

# Privacy Protections in Selected Federal Benefits Programs

## MODEL LETTER AND APPENDIX

FEBRUARY 2018

Dear partners working to protect immigrant families:

The model letter and appendix below are intended for your reference. You can tailor them or revise them for use with your own state and local agencies. These materials include federal laws, regulations, and guidance that protect the personal information that immigrant families provide to public benefits agencies when applying for health, nutrition, cash assistance, child care, and other public benefits programs. Your state may have additional protections that you can also include.

We thank numerous partners, including the Center for Law and Social Policy, the Center on Budget and Policy Priorities, and the Food Research & Action Center for their contributions to this work. Please send any questions to Tanya Broder, NILC senior staff attorney ([broder@nilc.org](mailto:broder@nilc.org)), or to NILC consultant Sonya Schwartz ([sonya@sonyaandpartners.com](mailto:sonya@sonyaandpartners.com)).

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### MODEL LETTER

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Dear [Name of State Official]:

We are writing to ask for your help in responding to a problem affecting the health and well-being of immigrants and their family members. Widespread reports indicate that immigrants are afraid to apply for or are asking to be removed from critical programs for which they or their family members are eligible. Immigrant families are concerned that personal information provided to public benefit agencies could be used to enforce federal immigration laws. This fear deprives immigrants and U.S. citizen children of vital health, nutrition, income support, and child care benefits.

Federal civil rights and privacy laws and the laws and regulations governing specific benefit programs limit inquiries about and collection of sensitive personal information, the information that may be verified, and whether information about benefit applicants or recipients may be used or disclosed for purposes other than determining eligibility or administering the program. Programs that protect information about applicants and recipients include Medicaid, the Children's Health Insurance Program (CHIP), the health insurance marketplace, the Supplemental Nutrition Assistance Program (SNAP), the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), the National School Lunch Program, Temporary Assistance for Needy Families (TANF), the Child Care and Development Fund (CCDF), Head Start, and Early Head Start. *Information about the laws, regulations and rules governing each program is provided in the Appendix attached to this letter.* Additional protections may be available under state laws.

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With very limited exceptions, information about benefit recipients may be used only to administer the public benefit program and may not be disclosed to federal agencies or officials for other purposes, such as the enforcement of immigration laws. Federal agencies have confirmed that these protections apply to benefit recipients even after the passage of the federal welfare and immigration laws.<sup>1</sup> Although 8 U.S.C. sections 1373 and 1644 generally prohibit government agencies from restricting communications with federal immigration officials “regarding an individual’s citizenship or immigration status,” these restrictions do not apply to any other information about individuals, such as their receipt of public benefits.<sup>2</sup> State agencies generally may not disclose information about public benefits recipients, if the purpose of the request is unrelated to administering public benefit programs.

The federal laws protecting information about benefit recipients remain intact, and cannot be altered by an executive order.<sup>3</sup> Absent any change in federal statute, state agencies should decline any request for disclosure of information regarding a benefit recipient unless the request is consistent with these laws, the state plan approved for the program, and other federal regulations or guidance that flows from these federal statutes.

We continue to hear that there is a great deal of confusion about these rules and that immigrant families are afraid to seek or to continue receiving important benefits. We therefore urge you to ensure that these rules are understood and followed by your agency. We urge you to:

- Share this information with your staff and any local counterparts, such as county eligibility workers, school administrators, enrollment partners and contractors, direct service providers, and other partners.
- Review your applications and enrollment systems, reporting systems, and guidance for eligibility and enrollment workers, to ensure that they comply with these laws and rules.
- Provide easy-to-understand information in multiple languages that can be used to notify community members about existing confidentiality protections.
- Be flexible about how household members may prove their income, including through a letter from an employer, self-attestation, or another means if needed.
- Call upon us to help train your agency staff and any state or local counterparts about these important privacy protections.

New York City and the city and county of San Francisco recently authored and shared materials — available in multiple languages — that educate immigrant families about the privacy protections in multiple programs and urge them not to be afraid to continue seeking health care and other benefits and services.<sup>4</sup>

We appreciate your dedication to *all* individuals and families applying for and enrolling in health, nutrition, income support, and child care programs. Please feel free to contact me if you would like to discuss.

Sincerely,

[Your name  
Your contact information]

## APPENDIX

THIS APPENDIX INCLUDES federal civil rights and privacy laws, and the laws, regulations, and guidance governing specific benefit programs that (1) limit inquiries about and collection of sensitive personal information; (2) specify the information that may be verified; and (3) limit how information about benefit applicants or recipients may be used or disclosed for purposes other than determining eligibility or administering the program.

Applicants must meet all the program rules — including providing information about the income of household members — to be determined eligible for benefits, but should provide only the information necessary to prove eligibility and should always avoid providing any false information.<sup>5</sup> Given that many citizens and immigrants work in the informal economy, state agencies should be flexible about accepting various forms of proof of income, including, for example, a letter from an employer or self-attestation.

