

NLWJC - Kagan

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Medicaid

December 11, 1996

IMMIGRANTS WHO LOSE SSI/MEDICAID DUE TO IMMIGRATION STATUS

Background

The welfare reform law affects "qualified" legal immigrants in several ways. One provision of the new law specifically cuts off SSI benefits for all immigrants, including those already in the U.S. and receiving benefits. Since SSI recipients are automatically eligible for Medicaid, the result of welfare reform is that there is no longer a guarantee of Medicaid coverage for these "qualified" immigrants.

However, in a State electing to cover "qualified" immigrants, many of these individuals can still receive Medicaid if they are eligible under another category, such as medically needy or one of the optional, non-cash assistance groups. The medically needy option is for individuals with income and resources that are too high, but who have incurred medical expenses which allow them to "spend down" to Medicaid eligibility. The optional non-cash assistance groups provide Medicaid to individuals who would be eligible for SSI or AFDC, but for some circumstance that caused them to be ineligible for cash.

In some States, Medicaid is only provided to individuals who are actually receiving cash assistance. The States do not cover any other groups under which immigrants might qualify and so, the new welfare statute will cause these immigrants (who would otherwise be eligible for SSI) to become ineligible for Medicaid. It is not clear whether this was the intent of Congress.

We have three proposals based on the "separate bucket" concept. The first is the change in the definition of medically needy that allows more States to automatically continue coverage of "qualified" immigrants, which has already been accepted. In addition, we are proposing both an administrative and a legislative fix which, together with the medically needy change, will enable all 51 States to extend Medicaid eligibility for those individuals who will lose SSI due to their immigration status.

Options:

- o **Propose a temporary delay of implementation of the restrictions on coverage of individuals who lose SSI due to immigration status (Administrative Proposal)**

This proposal delays implementation of the new restrictions for "qualified" immigrants who will lose SSI because of the welfare reform restrictions on immigrants. States would be advised in the preamble to a proposed welfare reform regulation that they may continue to cover qualified immigrants who would otherwise meet the income and resources requirements of the SSI program, even if the State does not cover optional SSI-related Medicaid eligibility groups.

This approach is based upon the assumption that Congress did not intend to deprive

“qualified” immigrants of Medicaid (including emergency services), while still requiring States to provide non-qualified immigrants with Medicaid for emergency services.

This administrative approach would enable the State to cover qualified immigrants, who are at imminent risk of losing Medicaid, but only for a short period. This will give us time to ask Congress whether they intended to remove these qualified immigrants from Medicaid. Unless Congress indicates that it did not intend for these qualified immigrants to lose Medicaid or the commenters identify a legal basis under existing law for continued eligibility, the final regulation will eliminate Medicaid coverage for these individuals.

- o Propose optional Medicaid eligibility for “qualified aliens” who would be eligible for SSI cash except for the welfare reform ban. (Legislative Proposal)**

Create an optional Medicaid eligibility group, specifically for those “qualified” legal immigrants who lose SSI cash assistance.

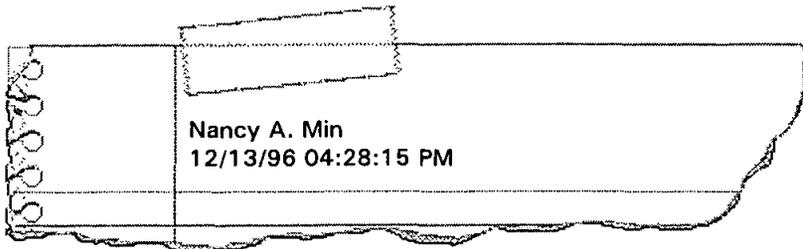
This proposal would create a mechanism for States that have not opted to continue Medicaid benefits for all individuals who meet SSI criteria but do not receive SSI payments, but who wish to protect this particular group of legal “qualified aliens.”

The proposed administrative solutions will provide only a temporary delay to the implementation of these restrictions. Passage of this proposal would allow the 7 States not helped by the administrative fixes to provide Medicaid coverage to “qualified” immigrants. In addition, the advantage of a legislative change is that creating a separate optional eligibility category preserves the automatic link between cash-assistance and Medicaid, and provides States with a great deal of flexibility.

Recommendation

We recommend both of these options.

While administrative solutions are preferable, the only way to guarantee that States have the ability to continue providing Medicaid coverage to “qualified” immigrants is through a legislative change. The regulatory change will create a temporary delay in implementation of these restrictions, but this delay is temporary, since there is no apparent statutory authority for a permanent fix. A permanent solution must be enacted by Congress.



