

August 11, 2006

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

**Re: Medicaid Citizenship Documentation Interim Final Rule,
71 Fed. Reg. 29214 (July 12, 2006)**

The 20 undersigned organizations are pleased to submit these comments on CMS's Interim Final Rule on the new Medicaid citizenship documentation requirement.

The American College of Nurse-Midwives represents some 7,000 certified nurse-midwives and certified midwives across the nation who care for women and their newborns.

The American Nurses Association (ANA) is the only full-service professional association representing the nation's registered nurses through its 54 constituent member organizations. ANA supports the availability and accessibility of affordable, quality health care for Medicaid beneficiaries.

The American Public Health Association (APHA) is the oldest, largest and most diverse organization of public health professionals in the world, dedicated to protecting all Americans, their families and communities from preventable, serious health threats and assuring community-based health promotion and disease prevention activities and preventive health services are universally accessible in the United States.

The Asian and Pacific Islander American Health Forum's mission is to enable Asian Americans and Pacific Islanders to attain the highest level of health and well being.

The Association of University Centers on Disabilities is a network of interdisciplinary Centers advancing policy and practice for and with individuals with developmental and other disabilities, their families, and communities.

The Epilepsy Foundation is the national voluntary health association solely dedicated to the welfare of the nearly 3 million people with epilepsy in the U.S. and their families. The Foundation works to ensure that people with seizures are able to participate in all life experiences and will prevent, control and cure epilepsy through research, education, advocacy and services.

Families USA is the national, non-profit, non-partisan organization for health care consumers. Our mission is to ensure that all Americans have access to high-quality, affordable health care. Families USA strongly supports comprehensive, affordable health insurance for all residents of this nation.

The National Alliance of State and Territorial AIDS Directors is a nonprofit national association of state health department HIV/AIDS program directors responsible for administering HIV/AIDS and viral hepatitis health care, prevention, education, and supportive services programs funded by state and federal governments. NASTAD is dedicated to reducing the incidence of HIV and viral hepatitis infection in the U.S. and its territories, providing comprehensive, compassionate, and quality care to all persons living with HIV/AIDS, and the development of responsible and compassionate public policies. NASTAD is a co-chair of the HIV Medicare and Medicaid Workgroup, a coalition of 73 national, state, and local AIDS advocacy organizations, community groups, healthcare providers, Medicaid and Medicare consumers, and other individual advocates. The Workgroup is committed to ensuring that people living with HIV/AIDS have access to appropriate, cost-effective health care and drug treatment.

NASOP is the Association of State Long-Term Care Ombudsmen. The programs its members administer provide ombudsman advocacy services to residents of long-term care facilities.

National Center for Law and Economic Justice is a national non-profit legal and policy advocacy organization that uses litigation, policy organizing, and support for grassroots organizing to ensure that all low-income people have access to critical public benefits and services, including Medicaid, for which they are eligible.

Established in 1994 in Washington, DC, The National Hispanic Medical Association is a non-profit representing licensed Hispanic physicians in the U.S. The mission of NHMA is to improve the health of Hispanics and other underserved.

The National Immigration Law Center (NILC) is dedicated to protecting and promoting the rights of low income immigrants and their family members.

The National Latino Council on Alcohol and Tobacco Prevention (LCAT) is a national, nonpartisan organization with a network of over 2,500 Latino community health advocates and experts concerned about access to health for members of our communities.

The National WIC Association, NWA, represents the 50 geographic state agencies, 37 Indian and Native American territory, trust and commonwealth state agencies and 2,200 local agencies that together provide WIC services to 8 million women, infants and children monthly through 10,000 WIC clinics nationwide. NWA is dedicated to providing leadership to the WIC Community in promoting quality nutrition services; advocating for services for all eligible women, infants and children; and assuring the sound and responsive management of the WIC Program.

The National Migrant and Seasonal Head Start Association (NMSHSA), a non profit 501(c) (3) organization, was incorporated in 2001 to be the voice for the children of migrant and seasonal farmworkers within the Head Start community and serves as the premier advocate for resources, the disseminator of information to the general public and to create partnerships to help member agencies provide quality comprehensive services to all farmworker children and their families.

Out of Many, One is a national multicultural advocacy network of organizations representing the five major racial/ethnic groups experiencing health disparities. OMO is committed to help attain health parity for communities of color. A primary focus is advocacy for racial/ethnic and language preference data as an essential requirement for achieving these goals.