### The Tri-Agency Guidance

In 2000, the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Agriculture (USDA) issued guidance and accompanying questions and answers about state inquiries into citizenship, immigration status, and Social Security numbers (SSNs) of individuals applying for public benefit programs.<sup>6</sup> This “Tri-Agency Guidance” clarifies when a state is required to request information about citizenship, immigration status, and SSNs on joint and single-program applications; when a state is not required to collect this information; and when a state may deny these benefits to individuals who do not provide this information.

The guidance explains that state agencies may not deny benefits to otherwise-eligible *applicants* based on a *nonapplicant’s* failure to furnish an SSN or immigration status information. (*Nonapplicant* refers to a person who is not applying for benefits for him/herself.) Specific laws and policies in the public benefit programs detailed below codify and reinforce these rules.

The guidance relies on the principles underlying Title VI of the Civil Rights Act of 1964 and the Privacy Act. Title VI prohibits recipients of federal funds from discriminating based on race, color, and national origin. States may be in violation of Title VI if their application requirements and processes have the effect of deterring eligible applicants and recipients in immigrant families from enjoying equal participation in and access to programs because of their national origin.<sup>7</sup> The Privacy Act prohibits states from denying benefits to certain applicants who do not disclose their SSN if the disclosure is not required by federal statute.<sup>8</sup> It requires states, when seeking disclosure of SSNs, to provide information about whether disclosure of an SSN is mandatory, the authority for the request, and how it will be used.<sup>9</sup>

### Systematic Alien Verification for Entitlements (SAVE)

U.S. Citizenship and Immigration Services (USCIS) administers the SAVE program. State benefit agencies use SAVE to verify individuals’ immigration status when determining their eligibility for programs such as Medicaid, CHIP, TANF, and SNAP.<sup>10</sup> SAVE provides key information that a state agency may use to determine if the applicant meets the immigration-related eligibility standards for that program.<sup>11</sup> The benefit eligibility determination itself is performed by the benefit agency.

The SAVE system taps into federal databases to verify an individual’s status. When the information first provided by the state agency is incomplete or appears to be inaccurate, the

state agency may receive a request for further information.<sup>12</sup> If this second step is unsuccessful, the state agency should ask the U.S. Department of Homeland Security (DHS), of which USCIS is a part, to conduct a manual search of its records.<sup>13</sup>

The SAVE statute includes safeguards that protect applicants for certain programs, such as:<sup>14</sup>

1. Immigrants must be given a “reasonable opportunity” to provide documentation of their immigration status.
2. If an immigrant is otherwise eligible, benefits must not be delayed, denied, reduced, or terminated during the reasonable opportunity period while documents are being gathered or while USCIS is verifying status.
3. DHS may not use information submitted to SAVE for civil immigration enforcement purposes.

## Health Coverage Programs

### Medicaid

Medicaid law requires states to provide safeguards that restrict the use or disclosure of information about program applicants and recipients to purposes directly connected with administration of the Medicaid program.<sup>15</sup> Purposes directly related to Medicaid administration include: establishing eligibility; determining the amount of medical assistance; providing services; or conducting or assisting an investigation, prosecution, or civil or criminal proceeding related to administration of the state Medicaid plan.<sup>16</sup> HHS has determined that releasing information to a federal immigration agency regarding receipt of Medicaid benefits is *not* connected to the administration of the state plan.<sup>17</sup> Information that states *must* safeguard includes: names and addresses, any information received for verifying income eligibility and the amount of medical assistance payments, agency evaluation of personal information, social and economic conditions or circumstances, and Social Security number.<sup>18</sup> The Medicaid agency must have specific criteria for releasing information about applicants and beneficiaries, including restricting access to agencies that are subject to standards of confidentiality comparable to Medicaid’s standards.<sup>19</sup>

Medicaid regulations require states to have safeguards in place to protect any information provided about nonapplicants, applicants, and beneficiaries.<sup>20</sup> If the Medicaid agency receives a request for information about an applicant or recipient for some reason not directly connected to administration of Medicaid, the agency generally may not release the information without first obtaining permission from the affected individual.<sup>21</sup> Information must be stored and processed in a way that protects it against unauthorized disclosure for other purposes.<sup>22</sup>

The state may require an *applicant* to provide only the information necessary to make an eligibility determination or for a purpose directly connected to administering the state plan.<sup>23</sup> SSNs are generally required of Medicaid applicants.<sup>24</sup> However, if an applicant cannot recall their SSN or has not been issued an SSN, the agency must assist the applicant in applying for an SSN.<sup>25</sup> If an applicant is not eligible for an SSN, is eligible only for a nonwork SSN, or has a well-established religious objection to obtaining an SSN, the state may use a Medicaid identification number to determine eligibility.<sup>26</sup> And individuals seeking Medicaid for emergency services only do not need to provide an SSN, nor are they required to provide information about their immigration status or have their citizenship or immigration status verified.<sup>27</sup>

