

# CLASP

CENTER FOR LAW AND SOCIAL POLICY

August 11, 2006

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

**RE: Medicaid Citizenship Documentation, Interim Final Rule,  
71 Fed. Reg. 39241 (July 12, 2006), File Code CMS-2257-IFC**

I am writing on behalf of the Center for Law and Social Policy (CLASP) 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 of 2005 (Pub. L. 109-171) (DRA).

CLASP seeks to advance the economic security, educational and workforce opportunities and family stability of low-income children, youth and families. One component of this work involves advocacy on behalf of children who are involved with or at risk of becoming involved with the child welfare system. As such, we are particularly concerned about the detrimental effects the interim rule will have on children in foster care and children with special needs who have been adopted from foster care.

**Delay in Access to Medical Care is Particularly Problematic for Children in Foster Care and Children with Special Needs Adopted from Foster Care**

Children in foster care and children with special needs who have been adopted from foster care often have significant and urgent physical and mental health needs. Delaying access to medical care while particular documents are located will simply add to the trauma the child is experiencing. If the child welfare agency covers the medical costs during the period while documents are located, scarce resources will be diverted from other critical services and supports, including those which prevent abuse or neglect from occurring or avoid the need for foster care. The delay could be significant in many cases. Children in foster care are generally there because their parents abused or neglected them. These parents may not be able or willing to help the child welfare agency locate the requisite documents. Fortunately, the DRA offers a solution to these problems and CMS should avail itself of the statute's flexibility.

The citizenship documentation provisions of the DRA were intended to prevent undocumented immigrants from inappropriately receiving access to Medicaid. The statute requires individuals who declare their citizenship or nationality in order to establish eligibility for Medicaid to provide “satisfactory documentary evidence” of such citizenship or nationality. However, certain groups of individuals are exempt from this requirement. Specifically, those who are receiving Medicaid by virtue of their receipt of Supplemental Security Income (SSI) and those who are receiving Medicaid and are receiving or are eligible for Medicare, are exempt from the documentation requirements because their citizenship has already been established by the Social Security Administration.<sup>1</sup> Section 6036 of the DRA also authorizes the Secretary to apply such exemptions to others where satisfactory evidence of citizenship or nationality has already been presented.

- **CMS should exempt children eligible for Medicaid on the basis of their receipt of foster care maintenance payments or adoption assistance payments from the citizenship and identity documentation requirements**

CLASP urges CMS to amend 42 CFR 435.1008 to add children in foster care and children with special needs who are adopted from foster care to the list of groups exempt from the documentation requirements. There are several reasons it is unnecessary for children in foster care or children with special needs who are adopted from foster care to present evidence of citizenship or nationality.

*Child welfare agencies already verify the citizenship of these children* as they determine eligibility for assistance under Title IV-E of the Social Security Act. Child welfare agencies also establish the identity of children when they take them into care and assume custody of them and when they assist with the adoption of children with special needs who have been in their care. Given the involvement of the child welfare agencies and courts, the Secretary should use the authority provided in the DRA to determine that satisfactory evidence of citizenship or nationality has already been provided and should exempt children in foster care and children with special needs adopted from foster care from the documentation requirements.

*Children who are eligible for federal foster care maintenance payments and adoption assistance under Title IV-E are categorically eligible for Medicaid.*<sup>2</sup> They need not apply for Medicaid nor make a declaration of citizenship or nationality to establish eligibility. They are automatically eligible simply by virtue of their receipt of Title IV-E. These children are analogous to recipients of SSI who are, in many states, automatically eligible for Medicaid by virtue of their receipt of SSI.

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<sup>1</sup> CLASP commends CMS for determining that this was Congressional intent and that a scrivener’s error inadvertently applied this exemption only to aliens, not citizens.

