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

Submitted electronically to http://www.regulations.gov

Re: Comments on CMS’ Proposed Rule on Medicaid Eligibility Changes under the Affordable Care Act of 2010 -- File Code CMS-2349-P

To Whom It May Concern:

The National Immigration Law Center (NILC) specializes in the intersection of health care and immigration laws and policies, offering technical assistance, training, and publications to government agencies, non-profit organizations and health care providers across the country. For over 30 years, NILC has worked to promote and ensure access to health services for low-income immigrants and their family members. NILC is submitting the following comments on the Proposed Rule on Medicaid Eligibility Changes under the Affordable Care Act of 2010, published at 76 Fed. Reg. 51148-99 (August 17, 2011).

These comments focus on issues affecting access to Medicaid and the Children’s Health Insurance Program (CHIP) for low-income immigrants and their family members. In general, the proposed regulations take helpful steps toward ensuring that eligible individuals in immigrant families can secure critical health coverage.

Residency Rules for Medicaid and CHIP (42 CFR §435.403 & §457.320; §435.956)

We agree that streamlining the state residency rules for the various eligibility groups will help simplify the application process. We also agree that a consistent standard for determining state residency in Medicaid, CHIP and the health insurance exchanges will help ensure seamless coverage for individuals and families who move between or qualify for different programs. We support the elimination of the phrase “permanently and for an indefinite period,” 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. We appreciate the 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 ability for children of migrant and seasonal farmworkers to establish residency in a flexible manner.
Ensuring that state residency and immigration status are evaluated independently can protect against unnecessary inquiries of families seeking coverage. Some states, believing that a parent’s status is relevant in determining a child’s residence, have been asking for immigration status information of non-applicant parents, chilling access to coverage for eligible children, and violating the principles articulated in the Tri-Agency Guidance.\(^1\) It is also important to ensure that U.S. citizen children have an opportunity to establish that they reside in a state, regardless of the parent’s immigration status.

**RECOMMENDATION:** We strongly support the elimination of the phrase “permanently and for an indefinite period,” and the clarification that a child’s state of residence cannot be determined solely based on the residence of the parent. As noted in the preamble, determinations of state residency are independent from citizenship or immigration determinations. The rules thus include a helpful clarification that documents providing information regarding an individual’s status may not be used alone to determine state residency. 42 C.F.R. § 435.956(c)(2). To ensure that these determinations are made independently, and to reduce any potential confusion, we recommend that the word “alone” be deleted from this provision. As the preamble confirms, each individual should have the opportunity to establish that he or she resides in a state.

**Availability of Program Information (42 CFR §435.905)**

NILC supports the proposal at § 435.905(b) that information about eligibility, services, rights and responsibilities be provided in a manner that is accessible to limited-English proficient (LEP) individuals. We recommend that the final rule include specific requirements for translating materials. 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 in §1557 of the ACA. We recommend that these regulations follow the guidelines in the HHS LEP Guidance documents.\(^2\) It is crucial that program information be prepared and delivered in a culturally competent manner, which addresses the concerns of mixed status households. Information should be provided at a reading grade level that approximates the average reading proficiency in the U.S.

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It is well documented that language barriers affect access to health care. The HHS LEP Guidance calls for the recipient of federal funds to 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 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. The LEP Guidance also recognizes that all LEP individuals, regardless of whether they meet the 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.

The final rules must ensure that any translation is competent; machines generally do not produce competent translations. We recommend that HHS require Medicaid agencies to provide taglines in at least 15 languages with all information, informing LEP enrollees how to secure access to language services. The request for 15 languages is based on existing government practice.

RECOMMENDATION: Support and amend § 435.905(b) to retain the requirement that program information be accessible to LEP individuals, and 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 secure access to 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 in addressing mixed-status families’ unique issues and concerns, the Medicaid

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3 Institute of Medicine, Unequal Treatment: Confronting Racial and Ethnic Disparities in Health 17 (2002).
4 The Social Security Administration, through its Multilanguage Gateway, translates many of its documents into 15 languages; CMS plans to translate Medicare forms and notices into 15 languages in addition to Spanish. www.cms.gov/EEOInfo/Downloads/AnnualLanguageAccessAssessmentOutcomeReport.pdf. A sample tagline could read: “No Cost Language Services. You can get an interpreter and get 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.”
services that are available to each family member, and the rights and responsibilities of applicants and beneficiaries.