Medicaid is also required to accept applications filed by *nonapplicant* adults: household or family members who are not seeking benefits for themselves.<sup>28</sup> A state agency *may* — but is not required to — request a nonapplicant’s SSN, but only if: (1) providing an SSN is voluntary; (2) the SSN is used only to determine the applicant’s eligibility for Medicaid or another insurance affordability program; and (3) the agency provides clear notice that provision of the nonapplicant’s SSN is voluntary, and provides information about how the SSN will be used.<sup>29</sup> In addition, states may *not* require applicants to provide information about the citizenship or immigration status of any nonapplicant household member or deny benefits to applicants because any nonapplicant household members have not disclosed their citizenship or immigration status.<sup>30</sup>

### Children’s Health Insurance Program (CHIP)

The CHIP statute requires states to reduce administrative barriers to applying for the program.<sup>31</sup> States that use the Medicaid application and renewal forms and Medicaid eligibility verification process are deemed to comply with the CHIP statute.<sup>32</sup> CHIP regulations specifically prohibit states from requiring nonapplicants — individuals not seeking an eligibility determination for themselves — to provide a Social Security number.<sup>33</sup> The CHIP regulations also require *all* CHIP programs (Medicaid expansion programs, separate CHIP programs, or a combination of the two) to comply with Medicaid’s privacy protections (see above).<sup>34</sup>

### Health Insurance Marketplace (“the marketplace”)

The Affordable Care Act (ACA) includes strong privacy protections for people who seek to purchase health care coverage in the marketplace. People applying for coverage in the marketplace must provide only the information strictly necessary to authenticate identity and to determine eligibility to buy health insurance through the marketplace and the amount of advance health insurance premium tax credits and cost-sharing reductions for which they may be eligible.<sup>35</sup> Any person or agency receiving information from the marketplace must use it only to ensure efficient operation of the health insurance marketplace, including verifying participants’ eligibility or claiming insurance premium tax credits or cost-sharing reductions.<sup>36</sup>

The marketplace regulations limit how and when applicants’ personally identifiable information may be used and disclosed. Information that is linkable to an applicant or an applicant’s family member, such as a Social Security number, name, address, or other information, may be used only for specific exchange functions, such as determining applicants’ eligibility and enrolling them in health coverage plans.<sup>37</sup> And, data-sharing arrangements must be as or more stringent than those required under Medicaid.<sup>38</sup> Any marketplace agreements with nonmarketplace entities, such as contractors, must require them to comply with the marketplace privacy rules. Individuals who knowingly and willfully use or disclose information in violation of the ACA may be liable for civil monetary penalties of up to \$25,000.<sup>39</sup>

The marketplace may only require applicants to provide an SSN if they have one.<sup>40</sup> The marketplace regulations generally prohibit inquiries about the citizenship or immigration status of individuals who are not seeking coverage for themselves, on either an application or a supplemental form.<sup>41</sup> However, if a nonapplicant is the tax-filer for the year that tax data is used to verify household income and family size, and has an SSN, the nonapplicant must provide it.<sup>42</sup>

In 2013, U.S. Immigration and Customs Enforcement (ICE) confirmed that it does not use information obtained from applicants for health coverage under the ACA, Medicaid, or CHIP for purposes of civil immigration enforcement.<sup>43</sup> The ICE memo cited the ACA, the Social Security



Act and implementing regulations, which limit the use of information provided by applicants for health coverage.<sup>44</sup>

## Nutrition Programs

### Supplemental Nutrition Assistance Program (SNAP)

The SNAP laws generally prohibit the use or disclosure of information obtained from applicants.<sup>45</sup> There are a few exceptions that allow disclosures to: (1) people directly involved in administering and enforcing SNAP, (2) the comptroller general of the U.S. for audit and examination authorized under law, (3) a state or local law enforcement investigation of violations of SNAP laws or regulations, or (4) the federal government for purposes of collecting the amount of an over-issuance of benefits. SNAP law also allows the disclosure of an address, Social Security number, and photograph (if available) of a household member to a federal state or local law enforcement officer if the household member is fleeing to avoid prosecution or custody or confinement after committing a felony or is violating a condition of probation or parole under federal or state law or if a family member has information necessary for an officer to locate this household member.<sup>46</sup>

When applying for SNAP, if a household member indicates an inability or unwillingness to provide documentation of immigration status, the state agency must classify that person as ineligible and the state agency must *not* continue efforts to obtain documentation.<sup>47</sup> In addition, while states are generally required to verify the immigration status of any applicants, if any household members do not wish to have their status verified, the state agency must give the household the option to withdraw its application or to participate without those household members.<sup>48</sup>

Similarly, if a SNAP household member does not provide an SSN (and does not wish to apply for one), the state agency generally will determine the person ineligible for benefits. However, state agencies may not deny benefits to otherwise-eligible household members simply because other household members fail to provide or apply for an SSN.<sup>49</sup>

The SNAP regulations also reference an interagency guidance that requires reporting in very narrow circumstances — if the agency “knows” that an immigrant is not lawfully present in the U.S.<sup>50</sup> The “knowing” standard is met only if all three of the following conditions exist: (1) the immigrant is seeking SNAP for the immigrant’s own use; (2) the SNAP agency has made a formal finding of fact or conclusion of law, subject to administrative review, that the immigrant is unlawfully present (a SAVE response showing no record of an individual does *not* meet this standard of “knowing”); and (3) a DHS determination of unlawful presence (e.g., a final order of deportation) supports the SNAP agency’s finding.<sup>51</sup>

