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NEW HHS REGULATIONS FOCUS MEDICAID DOCUMENTATION REQUIREMENT ON U.S. CITIZEN FAMILIES

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On July 6, the Centers for Medicare & Medicaid Services (CMS) at the U.S. Department of Health and Human Services released interim final regulations implementing a new documentation requirement for Medicaid beneficiaries.¹ (The interim final regulations supersede the CMS guidance issued to state Medicaid agencies on June 9.)² The regulations exempt Medicare beneficiaries and most elderly and disabled individuals who receive Supplemental Security Income (SSI) benefits from the citizenship documentation requirement. Thus, the burden of meeting the new requirement will now fall primarily on U.S. citizen children and parents.

As of July 1, all U.S. citizen families who apply for Medicaid or renew their Medicaid eligibility must prove their citizenship by presenting a U.S. passport or the combination of a U.S. birth certificate and an identification document. Citizen children and parents who cannot do so will be denied health services financed with federal Medicaid funds. The new requirement was mandated by the Deficit Reduction Act (DRA) of 2005.³

At least 28 million children and 15 million adults will be affected by the new requirement, as will millions of individuals who will need Medicaid's health care services in the future.⁴ The requirement does not apply to legal immigrants, who for many years have been required to demonstrate satisfactory immigration status and financial need in order to qualify for Medicaid.

¹ The interim final regulations were published in the Federal Register on July 12, 2006. (71 Fed Reg 39214). The regulations became effective on July 6 when they were placed on display at the Federal Register one day prior to a scheduled hearing in *Bell v. Leavitt*, N.D. Ill. (filed June 29, 2006), a nationwide class action challenging the constitutionality of the new documentation requirement and seeking to enjoin its implementation. Public comments will be accepted on these regulations until August 11, but the regulations will be effective while comments are being received and considered.

² The guidance was issued as a State Medicaid Director Letter, SMDL# 06-012. For an analysis of the guidance, see Judith Solomon and Andy Schneider, "HHS Guidance will Exacerbate Problems Caused by New Medicaid Documentation Requirement," Center on Budget and Policy Priorities, June 16, 2006.

³ The new requirement is at section 6036 of the Deficit Reduction Act. For more information about the provision, see "The New Medicaid Citizenship Documentation Requirement: A Brief Overview," Center on Budget and Policy Priorities, April 20, 2006.

⁴ Congressional Budget Office March 2006 Baseline Fact Sheet, Enrollment by Eligibility Category, FY 2006.

Under the interim final regulations released July 6:

- Most U.S. citizens applying for or renewing Medicaid coverage are subject to the new documentation requirement. Only Medicare beneficiaries and most elderly or disabled individuals who receive SSI benefits are exempt.⁵ The interim final regulations do not protect other groups that may have considerable difficulty meeting the requirement, including children in foster care, victims of natural disasters, Native Americans, and some individuals with disabilities who do not receive Medicare or SSI.
- People applying for Medicaid who are subject to the requirement will not be able to receive Medicaid coverage for needed health care services while they attempt to obtain the needed documents, or while the state Medicaid agency seeks to obtain their birth record or identity information through a cross-match with another agency (see below).
- Individuals who are required to supply documents to prove their citizenship (as distinguished from those whose birth certificates are obtained by the state agency through a data match – see below) must provide passports or birth certificates unless they can show that these documents either do not exist or cannot be obtained within a reasonable period of time. All documents provided to meet the requirement must be originals or copies certified by the issuing agency.

These provisions are likely to result in delays and outright denials of coverage for U.S. citizens applying for Medicaid, as well as the loss of Medicaid coverage for U.S. citizens now enrolled in the program. As a result, the number of uninsured citizens — as well as the amount of uncompensated care provided by hospitals and other health care providers to low-income individuals — is likely to increase.

