



October 28, 2011

Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attn: CMS-2349-P
P.O. Box 8016
Baltimore, MD 21244-8016

RE: Addendum to Comments on CMS' Proposed Rule on Medicaid Eligibility Changes under the Affordable Care Act of 2010 -- File Code CMS-2349-P

Dear Secretary Sebelius:

We appreciate the opportunity to provide this addendum to comments on the proposed rule regarding Medicaid eligibility changes that implements important parts of the Patient Protection and Affordable Care Act (ACA). This addendum is focused on proposed rules and recommendations of concern specifically to immigrant families in the U.S. Disproportionate numbers of immigrants and their family members are uninsured, despite their high levels of participation in the nation's workforce, and immigrant eligibility rules differ from those of citizens. There are an estimated 3.5 to 5.5 million children living in mixed-status immigrant households.¹ Three-quarters of the children are citizens, one in four of whom is uninsured. These factors warrant review and comment through the lens of immigrants' special circumstances regarding access to coverage and care. With the implementation of the ACA, it is critical to ensure that the Medicaid and Children's Health Insurance Program (CHIP) rules provide robust access to affordable health coverage for all eligible residents, especially vulnerable populations such as immigrant families.

Georgetown University's Center for Children and Families (CCF) is an independent, nonpartisan policy and research center whose mission is to expand and improve health coverage for America's children and families. CCF is providing this comment addendum on the Notice of Proposed Rulemaking (NPRM) for 42 CFR Parts 431, 433, 435, et al., in hopes of ensuring that the unique needs of children in mixed-status immigrant families are addressed. Specifically, CCF is providing comments on the following subjects, and we urge the Department of Health and Human Services to consider the recommendations.

¹ J. Passel, D.Cohn, "A Portrait of Unauthorized Immigrants in the United States," (April 14, 2009), Pew Hispanic Center, available at <http://www.pewhispanic.org/reports/report.php?ReportID=107>. See also S. McMorrow, G.M. Kenney, & C. Coyer, "Addressing Coverage Challenges for Children under the Affordable Care Act," Urban Institute (May 2011), available at http://www.urban.org/uploaded_pdf/412341-Affordable-Care-Act.pdf.

- 1) Availability of program information
- 2) State residency
- 3) Information on application forms
- 4) Verification of eligibility

AVAILABILITY OF PROGRAM INFORMATION (435.905)

CCF supports the proposal at § 435.905(b) that information about eligibility, services, and rights and responsibilities must be provided in a manner that is accessible to limited-English proficient (LEP) individuals. We recommend that the final rule include additional materials and specific requirements for translating materials. All state Medicaid agencies are subject to the requirements of Title VI, 42 U.S.C. § 2000d *et seq.*, which prohibits discrimination by any entity receiving Federal financial assistance, and this prohibition is included also in § 1557 of the ACA. We recommend that these regulations follow the guidelines included in the HHS “LEP Guidances.”² It is also crucial that program information be prepared and delivered in a way that is culturally competent for mixed-status immigrant families. Information should be provided at a reading grade level that approximates the average reading proficiency in the U.S.

It is well documented that language barriers affect access to health care.³ The HHS LEP Guidance calls for the recipient of federal funds to, first, provide written translation of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served; and second, if there are fewer than 50 people in a language group that reaches the five percent threshold, the recipient can provide written notice of the right to receive competent oral interpretation of the written materials, free of cost. Further, the LEP Guidance recognizes that all LEP individuals, regardless of meeting a threshold for translating written documents, must be afforded oral language assistance when needed. The failure of a state Medicaid agency to comply with these rules violates Title VI and Section 1557 of the ACA.

Further, the final rules must ensure that the translation is competent and not done through machine translation which does not produce competent translations. We also recommend that HHS require Medicaid agencies to provide taglines in at least 15 languages with all information, informing LEP enrollees of how to access language services. The request for 15 languages is based on existing government practice.⁴

² “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,” 68 Fed. Reg. 47311 (August 8, 2003), available at www.lep.gov.

³ Institute of Medicine, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health* 17 (2002)(citations omitted).

⁴ The Social Security Administration, through its Multilanguage Gateway <<http://www.ssa.gov/multilanguage/>>, translates many of its documents into 15 languages and CMS plans to translate Medicare forms and notices into 15 languages in addition to Spanish <http://www.cms.gov/EEOInfo/Downloads/AnnualLanguageAccessAssessmentOutcomeReport.pdf>. A sample tagline could read: “No Cost Language Services. You can get an interpreter and get

- **Recommendation:** Support and Amend § 435.905(b) to retain the requirement that program information be accessible to LEP persons, and further require that written information be translated into other languages when there is a threshold of 500 LEP individuals or five percent of those eligible to be served by the Exchange, whichever is less; that agencies provide taglines in at least 15 languages that inform LEP applicants and enrollees how to access language services, and provide oral language assistance – through competent interpreters or bilingual staff – to all LEP applicants and beneficiaries.
- **Recommendation:** Amend § 435.905(b) by requiring that program information be provided in a culturally-competent manner that is effective for communicating with mixed-status immigrant families who have unique concerns and are affected by unique rules regarding eligibility and enrollment.