Project Inform is a national HIV/AIDS healthcare and treatment advocacy organization based in San Francisco. It advocates for programs that provide quality care for people with HIV/AIDS, including Medicaid, Medicare, and the Ryan White CARE Act. Project Inform also organizes “PI Action”, a national grassroots network of people affected by HIV/AIDS who communicate with their elected officials on key legislative and funding issues.

RESULTS is a nonprofit grassroots advocacy organization, committed to creating the political will to end hunger and the worst aspects of poverty. RESULTS is committed to individuals exercising their personal and political power by lobbying elected officials for effective solutions and key policies that affect hunger and poverty.

SHIRE is a national policy advocacy organization with deep community roots that focuses on the elimination of health disparities among communities of color. We work for attaining optimal health for all through advocacy, policy research and analysis, coalition-building, technical assistance and community demonstrations with policy implications.

USAction is dedicated to winning liberty and justice for all. They represent three million members in 34 affiliates, with statewide organizations in 24 states.

At least 42 million individuals who are already on Medicaid will be affected by this new documentation requirement. We are deeply concerned that many of these individuals, as well as the thousands of people who apply for Medicaid each year, will face the loss or denial of Medicaid coverage because they cannot meet the requirements of the Interim Final Regulation to prove their citizenship and/or identity.

Positive Aspects of the Rule

We commend CMS for ameliorating the impact of the new documentation requirement by:

- 1) Recognizing the “scrivener’s error” in the statute and exempting individuals on SSI or Medicare from the new rule.
- 2) Allowing the use of the SDX and state vital records databases to cross-match citizenship records, as well as allowing states to use state and federal databases to conduct identity cross-matches.
- 3) Clarifying that the new citizenship documentation requirement does not apply to “presumptive eligibility” for pregnant women and children in Medicaid, and that states may continue to use this effective and important strategy for enrollment.

These important steps will alleviate the burden of the documentation requirement for millions of vulnerable citizens.

However, many aspects of the rule remain problematic and overly burdensome for Medicaid recipients and applicants.

Concerns about the Rule

435.407(a) Medicaid payment records for births in U.S. hospitals should suffice as proof of citizenship and identity for newborns.

According to the preamble to the rule, newborns who are born to mothers on Medicaid will have to provide citizenship documentation at their next renewal (newborns are categorically-eligible for one year if their mothers were categorically-eligible at the child's birth and would have continued to be eligible if they were still pregnant during this time). 71 Fed. Reg. at 39216. The preamble also states that newborns born to undocumented immigrants or legal immigrants within the 5-year bar must apply for Medicaid and provide citizenship documentation following their birth before they can get any coverage at all. 71 Fed. Reg. at 39216. Yet, in both situations, there is no question that these children are American citizens by virtue of their birth in U.S. hospitals. Moreover, the states have first-hand knowledge of the citizenship of these children because Medicaid paid for their births.

This policy is problematic because it creates additional paperwork and potential delays or loss of coverage for infants, many of whom will have immediate health care needs, especially for those children who must, under the regulations, show proof of citizenship in order to get Medicaid coverage at birth. It is unlikely that these children can prove citizenship through state vital record matches, because time delays and processing lags do not allow for vital records to be created immediately at time of birth. Other third or fourth tier documents may be used, but are problematic as well. The third tier hospital record created at time of birth may be difficult to obtain in a prompt manner. A medical record created near the time of birth could be used, but it may be just as difficult to obtain, and as a fourth tier document, it can only be used "in the rarest of circumstances." 71 Fed. Reg. at 39224.

The easiest way to solve this problem is to allow states to use Medicaid billing records of births it has paid for as proof of U.S. citizenship and identity. Children born in the U.S., whose births were paid for by Medicaid, should be able to get and keep Medicaid if they are otherwise eligible without the need for their families to provide any additional proof that they are citizens.

We urge CMS to amend 42 CFR 435.407(a) to add that a state Medicaid agency's record of payment for the birth of an individual in a U.S. hospital is primary documentary evidence of both citizenship and identity.

435.407(a)-(d) The document hierarchy established in the rule goes beyond the statutory requirements of the DRA.

The Interim Final Rule and June 9, 2006 State Medicaid Director letter establish a hierarchical structure for documents that individuals can use to prove citizenship. The documents are tiered according to their "reliability." 71 Fed. Reg. at 39218. Documents such as a U.S. passport or

Certificate of Naturalization are in the first tier and thus deemed more “reliable” than documents in Tiers 2, 3 and 4. The rule also requires states to obtain higher-level documentation where it is available, before moving on to documentation from a lower tier. 71 Fed. Reg. at 39222-39224.