Record Type: Record

To: FORTUNA_D @ A1 @ CD @ LNGTWY

cc: See the distribution list at the bottom of this message

Subject: Re: SSI/Medicaid "bucket" 

I heard a rumor that there was a new, creative wind blowing. I will be very interested in seeing this paper. I hope it solves the problem.

Message Copied To:

Elena Kagan/WHO/EOP
Kenneth S. Apfel/OMB/EOP
Emily Bromberg/WHO/EOP
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FORTUNA_D @ A1
12/13/96 11:48:00 AM

Record Type: Record

To: See the distribution list at the bottom of this message

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Subject: SSI/Medicaid "bucket"

HHS had a meeting on the bucket with the Secretary. They decided they advocate an alternative between the advocates' position that it can be done administratively and the alternative view that it must be done legislatively. Based on some obscure legal authority, they believe they can tell (require?) states to continue to give Medicaid to those losing SSI for a year (?), and that beyond that they need legislation.

I am allegedly going to get some paper on this, which I will forward to relevant parties.

All of this, of course, puts aside the budget issue.

Elena, it would be helpful if you could talk to Anna about this, to see if we can come to a resolution on the legal end of things.

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FAX MEMORANDUM

TO: Elena Kagan

FROM: Chai Feldblum *CF*

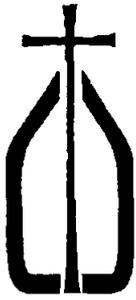
DATE: December 6, 1996

PAGES: 9 (including this one)

RE: SSI - Medicaid Link After Welfare Reform

OK, finally--attached are the comments we prepared on behalf of Catholic Charities USA in response to the draft Medicaid Manual issued by HCFA. I've sent this to Anna Durand, as well.

I also talked to Randy Moss yesterday about a bunch of welfare reform issues. In good lawyer style, he mostly listened with no comment. But I've sent this along to him as well--although I'm not sure how deep he's in this particular issue. Anyway, the welfare reform language is certainly susceptible to a number of equally reasonable legal interpretations. I just hope the interpretation that best serves the interest of public policy is the one arrived at! (And OMB will find the savings)



Catholic
Charities
USA

December 5, 1996

Rondalyn Haughton
Director, Office of Professional Relations
Department of Health and Human Services
Health Care Financing Administration
200 Independence Ave., SW, Room 435-H
Washington, DC 20201

Dear Ms. Haughton,

We are writing to offer comments to the Medicaid Manual distributed by your office on November 22. We commend your efforts to implement smoothly, and with as little harm as possible to those in need, the changes in Medicaid occasioned by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "Welfare Act"). Keeping in mind the President's commitment to preserve services and benefits for legal immigrants when allowed under the law, we ask that you revisit one area which will affect the well-being of a large segment of legal immigrants who rely on Medicaid. We ask you to clarify that States have the discretion, without expanding their existing Medicaid programs, to provide Medicaid to immigrants who previously received SSI cash payments. These comments provide and explain the legal basis for this interpretation. They also offer proposed language for the Medicaid Manual.

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I. WELFARE ACT PROVISIONS

Prior to the passage of the Welfare Act, one of the primary ways in which immigrants qualified for Medicaid was through the receipt of Supplemental Security Income ("SSI") cash payments. Section 402(a) of the Welfare Act now prohibits certain immigrants who are lawfully residing in the United States ("legal immigrants") from receiving SSI payments. Section 402(b) of that Act gives States the discretion to determine whether legal immigrants otherwise eligible for Medicaid under a State plan will remain eligible for Medicaid.

Section 402(b) allows States to ask and answer a single question: "Will we, as a State, continue Medicaid eligibility for legal immigrants who are otherwise eligible for Medicaid under our State plan?" If a State answers this question in the negative, legal immigrants will be denied Medicaid in that State. Conversely, if a State answers affirmatively, legal immigrants will be treated *as if they were citizens* for purposes of Medicaid eligibility in that State. Immigrants who previously received SSI payments will be "deemed" as if they were receiving SSI and will be eligible for Medicaid as part of that "categorically needy" group.

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If a State fails to notify the Federal government of its decision regarding Medicaid eligibility for legal immigrants, such immigrants will continue to be eligible for Medicaid under current categories for which they qualify *as immigrants*. In other words, legal immigrants who were receiving Medicaid through the receipt of AFDC, as pregnant women or children, or through any category other than SSI, will automatically continue to be covered under Medicaid in any State that has not notified the Federal government of its desire to eliminate Medicaid coverage for such individuals.