### National School Lunch Program

Immigration status is not an eligibility factor for free or reduced-price school lunches or breakfasts.<sup>52</sup> However, an adult household member must sign an application for the school lunch program. Adults signing the application must either enter the last four digits of their SSN, or state that they do not have one. Households that provide a SNAP, TANF, or Food Distribution Program on Indian Reservations (FDPIR) case number on the application do not need to provide the last four digits of their SSN or state that they do not have one.<sup>53</sup>

Many children can be certified for school meal benefits without a household application being completed for them. Some children can be directly certified for free school meals through data-matching, because their household already participates in other federal programs, or

because a child is homeless or particularly vulnerable.<sup>54</sup> School districts can also opt for “community eligibility,” which allows children in high-poverty schools to receive school meals without having parents sign household applications.<sup>55</sup> USDA’s website provides a list of schools and districts in each state that may be eligible to elect the community eligibility option.<sup>56</sup> Schools should consider taking up these options to help address families’ concerns about providing personal information to government.

Under the National School Lunch Program law, any information obtained from either (1) an application for free or reduced-price meals or (2) SNAP, FDPIR, TANF, Medicaid, school breakfast, or a similar income-based program may be disclosed only for purposes related to the administration of school meals (and related programs) or an alleged fraud investigation.<sup>57</sup> Administration of the program includes verification of eligibility (which may be done by a third-party contractor) for school meals and other nutrition, education, and health programs.<sup>58</sup> A person who violates the program rules by disclosing information may be subject to a criminal penalty.<sup>59</sup>

### Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)

Low-income pregnant women, mothers of infants up to six months old, and children up to age five who are at nutritional risk are eligible for WIC regardless of their immigration status.<sup>60</sup> A state must determine that applicants establish identity, residency, income, and nutritional risk and, where applicable, pregnancy.<sup>61</sup> If an applicant does not have proof of residency or identity, a state or local agency must require applicants to confirm their residency or identity in writing.<sup>62</sup>

WIC regulations limit what the state agency may disclose and to whom. Under the rules, “confidential applicant and participant information” may be disclosed only to people directly connected with administration or enforcement of the WIC program whom the state agency determines have a need to know the information for WIC program purposes.<sup>63</sup> “Confidential applicant and participant information” is defined as any information about an applicant or participant as a result of a WIC application, certification, or participation that individually identifies an applicant or participant and/or family members.<sup>64</sup>

## Cash Assistance

### Temporary Assistance for Needy Families (TANF)

The federal TANF law requires states to include in their state plan that they will take such reasonable steps as the state deems necessary to restrict the use and disclosure of information about individuals and families receiving assistance under a federally funded TANF program.<sup>65</sup>

*Applicants* for TANF are required to provide information about their citizenship or immigration status as a condition of eligibility for benefits.<sup>66</sup> Applicants must also disclose their SSN, unless they have not been issued one, in which case the state must help the applicant apply for an SSN.<sup>67</sup>

TANF also follows the Tri-Agency Guidance regarding questions about immigration status and Social Security number for *nonapplicants*.<sup>68</sup> Although TANF eligibility and benefits generally are based on the circumstances of the family unit, states are not required to obtain an SSN or the immigration status of a nonapplicant.<sup>69</sup> States have flexibility in TANF to treat a family member who is not applying for TANF for him/herself as a nonapplicant and/or to allow the person to be excluded from the TANF family by using TANF “child only” rules.<sup>70</sup>

Federal law also requires TANF programs to report to immigration authorities only in very narrow circumstances — if a state agency “knows” that an immigrant who is *applying to receive*

*TANF for his/her own use* is not lawfully present in the U.S.<sup>71</sup> The “knowing” standard is met only if all three of the following conditions exist: (1) the immigrant is seeking benefits for the immigrant’s own use; (2) the state agency has made a formal finding of fact or conclusion of law, subject to administrative review, that the immigrant is unlawfully present (a SAVE response showing no record of an individual does *not* meet this standard of “knowing”); and (3) an immigration agency’s determination of unlawful presence (e.g., a final order of removal) supports the agency’s finding.<sup>72</sup>

## Child Care Programs

In federally-funded child care programs, the information that families need to provide depends on whether the program is funded by the Child Care and Development Fund (CCDF, also known as the Child Care and Development Block Grant (CCDBG), or TANF.<sup>73</sup>

### CCDF-funded Child Care

CCDF regulations require lead agencies to certify in their CCDF Plan that they have policies to govern the use and disclosure of confidential and personally identifiable information about children and families receiving CCDF-funded assistance and child care.<sup>74</sup> Regulations also highlight the importance of personal information not being used for purposes outside of the administration or enforcement of CCDF.<sup>75</sup>

For most child care funded by CCDF, *only the child’s* immigration or citizenship status is relevant for eligibility determinations, and administering agencies may not request information about a parent’s citizenship or immigration status. (Note the exception for child care subject to public educational or Head Start standards below).<sup>76</sup>