While we are pleased that CMS has used the authority granted in the DRA expanded the list of documents that can be used to prove citizenship beyond those included in the statute, we are concerned that the hierarchy employed in the Interim Final Rule goes beyond the statutory requirements of Section 6036 of the DRA. The hierarchy will cause significant time delays for applicants and headaches for agency staff and beneficiaries and applicants as individuals attempt to demonstrate that they cannot get a higher tier document before moving to the subsequent tier. The hierarchy also makes little sense: If a fourth tier document eventually becomes sufficient proof for an individual, then why cannot it be sufficient documentation at the outset?

We urge CMS to amend 42 CFR 435.407(a)-(d) and eliminate the document hierarchy.

435.407(a) Native American tribal enrollment cards should be included in the list of documents to prove citizenship

The new rule and their four tier hierarchy of documents do not allow for Native American tribal identification documents to be used to prove U.S. citizenship,¹ although they may be used for identity purposes. The National Association of State Medicaid Directors has stated that the tribal enrollment process does a “thorough job of assuring that an individual was born to a person who is a member of the tribe and as a member of the tribe, is a descendant of someone who was born in the United States, and is listed in a federal document that officially confers status to receive title to land, cash, etc.”² We urge CMS to allow the use of tribal identification cards as primary documentary evidence of an individual’s U.S. citizenship and identity.

If tribal identification cards are not accepted as evidence of citizenship and identity, many Native American Medicaid recipients and applicants may not be able to provide other means of satisfactory citizenship documentation. Some Native Americans may not have been born in hospitals, therefore, there is no official record of their birth. Not recognizing tribal identification cards as proof of U.S. citizenship will cause great hardship for the Native American population and create a barrier to their enrollment and/or maintenance of Medicaid coverage.

We ask that all tribal enrollment cards are added to 42 CFR 435.407(a) as acceptable primary documentary evidence of an individual’s U.S. citizenship and identity.

¹ There are three instances where Native American-related documents may be used: individuals in the Kickapoo tribe may use their American Indian card designated with “KIC” as secondary evidence and Seneca Indian tribal census records and BIA tribal census records of Navajo Indians may be used as fourth-level evidence.

² June 21, 2006 letter from American Public Human Services Association/National Association of State Medicaid Directors to Dennis Smith, CMS.

435.407(c) and (d) The requirement that third and fourth level evidence must be issued at least 5 years before an individual's application for Medicaid is arbitrary and overly burdensome.

Most of the third and fourth level evidentiary documents listed in the Interim Final Rule are acceptable documentation only if they are dated at least five year's prior to the applicant's or recipient's original application for Medicaid. 71 Fed. Reg. at 39223-39224. This requirement will undoubtedly result in hardship for many individuals, especially those who are applying for, or are long time recipients of, nursing home care and may not possess documents that meet this time restriction. Furthermore, there is no apparent explanation in the Interim Final Rule for this stringent requirement.

We urge CMS to amend 42 CFR 435.407(c) and (d) by removing the requirement that third and fourth level documentary evidence must have been created five years prior to the individual's application for Medicaid.

435.407 (c) and (d) 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 strenuously 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 (see comments related to 435.407(k) below for more on this point).

435.407(h)(1) Copies of documents should be sufficient proof of citizenship.

The new rule requires that individuals submit original documents (or copies certified by the issuing agency) to satisfy the citizenship and identity requirements. 71 Fed. Reg. at 39225. This provision of the rule poses a significant burden for both individuals and state agencies. Over the years many states have simplified and streamlined application procedures for Medicaid, including adopting a mail-in application process and eliminating face-to-face interviews. These processes reduce Medicaid administrative costs by eliminating the timely interview process and reducing staff time required for each application and renewal. They have been shown to make Medicaid more effective by increasing participation in Medicaid among people who are eligible for it. While CMS clarifies in the preamble of the rule that the documentation requirement does not prohibit utilization of mail-in application and renewal processes, the requirement that individuals submit original documents undermines those efforts. It is highly unlikely that

individuals will want to mail in their original documents and rely on the Medicaid agency to return them. Moreover, mailing original documents back to people would be quite costly for states. Furthermore, it is impractical for someone to mail in a driver's license to document their identity for Medicaid purposes because they may need to drive before they get it back. This provision of the rule will only delay coverage for new applicants forced to schedule appointments with the Medicaid agency to fulfill this requirement. Some applicants may even be discouraged from completing the application process.

