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U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

JOE BARTON, TEXAS
CHAIRMAN

August 9, 2006

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

Dear Secretary Leavitt:

We are writing to comment on the July 12 interim final rule (71 *Fed. Reg.* 39214) published to implement section 6036 of the Deficit Reduction Act of 2005 (DRA). Section 6036 requires, effective July 1, any individual on Medicaid or applying for Medicaid to document both citizenship and identity. We have grave concerns that, as currently drafted, the rule would impose unnecessary hardship on beneficiaries and unnecessary burdens on States, localities, and healthcare providers. The end result will be millions of American citizens delaying or forgoing needed health care, worsening health outcomes in the United States.

There are numerous instances where the rule imposes requirements for documentation beyond those outlined in the statute. In addition, the rule fails to provide for commonsense, legitimate avenues for States and beneficiaries to obtain and present required documentation. As a result, access to needed care for many vulnerable individuals, such as newborns, individuals with disabilities or life-threatening ailments, and pregnant women in need of prenatal care, will be unnecessarily delayed or not received at all.

Medicaid is now the Nation's largest insurer, covering 60 million Americans, according to most recent estimates by the Congressional Budget Office. Over the past decade, the Federal and State governments have worked in partnership to facilitate enrollment in Medicaid coverage. They have streamlined and simplified the application process so that more families will enroll in this insurance program to help pay for needed care and treatment. Moreover, Congress and Federal agencies have tried in recent years to eliminate government bureaucracy, reduce paperwork, and become more responsive to its citizens. This rule, as proposed, is a step backwards. While it is unavoidable that the added bureaucracy caused by section 6036 of the Deficit Reduction Act will negatively affect public health and efforts to reduce the number of uninsured, we urge the Department to use its authorities to minimize the likelihood that U.S.

citizens applying for, or receiving, Medicaid coverage will face delay, denial, or loss of that coverage.

In that vein, there are a number of provisions in the interim final rule that require modification, particularly relating to newborns, foster children, and Native Americans. In addition, as currently drafted the interim final rule should also be revised with respect to: acceptable proof of citizenship for individuals without documentation; the opportunity to present documentation without delay in access to care or coverage; and methods for States to obtain documentation, including allowing the use of electronic verification as a first level tool. These matters are outlined in more detail in an attachment to this letter and we urge you to incorporate these comments into your final rule.

Our list, however, is not exhaustive, and we hope you will also give great weight to comments put forward by the States, Medicaid Directors, advocates for children and families, and public interest groups. Unfortunately, this provision will ultimately exact the majority of its punishment on U.S. citizens. We hope you will do your best to mitigate its negative effects on our Nation's people.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER
COMMITTEE ON ENERGY AND COMMERCE

SHERROD BROWN
RANKING MEMBER
SUBCOMMITTEE ON HEALTH

HENRY A. WAXMAN
RANKING MEMBER
COMMITTEE ON GOVERNMENT REFORM

Attachment

ATTACHMENT

Comments of Representatives John D. Dingell, Sherrod Brown, and Henry A. Waxman
on
The Medicaid Citizenship Documentation Interim Final Rule
71 *Federal Register* 39214 (July 12, 2006)

Newborns

The interim final rule places an unnecessary burden on families with newborns, potentially jeopardizing infants' access to care and insurance coverage. An infant born in the United States is de facto a U.S. citizen. If the State agency paid for the birth under Medicaid, it would seem logical that the State could use this insurance claim as proof of citizenship for the purposes of the DRA requirements. Under the interim final rule, however, a health insurance record, including a record of Medicaid payment for the birth in a U.S. hospital, would not be satisfactory evidence for an infant. Only records created at least five years before the initial application for Medicaid are allowed, effectively nullifying the use of this evidence for newborns (42 CFR 435.407(c)(2)).