STATE RESIDENCY (435.403, 457.320)

CCF strongly supports streamlining the state residency rules for the various eligibility groups to simplify the application process. We support a consistent standard for determining state residency in Medicaid, CHIP and the health insurance exchanges, to promote seamless coverage for individuals and families who move between or qualify for different programs. We agree with the proposed elimination of the phrase “permanently and for an indefinite period,” discussed in the Preamble at 51160, which helps ensure coverage for individuals who are currently residing in or seeking employment in a state, but who may choose to move from the state at a future time. CCF appreciates the proposed clarification that a child’s state of residence cannot be determined solely based on the residence of the parent or caretaker, as well as the NPRM’s proposed flexibility for the establishment of residency by children of migrant and seasonal farmworkers. See “Verification” below for comment about verification of state residency at § 435.956(c)(2).

- **Recommendation:** Support § 435.403(h), residency requirement for individuals age 21 and over, as providing greater simplification, flexibility, and coordination with the residency rules of CHIP and the Exchange, and the accommodation of seasonal workers and others who enter a state with a job commitment or seeking employment.
- **Recommendation:** Support § 435.403(i), residency requirement for individuals under age 21, as consistent with other residency rules, for eliminating the need to determine a child’s residency solely based on the residence of the parent or caretaker, and for accommodating the child of a seasonal worker who may lack a fixed address.

documents read to you in your language. For help, call us at the number listed on your ID card or xxx-xxx-xxxx. For more help, call your state’s Department of Insurance at xxx-xxx-xxxx.”

- **Recommendation:** Support § 457.320, providing that the CHIP residency requirements will mirror those for Medicaid at § 435.403, and supported for the same reasons.

INFORMATION ON APPLICATION FORMS (435.907, 457.340)

CCF is particularly pleased that the NPRM reinforces civil rights and privacy laws, and the principles set forth in the “Tri-Agency” guidance setting standards for application form questions regarding citizenship, immigration status, and Social Security numbers (SSNs).⁵

435.907(e), 457.340(b) Information related to non-applicants

CCF strongly supports codification of the rules further protecting privacy by prohibiting states from requiring SSNs of individuals who are not seeking coverage for themselves (“non-applicants”), at § 435.907(e)(1). As the preamble notes at 51161, the Medicaid program’s longstanding rules at 42 USC § 1396a(a)(7), like the confidentiality provisions enacted in § 1411(g) of the ACA, limit the use and disclosure of information about Medicaid applicants and recipients. CCF supports the preamble statement that information from non-applicants that is used to determine an applicant’s eligibility must be safeguarded pursuant to Medicaid’s existing laws. In addition, the codification by the NPRM of standards in the Privacy Act at § 435.907(e)(2) regarding conditions under which a SSN may be requested of a non-applicant are helpful, and CCF urges HHS to ensure their implementation to avoid discouraging mixed-status immigrant families from submitting Medicaid applications for their eligible family members. Helpfully, the NPRM at § 457.340(b) and referencing § 435.907(e) includes similar safeguards for families seeking or receiving CHIP for their children. Finally, we suggest the important addition of a new § 435.907(e)(3) that strictly prohibits agencies from inquiring into or requesting information on the citizenship or immigration status of a non-applicant, as it is unnecessary to an applicant’s eligibility determination and discourages the participation of immigrant families.

- **Recommendation:** Support § 435.907(e)(1) prohibiting states from requiring SSNs of individuals who are not seeking coverage for themselves.
- **Recommendation:** Support § 435.907(e)(2) requiring agencies that wish to request SSNs voluntarily from non-applicants to adhere to the strict conditions of the Privacy Act.
- **Recommendation:** Amend § 435.907(e) by adding a new subsection (3) that prohibits agencies from requesting information on the immigration status of a non-applicant.

⁵ Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children’s Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits (2000), found at <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/triagencyletter.html>

- **Recommendation:** Support § 457.340(b) providing the Medicaid protections of § 435.907(e) to the CHIP program.

435.908, 457.340(a) Application assistance

CCF supports the requirement that assistance be made available in person and over the phone in addition to online assistance, and that it be provided in a manner accessible to limited-English proficient (LEP) individuals. We encourage greater specificity in the requirement for meaningful access to LEP persons.