<sup>2</sup> 42 U.S.C. 672(h); 42 U.S.C. 1396a(a)(10)(A)(i)(I); 42 U.S.C. 673(b)(1); and 42 U.S.C. 1396a(a)(10)(A)(i)(I);

Children who are not eligible for Title IV-E foster care assistance are analogous to recipients of SSI in states that do not automatically make such individuals eligible for Medicaid, but rather require them to apply to receive Medicaid. Like such SSI recipients, children in foster care are eligible for Medicaid because of their status as foster children, even if they are not eligible for Title IV-E.<sup>3</sup> Similarly, children with special needs who are adopted from foster care and are receiving state-funded adoption assistance must be provided with either Medicaid or comparable health coverage.<sup>4</sup> Thus, children receiving Medicaid with their state funded adoption assistance are receiving Medicaid by virtue of their status as adopted children with special needs.

In the interim final rule, CMS has indicated that states that do not automatically provide Medicaid to SSI recipients may use the Social Security Administration's State Data Exchange (SDX) to verify citizenship. We agree with others who have commented on the interim rule arguing that all SSI recipients should be exempt because SSA has verified their citizenship status before granting them SSI. Similarly, CMS should exempt all children in foster care and all children with special needs adopted from foster care.

If CMS decides not to do so, CLASP encourages CMS to allow state Medicaid agencies to rely upon child welfare agencies verifications of citizenship, much as it allows Medicaid agencies to rely upon SDX. When a child comes into foster care the state child welfare agency must verify a child's citizenship as part of the Title IV-E eligibility determination. There is no reason to require the Medicaid agency to duplicate these efforts. For the same reason, CLASP also recommends that CMS remove the provision in the preamble to the interim rule that states that "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."

- **CMS should provide applicants for Medicaid the same "reasonable opportunity" to obtain the necessary documentation as current recipients of Medicaid**

The interim rule requires states to deny Medicaid to applicants until they have provided satisfactory documentation of their citizenship and identity while it allows current recipients a "reasonable opportunity" to provide the necessary documentation at the time of redetermination. Nothing in the DRA requires the denial of coverage until documentation is provided. The DRA did not alter the eligibility requirements for Medicaid. Instead it requires that a declaration of citizenship or nationality (which is the eligibility requirement) be properly verified and documented. CMS should clarify the definition of "reasonable opportunity," as it applies to applicants, in 42 CFR 435.207(j) to permit states to provide Medicaid benefits to individuals who meet the eligibility criteria for Medicaid for a reasonable period while documents are gathered. To do otherwise threatens the health of those with on-going, serious medical conditions.

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<sup>3</sup> These children are listed in the regulations as reasonable classifications of children for the Ribicoff option and all states have included such children in their options. 42 U.S.C. 1396a(a)(10)(A)(ii); 42 C.F.R. 435.222

<sup>4</sup> 42 USC 671(a)(21)

- **If CMS is unwilling to exempt children in foster care and children with special needs who are adopted from foster care from the documentation requirements, these children should be treated as recipients**

If CMS will not exempt children in foster care and children with special needs who are adopted from foster care from the documentation requirements, CMS should clarify in 42 CFR 435.407(j) that these children are to be treated as recipients. As noted above, these children do not apply for Medicaid and thus should be treated as recipients. We understand that officials from CMS have stated verbally that it is their intention to treat children in foster care as recipients in this manner, but it is important that this clarification be put in writing and that clarification include children with special needs who are adopted from foster care. This approach would provide child welfare agencies more time to obtain the necessary documentation and avoid delaying or disrupting the medical care children need.

- **CMS should allow additional items to document both citizenship and identity including: (1) for children in foster care or children with special needs adopted from foster care, a certification from the child welfare agency; (2) a final order or decree of adoption; (3) data from birth records in the Child Support database; (4) Medicaid claims data showing that Medicaid paid for the birth of a child; and (5) a birth certificate**

CMS should amend 42 CFR 435.407(a) to allow additional items to document both citizenship and identity. For children in foster care or children with special needs adopted from foster care, a Medicaid agency should be able to accept a certification of citizenship and identity from a child welfare agency. Since child welfare agencies have information about the identity of and have verified the citizenship of children in foster care, the Medicaid agency should be able to rely on a certification from the child welfare agency without any additional documentation.