Moreover, under current law, infants born to U.S. citizens receiving Medicaid are deemed to be eligible for Medicaid upon birth and remain eligible for one year so long as the child remains in the family and the mother remains eligible for Medicaid (or would remain eligible if pregnant). The preamble to the interim final rule requires the family to produce citizenship and identity documentation for the child at the next redetermination of eligibility (71 *Fed. Reg.* 39216), which would be at age one. It is unnecessary and duplicative to require subsequent documentation, 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 ban on Medicaid coverage or an undocumented immigrant, the preamble states that, in order for the newborn to be covered by Medicaid, an application for Medicaid coverage 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 immigration status of the parent has no bearing on the child's citizenship status or eligibility for Medicaid.

Moreover, the preamble to the interim final rule takes the position that an applicant is not eligible for Medicaid until the documentation requirements have been satisfied. Under the interim final rule, newborns who fall under the requirement to apply for Medicaid would thus be denied coverage for needed care, whether it be wellness checkups or treatment for more serious problems, until additional documentation could be procured, even though the State is in possession of documentation of citizenship, in the form of the claim for payment of the birth. Hospitals and physicians treating newborns in these circumstances will be at risk for non-payment for the treatment of newborns who are low-birth weight, have postpartum

complications, or simply need well-baby care and who must, under the interim final rule, meet the documentation requirements. This is unnecessary, because the State Medicaid agency has already made the determination, by paying for the birth, that the child was born at a hospital in the U.S. and is a citizen.

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 a newborn in a U.S. hospital is satisfactory documentary evidence of both identity and citizenship and no further documentation should be required.

Children in Foster Care

The interim final rule applies the DRA citizenship documentation requirements to all children who are U.S. citizens, except those eligible for Medicaid based on their receipt of SSI benefits. Among the children who would be subject to the documentation requirements are those in foster care, including those receiving Federal foster care assistance under Title IV-E.

We believe these onerous new documentation requirements should not apply to children in the foster care system for a number of reasons. First, under current Administration for Children and Families (ACF) policy, State child welfare agencies must verify the citizenship status of all foster care children in order to determine eligibility for Title IV-E payments. We believe current State practice in fulfilling the requirement to verify the citizenship or immigration status of all children receiving Federal foster care maintenance payments, adoption assistance payments, or independent living services (ACYF-CB-PIQ-99-01) have been and continue to be sufficient to meet the requirements for the purpose of Medicaid. The requirement for States to re-document a foster child's citizenship and identity imposed by the interim final rule imposes unnecessary duplication of the State agency effort and will delay health care for these children.

Second, foster children clearly fit into the DRA-allowed category for an exemption from these onerous requirements. The DRA stipulates that the citizenship documentation requirement shall not apply to individuals who are eligible for Medicaid "on such other basis as the Secretary may specify under which satisfactory documentary evidence of citizenship or nationality had been previously presented," section 1903(x)(2)(C) of the Social Security Act. The receipt of Title IV-E payments is precisely such a basis of eligibility.

Third, given the adversarial process often used to remove children from their birth families, the majority of the citizenship determination is completed through electronic verification with vital statistics databases. Birth families often do not have the documents needed or are mentally incapacitated, or unwilling to provide this information. Requiring the foster care family or the State to procure original documentation or additional documentation beyond the proof obtained by the child welfare agency is an unrealistic exercise.

Fourth, the medical needs of foster children necessitate no delay in receiving Medicaid coverage. More than 80 percent of children in care have developmental, emotional, or behavioral problems. Many of the children in foster care have physical and/or psychological problems due to causes such as pre-natal exposure to alcohol or drugs, neglect and/or abuse, and multiple foster care placements. Thirty to 40 percent of children in the child welfare system have physical health problems. And, although children in foster care represent 3 percent of all Medicaid enrollees, they account for 25-41 percent of Medicaid mental health expenditures. This is hardly a group of individuals that should have their health care delayed or denied. Delaying healthcare coverage for these children so often in need of medical attention is unacceptable and contrary to public interest.