Legal immigrants who previously received SSI cash payments and who live in a State that has elected to cover individuals who meet the income, resource, and disability requirements of SSI, but are not actually receiving SSI cash payments, will automatically fall into this "SSI/optional categorically needy" group and will receive Medicaid. Conversely, legal immigrants who previously received SSI payments in a State that has not elected to create a "SSI/optional categorically needy" group will lose Medicaid coverage if the State fails to notify the Federal government of its intention to cover such individuals.

II. STATE DISCRETION TO PROVIDE MEDICAID TO IMMIGRANTS

The discretion provided to States by §402(b) of the Welfare Act is both broad and limited. It is *broad* in the sense that States are allowed to decide, notwithstanding any previous restriction in the Medicaid statute, whether or not to provide Medicaid coverage to immigrants lawfully residing in the United States. It is *limited* because States are given the authority to decide only *one* question: whether or not they will treat legal immigrants *as citizens* for purposes of Medicaid eligibility.

The broad discretion granted to States was the end result of a long political process. Early versions of the Welfare Act passed by the House of Representatives had barred current legal immigrants from Medicaid. In contrast, Senate-passed versions of the legislation gave States discretion to bar legal immigrants from Medicaid. The conference agreement for the final Welfare Act followed the Senate approach in response to pressure from States that wished to maintain Medicaid coverage for current legal immigrants in order to retain access to Federal funds. Thus, Congress' ultimate political resolution was to provide States the broad discretion and flexibility to grant or deny Medicaid eligibility to legal immigrants.

The limitation on State discretion arises from the convergence of §402(b)(1) and §433 of the Welfare Act. Section 402(b)(1) provides the following:

Notwithstanding any other provision of law . . . a State is authorized to determine the *eligibility* of an alien who is a qualified alien for [Medicaid].

Section 433(a)(1) provides the following definition of "eligibility:"

For purposes of this title, eligibility relates only to the *general issue* of eligibility or ineligibility *on the basis of alienage* (emphasis added).

The combination of §402(b)(1) and §433 makes clear that States are allowed to make one decision: whether they will consider individuals eligible or ineligible *because of* their alienage. If a State decides aliens will be eligible, that means the State has decided to *disregard alienage* and to treat immigrants legally residing in the United States *as if they were citizens* for purposes of Medicaid eligibility.

If a State exercises its authority to consider legal immigrants as if they were citizens, immigrants who would receive SSI payments except for their alienage will be "*deemed*" as if they were receiving SSI payments for purposes of Medicaid eligibility. The concept of "*deeming*" is not a foreign one. Congress has amended Medicaid to create several categories of individuals who are "*deemed*" to be receiving SSI or AFDC for purposes of Medicaid eligibility,¹ and the Health Care Financing Administration ("HCFA") has often issued regulations implementing these statutory changes.² Indeed, Congress took an analogous action in the Welfare Act with regard to families losing AFDC as a result of the repeal of that program. In §114 of the Welfare Act (the "Chafce-Breaux provision"), Congress required States to continue providing Medicaid to individuals who *would have received* AFDC prior to the enactment of the Welfare Act. Section 114 states: "For purposes of this title . . . in determining eligibility for medical assistance, an individual *shall be treated as receiving [AFDC] aid or assistance.*"

In the context of SSI and immigrants, however, rather than amend the Medicaid statute to create a category of individuals deemed as receiving SSI payments, and rather than mandate States to create such a category, Congress chose to delegate the *decision* to create such a category, and the *authority* to do so, to the States. Once a State decides to provide Medicaid coverage to legal immigrants, it has chosen to exercise the option provided it by Congress to deem such individuals as if they were receiving SSI payments. Thus, Congress acted to deny SSI *cash* payments to immigrants legally residing in the United States, but chose to delegate the consequential question of *Medicaid* coverage to the States.

¹ See, e.g., 42 U.S.C. §1396v(a)(3) (Medicaid eligibility maintained for foster children who would have been eligible for AFDC except for removal from the family home by court order or voluntary placement by deeming them as receiving AFDC); see also 42 U.S.C. §1396v(a)(5)(E) (Medicaid eligibility restored for individuals who lost Medicaid because a Social Security cost of living increase made them ineligible for SSI by deeming them as receiving SSI).

² See, e.g., 42 C.F.R. §435.113, 42 C.F.R. §435.122 .

III. HCFA'S INTERPRETATION

The reading of §402 offered by HCFA fails to give appropriate weight to Congress' ultimate political resolution with regard to Medicaid and the States, and fails to implement the discretion granted by Congress to the States as part of that resolution. Subsection 3212.3(B) of the November 22 draft of HCFA's Medicaid Manual directs States to continue providing Medicaid until notified that "a Medicaid eligible SSI recipient's SSI benefits have stopped" When this occurs, the State Medicaid office is directed to redetermine the alien's Medicaid eligibility under other existing categories in the State's Medicaid program.