In addition, states are prohibited from requiring SSNs as a condition of eligibility for CCDF-funded child care assistance.<sup>77</sup> States are permitted to request an SSN on an application form, but the form must make clear that providing an SSN is optional.<sup>78</sup> The application instructions must state (1) that an SSN is not required, (2) that “eligibility will not be denied due to the failure of the applicant to provide an [SSN],” (3) how SSNs are intended to be used, and (4) how the state will preserve confidentiality.<sup>79</sup> Agencies may assign a unique identifying number to the family unit receiving assistance instead of an SSN.<sup>80</sup>

CCDF-funded child care that is provided in a setting subject to public educational standards is *available without regard to a child’s immigration status*.<sup>81</sup> Child care that is subject to Head Start standards and supported by combined Head Start and CCDF funding is also *exempt from verifying immigration status*.<sup>82</sup>

### TANF-funded Child Care

Eligibility for child care funded by TANF is generally based on the eligibility of the parent. Eligibility rules for TANF and TANF-related child care vary from state to state. See the TANF section above.

### Head Start and Early Head Start

Children may be eligible for Head Start and Early Head Start regardless of their immigration status.<sup>83</sup> Children may enroll in Head Start or Early Head Start without providing information about their own or a parent’s immigration or citizenship status. Head Start Child Care Partnerships also follow these rules.



## NOTES

<sup>1</sup> The U.S. Department of Health and Human Services (HHS) clarified that existing restrictions on exchanging information about a person's Medicaid or Aid to Families with Dependent Children status continue in effect without change, despite 8 U.S.C. § 1373. See Letter from Sally K. Richardson, Center for Medicaid and State Operations, to State Medicaid Directors (Dec. 17, 1997); Letter from Lavinia Limón, Director of the Office of Family Assistance, to State TANF Directors (Dec. 17, 1997) (on file with the National Immigration Law Center).

<sup>2</sup> Washington State's attorney general recently issued guidance that reminded state agencies about the limitations of 8 U.S.C. § 1373. He emphasizes that federal law does not require agencies to share information, does not require them to collect information about immigration status, and applies only to information regarding citizenship or immigration status. Similarly, it does not prohibit state and local agencies from adopting privacy policies protecting other information, such as a person's address, place of birth, household members, or the types of benefits or services received. *Guidance Concerning Immigration Enforcement* (Washington State Office of the Attorney General, Apr. 2017), <http://www.atg.wa.gov/immigrationguidance>. The guidance also notes that states and localities may have authority under their police powers to offer broader confidentiality protections, which could cover information about citizenship and immigration status. The application of 8 U.S.C. § 1373 may be further constrained, e.g., if citizenship or immigration status is "essential to the performance" of state or local government functions and the information would "be difficult or impossible" to obtain "if some expectation of confidentiality is not preserved." *Id.*, citing *City of New York v. United States*, 179 F.3d 29, 36-37 (2d Cir. 1999); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>3</sup> There are other strong arguments why these federal statutes remain fully intact, protecting all information about recipients of public benefits, despite 8 U.S.C. § 1373. Implicit repeals of federal statutes are disfavored under federal law. Thus, a U.S. Department of Justice memo concluded that 8 U.S.C. § 1373 did not repeal federal statutory prohibitions on disclosure to immigration officials of information collected for the U.S. Census. Memorandum from Dept. of Justice, Office of Legal Counsel, to General Counsel, Dept. of Commerce, "Relationship Between Illegal Immigrant Responsibility Act of 1996 and

Statutory Requirement for Confidentiality of Census Information" (May 18, 1999). Subsequent laws, such as the Affordable Care Act (ACA), which protect specific information, similarly remain in force. And, where possible, laws must be construed to avoid conflicts with constitutional provisions, such as a state's rights under the Tenth Amendment.

<sup>4</sup> See "Human Services Agency: Post-Election Frequently Asked Questions" (Human Services Agency, City and County of San Francisco, Mar. 2017), available from [www.sfhsa.org/about/reports-publications/public-benefits-immigrants](http://www.sfhsa.org/about/reports-publications/public-benefits-immigrants); "Open Letter to Immigrant New Yorkers" (NYC Health + Hospitals and the New York City Mayor's Office of Immigrant Affairs, Dec. 2016), available from [www.nychealthandhospitals.org/immigrant/](http://www.nychealthandhospitals.org/immigrant/); and "Seek Care Without Fear-Know The Facts" (NYC Health + Hospitals and the New York City Mayor's Office of Immigrant Affairs), [www.nychealthandhospitals.org/seek-care-without-fear-know-the-facts/](http://www.nychealthandhospitals.org/seek-care-without-fear-know-the-facts/).

<sup>5</sup> One common exception to privacy protections in most programs is when benefits are fraudulently obtained.

