workers, and clients understand that the new requirements affect only Medicaid, not the Food Stamp Program. Medicaid traditionally operates in conjunction with food stamps and other benefits programs, and the programs are frequently administered by the same workers. It is vital that CMS work with states and USDA to educate caseworkers and the public about what the rule requires regarding the Medicaid program and makes clear that the provision does not affect food stamp requirements. Given the scope of hunger and food insecurity in our nation, we can ill afford any spillover effects of the Medicaid rule onto the Food Stamp Program. We must guard against intensifying problems that vulnerable families face in accessing resources to put food on the table.

Conclusion

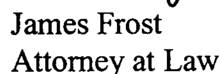
As the foregoing discussion demonstrates, it is in the best interests of the Nation, the State of Missouri, and the millions of people who depend on the Medicaid program for their health care to ensure that any documentation requirements imposed by the federal government do not interfere with the mission of the Medicaid program – delivering medically necessary health care services to low-income individuals and families – and do not increase the administrative and fiscal burden placed upon the State of Missouri.

Thank you for the opportunity to submit these comments.

Very truly yours,



Joel D. Ferber
Attorney at Law



James Frost
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August 3, 2006

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2:30 pm

Mark McClellan, M.D. Ph.D., Administrator
Centers for Medicare and Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Re: Interim Final Rule on Medicaid Program; Citizenship Documentation Requirements [CMS-2257-IFC]

Dear Dr. McClellan:

On behalf of the Mental Health Association in Illinois, I am submitting the following comments on the interim final rule regarding the new citizenship documentation requirements for the Medicaid program published by the Centers for Medicare and Medicaid Services (CMS) on July 12, 2006. Thank you for this opportunity to comment.

Medicaid has been critical to improving access to mental health treatment, especially community-based care. While mental illness is a leading cause of disability in this country, those with mental health disorders often must turn to Medicaid for access to the range of supports and services they need, frequently because private insurance generally does not provide adequate coverage of necessary mental health treatment. Medicaid provides a vital lifeline for millions with mental health disorders.

The new documentation requirement for Medicaid will undoubtedly take an especially heavy toll on individuals with mental illness. These individuals can be reticent to seek treatment because of long experience with the stigma that surrounds mental illness. At some point, most have also encountered discriminatory limits on coverage of mental health treatment. For many who have had to overcome stigma and discrimination before even trying to access treatment, the formidable new administrative burdens dictated by this rule will pose yet another barrier, heightening the risk that they will lose Medicaid coverage and forego medications and therapies that could dramatically improve and even save their lives.

Mental illness can be profoundly disabling. Yet the rule provides little real accommodation to the kind of functional and cognitive impairment that some individuals with mental illness may experience. For example, some mental health disorders can disrupt organizational skills. Yet these are among the very skills required to maintain and keep track of the kinds of records called for by this new requirement. Those with very serious mental health disorders are often transient and change providers frequently. Such circumstances markedly complicate the challenge of complying with requirements CMS has established.

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Maintaining uninterrupted access to treatment for individuals with mental health disorders is a critical concern because abruptly discontinuing psychiatric medication can be very harmful. People with serious mental illnesses can decompensate very rapidly and wind up in the hospital or worse.

We know that a large percentage of the homeless population have mental health disorders. Many homeless people who may be eligible for Medicaid will not have any of the documents that the DRA provision and CMS guidance and regulation have designated as acceptable. Moreover, it will be extremely difficult if not impossible for these individuals to now obtain these documents.

We recognize and appreciate the efforts CMS has made to expand the types of documents that may be used to document citizenship beyond what was specifically referenced in the statute, to exempt individuals receiving Medicare or SSI, and to encourage states to use electronic records checks for verifying citizenship and identity. However, because individuals with mental illness are particularly at risk of not being able to secure the required documents or to do so in a timely manner, we strongly believe that additional protections are sorely needed and should be addressed by CMS in issuing final regulations and in the meantime should be clarified in policy guidance that may be issued sooner. In particular, we urge CMS to:

- Specify that states must use every effort to simplify this process for individuals with mental or physical conditions that make it difficult to comply with the new documentation requirement, including by first using all electronic means possible to verify citizenship and identity, and clarifying that this special assistance must be provided to homeless individuals and victims of disasters as well;

- Exempt all individuals with disabilities including those receiving Social Security Disability Insurance (SSDI), as well as populations receiving other federal benefits for which their citizenship previously had to be demonstrated, especially children in foster care; Press states to use electronic means to verify citizenship and identity whenever possible and clarify that state mental health authority electronic records may also be used to verify identity;

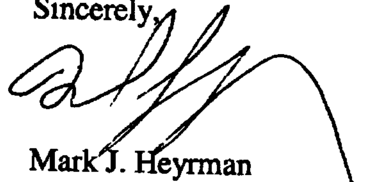
- Specify that affidavits from providers of long term care or rehabilitation services may suffice to demonstrate the identity of an applicant or recipient who has a disability and for whom providing other more standard forms of identity presents a real hardship;

- Clarify that states must presume applicants are citizens for a reasonable period while they are searching for their documents just as CMS has provided for recipients, or at least provide this presumption for applicants with an immediate need for medical care;

- For individuals who simply cannot provide any of the designated documents or affidavits, allow states to base a determination on all the evidence that is available and to allow or continue enrollment as long as there are reasonable grounds to conclude the applicant or recipient is a citizen;
- Explain that states may accept copies or notarized copies of documents when there is no reason to believe these copies are counterfeit, altered or inconsistent with information previously supplied by the applicant or recipient;
- Specify that applicants cannot be denied eligibility simply because they failed to meet a state's reasonable opportunity time standards and once this reasonable opportunity period has ended, make clear that states must help individuals who are still having difficulty producing the required documents; and
- Clarify that once applicants or recipients have met the documentation requirement in one state, they will not be required to demonstrate citizenship again for Medicaid enrollment if they move to another state.

Thank you for your consideration of our concerns.

Sincerely,



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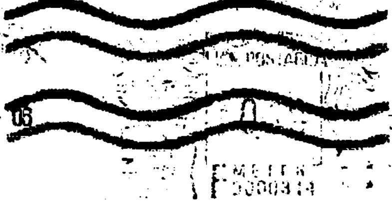

Mark McClellan, M.D. Ph.D., Administrator
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August 11, 2006

Centers for Medicare & Medicaid Services
Hubert H Humphrey Building, Room 445-G
200 Independence Avenue, S.W.
Washington, DC 20201

RE: CMS-2257-IFC

Dear Sir or Madam:

I am writing on behalf of America's Health Insurance Plans (AHIP) to respond to the interim final rule with comment period, "Medicaid Program; Citizenship Documentation Requirements" (71 FR 39214) published in the Federal Register on July 12, 2006 by the Centers for Medicare & Medicaid Services (CMS). AHIP is the national trade association representing nearly 1,300 member companies providing health insurance coverage to more than 200 million Americans. This rule has a significant effect on AHIP's member organizations, many of which participate as Medicaid health plans under State Medicaid managed care programs. AHIP's members provide benefits to almost three-quarters of the beneficiaries enrolled in such plans.

AHIP member organizations have a strong commitment to providing quality, comprehensive health care benefits to their Medicaid members. We are concerned that implementation of the citizenship documentation requirements of the Deficit Reduction Act of 2005 has the potential to jeopardize access to Medicaid benefits for these beneficiaries and others who would otherwise be eligible. As discussed in our comments below, we believe that some of the provisions of the interim final rule are consistent with this goal, while others could have negative consequences and should be revised to avoid seriously disadvantaging individuals for whom availability of the Medicaid program is critically important. We strongly urge CMS to ensure that the regulations do not create barriers that could result in inappropriate loss of eligibility or denial of applications, particularly for the nation's most frail and vulnerable citizens.