Under HCFA's reading, many States would be required to *expand* their Medicaid program in order to continue covering the *same* people they cover now. At the present time, twenty-nine States have chosen to provide Medicaid to individuals who meet the income and resource requirements, and the disability standard, of SSI but do not actually receive SSI payments.³ If these States wish to cover legal immigrants as before, they need do nothing more than recertify such individuals as "SSI/optionally categorically needy." But if any of the remaining twenty-one States wishes to cover the same immigrants they had been covering before, these States must create a *new* "SSI/optional categorically needy" group for *both* citizens and immigrants. (October 4, 1996, Letter from HCFA to State Medicaid Directors, HCFA Fact Sheet #3.)

There is no evidence in the legislative history that Congress intended to require States to expand Medicaid coverage in order to serve the same people they were serving before. Indeed, such a result would have been contrary to the spirit of the political resolution reached by Congress to accommodate the States. The most significant mention of Medicaid eligibility for legal immigrants during the overall course of welfare reform legislation speaks not of expanding State programs, but of providing States with the discretion to determine eligibility: "The conference agreement follows the House bill and the Senate amendment with the following modifications: . . . States have the option of providing benefits to lawfully present aliens under . . . Medicaid . . ." (Cong. Rec. H15432, Dec. 21, 1995).⁴ Forcing a State to continue its identical Medicaid coverage for legal immigrants *only* by significantly expanding its existing Medicaid program would be a sufficiently dramatic change that one would expect to see such an

³ In its October 4, 1996 letter to State Medicaid Directors (Fact Sheet #3), HCFA calls this group "non-cash SSI-related." We call this group "SSI/optionally categorically needy," based on "Yellow Book" terminology.

⁴ This sentence appears in the conference report to the first welfare bill passed by Congress. In the House version of that bill, legal immigrants had been barred completely from Medicaid; in the Senate version, legal immigrants were barred only from SSI. The conferees agreed on an approach that followed the Senate version, and explicitly gave States discretion to determine Medicaid coverage for legal immigrants.

intent reflected somewhere in the conference agreement or the Congressional Record. As the time-honored principle of statutory interpretation teaches, the “dog didn’t bark” in this case.⁵

HCFA may be relying for its interpretation on a report by the Congressional Budget Office (“CBO”) analyzing the budgetary implications of the final Welfare Act that passed. In its report, CBO determined the amount of the Act’s savings by assuming that immigrants previously receiving SSI cash payments would no longer be eligible for Medicaid as a categorically needy group. As the report stated, a “number of legal immigrants currently residing in the United States would lose Medicaid under the bill because they have been eliminated from receiving SSI cash benefits and cannot qualify for Medicaid under any other eligibility category.” (Congressional Budget Office, Federal Budgetary Implications of H.R. 3734, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996.)

The interpretation of the bill on which CBO based its cost estimate is flawed. This interpretation failed to recognize Congress’ ultimate political resolution of granting States *discretion* to deem legal immigrants as receiving SSI and thus being eligible for Medicaid. CBO’s cost estimate is flawed because it failed to include analysis of an additional option allowed by the bill: that States might choose to *continue* covering legal immigrants under Medicaid *just as they had been covering such individuals before*. Granting States the discretion to continue coverage was precisely the goal of the conference agreement.

HCFA, as an executive agency responsible for interpreting statutory language, should not continue a misreading of statutory language based on CBO’s incorrect interpretation. It is a cardinal rule of statutory interpretation that executive agencies are charged with “the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 851 (1984).

IV. “NOTWITHSTANDING ANY OTHER PROVISION OF LAW”

Section 402(b)(1) provides the following:

Notwithstanding any other provision of law . . . a State is authorized to determine the eligibility of an alien who is a qualified alien for [Medicaid].

For States that wish to continue Medicaid coverage for legal aliens, the phrase “notwithstanding any other provision of law” provides these States with the necessary authority to do so. That is, *notwithstanding* §402(a), which bars SSI cash payments to immigrants lawfully residing in the United States, and *notwithstanding* 42 U.S.C. §1396a(a)(10)(i)(II), which mandates Medicaid coverage solely for individuals “with respect to whom supplemental security

⁵ See, e.g., Shine v. Shine, 802 F.2d 583 (1986) (explaining principle that a statute “should not be read to effect a reversal of . . . long-standing principles” without legislative history affirmatively evincing such Congressional intent, including “not[ation] in the congressional discussions”).

income benefits are being paid under title XVI," States are authorized to deem such immigrants *as if* they were receiving SSI cash payments for purposes of Medicaid eligibility.