<sup>6</sup> Letter from U.S. Dept. of Health & Human Services and U.S. Dept. of Agriculture to State Health and Welfare Officials, "Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program, Temporary Assistance for Needy Families, and Food Stamp Benefits" (Sep. 21, 2000) (hereinafter "Tri-Agency Letter"), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/triagency-letter/index.html>. See also "Policy Guidance Regarding Inquiries into Citizenship, Immigration Status, and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (CHIP), Temporary Assistance for Needy Families (TANF) and Food Stamp Benefit: Questions and Answers" (U.S. Dept. of Health & Human Services and U.S. Dept. of Agriculture, last revised Mar. 24, 2006) (hereinafter "Policy Guidance: Questions and Answers"), <https://www.hhs.gov/sites/default/files/triagencyq%26as.pdf>.

<sup>7</sup> 42 U.S.C. § 2000d.

<sup>8</sup> 5 U.S.C. § 552a(e)(3).

<sup>9</sup> *Id.*

<sup>10</sup> 42 U.S.C. § 1320b-7(d)(3)(A).

<sup>11</sup> *Id.* § 1320b-7(d)(3)(A).

<sup>12</sup> “SAVE Verification Process” (U.S. Citizenship and Immigration Services webpage), <https://www.uscis.gov/save/about-save/verification-process>.

<sup>13</sup> *Id.*

<sup>14</sup> 42 U.S.C. § 1320b-7(d)(4). Protections against the use of this information for civil immigration enforcement purposes were enacted in the Immigration Reform and Control Act of 1986, P.L. 99-603, § 121(c)(1), 100 Stat. 3359, 3391 (1986), codified at 42 U.S.C. § 1320b-7 note.

<sup>15</sup> 42 U.S.C. § 1396a(a)(7) and 42 U.S.C. § 1320b-7(a)(5). It provides an exception for enrollment in other related programs, such as to verify children’s eligibility for school breakfast and lunch.

<sup>16</sup> 42 C.F.R. § 431.302.

<sup>17</sup> Letter from Sally Richardson, Center for Medicaid and State Operations, to State Medicaid Directors, (Dec. 17, 1997) (on file with the National Immigration Law Center).

<sup>18</sup> 42 C.F.R. § 431.305.

<sup>19</sup> *Id.* § 431.306.

<sup>20</sup> *Id.* § 431.300(b) and 42 C.F.R. § 431.300(c).

<sup>21</sup> *Id.* § 431.306 (d).

<sup>22</sup> *Id.* § 431.300(c)(2).

<sup>23</sup> *Id.* § 435.907(e)(1).

<sup>24</sup> *Id.* § 435.910.

<sup>25</sup> Additionally, Medicaid applicants must be notified why they are asked for an SSN and what it will be used for, and Medicaid agencies must help an individual apply for one if the individual is eligible for one but either doesn’t have one or doesn’t know their SSN. However, the individual’s coverage may not be denied or delayed pending issuance or verification of an SSN by the Social Security Administration (SSA). *Id.* § 435.910(e).

<sup>26</sup> *Id.* § 435.910(h).

<sup>27</sup> 42 U.S.C. § 3230b-7(f).

<sup>28</sup> 42 C.F.R. § 435.907(a); 42 C.F.R. § 435.4.

<sup>29</sup> *Id.* § 435.907(e)(2); § 435.907(e)(3); and § 435.910(e)(3).

<sup>30</sup> 42 C.F.R. § 435.907(e)(1). See also “Policy Guidance: Questions and Answers,” *supra* note 6. The preamble to the final rule on Medicaid program eligibility, at page 17164, notes that states may not request information regarding a nonapplicant’s citizenship or immigration status. Medicaid Program; Eligibility Changes Under the Affordable Care Act of

2010: Final Rule, 77 Fed. Reg. 17144–17217 (Mar. 23, 2012).

<sup>31</sup> 42 U.S.C. § 1397 bb (b)(4)(A).

<sup>32</sup> *Id.* § 1397 bb (b)(4)(B).

<sup>33</sup> 42 C.F.R. § 457.320(b)(4), 42 C.F.R. § 457.301.

<sup>34</sup> *Id.* § 457.1110; 42 CFR § 457.340 (b).

<sup>35</sup> Affordable Care Act § 1411(g)(1), codified at 42 U.S.C. § 18081(g)(1).

<sup>36</sup> *Id.* § 1411(g)(2), codified at 42 U.S.C. § 18081(g)(2).

<sup>37</sup> 45 C.F.R. § 155.260(a). The definition of *personally identifiable information* is provided at 45 C.F.R. § 1305.

<sup>38</sup> *Id.* § 155.260 (e)(3).

<sup>39</sup> *Id.* § 155.260(g).

<sup>40</sup> *Id.* § 155.310(a)(3)(i).

<sup>41</sup> *Id.* § 155.310(a)(2).

<sup>42</sup> *Id.* § 155.305(f)(6).

<sup>43</sup> “Clarification of Existing Practices Related to Certain Health Care Information” (U.S. Immigration and Customs Enforcement, Oct. 25, 2013), <https://www.ice.gov/doclib/ero-outreach/pdf/ice-aca-memo.pdf>.

<sup>44</sup> *Id.*

<sup>45</sup> 7 U.S.C. § 2020(e)(8).

<sup>46</sup> *Id.* § 2020(e)(8). NOTE: In New Jersey, the exception applies to a household member fleeing to avoid prosecution for a high misdemeanor.