General Comments

- **Dually eligible beneficiaries and SSI recipients.** AHIP supports CMS' interpretation of Section 1903(x)(2) of the Social Security Act (reflected in §435.1008 of the regulations) that individuals who are dually eligible for Medicare and Medicaid or eligible for Medicaid by virtue of receiving

Supplemental Security Income (SSI) are exempt from the requirement for providing satisfactory documentary evidence of citizenship. The Preamble (see pages 39215-39216) clearly explains the basis for the Agency's conclusion that the including a reference to an "alien" rather than an "individual" in this context in the amendment to Section 1903(x)(2) of the Social Security Act enacted in the DRA was a drafting error.

- **Presumptive eligibility.** AHIP also supports the policy discussed in the Preamble (see page 39216) that individuals in a "presumptive eligibility period" may receive Medicaid benefits prior to meeting the citizenship documentation requirements. While these individuals become subject to the requirements when they file an application and declare on the application that they are U.S. citizens or nationals, the availability of benefits based upon their presumptive eligibility will be important to meeting critical health care needs (i.e. for pregnant women).

- **Use of databases.** Further, AHIP supports several provisions of the regulations that streamline or facilitate compliance with citizenship and identity documentation requirements through the use of available databases, although we believe the use of such information should be expanded as noted in our comments below. These provisions include:
  - -- Allowing States, at their option, to use matches with the State Data Exchange (SDX), if the State does not provide automatic Medicaid eligibility to SSI recipients, as primary evidence of citizenship and identity. (§435.407(a)(5))
  - -- Allowing States at their option to use a cross match with a State vital statistics agencies to document a birth record in lieu of an original certified copy of a birth certificate to assist applicants or beneficiaries in establishing citizenship. (§435.407(b)(1))
  - -- Allowing States the option of using a cross match with a Federal or State governmental, public assistance, law enforcement or corrections agency's data system to determine identity, as long as the agency establishes and certifies true identity of individuals. (§435.407(e)(10))

- In several key areas, as discussed in more detail below, AHIP strongly urges CMS to revise the interim final rule to avoid undue burden in meeting the documentation requirements and promote access to Medicaid benefits for eligible citizens. For example:
  - -- The requirement for submission of original documentation of identity is likely to mean that, in many instances, individuals can provide the documentation only by appearing in person at a Medicaid office, because it would be impractical to send by mail the original of a driver's license, military dependent's identification card, or other original record that is used daily by the individual. (§435.407(h)(1))
  - -- §435.407(f) establishes that for children under 16, school records may be used to determine citizenship. While we support CMS' recognition that special consideration should be given to documentation requirements for

children, we believe that rules continue to be unnecessarily burdensome. Documentation requirements for adults rely largely on proof of identity that includes a picture. CMS recognizes that this is impractical for children. However, it appears that a nursery or daycare record or an affidavit from a parent that includes the child's name or date of birth is no more reliable than the birth certificate that must be provided as proof of citizenship. For this population, AHIP supports the use of a birth record to establish both citizenship and identity.

Specific Comments

PREAMBLE

I. Background

Implementation Conditions/Considerations

- **Clarification of reference to individual enrolled in "Medicare" (Preamble, page 39215)**

  Issue: This section of the Preamble discusses the exemption from the requirement that an individual must present satisfactory documentary evidence of citizenship that applies to an individual enrolled in Medicare or eligible for Medicaid by virtue of receiving Supplemental Security Income (SSI). AHIP believes the reference to "Medicare" may be confusing because it does not specify that the exemption applies to an individual who is entitled to Medicare Part A and/or enrolled under Part B, although the language of the regulation in §435.1008 clarifies that this is the case.

  Recommendation: For clarity, AHIP recommends that the reference to "Medicare" in this discussion in the Preamble be clarified consistent with the language of the regulation in §435.1008.

- **Exceptions to "reasonable opportunity period," (Preamble, page 39216; §435.407(j))**

  Issue: This section establishes that at the time of application or redetermination, the State must give a Medicaid applicant or beneficiary a reasonable opportunity to present documents establishing U.S. citizenship or nationality and identity. Further, this section indicates that the reasonable opportunity period should be consistent with the State's administrative requirements such that the State does not exceed the time limits established in Federal regulations for timely determination of Medicaid eligibility; 90 days for applicants who apply on the basis of disability and 45 days for all other applicants. AHIP supports the rule permitting States to allow for a reasonable opportunity period for Medicaid

beneficiaries and applicants to provide the required documentation. However, we believe that there may be instances when an individual may need a time period beyond the 45-90 days to provide the documentation. It appears that the language in §435.911 does allow this flexibility.

Recommendation: AHIP recommends that §425.407(j) be revised to provide that in the case of eligibility redeterminations States may allow additional time for Medicaid recipients to provide documentary evidence of citizenship and identity, if needed, beyond the currently defined "reasonable opportunity period" and continue eligibility for Medicaid benefits during that period.

- **Use of a cross match with a State vital statistics agency to document a birth record – (Preamble, page 39216; §435.407(b)(1))**

  Issue: This section discusses the provision that permits States, at their own option, to use cross matches with State vital statistics agencies in place of a birth certificate to establish citizenship. This section also indicates that CMS is soliciting comments and suggestions for the use of other electronic data matches with other governmental systems of records that contain reliable information about the citizenship or identity of individuals. AHIP supports the use of cross matches with State vital statistic agencies in lieu of a birth certificate, and also strongly supports expansion of the opportunity for States to use other databases to determine citizenship. AHIP notes that in §435.407(e)(10), the regulations allow States the option to use a cross match with a Federal or State governmental, public assistance, law enforcement or corrections agency's data system to establish identity of an individual.

  Recommendation: AHIP recommends that §435.407(b)(1) be revised to provide that a State may use a cross match with other Federal or State databases, in addition to the already defined use of a cross match with a State vital statistics agency, to document citizenship of a Medicaid applicant or beneficiary.

PROVISIONS OF THE INTERIM FINAL RULE WITH COMMENT PERIOD

Fourth Level of Evidence of Citizenship -- §435.407(d)

- **Use of written affidavits in "rare" circumstances -- §435.407(d)(5) (See also Preamble, page 39219)**

  Issue: This section of the regulation provides that written affidavits are allowable to establish citizenship in the rarest circumstances—only when a State determines that an individual is unable to provide evidence of citizenship listed in any other of the three categories. The rule states that, if the documentation requirement needs to be met through the use of affidavits, the following rules apply:

+ There must be at least two affidavits by individuals who have personal knowledge of the events(s) establishing the applicant's or beneficiary's claim of citizenship;
+ The persons submitting the affidavits must be able to provide proof of their own citizenship and identity; and
+ The applicant or beneficiary (or their guardian/representative) must submit an affidavit explaining why the evidence does not exist or cannon be obtained.

AHIP has serious concerns that these requirements have the potential to disproportionately disadvantage some of the most vulnerable Medicaid beneficiaries, specifically the homeless, institutionalized individuals, and mentally ill or mentally incapacitated individuals, because these individuals are likely unable to provide the required documentary evidence of citizenship or identity. While §435.407(g) (Special populations) provides that states must assist such frail individuals to secure satisfactory evidence of citizenship, we believe that the practical difficulty of this task and the State's finite resources to carry it out will make compliance very difficult. Accordingly, AHIP believes that the regulation should be revised to more explicitly address the circumstances of these vulnerable individuals.