The new rule also estimates that it will take recipients and applicants 10 minutes to collect and present evidence of citizenship and identity to the state, and take states 5 minutes to obtain this documentation from each individual, verify citizenship and maintain records. 71 Fed. Reg. at 39220. We believe these time estimates are extremely erroneous since the rule requires applicants and recipients to submit original documents to the state.

Nothing in the DRA itself requires Medicaid applicants or recipients to submit original or certified copies to the Medicaid agency in order to fulfill this new documentation requirement.

We urge CMS to reconsider and to eliminate the requirement in 42 CFR 435.407(h)(1) that original documents or certified copies be submitted.

435.407(h)(5) Meeting the citizenship documentation requirement in one state should suffice for any other state.

The Interim Final Rule states that documentation of citizenship and identity should be a one-time event. 71 Fed. Reg. at 39225. The Rule includes no provision for ensuring that individuals who meet the documentation requirement in one state and get onto Medicaid, then move to a different state can enroll Medicaid in their new state without providing documentation a second time. The Interim Final Rule should be clarified and amended at 42 CFR 435.407(h)(5) so that individuals truly only have to provide documentary evidence of citizenship once as the regulations intend.

435.407(j) Medicaid coverage should not be delayed because of lack of citizenship documentation.

While we commend CMS for requiring states to provide people applying for or renewing Medicaid coverage a "reasonable opportunity" to submit citizenship documentation, we are concerned that the rule is more stringent than required by Section 6036 of the DRA by not allowing people who are applying for and who are eligible for Medicaid to be enrolled until they have submitted satisfactory evidence of their citizenship status. This interpretation of the statute will cause significant delays in health care coverage and access to health care services for many very vulnerable people.

The new 42 CFR 435.407(j) requires states to give an applicant a "reasonable opportunity to submit satisfactory documentary evidence of citizenship before taking action affecting the individual's eligibility for Medicaid." Although no time period is directly specified, the rule

states that the “reasonable opportunity” should be consistent with the timeframes allowed to submit documentation to establish other eligibility requirements for which documentation is needed. 71 Fed. Reg. at 39225. 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.

There is no statutory requirement to prohibit people who are otherwise eligible for Medicaid from enrolling in the program immediately. As written in Section 6036 of the DRA, the citizenship documentation requirement is a requirement for states to receive federal matching funds, not an eligibility requirement for individuals. Once someone has declared under penalty of perjury that s/he is an American citizen and met all eligibility requirements for Medicaid, s/he should be enrolled in Medicaid pending submission of the appropriate documentation of citizenship. Without this change, coverage for working families, children, pregnant women, and parents will be delayed. And without this coverage, individuals with health care needs will delay seeking care and may ultimately require more expensive care if their condition worsens. We urge CMS to revise 42 CFR 435.407(j) so that applicants who declare they are U.S. citizens and meet all the Medicaid eligibility criteria are enrolled in Medicaid, while they have a “reasonable opportunity period” to obtain the documentation necessary to prove their U.S. citizenship and identity.

435.407(k) The final rule should include a safety net for those who cannot prove citizenship.

Despite the various avenues for obtaining citizenship and identity documentation outlined in the rule, there will still be Medicaid applicants and recipients who are U.S. citizens but who are unable to come up with the kinds of documentation CMS has determined are appropriate. These individuals may be homeless, victims of natural disasters, such as hurricanes, or individuals who are incapacitated or have severe mental health issues. Although the rule commands states to assist “special populations,” 71 Fed. Reg. at 39225, such as those listed above, with finding documentation of their citizenship, the rule appears to indicate that if none of the documents listed in the hierarchy are found, states may deny or terminate Medicaid, even if the individual is otherwise eligible. 71 Fed. Reg. at 39225. While some have suggested that the ability to use two written affidavits to document citizenship provides a “safety net” for those who do not have the other accepted documents, the rules for using the affidavits will make it unlikely that individuals who cannot provide any other documents to prove citizenship status will be able to offer two acceptable affidavits.