For States that wish to deny Medicaid coverage for legal immigrants, the phrase "notwithstanding any provision of law" provides States with the authority to take that course of action. That is, *notwithstanding* the legal requirements of the statute authorizing Medicaid (*see, e.g., Medicaid Source Book: Background Data and Analysis ("Yellow Book"), CRS 103-A, Jan. 1993, p. 244*), States may discriminate against immigrants as a group in their Medicaid programs.

Any broader reading of the phrase "notwithstanding any other provision of law" would be inappropriate. There is no evidence in the legislative history that the phrase was intended to encompass a wholesale repeal of all Medicaid rules, such as statewideness, comparability, and amount, duration, and scope, or a wholesale repeal of all statutory civil rights rules.⁶ Such an interpretation would have been a monumental change in healthcare and civil rights principles and would not have been accompanied by silence. (*See, e.g., Shine v. Shine*, 802 F.2d 583 (1986).)

Instead of such a bizarre and far-reaching interpretation, the phrase "notwithstanding any other provision of law" must be understood in light of the explicit *limited* definition of "eligibility" provided by Congress in §433. Congress intended for States to be given the authority to decide whether alienage would *matter* in the initial decision of whether to provide Medicaid coverage. The phrase "notwithstanding any provision of law" was inserted to provide States with the statutory leeway to exercise this one particular decision. Thus, once States choose to disregard alienage and provide Medicaid to legal immigrants, they remain bound by existing Medicaid requirements of statewideness, comparability, and amount, duration and scope.

V. CONCLUSION

HCFA should strike § 3212.3 of its Medicaid Manual and insert a new §3212.3 as follows:

3212.3 Transition for aliens receiving Medicaid benefits on August 22, 1996.--

A. Aliens receiving Medicaid on August 22, 1996.--Continue to provide Medicaid to any alien who was lawfully residing in a State, who continues to meet the State's Medicaid eligibility criteria, and who was receiving Medicaid on August 22, 1996 until January 1, 1997. An individual is considered to be receiving Medicaid on August 22, 1996 if the individual had a valid Medicaid card or your records show Medicaid eligibility on that date.

⁶ For example, Title VI of the Civil Rights Act of 1964 provides that no person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of or be subject to discrimination under, any program or activity receiving Federal financial assistance. (42 U.S.C. § 2000(d) (1996).)

B. State Discretion After January 1, 1997.--After January 1, 1996 you are granted the authority to determine Medicaid eligibility for qualified immigrants. You must answer a single question: "Will we, as a State, consider qualified immigrants eligible for Medicaid?"

- If you answer in the negative, all qualified immigrants, subject to the exceptions in §3212.4, will be barred from receiving Medicaid in your State.

- If you answer affirmatively, qualified immigrants will be treated as citizens for the purposes of Medicaid eligibility. Immigrants who would be eligible for SSI cash payments but for their alienage will be deemed as if they were receiving those payments, and will be eligible for Medicaid as members of that "categorically needy" group.

- You must inform the Health Care Financing Administration of your choice by stating explicitly in a letter signed by the your Medicaid Director that you have elected or declined to consider qualified immigrants eligible for Medicaid. You may also notify HCFA of your decision by amending your State plan.

C. Failure of State to Elect.--If you fail to notify the Federal government of your decision regarding Medicaid eligibility for immigrants as specified in (B), qualified immigrants will continue to be eligible for Medicaid under categories for which they currently qualify as immigrants:

- SSA will issue an informational notice to all SSI individuals whose citizenship status is unknown in early 1997. This notice will inform the SSI beneficiary of the changes in the law and give the individual 90 days to obtain evidence of citizenship or immigration status. The foregoing notice will be followed by another notice during the summer of 1997 telling the individual that SSI benefits will stop because the individual does not meet the alien eligibility requirements. This notice of planned action will generate an SDX record. Upon receipt of the SDX from SSA indicating that a Medicaid eligible SSI alien recipient's SSI benefits have stopped, redetermine the alien's Medicaid eligibility. FFP will be available for individuals who qualify under another Medicaid category.

- Qualified immigrants who meet the income, resource and disability requirements of SSI, but are not actually receiving SSI cash payments, will continue to be covered under Medicaid if you have elected to cover individuals who meet the income, resource, and disability requirements of SSI.

- If you have not previously elected to create such a group, and choose not to do so at the present time, qualified immigrants who had previously

received SSI will lose their Medicaid coverage through your failure to notify HCFA of your intentions regarding this group of individuals.