Recommendation: AHIP recommends that with respect to the homeless, institutionalized, mentally ill or mentally incapacitated individuals, and other populations that are likely to experience significant difficulty meeting the documentation requirements, CMS revise the regulation to provide criteria that States are permitted to use to verify citizenship in the absence of the evidence specified in the rule (e.g., a specified extended period of receiving Medicaid benefits in an institution). We also recommend that the criteria address documentation of identity.

Special identity rules for children -- §435.407(f)

- **Children under school-age.**

  Issue: This section provides that for children under 16, school records may be used to determine citizenship. As discussed in our general comments above, while we support CMS' recognition that special consideration should be given to documentation requirements for children, we believe that rules continue to be unnecessarily burdensome. Documentation requirements for adults rely largely on proof of identity that includes a picture. CMS recognizes that this is impractical for children. However, it appears that a nursery or daycare record or an affidavit from a parent that includes the child's name or date of birth is no more reliable than the birth certificate that must be provided as proof of citizenship.

Recommendation: For children under who are not yet school-age, AHIP recommends that CMS revise the regulation to provide that State may accept a birth record to establish both citizenship and identity.

- **Foster care children.**

  Issue: Based upon the experience of our member organizations providing Medicaid benefits to foster care children, we believe that there are likely to be significant challenges in obtaining the required documentary evidence of identity for these children. For reasons similar to those cited in the discussion of special populations above, we believe that CMS should explicitly provide criteria that the States may use determine identity in the absence of such evidence (e.g., inclusion of the child in the foster care system for a specified period of time).

  Recommendation: AHIP recommends that with respect to the children in foster care, CMS provide criteria that States are permitted to use to verify citizenship in the absence of the evidence specified in the rule (e.g., specified extended period receiving Medicaid benefits in an institution). We also recommend that the criteria address documentation of identity.

Special populations needing assistance -- §435.407(g)

- **Additional assistance for special populations -- §435.407(g) (See also Preamble, page 39216)**

  Issue: This section of the regulation provides a mechanism for States to address the circumstances of special populations who are unable to satisfy the citizenship documentation requirements. While AHIP supports inclusion of such a provision in the regulation, as noted above in our comments on §435.407(d)(5), we believe that the regulation should be revised to provide additional mechanism for the State to verify both citizenship and identity.

  Recommendation: AHIP recommends, consistent with our comment above, that CMS revise §436.407(g) to provide criteria that States are permitted to use to verify citizenship in the absence of the evidence specified in the rule (e.g., specified extended period receiving Medicaid benefits in an institution). We also recommend that the criteria address documentation of identity.

- **Documentary evidence -- §435.407(h)**

  + **Requirement for submission of originals or certified copies of documentary evidence only -- §435.407(h)(1) (See also Preamble, page 39219)**

    Issue: With respect to evidentiary documentation, this section provides that the State can only accept originals or copies certified by the issuing

agency, and copies or notarized copies of these documents may not be accepted for submission. However, the DRA does not establish such a requirement. AHIP believes that this requirement is unnecessarily burdensome to affected Medicaid beneficiaries and applicants and may have the unintended effect of making the documentation requirement process significantly more difficult for these individuals. Our comment below concerning the practical barriers to submission of original documentation by mail contains examples of the difficulties that beneficiaries may face. (See the discussion below regarding §435.407(h)(3).)

We believe that revision of the regulation to permit submission of copies of required documentation to establish citizenship and identity would facilitate the submission process for beneficiaries while continuing to serve the purpose of the documentation requirement. In support our recommendation, we would like to highlight a recent report issued by the Kaiser Commission on Medicaid and the Uninsured, which focuses on lessons learned from New York with respect to citizenship documentation requirements[1]. According to the study, New York has required documentation of citizenship for Medicaid applicants since at least the mid-1970s, and the State accepts copies of all required documents to establish citizenship and identity. The study also states that "the interim [State Medicaid Director] guidance notes that New York has required documentation of citizenship in Medicaid for many years without 'undue hardship to either applicants or the state,' and indicates that the DRA requirements 'mirror' New York's rules." It is evident that because New York has a proven record of experience, which according to CMS, has been successful in ameliorating hardship on behalf of applicants and the State, that New York can be viewed as a case study in "the development of federal guidance with respect to DRA implementation, as well as planning in state Medicaid programs that will be documenting citizenship for the first time.

Recommendation: AHIP strongly recommends that the rule be revised to allow States to accept copies of the required documentation to establish citizenship **and** identity.

+ **Submission original documentary evidence via mail -- §435.407(h)(3) (See also Preamble, page 39219)**

Issue: This section indicates that individuals may submit documentary evidence to establish citizenship or identity by mail or by other means without appearing in person. While AHIP is supportive of CMS' efforts

[1] The Kaiser Commission on Medicaid and the Uninsured, Citizenship Documentation Requirements in the Deficit Reduction Act of 2005: Lessons Learned from New York, Washington, DC: The Henry J. Kaiser Family Foundation, June 2006.

to provide flexibility in how individuals may submit their evidentiary documentation to States, we believe that the intended flexibility may not materialize because of the requirement that all documentary evidence submitted must either be an original or a copy of an original certified by the issuing agency (as described above). For example:

-- It is not likely that Medicaid beneficiaries or applicants will be comfortable with mailing their original documents to the State; and be willing to rely on the State to return their original documents to them via mail; and

-- The administrative burden on States to properly return the original documents submitted to them would be substantial; and

-- It is not feasible for an individual to mail the State their drivers' license to establish identity as they will more than likely need the document for everyday use, i.e. driving a vehicle, writing checks, and establishing identity in other venues.

Recommendation: AHIP reiterates our recommendation above that the rule be revised to allow States to accept copies of the required documentation to establish citizenship and identity.

\+ **One-time presentation of documentary evidence -- §435.407(h)(5) (See also Preamble at page 39215)**

Issue: The regulation section provides that the presentation of documentary evidence of citizenship is a one-time activity and that subsequent changes to an individual's eligibility should not require repeating the documentation unless later evidence raises a question of a person's citizenship. The rule further indicates that the State need only check its databases to verify that the individual already established citizenship. AHIP urges CMS to explicitly provide that the "one-time activity" policy applies across state lines. We believe that if a State effectively establishes citizenship and identity for a Medicaid eligible individual and subsequently, the individual moves to another State, the new State should be able to verify the eligibility of the individual with their previous State of residence. This expansion of reliance on existing databases would be particularly helpful with migrant populations that travel between States to perform seasonal work, and rely on Medicaid assistance to provide much needed healthcare benefits for their families.

Recommendation: AHIP recommends that CMS revise the regulation here or in another appropriate section to provide that the one-time activity policy operates across State lines so that a State may rely on the record of a determination that is maintained in another.

III. Collection of Information Requirements

- **Citizenship and Alienage (§435.406)**

Burden estimate for citizen documentation requirement (FR 39220)

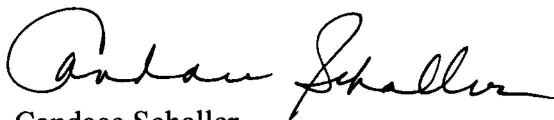
Issue: This section of the Federal Register notice states that CMS estimates "it would take an individual 10 minutes to obtain acceptable documentary evidence and to verify the declaration," and that "it will take each State 5 minutes to obtain acceptable documentation, verify citizenship, and maintain current records on each individual." AHIP believes these estimates are unlikely to reflect the multiple steps that will be necessary for States to obtain documentary evidence, which, for example, could require a State employee to meet with an applicant or beneficiary at a State Medicaid office or a search of multiple databases.

Recommendation: AHIP recommends that CMS reevaluate the burden estimate based upon outreach to States to obtain information about their plans for implementing the requirements contained in the regulations.