On a more positive note, the interim final regulations permit states to use a cross-match with state vital statistics agencies to document individuals' birth record and to match records with other government agencies to establish individuals' identity. The ability to document a birth record through a cross-match will be helpful for applicants and beneficiaries who reside in the state where they were born. (States do not have the capacity to do cross-matches with vital records agencies in other states). By taking advantage of this option, states can make the documentation requirement substantially less burdensome for Medicaid applicants and beneficiaries. That, in turn, can reduce the degree to which the requirement leads to an increase in uninsurance and uncompensated care. It also can lessen the paperwork burden the requirement imposes on state eligibility workers.

Passport or Birth Certificate Required Unless State Cross-Matches with Other Databases

Under the DRA, U.S. citizens can satisfy the requirement to document their citizenship and identity by producing a U.S. passport. However, recognizing that many low-income Medicaid beneficiaries do not have passports (which are costly to obtain), the DRA also allows citizens to document their citizenship through a U.S. birth certificate or other proof that they were born in the

⁵ Eleven states do not automatically extend Medicaid coverage to SSI recipients. While SSI recipients in those states (Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma and Virginia) are not exempt from the citizenship documentation requirement, the regulations give states the option of using information on the citizenship of SSI recipients that is kept in the State Data Exchange (SDX) database for SSI recipients to document both the citizenship and identity of SSI recipients in these eleven states. 42 CFR 435.407(a)(5).

United States; such individuals must then also provide a driver's license or other document proving their personal identity.⁶ In addition, the DRA gives the Secretary of HHS discretion to specify additional documents that provide proof of U.S. citizenship or a reliable means of documenting personal identity.

The interim final regulations establish a hierarchy of acceptable documents on the basis of their reliability. They direct states to ask for documents at the highest level of reliability before accepting a document of lesser reliability; only if a document at a higher level of reliability is not "available" (a term not defined in the interim final regulations) may a state accept a document at a lower level. There is no reference to such a hierarchy process in the DRA. Moreover, while a few states required documentation of citizenship for Medicaid *prior* to the enactment of the DRA, the interim final regulations specify a narrower range of acceptable documents than have been acceptable under those state requirements.⁷

Under the interim final regulations, "primary" documents — considered the most reliable evidence of citizenship and identity — are a U.S. passport and a certificate of naturalization. In states that do not automatically extend Medicaid coverage to SSI beneficiaries, primary documentary evidence may (at the state's option) include a cross-match with the State Data Exchange for SSI recipients.

If these primary documents are not available, the state may accept "secondary" documents as evidence of citizenship, such as birth certificates, final adoption decrees, or official records of U.S. military service. As discussed below, states have the option of cross-matching with a state vital statistics agency to document a birth record.

If neither primary nor secondary documents are available, "third level" evidence of citizenship is acceptable. Third level documents are either hospital records that indicate a U.S. place of birth or life, health, or other insurance records indicating a U.S. place of birth. Such records must have been created at least five years before the individual applied for Medicaid.

The interim final regulations allow the use of "fourth level evidence" to establish citizenship only "in the rarest of circumstances."⁸ Examples of such documents include institutional admission papers from a nursing facility, medical records created at least five years before the Medicaid application date, and written affidavits. Affidavits may "ONLY be used in rare circumstances" to document citizenship.⁹ Two affidavits must be submitted, one of which must be from a person not related to the applicant or beneficiary. Persons making the affidavits must be able to prove their own citizenship and identity and must have personal knowledge of the "event(s)" establishing the

⁶ Passports cost \$97 for individuals over age 16 and \$82 for those under 16. Getting passports on an expedited basis costs an additional \$60.

⁷ For a list of documents accepted by Georgia, Montana, New Hampshire, and New York, see Patricia Boozang, Melinda Dutton, and Julie Hudman, *Citizenship Documentation Requirements in the Deficit Reduction Act of 2005: Lessons from New York*, Kaiser Commission on Medicaid and the Uninsured, June 2006, Table 1.

⁸ 42 CFR 435.407(d).

⁹ 42 CFR 435.407(d)(5).

applicant or beneficiary’s citizenship, presumably his or her birth. Given these restrictions, such affidavits are not likely to be helpful for most individuals who have been unable to provide other proof, because they will probably not have ready access to two people who have personal knowledge of their birth.