In addition, HCFA should amend §3212.5 to include the following:

- You must abide by all existing Medicaid requirements, including statewideness, comparability, and amount, duration, and scope with respect to "qualified" aliens.
- You may not discriminate among classes or groups of "qualified" aliens by providing different levels of services.
- You may not discriminate between citizens and "qualified" aliens by providing different levels of services.

Sincerely,

Rev. Fred Kammer, SJ
President
Catholic Charities USA



FORTUNA_D @ A1
12/03/96 01:48:00 PM

Record Type: Record

To: BENAMI_J @ A1@CD@LNGTWY

cc: Elena Kagan, Emily Bromberg, Keith J. Fontenot, ABERNATHY_P @ A1@CD@LNGTWY

Subject: bucket

Looks like fixing the bucket is expensive -- somewhere between \$750 million to \$2 billion over 6 or 7 years. There is confusion on this -- we scored nothing, which was not right; CBO scored \$2.5b, which is too much; and the truth is somewhere in between. But it's hard to see how it's less than \$750 million or so. (Keith: I got this from Bonnie Washington.)

OMB says the HCFA Actuary is doing a fresh number. But it's unclear whether we are stuck w/CBO's numbers, even if they're wrong. OMB is aware that they need to press them to do this number right away.

Shouldn't we add this to the menu/mix that OMB has developed?

10/29/96

"All-or-None" Qualified Alien Issue

Issue: Whether, if a State chooses to cover eligible qualified aliens, the State must cover all those eligible aliens in the categories into which they may fit, or whether the States may choose only certain categories of qualified aliens.

Background:

Historically, Title XIX has given States some flexibility around optional categorical eligibility policies, in that they can provide this optional eligibility to only one of the major categories, such as the aged or disabled, or to several or all of these categories. For the most part, Title XIX gives the same flexibility when States are deciding their options on covering the medically needy, i.e. they can cover one major category, several, or all of the major categories. (There is an exception for certain pregnant women and children, who are entitled to mandatory coverage).

With the enactment of welfare reform and its immigration provisions, States have asked if they are permitted a similar degree of flexibility, so they can cover, for example, only aged qualified aliens, or whether they must cover all qualified aliens if they choose to cover any at all.

While it is early in the States' decisionmaking process, the APWA reports that so far 14 States intend to provide Medicaid coverage to qualified aliens and 2 States have decided not to. At a recent E-TAG meeting, the States were asked whether any States is planning to cover some groups, but not all groups, of qualified aliens. The individuals in the E-TAG meeting were only aware of one State that plans to cover only some groups within the qualified alien population.

General Legal Principles:

- o A State cannot cover a category of qualified aliens unless it covers the same category for U.S. citizens.
- o Medicaid can only be provided to qualified aliens if they meet all other applicable eligibility requirements beyond immigration status.

Groups of Aliens Impacted:

- o Qualified aliens who entered the U.S. before August 22, 1996.
- o Qualified aliens for whom the 5 year ban has expired.
- o Certain qualified aliens who lose SSI because of immigration status, but who could still qualify under other Medicaid eligibility criteria.

Groups of Aliens Not Impacted:

- o Qualified aliens excepted from the 5 year ban, who arrived in the U.S. on or after August 22, 1996, and whose Medicaid eligibility is mandated by Section 403(b).
- o Qualified aliens whose Medicaid eligibility is mandated by Section 402(b)(2), such as legal immigrant who have worked 40 qualifying quarters.

Options:

Two options are offered for consideration:

1. **If a State covers any impacted qualified alien, it must cover all impacted qualified aliens who would otherwise meet the eligibility requirements in the State Plan.**

Pros

- o **This option promotes equity among the various categories of impacted qualified aliens.**
- o **Adopting this option may induce States to make Medicaid eligible certain categories of impacted qualified aliens whom they would not otherwise cover.**

Cons

- o **Requiring States to cover all qualified aliens may induce some of them to decide not to cover any impacted qualified aliens.**

2. A State may cover only certain subgroups of impacted qualified aliens based on the pre-welfare reform Medicaid eligibility categories. For example, a State could cover only those impacted qualified aliens who are aged.

Pros

- o May induce some States, who would not cover any impacted qualified aliens if placed in an all-or-none position, to cover some subgroups of impacted qualified aliens.

Cons

- o Creates inequity among impacted qualified aliens.
- o May result in fewer qualified aliens becoming Medicaid eligible than under Option 1, particularly since it does not appear that many States would be driven into selecting "none" if Option 2 is not available to them.
- o Creates administrative complexity for the States in keeping track of subgroups of qualified aliens who are or are not Medicaid eligible.
- o Causes more confusion for beneficiaries and providers in adding another layer to the decision tree of who is and is not eligible.