Note: Our comments reference §§435.400, et seq of the interim final rule. However, they also apply to §§436.400, et seq as appropriate.

We appreciate the opportunity to provide comment on this interim final rule. If you have questions or would like additional information, please contact me at (202) 778-3209.

Sincerely,



Candace Schaller
Senior Vice President, Regulatory Affairs

cc: Melissa Musotto
Office of Strategic Operations and Regulatory Affairs
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Katherine Astrich
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August 9, 2006

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VIA FEDERAL EXPRESS

Mark B. McClellan, M.D., Ph.D.
Administrator
Centers for Medicare & Medicaid Services
Room 314-G Humphrey Bldg.
200 Independence Ave., S.W.
Washington, DC 20201

Dear Dr. McClellan:

On behalf of Florida's counties, I am writing to provide comment on the guidance issued regarding implementation of the Deficit Reduction Act (DRA) citizenship documentation provisions for Medicaid.

Florida's counties provide many of the health services that are reimbursable by Medicaid. As one of our nation's safety net provides, counties are ultimately responsible for the provision of health services to the indigent and underserved populations, and also work to determine initial and ongoing eligibility for Medicaid. Additionally, county clerks are responsible for providing many of the documents that will be required for eligibility determination. For these reasons, the interim final rule will have great impact on county governments.

While the Florida Association of Counties (FAC) understands the interest in further enforcing the existing American citizenship or legal immigration status required for Medicaid eligibility, we are concerned with several points issued in the guidelines:

Documentation Prior to Eligibility

- CMS guidelines interpret Section 6036 of the DRA as affecting eligibility for Medicaid. FAC suggests the interim final rule allows applicants who have met all other eligibility requirements to receive Medicaid benefits while they are attempting to meet the citizenship documentation requirements.

Documentation for Children Receiving Title IV-E Benefits and SSI Recipients

- Documentation requirements should not apply to Title IV-E Foster Care and Adoption Assistance or Supplemental Security Income recipients. Neither program is subject to the declaration of U.S. citizenship under Section 1137 of the Social Security Act. These recipients are entitled to Medicaid benefits by virtue of their eligibility for these other programs.

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Allowable Documentation

- FAC is please that the Department chose to use the flexibility given by the DRA to adopt additional means of verifying citizenship and identity rahter than the limited options listed in statute. Additionally, we would recommend that acceptable documentation of citizenship and identity for other federal means-tested public benefit programs be considered acceptable documentation for purposes of Medicaid. Furthermore, we recommend that CMS clarify that costs incurred by a county in assisting applicants and recipients establish citizenship or identity be an allowable expense under Medicaid administrative costs. Finally, FAC recommends that CMS consider additional citizenship and identity documents that may be more easily obtained by especially vulnerable populations.

Thank you for your consideration of our concerns and we look forward to working with you in the future on this important issue. Should you have any questions regarding our comments or recommendations, please feel free to contact Heather Youmans at (850) 922-4300 or via email at hyoumans@fl-counties.com.

Sincerely,

Christopher L. Holley
Executive Director

CLH/rb

cc: Commissioner Bill Williams, Chair, FAC Health & Human Services Committee
Commissioner Joyce Valentino, Vice Chair, FAC Health & Human Services Committee
Commissioner Suzanne Jenkins, Vice Chair, FAC Health & Human Services Committee
Commissioner Bob Janes, Chair, National Association of Counties Health Steering Committee

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Neighborhood Health Plan of Rhode Island

AUG 21 2006

August 10, 2006

Department of Health and Human Services
Att: CMS-2257-IFC
Room 445-G
Hubert. Humphrey Building
200 Independence Avenue, SW
Washington, D.C. 20201

Re: CMS-2257-IFC -- Interim Final Rule on Medicaid Program; Citizenship Documentation Requirements (RIN 0938-A051)

On behalf of Neighborhood Health Plan of Rhode Island (NHPRI), a health plan in partnership with community health centers, we welcome this opportunity to formally comment on CMS Medicaid Citizenship Documentation regulations.

We appreciate and applaud the exemptions CMS has already granted the elderly and Supplemental Security Income populations. Nevertheless, we are very concerned that foster children are not also excluded from documentation requirements. We believe the DRA's citizenship documentation requirements will hamper the efforts of Medicaid and child welfare agencies to meet the needs of our nation's most at-risk children and will place the health of some of these children in jeopardy.

Respectfully, we encourage CMS to consider exempting all foster children in state custody programs. We define "foster" to include all children in state custody because as a group, the cohort is larger than those deemed Title IV-E eligible. Of all children in the United States foster care programs, only one half are eligible for Title IV-E federal funding. In Rhode Island only 25% are eligible to be classified as Title IV-E.

Currently, some citizens in the United States are unable to provide the necessary documents to verify proof of citizenship, children among them. Because foster children may not have their citizenship status documented upon admission into foster care, and the circumstances of their placement may limit the state's ability to collect all necessary documents, their timely access to Medicaid is unnecessarily jeopardized by these new regulations. NHPRI is concerned about the risks associated with delays in coverage and

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Neighborhood Health Plan of Rhode Island

have critical concerns that without Medicaid coverage children will not be placed into the appropriate care settings.

Dr. McClellan, thank you again for the opportunity to comment. Neighborhood Health Plan welcomes the opportunity to work with your agency in the continued development and refinement of Medicaid citizenship documentation. Please contact me at (401) 459-6099 if you have any questions.

Respectfully submitted,

Mark E. Reynolds
Chief Executive Officer

MONTANA
STATE UNIVERSITY
EXTENSION

56

August 11, 2006

Centers for Medicare and 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)

Family & Human Development

I am writing on behalf of the Grandparents Raising Grandchildren Project at Montana State University to comment on the interim final rule, which was published in the Federal Register on July 12, 2006, to implement Section 6036 of the Deficit Reduction Act (DRA, P.L. 109-171). The provision, which went into effect July 1, requires applicants for and recipients of Medicaid to provide proof of U.S. citizenship or nationality and identity. We are particularly concerned about the impact the regulations will have on the ability of children being raised both formally and informally by their grandparents. Many grandparents are raising their grandchildren due to abuse and neglect and do not have access to the child's birth certificate and other identifying documentation.

While we have numerous concerns about the barriers the new documentation requirements create for children getting timely, appropriate health and mental health care, we are focusing our comments today particularly on our concerns about the application of the interim final rules on children in foster care and children with special needs adopted from foster care as well as those children who are in an informal care arrangement living with a grandparent or other kin caregiver.

Clarification of the documentation requirement as it applies to these children is especially important for at least three reasons.

1) **Children's Health and Mental Health Needs.** Children in foster care and informal kin care are often children with very special health and mental health needs who are in need of immediate attention and any delay in receiving medical attention could threaten their lives. Many of them have chronic conditions that require ongoing care and even the prospect of discontinuing care while documentation is being sought is very threatening.

2) **New Costs for Child Welfare.** If Medicaid is not available and the child welfare agency must pick up the tab for health and mental health treatment for children in its care, normally paid for by Medicaid, the costs incurred by the child welfare agency will mean that scarce dollars are taken away from other important needs of these children.

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MONTANA
STATE UNIVERSITY
EXTENSION

3) **Difficulties in Securing Documentation.** Because of the fact that many children enter foster care or kin care from situations where parents have been charged with abuse or neglect, it is likely that there would be delays in obtaining the necessary documentation, in part because of the parents' hesitancy or unwillingness to cooperate with the agency in providing the necessary documentation to fulfill this requirement. There may also be cases where the whereabouts of the parent are unknown, further complicating and delaying the documentation process.