<sup>47</sup> 7 C.F.R. § 273.4(b)(2).

<sup>48</sup> *Id.* § 273.2(f)(1)(ii)(A).

<sup>49</sup> Memorandum from Food and Nutrition Service, U.S. Dept. of Agriculture, to all Supplemental Nutrition Assistance Program (SNAP) regional directors, Re: “SNAP – Conforming to the Tri-Agency Guidance through Online Applications” (Feb. 18, 2011), [www.fns.usda.gov/sites/default/files/Tri-Agency\\_Guidance\\_Memo-021811.pdf](http://www.fns.usda.gov/sites/default/files/Tri-Agency_Guidance_Memo-021811.pdf); *Eligibility Manual for School Meals: Determining and Verifying Eligibility: School Year 2016-2017* (Child Nutrition Programs, USDA Food and Nutrition Services, U.S. Dept. of Agriculture, July 29, 2016), available from <https://www.fns.usda.gov/2016-edition-eligibility-manual-school-meals>; and “Policy Guidance: Questions and Answers,” *supra* note 6.

<sup>50</sup> 7 C.F.R. § 273.4(b)(2).

<sup>51</sup> 65 Fed. Reg. 58301 (Sep. 28, 2000).

<sup>52</sup> 42 U.S.C. § 1758(b)(9).

<sup>53</sup> *Id.* § 1758(d)(1); 7 C.F.R. 245.6(a)(6); 7 C.F.R. § 245.6(a)(6).

<sup>54</sup> Data-matching is allowed with SNAP, TANF, FDPIR and, in some states, Medicaid, as well as for children who are certified for free meals without an application because they are homeless, migrant, runaway, enrolled in Head Start, or are in foster care. See Madeleine Levin and Zoë Neuberger, *Improving Direct Certification Will Help More Low-Income Children Receive School Meals* (Center on Budget and Policy Priorities and Food Research & Action Center, undated), [http://frac.org/wp-content/uploads/direct\\_certification\\_update.pdf](http://frac.org/wp-content/uploads/direct_certification_update.pdf).

<sup>55</sup> Under the Healthy Hunger Free Kids Act of 2010, the highest poverty schools and school districts may provide school meals to all enrolled students without actually collecting or having parents sign household applications. Instead, schools are reimbursed using a formula based on the percentage of students certified for free meals without an application. “School Meals: Community Eligibility Provision” (Food and Nutrition Service, U.S. Dept. of Agriculture webpage), <https://www.fns.usda.gov/school-meals/community-eligibility-provision>.

<sup>56</sup> A map with links to state-specific information on local education agencies and schools that may be eligible to elect the Community Eligibility Provision (CEP) is available here: “School Meals: Community Eligibility Provision Status of School Districts and Schools by State” (Food and Nutrition Service, U.S. Dept. of Agriculture webpage), <https://www.fns.usda.gov/school-meals/community-eligibility-provision-status-school-districts-and-schools-state>.

<sup>57</sup> 42 U.S.C. § 1758(b)(3)(F); 42 U.S.C. § 1758(b)(6); 7 C.F.R. § 245.6(f). The specific rules about disclosures, what information may be shared, and whether consent is needed can be found at *Eligibility Manual for School Meals: Determining and Verifying Eligibility: School Year 2016-2017*, *supra* note 49, p. 71.

<sup>58</sup> 7 C.F.R. § 245.6(f).

<sup>59</sup> 42 U.S.C. § 1758(b)(6)(C).

<sup>60</sup> In 49 states and the District of Columbia, eligibility for WIC is not based on immigration status. However, as of 2014, Indiana requires immigration and citizenship status verification to obtain WIC services in the state. “Making Sure WIC’s Doors Stay Open to All Eligible Moms and Young Children” (National WIC Association, May 12, 2017), <https://www.nwica.org/blog/making-sure-wics-doors-stay-open-to-all-eligible-moms-and-young-children#.WR2nYhMrLFW>.

<sup>61</sup> 7 C.F.R. § 246.7.

<sup>62</sup> *Id.* § 246.7 (c)(2)(i).

<sup>63</sup> *Id.* § 246.26(d)(1)(ii). The regulations provide exceptions that allow a WIC state or local agency to use confidential participant information in the administration of other programs that serve people eligible for WIC and for child abuse and neglect reporting. 7 C.F.R. 246.26(d). If applicants sign a voluntary release form, WIC may share information with health care providers. 7 C.F.R. § 246.26(d)(4).

<sup>64</sup> *Id.* § 246.26(d)(1)(i). There are also specific rules for responding to a search warrant that limit to the greatest extent possible access to the confidential information.

<sup>65</sup> 42 U.S.C. § 602(a)(1)(v).

<sup>66</sup> 45 C.F.R. § 205.52.

<sup>67</sup> *Id.* § 205.52.

<sup>68</sup> “Tri-Agency Letter,” *supra* note 6; and “Policy Guidance: Questions and Answers,” *supra* note 6.

<sup>69</sup> When applying for TANF, the family unit may state that the nonapplicant is ineligible for TANF without providing information about the nonapplicant’s immigration status.