Recommendation:

We recommend option 1. This option serves the objective of seeking to lessen the impact of the welfare reform immigration provisions, and results in equitable treatment.

Establishing a Link Between TANF Eligibility and Medicaid Eligibility

Issue

Is there a way for States to make Medicaid eligibility flow directly from eligibility for TANF, assuming that the TANF and Medicaid eligibility requirements are properly aligned?

Problem

There is considerable concern over the possibility that individuals currently eligible for Medicaid because of receipt of AFDC will lose Medicaid as they move from AFDC to TANF. Loss of Medicaid could result from a number of possible administrative problems, including States requiring a new or separate Medicaid application from former AFDC recipients when they apply for TANF. If a separate application is required, it is likely some individuals either will not take the steps necessary to file the application, or in some other manner will "fall through the cracks" in the administrative process. The potential for loss of Medicaid would be greatly reduced if States could provide automatic eligibility for TANF recipients, thereby eliminating the need for a separate Medicaid application.

Discussion

The welfare reform legislation permits States to use a common application for TANF and Medicaid. Use of a common application obviously would eliminate many of the problems inherent in the use of a separate application for Medicaid. However, there is no authority for HCFA to require use of a common application, and differences between TANF and Medicaid program requirements could make it difficult for States to use a common application.

We can provide a simple check-off statement in the Medicaid State Plan (via a State Plan Preprint) allowing States to indicate that the eligibility criteria for TANF are the same as the criteria for Medicaid for the new section 1931 group. Such a check-off would identify States that have aligned TANF and Medicaid income and resource criteria. However, as briefly noted above, other differences between the TANF and Medicaid programs may make alignment of income and resource criteria alone insufficient to prevent the need for separate applications.

While income and resource criteria can be aligned between the two programs, other differences between the programs pose problems for complete program alignment. There are a number of requirements applicable to Medicaid which are not applicable to TANF. Following are examples of the differences between the two programs. This is not intended to be an exhaustive list; rather, these are items we can readily identify. Others would doubtless arise as we and the States gain actual program experience.

- o **Residency.** States generally require that individuals receiving Medicaid be permanent residents of the State. There is no similar requirement for TANF. While it is unlikely that most States would provide TANF benefits to non-residents, some States with large migrant populations might do so while the migrants are actually in the State. However, these individuals might not be residents of the State for Medicaid purposes.
- o **Assignment of rights to medical support and payment.** Individuals applying for Medicaid must, as a condition of eligibility, assign all rights to potential third-party sources of payment for medical expenses to the State Medicaid program. No similar provision exists in TANF.
- o **Deprivation/100 hour rule.** The various requirements surrounding this rule currently apply to Medicaid, but not to TANF. The applicability of this rule to the section 1931 group is still under discussion.
- o **Child must be living with a designated relative.** Medicaid requires that an eligible family must include a child living with a designated relative. (The definition of "living with" is included in the definition of "dependent child" in section 406(a) of the old title IV-A. Section 1931 specifically requires that families eligible for Medicaid under that section meet the eligibility criteria of sections 406(a) through (c) and 407(a).) TANF has no similar requirement.

There may be ways for States to accommodate these and similar differences and still avoid requiring a separate application for Medicaid. For example, a sophisticated automated eligibility system may be able to sort through and deal with the various program differences. If a State can (and is willing to) deal with the program differences in such a way as to make Medicaid eligibility flow from TANF eligibility as directly as possible, HCFA presumably would be able to approve such a process. Such approval could be done through the State Plan Preprint using a check-off similar to the one discussed previously.

A second check-off presumably could be added that would allow the State to stipulate that the various program differences have been dealt with so that eligibility for TANF results in eligibility for Medicaid. Such a check-off could be made fairly detailed, specifically listing the various program differences to be resolved and asking for a State assurance for each item. However, it may be difficult to design a complete list given the likelihood of additional program conflicts coming to light as we gain actual program experience.

As an alternative, States could be asked to provide a more general assurance to the effect that they had resolved all differences between the programs so that eligibility for Medicaid could flow seamlessly from TANF eligibility. While such a general assurance would result in HCFA having less specific information about State programs, it would make State plan submittals and, ultimately, program administration much easier for the

States. Also, there is considerable precedent for HCFA accepting assurances from the States in various program areas.