Given such problems, we recommend first that the Centers for Medicare and Medicaid Services (CMS) take steps in the final regulations to exempt these children from the documentation requirements.

Family & Human Development

The Montana State University Grandparents Raising Grandchildren Extension Project recommends that CMS amend the interim final rule at 42 CFR 435.1008 to add children being raised in both informal and formal kinship care arrangements to the list of groups exempted from the citizenship and identify requirements.

If CMS decides not to exempt this group of children, we propose at a minimum that CMS consider them all as recipients of Medicaid, rather than applicants. In such a case, CMS would only require documentation at the point of their redetermination of eligibility and would clearly provide the child welfare agency a reasonable opportunity for providing necessary documentation, without any delay or disruption in the care and treatment the child is receiving.

We also recommend that CMS drop the provision currently in the interim final rule that says "Title IV-E children receiving Medicaid must have in their Medicaid file a declaration of citizenship or satisfactory immigration status and documentary evidence of the citizenship or immigration status claimed on the declaration." [71 Fed.Reg. at 39216] This provision is duplicative of work that the child welfare agency already does and adds burden and cost to the states. States generally verify citizenship when determining a child's eligibility for IV-E foster care payments, and it is not a good use of resources for it to be documented again by the Medicaid agency. The child welfare agency should be able to notify the Medicaid agency that it has such documentation on file. Similarly, when the state assumes custody of a child in its care, it should be assumed that they have established the identity of the child and they should be allowed to certify to that fact with the Medicaid agency.

Sincerely,

Aimee J. Kissel

Aimee J. Kissel
Grandparents Raising Grandchildren Project

Health and Human Development
316 Herrick Hall
P.O. Box 173540
Bozeman, MT 59717-3540
www.montana.edu/wwwhd/

Tel (406) 994-6745
Fax (406) 994-2013

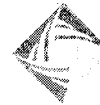
Hayes, Yolanda K. (CMS/OSORA)

From: Braxton, Shawn L. (CMS/OSORA)
Sent: Thursday, August 10, 2006 5:34 PM
To: Hayes, Yolanda K. (CMS/OSORA)
Cc: Johnson, Sharon B. (CMS/OSORA)
Subject: FW: Public Submission

>-----Original Message-----
>From: Whitcraft, Rosie [mailto:rosie.whitcraft@fda.hhs.gov]
>Sent: Thursday, August 10, 2006 4:47 PM
>To: Jones, Martique S. (CMS/OSORA); Braxton, Shawn L. (CMS/OSORA)
>Subject: FW: Public Submission
>
>
>
>-----Original Message-----
>From: no-reply@erulemaking.net [mailto:no-reply@erulemaking.net]
>Sent: Thursday, August 10, 2006 4:34 PM
>To: OC AIMS Support
>Subject: Public Submission
>
>Please Do Not Reply This Email.
>
>Public Comments on Medicaid Program; Citizenship Documentation
>Requirements:========
>
>Title: Medicaid Program; Citizenship Documentation Requirements
>FR Document Number: 06-06033
>Legacy Document ID:
>RIN: 0938-AO51
>Publish Date: 07/12/2006 00:00:00
>Submitter Info:
>
>
>First Name: Edward
>Last Name: Widmann
>Category: Attorney/Law Firm - OT010
>Mailing Address: 703 Ash St
>City: Denver
>Country: United States
>State or Province: CO
>Postal Code: 80220
>Organization Name: n.a.
>
>Comment Info: ================
>
>General Comment:I am concerned that citizenship documentation may be
>required with regard to
>children in foster care. As an attorney, adoptive father and
>one interested
>in
>issues of child placement, it concerns me that children who
>are screened and
>
>approved for foster care by a state or local agency should be
>entitled to
>receive the
>same benefits from medicaid as other foster children. To
>provide otherwise
>will be
>disruptive of the foster care system and discourage people

>from volunteering
>to be
>foster parents.
>Ed Widmann
>
>
>

58


COMMUNITY
HEALTH NETWORK
OF WASHINGTON

August 9, 2006

Centers for Medicare and Medicaid Services
Office of Strategic Operations and Regulatory Affairs,
Regulations Development Group
Attn: Melissa Musotto, CMS-2257-IFC, Room C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: Medicaid Citizenship Documentation Interim Final Rule, 71 Fed.Reg. 39214 (7/12/06)

Dear Ms. Musotto:

The Community Health Network of Washington is a community health center-based delivery network and the parent company of Community Health Plan, one of the largest safety net managed care plans in the country. Our system serves nearly 600,000 low-income patients across nearly every county in Washington State. About 40% or 230,000 of the patients in our network are Medicaid enrollees, representing more than ¼ of the state's Medicaid caseload. We are thereby extremely concerned that U.S. citizens applying for or receiving Medicaid coverage will face delay, denial, or loss of Medicaid coverage.

We are writing to comment on the interim final rule to implement section 6036 of the Deficit Reduction Act of 2005 (DRA). This provision of the DRA became effective on July 1 and requires that U.S. citizens and nationals applying for or receiving Medicaid document their citizenship and identity.

Our comments below highlight these seven key areas that we believe should be modified in the final rule.

Information collection requirements
We are concerned that the requirement that only originals and certified copies be accepted as satisfactory documentary evidence of citizenship adds unnecessarily to the burden of the new requirement on applicants, beneficiaries, and state Medicaid agencies. The requirement for originals and certified copies also calls into question the estimate that compliance with the requirement will only take an applicant or beneficiary ten minutes and state Medicaid agencies five minutes to satisfy the requirements of the regulations. In addition to locating or obtaining their documents, applicants and beneficiaries will likely have to visit state offices to submit them. State agencies will have to meet with individuals, make copies of their documents, and maintain records. This approach means scarce resources will be spent on bureaucratic processes rather than on needed health care services.

The DRA does not require that applicants and beneficiaries submit original or certified copies to satisfy the new citizenship documentation requirement. Yet CMS has added this as a requirement in the interim final regulations at 42 CFR 435.407(h)(1). This requirement adds greatly to the information collection burden of the regulations. It also requires states to dedicate precious additional resources to handle the added bureaucratic workload created by this requirement.

Applicants and beneficiaries will have to make unnecessary visits to state offices with original and certified copies. While the regulations state that applicants and beneficiaries can submit documents by mail, it is not likely that many applicants and beneficiaries will be

willing to mail in originals or certified copies of their birth certificates, or proof of identity such as driver's licenses or school identification cards.

We urge CMS to modifying the requirement at 42 CFR 435.407(h)(1) to make it clear that a state has the option of accepting copies or notarized copies of documents in lieu of original documents or copies certified by the issuing state agency. States should be able to accept copies when the state has no reason to believe that the copies are counterfeit, altered, or inconsistent with information previously supplied by the applicant or beneficiary.

U.S. citizens applying for benefits should receive benefits once they declare they are citizens and meet all eligibility requirements

Under the DRA, the new citizenship documentation requirement applies to all individuals (other than Medicare beneficiaries and, in most states, SSI beneficiaries) who apply for Medicaid. The preamble to the rule states that applicants "should not be made eligible until they have presented the required evidence." 71 Fed. Reg. at 39216. The rule itself states that states "must give an applicant or recipient a reasonable opportunity to submit satisfactory documentary evidence of citizenship before taking action affecting the individual's eligibility for Medicaid." 42 CFR 435.407(j).

Under the DRA, documentation of citizenship is not a criterion of Medicaid eligibility. Once an applicant for Medicaid declares that he or she is a citizen and meets all eligibility requirements, eligibility should be granted. There is nothing in the DRA that requires a delay in providing coverage. Yet CMS has prohibited states from granting coverage to eligible citizens until they can obtain documents such as birth certificates.