We would note that while section 6036 of the Deficit Reduction Act also requires proof of identity as a protection against fraud, the nature of foster care does not lend itself to this type of fraud. Establishing identity is generally a means to ensure that fraud is not committed by someone who is attempting to access services under a false name. Neither children nor their parents apply for foster care or Medicaid through the foster care system. Children are brought into the foster care system (often over the objection of their birth parents) to ensure their safety. Medical services are then provided through Medicaid to meet their often substantial healthcare needs. Caseworkers are rarely unsure about the identity of a child given that they work with the family and other members of community who corroborate the identity of the child, which negates the need for paper documentation. Additionally, most children in foster care do not have a driver's license, military card, identification card, or merchant mariner card and many, particularly those that are very young, do not have school records. Delaying or denying access to Medicaid coverage for foster children as a result of the requirements in the interim final rule will also deter foster families from taking in these children as many foster families could not afford the substantial medical needs of this population without Medicaid's assistance.

While the Centers for Medicare and Medicaid Services (CMS) has suggested verbally to States that foster children will be treated as current beneficiaries rather than applicants, and thus allowed to receive Medicaid-covered services for a period of time while the State seeks documentation, this is inadequate as it requires duplicative verification on the part of the States and ultimately may result in loss of healthcare services for particularly difficult cases. For the reasons listed above, we 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 requirements of the Deficit Reduction Act.

Native Americans

Native Americans will be particularly disadvantaged and disenfranchised from Medicaid if the requirements in the current rule remain in effect for them. Given the chronic under-funding of the Indian Health Service, Medicaid is an important supplement for Native Americans' health care. Moreover, the health needs of this population are great. For example, the infant mortality rate is 150 percent greater for Native Americans than for Caucasian infants and Native

Americans are 2.6 times more likely to be diagnosed with diabetes as are Caucasians. Medicaid helps to offset the relatively low levels of private insurance coverage among American Indians; roughly 17 percent depend on Medicaid for their insurance. But unchanged, the rule will pose a great barrier to gaining access to health care for this population.

The interim final rule does not allow the use of tribal enrollment cards as evidence of citizenship, except in the case of the Texas Kickapoos. There are over 560 Native American tribes that are formally recognized by the Federal Government and are on a nation-to-nation basis with the U.S. Government. All of these tribes issue enrollment cards 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. In short, tribal enrollment cards are highly reliable evidence of U.S. citizenship.

The Secretary should exercise his discretion 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. However, in the case of a Federally-recognized tribe located in a State that borders Canada or Mexico that the Secretary finds issues tribal enrollment cards to non-citizens, tribal enrollment cards should then only qualify as evidence of identity, not citizenship.

U.S. Citizens Without Documentation

The interim final rule leaves many gaps in its treatment of individuals who are unable to produce necessary documentation. 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 a situation in which a State is unable to locate the necessary documents for such an individual. The interim final rule also fails to 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, if such individuals apply for Medicaid they can never qualify, and if such individuals are current beneficiaries, they will lose their coverage once their "reasonable opportunity" period expires. Unfortunately, victims of hurricanes and other natural disasters whose records have been destroyed, those who were born at home and never had a birth certificate issued, individuals whose information is housed in an area affected by such a disaster, or homeless individuals whose records have been lost will be unable to qualify for Medicaid under the CMS rule.

We urge the Secretary to use the discretion afforded under the DRA to allow State Medicaid agencies the authority 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 Supplemental Security Income (SSI) program allow people who cannot present any of the documents SSI allows as proof of citizenship to provide what information they do have and explain why they cannot provide other documents. This is a wise approach to adopt.

Specifically, 42 CFR 435.407 should be revised 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 receiving Federal matching funds if an applicant or current beneficiary, or a representative of the State on the individual's behalf, has been unable to obtain primary, secondary, third, or fourth level evidence of citizenship during the reasonable opportunity period and it is reasonable to conclude that the individual is in fact a U.S. citizen or national. The State Medicaid agency would have to place the reasons for its conclusion in the individual's case file.