In addition, mixed-status immigrant families have unique needs and concerns regarding the application process due in part to the special eligibility rules that apply to them, which create great confusion over the eligibility of different family members for different programs, and due also to the fears, resulting from past agency errors, that an application for health care services will threaten the family's confidentiality, privacy and security. CCF recommends that HHS require states to provide application assistance in a culturally competent manner that effectively communicates to immigrant families the information they need, and to strictly prohibit communications and practices that discourage participation by eligible family members. These requirements must also be monitored and enforced as the ACA is implemented.

- **Recommendation:** Support § 435.908(b) and § 457.340(a) requiring application assistance to be provided in a manner that is accessible to LEP persons, and amend § 435.908(b) and § 457.340(a) to also specify a requirement to provide (1) oral language assistance by competent interpreters for all LEP individuals, and (2) translation of written materials into other languages when there is a threshold of 500 LEP individuals or five percent of those eligible to be served by the Exchange, whichever is less.
- **Recommendation:** Amend § 435.908(b) and § 457.340(a) to require that application assistance to mixed-status immigrant families be provided in a manner that is effective in meeting their unique information needs and encouraging participation of eligible family members.

457.340(b) Use of Social Security number (CHIP)

We are very concerned that HHS has proposed at § 457.340(b) to impose an SSN requirement for CHIP applicants, which will pose a serious barrier for some individuals and families. States should retain flexibility on whether to require the SSN from CHIP applicants. States that have elected the CHIP program's "fetus" option, for example, will not be able to collect SSNs from these applicants. In addition, some applicants are eligible only for a non-work SSN which is often difficult to obtain because States lack familiarity with the procedures.

The preamble acknowledges that some applicants may not have SSNs, but the proposed rule does not. If this proposed rule becomes final, it should be clear that SSNs may be required only of individuals who have them. We support the NPRM's emphasis in reminding States

that for the CHIP program, they cannot require SSNs of non-applicants, nor delay or deny services to otherwise eligible applicants pending the issuance or verification of the SSN.

- **Recommendation:** Amend § 457.340(b) to eliminate the requirement for each individual applying for CHIP to provide a SSN.
Alternative Recommendation: Where SSNs are required from applicants, amend the final rule to impose such a requirement only on individuals who have SSNs.
- **Recommendation:** Accompany the regulations with instructions to states on how to assist persons who must apply for a non-work SSN.
- **Recommendation:** Support the proposal in § 457.340(b) to prohibit requiring a SSN from non-applicants, consistent with 42 CFR § 435.907(e).
- **Recommendation:** Support the emphasis in § 457.340(b) that, in accordance with § 435.910, States cannot delay or deny services pending issuance of a SSN.

VERIFICATION (435.945, 435.948, 435.949, 435.952, 435.956, 457.380)

435.945, 457.380 General requirements

CCF appreciates NPRM's support at §435.945(b) for maintaining current policy which allows Medicaid agencies to accept self-attestations of all eligibility criteria other than citizenship and immigration status. Doing so will enable States to capture accurate information and to streamline the application process. This is particularly helpful for individuals and families whose income, housing situation, or birth date is not recorded in a traditional manner, including homeless families, those living with others, families fleeing domestic violence or natural disasters, individuals and families working in the informal economy or for multiple employers, among others. It is also helpful that at § 457.380(a), the CHIP program rules have been aligned with the Medicaid rules. Both final rules should clarify that under circumstances where evidence of citizenship and immigration status information cannot be available, such as during a natural disaster, States must also accept self-attestation of these eligibility criteria.

CCF supports the requirement at § 435.945(f) that, prior to requesting information for an applicant from another agency or program, the applicant or beneficiary must be notified that the agency will obtain and use the information to verify income and eligibility or for other purposes directly connected to administering the state plan. As further protection of applicants and to promote accountability, we also support the requirement in § 435.945(i) for state Medicaid agencies to execute written agreements with other agencies before releasing data to or requesting data from those agencies – and that such agreements must limit the use and disclosure of the information exchanged.

- **Recommendation:** Support §§ 435.945(b) and 457.380(a), maintaining a requirement for States to accept self-attestations of all eligibility criteria other than citizenship and immigration status in Medicaid and CHIP.

- **Recommendation:** Amend §§ 435.945(b) and 457.380(a) allowing for acceptance of self-attestation of citizenship and immigration status where evidence cannot be available.
- **Recommendation:** Support § 435.945(f), protecting applicants and beneficiaries by requiring an agency to notify the individual before obtaining and using information about them from another agency or program.
- **Recommendation:** Support § 435.945(i) requiring agencies to execute written agreements with other agencies before releasing or requesting data, and that such agreements must explicitly limit the use and disclosure of information exchanged.