The net effect of denying coverage to applicants lacking documentation will be to delay Medicaid coverage for large numbers of eligible, low-income pregnant women, children and other vulnerable Americans. This is likely to delay their medical care, worsen their health problems and create financial losses for health care providers.

U.S. citizens who have applied for Medicaid, who meet all of the state's eligibility criteria, and who are trying to obtain the necessary documentation, will experience significant delays in Medicaid coverage. Some U.S. citizens who get discouraged or cannot get the documents they need within the time allowed by the state will never get coverage. Because there has been no outreach program to educate U.S. citizens about the new requirement, most applicants are likely to be unaware of it, and there are likely to be significant delays in assembling the necessary documents.

We urge CMS to revise 42 CFR 435.407(j) to state that applicants declaring they are U.S. citizens or nationals and meeting the state's Medicaid eligibility criteria are eligible for Medicaid. Furthermore, we urge CMS to require states to provide applicants with Medicaid coverage during a "reasonable opportunity" period for obtaining the necessary documentation.

Children who are eligible for federal foster care payments should be exempt from the citizenship documentation requirement.

The interim final rule applies the DRA citizenship documentation requirements to *all* U.S. citizen children except those eligible for Medicaid based on their receipt of SSI benefits. Among the children subject to the documentation requirements are roughly one million children in foster care, including those receiving federal foster care assistance under Title IV-E. State child welfare agencies must verify the citizenship status of these children in the process of determining their eligibility for Title IV-E payments. It is our understanding that the Administration for Children and Families (ACF) requires state child welfare agencies to

follow the Department of Justice interim guidelines on verification of citizenship. Nonetheless, the preamble to the rule states that these Title IV-E children receiving Medicaid "must have in their Medicaid file a declaration of citizenship ... and documentary evidence of the citizenship ... claimed on the declaration." 71 Fed. Reg. at 39216. (It has been reported that CMS takes the view that foster care children should be treated as current beneficiaries rather than applicants for this purpose, but there is no language to this effect in either the rule itself or the preamble.)

The DRA does not compel this result, which requires unnecessary duplication of state agency efforts and puts these children at risk of delayed Medicaid coverage. To the contrary, the DRA allows the Secretary to exempt individuals who are eligible for other programs that required documentation of citizenship. The IV-E program is precisely such a program, yet CMS, without explanation, elected not to exempt foster care children receiving such payments from the new documentation requirement, 71 Fed. Reg. at 39216.

We urge CMS to revise 42 CFR 435.1008 to add children eligible for Medicaid on the basis of receiving Title IV-E payments to the list of groups exempted from the documentation requirement.

A state Medicaid agency's record of payment for the birth of an infant in a U.S. hospital should be considered satisfactory documentary evidence of citizenship and identity.

Among the children subject to the documentation requirements are infants born in U.S. hospitals. Newborns will not have birth records on file with state Vital Statistics agencies. The rule provides that in such circumstances, extracts of a hospital record created near the time of birth could be used as proof of citizenship, 42 CFR 435.407(c)(1), and if this "third level" of evidence was not available, a medical (clinic, doctor, or hospital) record created near the time of birth could be used, but only in the "rarest of circumstances," 42 CFR 435.407(d)(4).

Under current law, infants born to U.S. citizens receiving Medicaid at the time of birth are deemed to be eligible for Medicaid upon birth and to remain eligible for one year so long as the child remains a member of the woman's household and the woman remains eligible for Medicaid (or would remain eligible if pregnant). The preamble to the interim final rule states that, in such circumstances, "Citizenship and identity documentation for the child must be obtained at the next redetermination." 71 Fed. Reg. 39216. This makes no sense, since the state Medicaid agency paid for the child's birth in a U.S. hospital and the child is by definition a citizen. In the case of a child born in a U.S. hospital to a mother who is either a legal immigrant subject to the 5-year bar on Medicaid coverage or an undocumented immigrant, the preamble states that, in order for the newborn to be covered by Medicaid, an application must be filed and the citizenship documentation requirements would apply. 71 Fed. Reg. 39216. Again, this makes no sense, since the state Medicaid agency paid for the child's birth in a U.S. hospital and the child is by definition a citizen.

The risk to the health of newborns from delays in coverage and the potential for increased uncompensated care for providers are completely unnecessary. By paying for the birth, the state Medicaid agency has already made the determination that the child was born in a U.S. hospital.

We strongly urge that 42 CFR 435.407(a) be amended to specify that the state Medicaid agency's record of payment for the birth of an individual in a U.S. hospital is satisfactory documentary evidence of both identity and citizenship.

CMS should adopt the approach taken by the Social Security Administration for U.S. citizens who lack documentation of their citizenship.
There are U.S. citizens who will not be able to provide any of the documents listed in the interim final rule. Among these are victims of hurricanes and other natural disasters whose records have been destroyed, and homeless individuals whose records have been lost. The rule directs states to assist individuals with "incapacity of mind or body" to obtain evidence of citizenship, 42 CFR 435.407(g), but it does not address the situation in which a state is unable to locate the necessary documents for such an individual. Nor does the rule address the situation in which an individual does not have "incapacity of mind or body" but his or her documents have been lost or destroyed and, despite the best efforts of the individual or a representative, the documents cannot be obtained. As a result, under the rule if such individuals apply for Medicaid they can never qualify, and if such individuals are current beneficiaries, they will eventually lose their coverage.

As a last resort, the interim final rule allows the use of written affidavits to establish citizenship, but only when primary, secondary, or third-level evidence is unavailable, and "ONLY ... in rare circumstances," 42 CFR 435.407(d)(5). The requirements for these affidavits are rigorous, and it is likely that in a substantial number of cases they cannot be met, because two qualified individuals with personal knowledge of the events establishing the applicant's or beneficiary's claim to citizenship cannot be located or do not exist. In short, the rule simply does not recognize the reality that there are significant numbers of U.S. citizens without documents proving citizenship and without any idea that they need documents proving citizenship.

This result is both foreseeable and unnecessary. The DRA gives the Secretary discretion to expand on the list of documents included in the DRA that are considered to be "proof" of citizenship and a "reliable means" of identification. We urge that the Secretary use this discretion to acknowledge that state Medicaid agencies have the capacity to recognize when a U.S. citizen without documents is in fact a U.S. citizen for purposes of Medicaid eligibility.

The regulations for the SSI program allow people who cannot present any of the documents SSI allows as proof of citizenship to explain why they cannot provide the documents and to provide any information they do have. (20 CFR 416.1610) The Secretary should adopt a similar approach. Specifically, 42 CFR 435.407 should be revised by adding a new subsection (k) to enable a state Medicaid agency, at its option, to certify that it has obtained satisfactory documentary evidence of citizenship or national status for purposes of FFP under section 435.1008 if (1) an applicant or current beneficiary, or a representative or the state on the individual's behalf, has been unable to obtain primary, secondary, third level, or fourth level evidence of citizenship during the reasonable opportunity period and (2) it is reasonable to conclude that the individual is in fact a U.S. citizen or national based on the information that has been presented. This approach would ensure that the patients we serve who are U.S. citizens can continue to receive the health care services they need.

Those receiving Medicaid through family planning waivers should be exempt.
The population receiving Medicaid through family planning waivers will experience unnecessary, inordinate delays in service provision if they are required to wait to receive services until the proper documentation can be obtained. Services delays to this population would have negative consequences and therefore they should be exempted from the requirement. Washington State's family planning program has proven very effective in limiting unwanted pregnancies and we fear that these rules will erase the progress made over many years.