Citizens Without Passports Must Document Identity as Well as Citizenship Unless Their State Cross-Matches with Other Databases

U.S. citizens who cannot provide primary-level documents to meet the documentation requirement must provide proof of their personal identity as well as their citizenship. The interim final regulations specify certain documents as acceptable proof of identity, including a driver’s license with a photograph, a school identification card with a photograph, and a U.S. military card. As discussed below, states have the option of using a cross-match with other agency databases to satisfy the requirement for proof of identity.

For children under age 16, an affidavit by the parent or guardian stating the child’s date and place of birth may be used, but only if none of the other allowable identity documents is available.

Applicants’ Coverage Will Be Delayed Until Required Documentation Is Provided

The interim final regulations prohibit states from providing Medicaid coverage to citizens who apply for Medicaid until they satisfactorily document their citizenship and identity.¹⁰ The regulations require states to give applicants a “reasonable opportunity” to meet the documentation requirement before determining the individual’s eligibility for Medicaid, but they do not specify a timeframe.¹¹

Thus, U.S. citizens applying for Medicaid coverage cannot receive it until they obtain documents such as a passport or birth certificate — even if they have made a sworn declaration that they are citizens, have met all Medicaid eligibility requirements, and have applied for a passport or birth certificate and are waiting to receive it. During this period, they may go without coverage for prescription drugs, doctor’s visits, mental health treatment, and all other health care services unless their health care providers are willing to furnish such services free of charge. State Medicaid agencies may elect to help applicants obtain the needed documents, but are *required* to do so only “when because of incapacity of mind or body” the individual would be unable to comply with the documentation requirements “in a timely manner” and the applicant “lacks a representative to assist him or her.”¹²

This treatment of U.S. citizens who apply for Medicaid contrasts with the treatment of legal immigrants who apply for Medicaid. Legal immigrants who are otherwise eligible for Medicaid may

¹⁰ The regulations state that federal matching funds are not available for the costs of Medicaid services for an applicant unless the state “has obtained satisfactory documentary evidence of citizenship or national status.” 42 CFR 435.1008.

¹¹ 42 CFR 435.407(j) states that “[t]he time States give for submitting documentation of citizenship should be consistent with the time allowed to submit documentation to establish other facets of eligibility for which documentation is requested.” In general, that time period is 45 days for everyone except people with disabilities, who have 90 days to establish that they meet Medicaid eligibility requirements. 42 CFR §435.911.

¹² 42 CFR 435.407(g).

receive benefits during the time it takes them to obtain the documents they need to prove that they are in a legal immigration status.¹³ Similarly, U.S. citizens who are Medicaid beneficiaries and seek to *renew* their coverage can keep their Medicaid coverage while they obtain the documents they need to meet the new citizenship documentation requirement. (State Medicaid programs are required to redetermine eligibility for Medicaid at least every 12 months.)

Children in Foster Care and Other Vulnerable U.S. Citizens Remain at Risk

The interim final regulations exempt Medicare beneficiaries and SSI beneficiaries whose Medicaid eligibility is based upon their receipt of SSI from the new documentation requirement. These exemptions, while critically important, do not reach all of the vulnerable groups of U.S. citizens whose Medicaid coverage may be delayed, denied, or terminated as the result of the requirement. Among the groups left unprotected are victims of natural disasters like Hurricane Katrina, individuals with disabilities who receive state supplemental payments, homeless individuals, members of Native American tribes (other than the Texas Band of Kickapoos), and children in foster care.