**Information on Application Forms (42 CFR §435.907)**
We were particularly pleased that the regulations reinforce the civil rights and privacy laws and principles set forth in the Tri-Agency Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, CHIP and other programs. It is helpful to codify the rules prohibiting states from requiring Social Security Numbers (SSNs) of individuals who are not seeking coverage for themselves. As the preamble notes, the Medicaid program’s longstanding rules, like the confidentiality provisions enacted in the Affordable Care Act, limit the use and disclosure of information about Medicaid applicants and recipients. 42 USC §1396a(a)(7). We were also pleased with the clarification that information from non-applicants that is used to determine an applicant’s eligibility must be safeguarded pursuant to Medicaid’s existing laws. Helpfully, the regulations include similar safeguards for families seeking or receiving CHIP for their children. See 42 CFR §457.340(b), which references 42 CFR §435.907(e).

**RECOMMENDATION:** Strongly support the prohibition on requiring SSNs from individuals who are not seeking coverage for themselves, as well as the inclusion of similar safeguards in the CHIP program. 42 CFR §435.907(e); 42 CFR §457.340(b). The proposed rules confirm that agencies should not require information that isn’t necessary in order to determine an applicant’s eligibility. Consistent with the Tri-Agency guidance, the regulations also should clarify that Medicaid and CHIP agencies should not inquire about the citizenship or immigration status of non-applicants in their application forms or procedures.

**Application Assistance (42 CFR §435.908, §457.340(a))**
NILC supports the requirement that assistance be made available in person and by phone in addition to online, in a manner that is accessible to limited-English proficient (LEP) individuals. We encourage greater specificity in the requirement for meaningful access to LEP persons. Mixed-status families have unique needs and concerns regarding the application process. The complex eligibility rules create confusion, particularly when some family members are eligible and others are ineligible for the various programs. These families also have concerns that an application for health care services will threaten the family’s confidentiality, privacy or security. NILC recommends that HHS require states to provide application assistance in a culturally competent manner that effectively communicates the information that immigrant families need, and to prohibit communications and practices that discourage participation by eligible family members.
RECOMMENDATION: Support § 435.908(b) and § 457.340(a) requiring that application assistance be provided in a manner that is accessible to LEP individuals, and amend § 435.908(b) and § 457.340(a) to include 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 for mixed-status families be provided in a manner that is effective in meeting their unique information needs and encouraging participation of eligible family members.

Securing a Social Security Number from Applicants (42 CFR §435.956)
As the preamble notes, existing Medicaid regulations require the agency to assist an applicant in obtaining a Social Security number. 42 CFR §435.910. These regulations, referenced in the new verification section, 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.

RECOMMENDATION: Some lawfully residing individuals, including some “qualified” immigrants (e.g. some battered immigrants and Cuban or Haitian entrants) who are otherwise eligible for Medicaid or CHIP may not be eligible for a regular Social Security Number. The regulations, or alternatively, a guidance document issued by CMS should instruct agencies on how to assist these applicants in obtaining a non-work SSN. See, e.g. Social Security Program Operations Manual Systems (POMS) RM 10211.600 https://secure.ssa.gov/apps10/poms.nsf/lnx/0110211600

Social Security Number Requirement in CHIP (42 CFR §457.340)
We are very concerned about the proposal to impose an SSN requirement for CHIP applicants, which will pose a barrier for some individuals and families. States that have elected the CHIP program’s “fetus” option, for example, will not be able to collect SSNs from these applicants. To conform to the language in the preamble, the text of the regulations should make it clear that SSNs may be required only of individuals who have them. We appreciate the reminder that SSNs cannot be required of non-applicants in the CHIP program. And it is helpful that the proposed rule prohibits the delay or denial of services to otherwise eligible applicants pending the issuance or verification of the SSN.