<sup>70</sup> “Policy Guidance: Questions and Answers,” *supra* note 6. Currently, Wisconsin is the only state that requires adults to have an eligible immigration status for their child to receive TANF. See “Wisconsin Works (W-2) Benefits” (WelfareInfo.org, undated), [www.welfareinfo.org/benefits/wisconsin-works-w-2-1684](http://www.welfareinfo.org/benefits/wisconsin-works-w-2-1684).

<sup>71</sup> 42 U.S.C. § 608(g).

<sup>72</sup> 65 Fed. Reg. 58301 (Sep. 28, 2000).

<sup>73</sup> See Hannah Matthews, *Immigrant Eligibility for Federal Child Care and Early Education Programs* (Center for Law and Social Policy, April 2017), [www.clasp.org/resources-and-publications/publication-1/Immigrant-Eligibility-for-ECE-Programs.pdf](http://www.clasp.org/resources-and-publications/publication-1/Immigrant-Eligibility-for-ECE-Programs.pdf).

<sup>74</sup> Child Care and Development Fund Program, Final Rule, Federal Register, Vol. 81, No 190, § 98.15(b)(13) (Sep. 30, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-09-30/pdf/2016-22986.pdf>. See also preamble to the final rule at page 67452.

<sup>75</sup> *Id.* See also preamble to the final rule at 81 Fed. Reg. 67452.

<sup>76</sup> *Id.* See also Memo from the Administration on Children, Youth and Families, U.S. Dept. of Health and Human Services, to Lead Agencies administering child care programs under the Child Care and Development Block Grant (CCDBG) Act of 1990 as amended and other interested parties, subject: Clarification of Interpretation of “Federal Public Benefit” Regarding Child Care and Development Fund (CCDF) Services (Nov. 25, 1998),

<https://www.acf.hhs.gov/sites/default/files/occ/pio808.pdf>. See also Matthews, *supra* note 73.

<sup>77</sup> *Id.*

<sup>78</sup> The preamble to the final rule on Child Care and Development Fund Programs, at page 67532, states that it has amended language at § 98.71(a)(14) by deleting Social Security numbers (SSNs) and instead requiring a unique identifying number that will allow Lead Agencies and ACF to identify unique families over time in the absence of the SSN. The preamble states, “Pursuant to the Privacy Act (5 U.S.C. 552a note), Lead Agencies may not require families to disclose SSNs as a condition of receiving CCDF services.” Child Care and Development Fund Program, Final Rule, *supra* note 74. See also “Clarifying Policy Regarding Limits on Use of Social Security Numbers under the CCDF,” Program Instruction ACYF=PI-CC-00-04 (Office of Child Care, Administration for Children and Families, U.S. Dept. of Health and Human Services, published Oct. 27, 2000), <https://www.acf.hhs.gov/occ/resource/pi-cc-00-04>. This guidance was incorporated by reference into the final rule at 81 Fed. Reg. 67452.

<sup>79</sup> U.S. Dept. of Health and Human Services, Program Instruction ACYF=PI-CC-00-04, “Clarifying Policy Regarding Limits on Use of Social Security Numbers under the CCDF,” Office of Child Care, Administration for Children and Families (Oct. 27, 2000), <https://www.acf.hhs.gov/occ/resource/pi-cc-00-04>. This guidance was incorporated by reference into final rule at 81 Fed. Reg. 67452.

<sup>80</sup> *Id.*

<sup>81</sup> Memo re: Clarification of Interpretation of “Federal Public Benefit” Regarding Child Care and Development Fund (CCDF) Services, *supra* note 76. This applies when services are subject to the Head

Start Performance Standards and are supported by combined Head Start/ CCDF funding or are provided by service arrangements with child care agencies or when an agency that operates a Head Start program also provides a separate program for children that is entirely supported by CCDF funds.

<sup>82</sup> *Id.* In addition, child care providers that are nonprofit charitable organizations are not required to determine, verify, or otherwise require proof of eligibility of any applicant for benefits. The U.S. Dept. of Justice Rule on Verification for Public Benefits defines a nonprofit charitable organization as “an organization that is organized and operated (1) for purposes other than making gains or profits for the organization, its members or shareholders, and is precluded from distributing any gains or profits to its members or shareholders; and (2) for charitable purposes, including relief of the poor and distressed or the underprivileged, advancement of religion, or advancement of education.” There is an exception if a Head Start grantee also administers a separate program for children (not subject to Head Start Performance Standards) entirely supported by CCDF funds. In this specific case, the CCDF program would not be exempt from the Personal Responsibility and Work Opportunity Act’s (PRWORA’s) verification requirements.

<sup>83</sup> The Head Start and Early Head Start programs have been determined not to provide federal public benefits because non-post-secondary education benefits were omitted from the statutory definition in title IV of PRWORA. Therefore, Head Start providers are not required to implement PRWORA’s verification requirements. Memo re: Clarification of Interpretation of “Federal Public Benefit” Regarding Child Care and Development Fund (CCDF) Services, *supra* note 76.