Final orders or decrees of adoption should be sufficient to establish both citizenship and identity. Such documents provide the information needed to establish identity (e.g. name, parents' names etc.) and citizenship (e.g. information about place of birth). The same is true for birth records obtained from the child support database maintained under Title IV-D of the Social Security Act. In addition, these documents have been reviewed by courts and state agencies. Particularly for a child, who is unlikely to have photo identification and whose appearance can change dramatically over time, these documents should be sufficient and CMS should amend 42 CFR 435.407(a) accordingly.

For a child whose birth is paid for by Medicaid, the claims data will provide sufficient information about identity and citizenship. It will include the child's name, mother's name and, of course, the child's place of birth. For a newborn, this is probably the most accurate information available to meet the documentation requirements and CMS should amend 42 CFR 435.407(a) to include such claims data.

Finally, a birth certificate should be sufficient to establish both citizenship and identity, particularly for children, and CMS should amend 42 CFR 435.407(a) accordingly. This approach is consistent with the requirements of documenting citizenship in SSI where a certified birth certificate is sufficient proof of citizenship.<sup>5</sup>

In addition, the documents listed in the interim rule as sufficient proof of identity typically are documents obtained based on the presentation of a birth certificate and, as such, any proof of identity derives from the birth certificate. There is, therefore, no reason to require the presentation of two documents. Such a requirement is particularly problematic for children who often don't have any identity documents. For children in foster care or children with special needs adopted from foster care who lack identity documents, the only remaining option available under the interim rule is an affidavit. Birth parents of such children may be unwilling to make such affidavits and foster or adoptive parents or officials of child welfare agencies may not have personal knowledge of the date and place of birth of the child. Their knowledge may be based upon a review of the child's birth certificate. To require additional evidence of identity when a birth certificate is available is duplicative and could delay access to much needed medical care.

- **CMS should permit states to accept copies of requisite documents**

The interim final rule requires individuals to present original documents or certified copies of such documents. This requirement is unnecessarily burdensome. It can be both time consuming and costly to obtain original documents or certified copies and attempting to obtain such documents may delay access to medical care. In addition, the requirement makes a face-to-face interview more likely. Individuals who have original documents are not likely to send them through the mail and hope they are returned. The requirement of a face-to-face interview, albeit a *de facto* requirement, creates an unnecessary burden on both individuals and states. CMS should amend 42 CFR 435.407(h)(1) to allow states to accept copies or notarized copies of documents unless there is some reason to suspect falsification.

- **CMS should allow for situations where documentation cannot be obtained despite best efforts**

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 interim rule directs states to assist individuals with "incapacity of mind or body" to obtain evidence of citizenship, 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.

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<sup>5</sup> 20 CFR 416.1610(a)(1)

As a last resort, the interim final rule allows the use of written affidavits to establish citizenship, but “ONLY ... in rare circumstances”. 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 recipient’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 their citizenship.

Fortunately, 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. CLASP urges CMS to 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.

An analogous approach is found in the SSI program for an individual who cannot present any of the required documents. SSI allows such individuals, as proof of citizenship, to explain why they cannot provide the documents and to provide any information they do have.<sup>6</sup> CMS should adopt a similar approach for Medicaid applicants and recipients. Specifically, CMS should amend 42 CFR 435.407 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 under section 435.1008 if: (1) an applicant or current recipient, or a representative or the state on the individual’s behalf, has been unable to obtain sufficient 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 citizens can continue to receive the health care services they need.

CLASP appreciates your consideration of our comments and would be happy to meet with you to discuss them in further detail. We hope that as CMS reviews these and other comments, the interim rule can be amended to better protect the physical and mental health needs of some of the nation’s most vulnerable populations, including children in foster care and children with special needs adopted from foster care.

Sincerely,

Rutledge Q. Hutson  
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<sup>6</sup> 20 CFR 416.1610