First, the preamble to the Interim Final Rule allows an individual to prove citizenship through the use of two written affidavits only “in rare circumstances.” 71 Fed. Reg. at 39224. Second, the rules for using the affidavit exception are strict: individuals must obtain written affidavits by *two* individuals who have knowledge of that person’s citizenship, and at least one of these individuals cannot be related to the applicant or enrollee. Additionally, the individuals making the affidavits must be able to provide proof of *their own* citizenship and identity, and the applicant or enrollee must also make an affidavit explaining why documentary evidence does not exist or cannot be obtained. 71 Fed. Reg. at 39224. An individual who cannot meet the documentation requirement will be unlikely to produce two individuals who have personal

knowledge of the circumstances of their birth or naturalization, especially if one must not be a family member. Moreover, if the individual resides in a mixed status family, those family members who can offer an affidavit may not be citizens themselves. Undoubtedly, there will be individuals who cannot obtain documents from any of the tiers, not for lack of trying, and cannot meet the affidavit requirements. As a result, U.S. citizens who are otherwise eligible for Medicaid will be denied or lose coverage.

As an alternative to the affidavit system described in the Interim Final Rule, CMS could look to the SSI program, which does have a true “safety net.” If an SSI applicant who has declared U.S. citizenship cannot produce one of the required documents that indicate U.S. citizenship, they may explain why they cannot provide any of those documents, and instead, may provide any information they do have that might indicate they are a U.S. citizen. 20 CFR 416.1610. Adopting this procedure by adding a new provision to 42 CFR 435.407 would go a long way towards ensuring that citizens who cannot produce “acceptable” documentation under the new rule still be allowed to get or keep their Medicaid coverage.

We urge CMS to add a new provision at 42 CFR 435.407(k) which would adopt the SSI rules safety net.

435.1008 Foster children receiving Title IV-E assistance should be exempt from the documentation requirement.

The preamble to the Interim Final Rule states that “Title IV-E children receiving Medicaid...must have in their Medicaid file a declaration of citizenship...and documentary evidence of the citizenship....” 71 Fed. Reg. at 39216. CMS has exempted SSI and Medicare recipients from the new requirement since they already document their citizenship during the SSI and/or Medicare application processes. 71 Fed. Reg. at 39225. But Title IV-E children who receive Medicaid *do* have to document their citizenship to receive IV-E services (incorrectly stated in the preamble at 71 Fed. Reg. 29316). And as such, they should not have to document citizenship again in order to gain Medicaid coverage.

Foster children may have urgent medical and behavior health needs that necessitate a quick placement onto Medicaid. Documenting citizenship a second time for these children will lead to a delay in Medicaid coverage, which may result in a deterioration in their health or a need for more healthcare services later on.

Since foster children already must document citizenship to receive Title IV-E assistance, much like SSI or Medicare recipients document their citizenship in those programs, they should also be exempt from the Medicaid citizenship documentation requirement. We urge CMS to add an exemption at 42 CFR 435.1008 for foster children receiving Title IV-E assistance.

435.1008 CMS should use its authority to exempt additional groups of people from the citizenship documentation requirement.

The Interim Final Rule exempts Medicare and SSI recipients from the documentation requirement. 71 Fed. Reg. at 39225. Section 6036 of the DRA authorizes the Secretary of HHS to exempt other groups who have submitted proof of U.S. citizenship or nationality from the requirement. There are a number of other categories of Medicaid applicants and recipients who should be exempt from the documentation requirement because they already establish proof of their U.S. citizenship through the application process for other government benefit programs.

These groups include:

- SSDI recipients in the two year waiting period for Medicare, who have met all the eligibility criteria for Medicare—including providing proof of citizenship—and are just waiting to fulfill the two year time period.
- Former SSI and Medicare beneficiaries, who for whatever reason are no longer eligible for those programs, but have established proof of citizenship in the past, and are now eligible for Medicaid.
- Former and current TANF recipients who receive Medicaid on the basis of receipt of TANF. These individuals have proven their citizenship through the TANF program.

We urge CMS to amend 42 CFR 435.1008 and exempt the categories of individuals mentioned above.

Conclusion

We thank CMS for making strides to ameliorate the harm of the new Medicaid citizenship documentation requirement, but we believe that unless the steps described above are not taken, the citizenship documentation requirement will result in Medicaid recipients and new applicants losing or being denied coverage for critical health care benefits.

Thank you for considering these comments. We would be happy to discuss them with you at any time. If you have any questions, please contact Rachel Klein, Deputy Director of Health Policy at Families USA at (202) 628-3030.

Sincerely,

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