RECOMMENDATION: Retain state flexibility on whether to require an SSN from CHIP applicants, and ensure that where a requirement is imposed, SSNs are required only of individuals who have them. To the extent that an SSN requirement is implemented, and consistent with the Medicaid rules, the CHIP
rules should ensure that agencies assist applicants in obtaining an SSN, and
the agency should issue instructions on how to obtain a non-work SSN, where
applicable. See Social Security Program Operations Manual Systems (POMS)
RM 10211.600 https://secure.ssa.gov/apps10/poms.nsf/lnx/0110211600

Self-Attestations (42 CFR §435.945; 42 CFR §457.380)
We were pleased to see a reiteration of the current policy which allows
Medicaid agencies to accept self-attestations of all eligibility criteria other
than citizenship and immigration status. Doing so will enable the agencies to
capture accurate information and to streamline the application process. This is
particularly helpful for individuals and families whose income, housing
situation, or birthdate is not recorded in a traditional manner, including
homeless families, those living with others, families fleeing domestic violence
or natural disasters, individuals working in the informal economy or for
multiple employers, persons with disabilities who may face barriers to
securing documentation, and seniors, etc. It is also helpful that the CHIP
program rules have been aligned with the Medicaid rules.

RECOMMENDATION: Retain state flexibility to accept self-attestations of
eligibility criteria other than citizenship and immigration status for all
applicants. To ensure that all eligible individuals are able to secure coverage,
however, CMS should require states to accept self-attestation of these
eligibility criteria, at a minimum in cases where other evidence isn’t available.

Verifying Financial Information (42 CFR §435.948; 42 CFR §457.380(d))
Although the regulations state a preference for verifying information
electronically, they allow agencies to obtain information that is not available
from these sources. The flexibility in information collection and verification
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 flexibility will help ensure
that agencies capture an accurate picture of an individual’s earnings. We
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.

RECOMMENDATION: Support §§435.948(d) and 457.380(d) providing
flexibility in the collection and verification of financial eligibility where
electronic sources are not available, provided that the rules on confidentiality,
disclosure, and use of the information are satisfied.
Verifying Information through an Electronic Service (42 CFR §435.949 and §435.945)
The federal data services hub should be helpful in verifying information for many applicants. However, the proposed rule wisely grants states flexibility 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. We therefore appreciate the requirement in 42 CFR § 435.945(f) that, prior to requesting information for an applicant, the agency must inform the individual 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. We also appreciate the requirement in 42 CFR § 435.945(h) that state Medicaid agencies execute written agreements with other agencies before releasing data to or requesting data from those agencies – and that such agreement must limit the use and disclosure of the information exchanged.

RECOMMENDATION: We recommend that the regulations confirm that information can be requested, shared or used only for purposes strictly necessary to verify eligibility. We recommend that the formal written agreements specify that information can be used only for these narrow purposes.

Use of Information and Requests for Additional Information from Individuals (Reasonable Compatibility) 42 CFR §435.952(c)
The “reasonable compatibility” standard should be helpful in addressing unnecessary delays caused by minor discrepancies in information obtained from various sources, minimizing the burdens on both the agency and the applicant. It provides agencies flexibility to resolve remaining discrepancies in a practical manner. We also appreciate the due process protections incorporated into this process, which will help individuals correct any inaccuracies in their records without forfeiting critical coverage. In particular we appreciate the requirement that agencies provide a reasonable opportunity for the applicant to submit additional information and that they cannot deny, terminate or reduce benefits on the basis of information received through these verification mechanisms unless they have sought additional information from the applicant, and have provided the individual with notice and hearing rights.

RECOMMENDATION: Support the rule that prevents an agency from requiring additional documentation from applicants and beneficiaries when the information provided is reasonably compatible with the information obtained by the agency.
Thank you for your consideration of these comments. Please do not hesitate to contact Tanya Broder, at 510-663-8282, ext. 307 (broder@nilc.org), or Jenny Rejeske, at 202-683-1994 (rejeske@nilc.org) if you have any questions.

Respectfully,

Tanya Broder
National Immigration Law Center