American Indians should be able to use a tribal enrollment card issued by a federally-recognized tribe to meet the documentation requirement.
While the interim final rule at 42 C.F.R. 437.407(e)(6) recognizes American Indian tribal documents as proof of identity, the regulations do not permit tribal enrollment cards to be used as evidence of citizenship. (The regulations only allow identification cards issued by DHS to the Texas Band of Kickapoos as secondary evidence of citizenship and census records for the Seneca and Navajo Tribes as fourth-level evidence of citizenship). We urge CMS to revise the regulation at 42 CFR 435.407(a) to specify that a tribal enrollment card issued by a federally-recognized tribe should be treated like a passport and deemed primary evidence of citizenship and identity.

The federal government recognizes over 560 tribes in 34 states. These federally recognized tribes have been recognized by the federal government through treaty negotiations, federal statutes, or a federal administrative recognition process. Tribal constitutions establishing membership requirements are approved by the federal government. Each federally recognized tribe is responsible for issuing tribal enrollment cards to its members for purposes of receiving services from the federal government as well as tribal resources and voting in tribal matters. With very few exceptions, tribes issue enrollment cards only to individuals who are born in the U.S. (and have a U.S. birth certificate) or who are born to parents who are members of the tribe and who are U.S. citizens. Tribal genealogy charts date back to original and historic tribal membership rolls. In short, tribal enrollment cards are highly reliable evidence of U.S. citizenship. In the event a federally recognized tribe located in a state that borders Canada or Mexico issues tribal enrollment cards to non-U.S. citizens, the Secretary could require additional documentation of U.S. citizenship and tribal enrollment cards would qualify as evidence of identity but not citizenship.

By not recognizing tribal enrollment cards as proof of citizenship and identity, CMS is creating a barrier to American Indian participation in the Medicaid program. This action also will lead to an increase in uninsured American Indians, further straining community health centers and Indian health clinics that comprise a key part of the health care safety net. Therefore, the federal regulation should be revised to specify that tribal enrollment cards issued by a federally-recognized tribe should be acceptable primary evidence of citizenship and identity. County, public and private providers serving these patients may be at risk for losing Medicaid reimbursements.

In conclusion, the interim final rules for the citizenship verification provision in the DRA create unnecessary bureaucratic obstacles to applicants and beneficiaries. These rules are likely to have the following negative impacts:

- An increase in the number of uninsured patients;
- Avoidance of appropriate care by vulnerable, low-income patients;
- An increase in cost to insured people and taxpayers due to more cost-shifting; and
- Added strain on the already overburdened health care safety net.

We urge you to modify the interim final regulation to ensure that eligible citizens – as was the intent of this provision of the DRA – continue to have access to Medicaid coverage and that scarce Medicaid dollars can be spent on health care services rather than administration.

Sincerely,

Rebecca Kavoussi
Director of Public Policy

Hayes, Yolanda K. (CMS/OSORA)

From: Braxton, Shawn L. (CMS/OSORA)
Sent: Thursday, August 10, 2006 3:22 PM
To: Hayes, Yolanda K. (CMS/OSORA)
Cc: Johnson, Sharon B. (CMS/OSORA)
Subject: FW: Public Submission

>-----Original Message-----
>From: Whitcraft, Rosie [mailto:rosie.whitcraft@fda.hhs.gov]
>Sent: Thursday, August 10, 2006 3:13 PM
>To: Jones, Martique S. (CMS/OSORA); Braxton, Shawn L. (CMS/OSORA)
>Subject: FW: Public Submission
>
>
>
>-----Original Message-----
>From: no-reply@erulemaking.net [mailto:no-reply@erulemaking.net]
>Sent: Thursday, August 10, 2006 2:29 PM
>To: OC AIMS Support
>Subject: Public Submission
>
>Please Do Not Reply This Email.
>
>Public Comments on Medicaid Program; Citizenship Documentation
>Requirements:========
>
>Title: Medicaid Program; Citizenship Documentation Requirements
>FR Document Number: 06-06033
>Legacy Document ID:
>RIN: 0938-AO51
>Publish Date: 07/12/2006 00:00:00
>Submitter Info:
>
>
>First Name: James
>Last Name: Amann
>Category: State Government - G0010
>Mailing Address: Legislative Office Building
>City: Hartford
>Country: United States
>State or Province: CT
>Postal Code: 06460
>Organization Name: Connecticut General Assembly
>
>Comment Info: ================
>
>General Comment:August 10, 2006
>
>Michael O. Leavitt
>Secretary, United States Department of Health and Human Services
>200 Independence Avenue, SW
>Washington, DC 20201
>
>
>RE: Medicaid Citizenship Documentation Interim Final Rule, 71
>Fed.Reg. 39214
>
>(July 12, 2006)
>
>Dear Secretary Leavitt:
>

>I would like to express my comments on the interim final rule,
>which was
>published in the Federal Register on July 12, to implement
>section 6036 of
>the
>Deficit Reduction Act of 2005 (DRA). This provision of the DRA became
>effective
>on July 1 and requires that U.S. citizens and nationals applying for or
>receiving
>Medicaid document their citizenship and identity.
>
>As Connecticut Speaker of the House of Representatives, my
>goal along with
>many other state leaders has been to simplify the eligibility
>process and
>expand
>access to health care coverage. These new regulations will
>result in just
>the
>opposite.
>
>Connecticut?s Department of Social Services conducted an audit
>of a sample
>of
>Connecticut Medicaid cases and did not find one single case of
>an applicant
>falsely declaring citizenship. As you know your Department of
>Health and
>Human
>Services published a report that found no substantial evidence
>of falsely
>declaring
>citizenship a problem.
>
>I am encouraged that the interim final rule contains a number
>of provisions
>that will
>ease implementation of the Medicaid documentation requirement for some
>citizens. I remain concerned, however, that the final rule
>goes beyond what
>
>Congress intended and will have a harmful impact on pregnant women and
>children, especially children in state foster care programs, who are
>citizens of the
>United States. Therefore, I am recommending revisions in
>three areas to
>ensure
>that eligible pregnant women, parents, children and persons with
>disabilities can
>receive Medicaid benefits without experiencing delays, disruptions or
>denials of
>coverage.
>
>The preamble to the rule states that applicants ?should not be
>made eligible
>until
>they have presented the required evidence.? 71 Fed. Reg. at
>39216. This
>prohibition on granting coverage to applicants for Medicaid until they
>provide
>documentation of their citizenship will delay Medicaid
>coverage for large
>numbers
>of eligible, low-income pregnant women and children. These delays in
>coverage
>are of special concern for pregnant women, because they could
>hinder their

>ability
>to get timely prenatal care. Coverage will also be delayed
>for individuals
>attempting to enroll in state family planning waivers, creating an
>unnecessary
>barrier to women seeking family planning services.
>
>Congress did not make documentation of citizenship a condition
>of receiving
>Medicaid benefits. When applicants show that they meet all eligibility
>criteria and
>make a sworn declaration of citizenship, they should receive
>benefits while
>they
>get the documents they need. This is the rule for legal
>non-citizens whose
>legal
>status makes them eligible for Medicaid, and the same rule
>should be applied
>to
>citizens.
>
>
>
>
>
>I urge you to revise 42 CFR 435.407(j) to allow applicants who
>declare they
>are
>U.S. citizens or nationals and who have shown that they meet
>the state?s
>Medicaid eligibility criteria to receive Medicaid coverage
>while they obtain
>the
>documents they need to meet the new requirement.
>
>The interim final rule applies the DRA citizenship documentation
>requirements to
>all U.S. citizen children except those eligible for Medicaid
>based on their
>receipt of
>SSI benefits. About one million children in state foster care programs,
>including
>children receiving federal foster care assistance under Title IV-E, are
>subject to the
>citizenship documentation requirement. This includes about
>7000 children in
>
>foster care programs in Connecticut alone.
>
>State child welfare agencies must verify the citizenship
>status of children
>in their
>foster care programs to determine their eligibility for Title
>IV-E payments.
>
>Nonetheless, the preamble to the rule states that these Title
>IV-E children
>receiving Medicaid ?must have in their Medicaid file a declaration of
>citizenship ?
>and documentary evidence of the citizenship ? claimed on the
>declaration.?
>71
>Fed. Reg. at 39216.
>
>In the DRA, Congress allowed you to exempt individuals who are
>eligible for