435.948(d), 457.380(d) Verifying financial information

CCF supports the NPRM at § 435.948(d) allowing agencies to obtain information from other sources that is not available electronically, despite the fact that electronic collection and verification is preferred, to serve simplicity and streamlining. The flexibility articulated in §435.948(d) should allow individuals (including those working in the informal economy, and those who may lack an SSN) to establish their actual earnings through alternative means. This proposed rule will help ensure that agencies capture an accurate picture of an individual's earnings. We also support and appreciate the assurance that in addition to maximizing accuracy and minimizing delay, such alternatives must satisfy the rules on confidentiality, disclosure, and use of the information. CCF supports application of these standards to the CHIP program at § 457.380(d) of the NPRM.

- **Recommendation:** Support §§ 435.948(d) and 457.380(d) providing flexibility in collection and verification of financial eligibility if electronic sources are not available, provided rules on confidentiality, disclosure, and use of the information are satisfied.

435.949 Verification of information through an electronic service

CCF supports § 435.949(a), establishing a federal data services hub for streamlining verification of information for many applicants, and we also support the flexibility granted to States by § 435.949(c) to utilize alternative means where appropriate. To the extent that information passes through a range of different entities and individuals, either within the federal hub or through alternative means, it is critical to ensure that the privacy protections and limits on disclosure and use of the information exchanged or transmitted apply to each entity receiving or transmitting the information, at each stage of the eligibility determination.

- **Recommendation:** Support §§ 435.949(a) and (c) establishing a federal data services hub for verifying eligibility but also granting flexibility to States to use alternative means, while ensuring that any alternative methods protect confidentiality and strictly limit the use and disclosure of personal information.

435.952 Use of information and requests of additional information from individuals

CCF strongly supports the “reasonable compatibility” standard as helpful in addressing unnecessary delays caused by minor discrepancies in information obtained from various sources. The standard will minimize the burdens on both the agency and the applicant, and provide agencies with flexibility to resolve discrepancies in a practical manner. We also support the due process protections incorporated into this process, which will help individuals correct inaccuracies in their records without forfeiting critical coverage. In particular CCF supports the essential requirement that agencies provide a reasonable opportunity for the applicant to submit additional information and that agencies cannot deny, terminate or reduce benefits on the basis of information received unless they have sought additional information from the applicant, and have provided the individual with notice and hearing rights.

- **Recommendation:** Support § 435.952(c) restricting the agency from requiring additional documentation from applicants and beneficiaries so long as the information provided is reasonably compatible with information obtained by the agency.

Verification of other non-financial information (435.956)**435.956 (c)(2) State residency**

CCF supports the important clarification at § 435.956(c)(2) that documents providing information regarding an individual’s immigration status may not be used alone to determine state residency, and to further promote program integrity, we suggest deleting the word “alone” from the final rule. As noted in the preamble at 51165, determinations of state residency are independent from determinations of citizenship or satisfactory immigration status. To ensure that these determinations are in fact made independently, and to reduce any potential confusion, verification of immigration status should be separated from verification for state residency. As the preamble confirms, each individual should have the opportunity to establish that he or she resides in a state.

- **Recommendation:** Support § 435.956 for separating immigration status verification from state residency verification, and amend § 435.956 by deleting the word “alone” from the final rule, to avoid confusion and promote program integrity.

435.956(d) Verification of a Social Security number

CCF supports the NPRM at § 435.956(d) requiring verification of SSNs in accordance with existing Medicaid regulations at §§ 435.910(f) and (g). Those existing regulations prohibit the agency from denying or delaying services to an otherwise eligible applicant pending issuance or verification of the individual's SSN by the Social Security Administration. Section 435.910 also requires agencies to assist an applicant in obtaining a SSN -- final rules should emphasize this requirement given that some lawfully residing individuals, including some “qualified” immigrants such as certain victims of domestic violence and Cuban or

Haitian entrants may not be eligible for a regular Social Security number. The final rules should instruct agencies on how to assist these applicants in obtaining a non-work SSN.⁶

- **Recommendation:** Support § 435.956(d) requiring verification of SSNs in accordance with §§ 435.910(f) and (g), that prohibit denial or delay of services pending issuance of a SSN.
- **Recommendation:** Amend § 435.956(d) referencing also Medicaid regulations at § 435.910(e) and instructing agencies on how to assist otherwise-eligible lawfully present applicants to obtain a non-work SSN when they are ineligible for a regular SSN.

Thank you for your consideration of these comments. For more information, please contact Dinah Wiley at 703-402-2665 or by email at dinahwiley@gmail.com.

⁶ See Social Security Program Operations Manual Systems (POMS) RM 10211.600
<https://secure.ssa.gov/apps10/poms.nsf/lnx/0110211600>