The failure to protect U.S. citizen children receiving federal foster care payments is particularly unfortunate, because research has documented that children in foster care are much more likely to have chronic medical conditions and emotional problems than other children. Currently, when a state child welfare agency determines that a child is eligible for federal foster care payments — *a process that includes verifying that the child is a citizen or a legal non-citizen* — the state signs the child up for Medicaid as well. The interim final regulations ignore this longstanding linkage between Medicaid and foster care and force state Medicaid agencies to duplicate the work of state child welfare agencies by documenting the citizenship of children whose citizenship (or legal status) has already been verified. The option to cross-match data will mitigate but not eliminate this unnecessary requirement.¹⁴

States May Cross-Match with Other Databases for Birth Records and Identity

The interim final regulations allow states to use information technology (IT) to reduce the paperwork burdens that the new citizenship documentation requirement imposes on applicants, current beneficiaries, and state eligibility workers alike.¹⁵ IT can be particularly important for low-income families, who constitute the overwhelming majority of the population subject to the requirement.

For example, most low-income women and children will not have passports and thus will need to produce a birth certificate to prove citizenship. A certified copy of a birth certificate costs from \$5 to \$30, depending on the state. Normal processing times can range from several days to eight weeks, and expedited delivery can cost up to \$60. These costs can be burdensome for Medicaid

¹³ Section 1137(d)(4) of the Social Security Act.

¹⁴ Pat Redmond, “Children in Foster Care May Have to Delay Health Care Because of Federal Regulations on Citizenship Requirement,” Center on Budget and Policy Priorities, July 7, 2006.

¹⁵ For a discussion of the IT options available, see Leighton Ku, “Using Information Technology to Document Citizenship in Medicaid,” Center on Budget and Policy Priorities, June 20, 2006.

applicants and beneficiaries: most Medicaid beneficiaries have income below the poverty line (\$1,388 per month for a family of three in 2006).

Under the interim final regulations, state Medicaid agencies are not required to insist that an applicant or current beneficiary produce an original birth certificate or certified copy. They may instead “use a cross match with a State vital statistics agency to document a birth record.”¹⁶ Similarly, for purposes of proving identity, state Medicaid agencies may “use a cross match with a Federal or State governmental, public assistance, law enforcement or corrections agency’s data system to establish identity if the agency establishes and certifies true identity of individuals.” Examples of agencies specifically cited in the regulation that state Medicaid agencies can use to establish identity are agencies that administer food stamps, child support, corrections (including juvenile detention), motor vehicle, and child protective services.¹⁷

The use of cross-matching to satisfy the citizenship and identity requirements would substantially reduce the financial and logistical burden on citizens, as well as the paperwork burden on the Medicaid agency. Cross matches also could markedly reduce the time applicants need to meet the documentation requirement. In states that do *not* elect these cross-match options, all documents must be either “originals or copies certified by the issuing agencies”; copies or notarized copies will not be sufficient.¹⁸

Conclusion

The interim final regulations improve on CMS’s earlier guidance by exempting most elderly individuals and people with disabilities from the new citizenship documentation requirement. Nevertheless, many vulnerable U.S. citizens who are fully eligible for Medicaid — primarily poor children and parents— are likely to go without health care while they wait for birth records or other paperwork as a result of the requirement. Some who cannot obtain the necessary documents or who become discouraged by the new requirement may never get coverage and be uninsured. States can lessen the harm caused by the new requirement by cross-matching with other state and federal databases to document individuals’ citizenship and identity where possible.

¹⁶ 42 CFR 435.407(b)(1).

¹⁷ 42 CFR 435.407(e)(10). The regulation states that if a Medicaid agency elects to use a cross-match to document identity, it is “still responsible for assuring the accuracy of the identity information.”

¹⁸ 42 CFR 435.407(h)(1). Requiring certified copies undermines efforts to make it easier for working families to apply and retain Medicaid coverage. As of July 2005, 45 states (including the District of Columbia) did not require a face-to-face interview when applying for Medicaid for a child, and 48 states (including DC) did not require a face-to-face interview when renewing coverage for a child. But many low-income individuals, after spending time and money to obtain a certified document to prove their citizenship, may be reluctant to take the chance of losing the document in the mail, and thus will opt to visit the Medicaid eligibility office to apply for or renew their coverage. That could require them to take time off from work and lose some pay and may, in some cases, antagonize their employers.