>other
>programs that require documentation of citizenship. The IV-E program is
>precisely
>such a program. I therefore urge you to revise 42 CFR 435.1005 to add
>children
>eligible for Medicaid on the basis of receiving Title IV-E
>payments to the
>list of
>groups exempted from the documentation requirement. Foster
>children in the
>care
>of the state need immediate access to medical coverage. There
>is no reason
>to
>delay their Medicaid coverage when child welfare agencies have already
>verified
>that they are citizens or to add unnecessary and duplicative burdens to
>state
>agencies.
>
>Among the children subject to the documentation requirements
>are infants
>born in
>U.S. hospitals. Newborns will not have birth records on file with state
>Vital
>Statistics agencies. While the rule allows extracts of a
>hospital record
>created
>near the time of birth to be used as proof of citizenship, 42 CFR
>435.407(c)(1), and
>a medical (clinic, doctor, or hospital) record created near the time of
>birth to be
>used in the ?rarest of circumstances,? 42 CFR 435.407(d)(4),
>there is no
>reason
>that states should have to obtain this information. There is
>also no reason
>that
>newborns should experience delays in receiving Medicaid
>coverage while these
>
>documents are obtained. When a state Medicaid agency pays for
>a child?s
>birth in
>a U.S. hospital, the child is by definition a citizen.
>Further proof should
>not be
>required for newborns whose birth is paid for by a state?s
>Medicaid program.
>
>Risking the health of newborns and increasing the potential for
>uncompensated
>care is unnecessary in this situation.
>
>I strongly recommend that 42 CFR 435.407(a) be amended to
>specify that the
>state Medicaid agency?s record of payment for the birth of an
>individual in
>a U.S.
>hospital is satisfactory documentary evidence of both identity and
>citizenship.
>
>Thank you for your time. Please contact me with any questions
>you may have.
>
>Sincerely,
>

>James A. Amann
>Connecticut Speaker of the House
>
>
>
>
>

OHIO ASSOCIATION OF

FOODBANKS

51 North High Street
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43215
614-221-4336
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www.oashf.org

August 11, 2006

60

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)

We are the Ohio Association of Second Harvest Foodbanks, Ohio's Largest Charitable Response to Hunger. Our organization represents the state's 12 foodbanks, which distribute food to more than 3,300 member charities, including food pantries, soup kitchens, homeless shelters, and other food assistance organizations, located across Ohio. No county is untouched – through our network, emergency food is directed to all 88 Ohio counties. In fiscal year 2006, we distributed more than 92 million pounds of food and grocery items through our network.

We are writing to comment on the interim final rule, which was published in the Federal Register on July 12, to implement section 6036 of the Deficit Reduction Act of 2005 (DRA). This provision of the DRA requires that U.S. citizens and nationals applying for or receiving Medicaid document their citizenship and identity. We are concerned about the rule's potential impact on access to health care for vulnerable Americans, including families that are food insecure. We offer our recommendations for revisions to the rule that we believe will better address these families' circumstances and not exacerbate their difficulties in meeting their health needs.

More than 1.2 million Ohioans, including more than one-third who are children, receive emergency food assistance through our foodbank network. In any given week, over 207,000 Ohioans are being provided with emergency food. Over 35 percent are under the age of 18, and one out of 10 is under the age of five. Nine percent of those being served are seniors. This population faces unique challenges, as many are living on low or fixed incomes and can't accommodate fluctuations in the costs of basic needs – like utilities or prescription drugs.

A recent study, Hunger in America 2006, also provides evidence that Ohioans are forced to make choices between food and other basic needs. Almost half indicate they choose between paying for food and paying for utility bills or home heating fuel. More than one-third must choose between food or rent or a mortgage payment. And just under one-third make the difficult choice between food and medicine.

Our specific suggestions for revisions to the rule are as follows:

The regulations should better accommodate people for whom documents are not available or do not exist. U.S. citizens who may lack the documents listed in the interim final rule include, among others, victims of hurricanes and other natural disasters, homeless individuals.

The Secretary should use his discretion under the DRA to expand on the list of acceptable documents. Specifically, we urge the Secretary to borrow a practice from the Supplemental Security Income (SSI) Program, by which state Medicaid agencies can recognize when a person without documents is in fact a U.S. citizen.

CMS should not require applicants and beneficiaries to submit originals or certified copies. The DRA does not require that applicants and beneficiaries submit original or certified copies to satisfy the new citizenship documentation requirement. Revising the final rule to allow a broader range of options, that include, but are not limited to, original or certified copies would make it more likely that clients could easily comport with the new law and would streamline states' application processes significantly. This change would likely result in the need for fewer office visits for beneficiaries, require less staff time to meet these additional demands, and will likely lead to savings in both human productivity and actual administrative costs.

Once an applicant for Medicaid declares that he or she is a citizen and meets all eligibility requirements, Medicaid eligibility should be granted. Under the DRA, documentation of citizenship is not a criterion of Medicaid eligibility. Yet the proposed rule would prohibit states from granting coverage to eligible citizens until they can get certain documents that prove their citizenship and identity. We urge the final rule be modified to require states to provide coverage upon the submittal of an otherwise complete application and allow applicants, beneficiaries and the states to make good faith efforts to acquire the new documents required under the DRA.

Children in foster care should not have to verify citizenship again. State child welfare agencies must verify the citizenship status of these children in the process of determining their eligibility for Title IV-E foster care payments. Those outside of the IV- E program are already under the care of the state. Requiring foster children to document citizenship again constitutes an unnecessary duplication of state agency efforts and puts these children at risk of delayed Medicaid coverage. The DRA does not compel this result.

Native Americans should be able to use a tribal enrollment card issued by a federally-recognized tribe to meet the documentation requirement. Many Native Americans were not born in a hospital and have no record of their birth except through tribal genealogy records. By not recognizing tribal enrollment cards as proof of citizenship and identity, the regulations create a barrier to participation in the Medicaid program. We urge that the revised rule recognize tribal enrollment cards as satisfying the documentation requirement.

In addition to revising the rule, we urge CMS to undertake public education to ensure that state agencies, eligibility workers, and clients understand that the new requirements affect only Medicaid, not the Food Stamp Program. Medicaid traditionally operates in conjunction with food stamps and other benefits programs, and the programs are frequently administered by the same workers. It is vital that CMS work with states and USDA to educate caseworkers and the public about what the rule requires regarding the Medicaid program and makes clear that the provision does not affect food stamp requirements. Given the scope of hunger and food insecurity in our nation, we can ill afford any spillover effects of the Medicaid rule onto the Food Stamp Program. We must guard against intensifying problems that vulnerable families face in accessing resources to put food on the table.

Thank you for considering our concerns about the interim final regulations. We hope you will take into account how revising the rule would implement the DRA without undermining crucial benefits for vulnerable people. Should you have any questions please don't hesitate to contact me at 614/221-4336 or Lisa_oashf@ameritech.net

Sincerely,

Lisa Hamler-Fugitt
Executive Director