Reasonable Opportunity for Applicants to Obtain Required Documentation

Approximately 10 million low-income women and children will apply for Medicaid this year. Under the regulation, even if these women and children meet all of the State's criteria for Medicaid eligibility, they must wait for their Medicaid coverage to begin until they have assembled their documents and submitted them to the Medicaid agency. A pregnant mother who is waiting six weeks to have her original birth certificate mailed to her from out of State will have to forgo prenatal care in the interim. Needed care for children and mothers should not be delayed as parents await documents from State or Federal agencies. This delay in coverage also puts hospitals, physicians, clinics, and pharmacies at risk of not being paid for the services they provide.

First, we urge CMS to revise 42 CFR 435.407(j) to clarify 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 States must allow them a "reasonable opportunity" period of at least 45 days after this eligibility determination to obtain the necessary documentation. Individuals who are awaiting documents that require longer to process (for example, a Certificate of Citizenship can take more than six months to be processed, or a passport, which has a normal processing time of six weeks) should either be given additional time to produce documentation commensurate with the type of documentation sought or be able to request a waiver for additional time to produce the documentation.

Second, we urge CMS to revise 42 CFR 435.1008 to clarify that, consistent with current CMS regulations regarding eligibility, coverage is effective the third month before the month of application through the expiration of the "reasonable opportunity" period.

In the absence of this clarification, States and providers will have no assurance that Federal Medicaid matching funds are available for medically necessary covered services furnished by participating Medicaid providers to a U.S. citizen who has applied for Medicaid, been determined eligible, but is waiting for a birth record or an identity document. Failure to make these changes will result in numerous gravely ill individuals forgoing necessary treatment or preventive care. A sick child, for example, should not have his potentially life-saving care delayed while the family and State wait for a bureaucratic process to run its course. A hospital should not have to wait for payment because another government agency, wholly unrelated to health care, is backlogged with applications for citizenship documentation.

Original Copies and Electronic Information Interchange

Although there is no statutory basis for the requirement, the interim final rule requires that all documents proving citizenship, such as a birth certificate, and all documents proving identity, such as a driver's license with photo ID, "must be either originals or copies certified by the issuing agency." The rule estimates that "it would take an individual 10 minutes to acquire and provide to the State acceptable documentary evidence and to verify the declaration" and "it will take each State 5 minutes to obtain acceptable documentation, verify citizenship and maintain current records on each individual." This estimation is unrealistically low, considering the application process and processing times and the fact that many individuals are unlikely to have the necessary documents at hand. Furthermore, because CMS has failed to conduct statutorily required outreach, few people will be aware of the need to obtain these documents prior to application or redetermination.

Not only are individuals required to present original or certified copies of records, but States are also required to maintain copies of the evidence of citizenship and identity in case files or databases. These onerous requirements are not required by Federal law, and impose significant time and effort on both States and families seeking either originals or certified copies of their documents.

We urge CMS to modify the rule to comport with the statute, and eliminate the requirement that documents must either be originals or copies certified by the issuing agency. The final rule should also expand the ability of States to use computer matches to electronically document citizenship. For example, in addition to using automated vital records matches to document citizenship and certain other databases to document identity as allowed in the interim final rule, States should be able to use the Social Security Administration's NUMIDENT database, the SAVE database, or any other eletronic databases that contain identity or citizenship information, without requiring that the applicant or beneficiary first attempt, unsuccessfully, to provide documentation. These options would be highly accurate, less costly, and faster than requiring presentation of original or certified citizenship documents.

In addition, if one State has verified the citizenship or legal status of a Medicaid beneficiary, that verification should be acceptable in all States. When a beneficiary moves from one State to another State he or she would not have to go through the verification process again when applying for Medicaid service in the new State.

Finally, we urge CMS to begin the statutorily-required outreach campaign immediately so that families are aware of the information they must provide in order to receive coverage under Medicaid.