Assuming the details could be worked out, HCFA approval of a plan amendment where the check-off requirements are met would effectively constitute a certification that the two programs are aligned and eligibility for Medicaid would flow from eligibility for TANF. However, if States cannot, or for whatever reason will not, resolve the program differences so that only one application is necessary, there appears to be no authority for HCFA to require them to do otherwise. ✓

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RTrudel, 10/31/96; revised 11/7/96, revised 11/14/96



NATIONAL
ASSOCIATION
OF PUBLIC
HOSPITALS &
HEALTH
SYSTEMS

November 14, 1996

Mr. Bruce Vladeck
Health Care Financing Administration
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. Vladeck:

On behalf of the National Association of Public Hospitals and Health Systems (NAPH), I would like to thank you for your leadership and responsiveness in implementing the Medicaid-related provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 in a manner that is sensitive to the needs of America's safety net health system. As you are aware, the loss of Medicaid coverage for a significant number of legal immigrants, as envisioned in this bill, will have spillover effects on the ability of safety net providers to ensure access to necessary health services for all residents of our communities -- citizens as well as immigrants, insured as well as uninsured. Because of the stress that this rollback in coverage places on these providers' resources, it is important that the Medicaid-related provisions of the legislation be interpreted carefully so that no more individuals lose coverage than is required under the law.

In that spirit, I urge you to review HCFA's proposed policy with respect to current legal immigrants who lose their SSI and, derivatively, their Medicaid coverage under the bill. In an October 4 letter to State Medicaid Directors, HCFA indicated that states that currently do not have a non-cash SSI-related eligibility group for Medicaid would be required to amend their state plans to establish such a group if they wish to continue to cover immigrants who have lost SSI. These states would be faced with the dilemma of either disenrolling all current SSI immigrant recipients or effecting a significant expansion in their Medicaid programs well beyond what their resources may permit. Twenty-one states, including Texas, would confront such a predicament.

We believe the law permits a less drastic alternative. It is our reading of the Act that when it delegates to states the authority to "determine the eligibility of" legal aliens for Medicaid, it has authorized states effectively to ignore the alien status of those who otherwise meet SSI eligibility criteria and deem them to be SSI

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Mr. Bruce Vladeck
November 14, 1996
Page 2

recipients for purposes of determining Medicaid eligibility. In this way, states will not be required to create a new non-cash SSI-related eligibility category, but rather may opt simply to continue the Medicaid eligibility of those who otherwise would have lost it due solely to the loss of SSI. This reading of the statute is also consistent with Congress' otherwise stated intent to continue Medicaid coverage for all current immigrants, while providing states with an option to terminate coverage if they so choose.

In addition, we strongly recommend that HCFA clarify that in determining the Medicaid eligibility of legal immigrants, states only have the option to decide between continuing eligibility or not continuing eligibility for this population. They have not been granted flexibility to provide partial coverage or to distinguish between types of legal immigrants. In providing states with the option to "determine the eligibility" of legal immigrants, and in specifying that for these purposes, "eligibility relates only to the general issue of eligibility or ineligibility on the basis of alienage," Congress has made clear that the decision is an "up or down" one, and that states may not foray into other aspects of the Medicaid program, such as benefits packages, in determining "eligibility."

I am enclosing a copy of a memorandum prepared by the Georgetown Federal Legislation Clinic for Catholic Charities USA which discusses the legal theory supporting our interpretation of the statute in more detail. While this interpretation may not be the *only* possible reading of the law, it is clearly well within the scope of discretion that Congress has granted HCFA as the implementing agency. We urge you to adopt such an approach as you prepare final instructions for states in implementing this complex legislation.

We would be pleased to meet with you, your staff, and/or your lawyers to discuss this interpretation in more detail, if it would be helpful. Please feel free to give me a call at (202) 624-7237. Barbara Eyman (202-624-7359) and Lynne Fagnani (202-414-0101) are also available to answer any questions. In the meantime, I thank you once again for your demonstrated commitment to preserving and protecting our nation's system of safety net providers.

Sincerely,


Larry S. Gage
President

Enclosure
22171634.w51



GEORGETOWN UNIVERSITY LAW CENTER

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STATE DISCRETION TO DETERMINE
MEDICAID ELIGIBILITY FOR QUALIFIED ALIENS

I. INTRODUCTION

Prior to the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "Welfare Act"), one of the primary ways in which immigrants qualified for Medicaid was through the receipt of Supplemental Security Income ("SSI") cash payments. Section 402(a) of the Welfare Act now prohibits certain immigrants who are lawfully residing in the United States ("legal immigrants") from receiving SSI payments. Section 402(b) of that Act gives States the discretion to determine whether legal immigrants otherwise eligible for Medicaid under a State plan will remain eligible for Medicaid.

Section 402(b) allows States to ask and answer a single question: "Will we, as a State, continue Medicaid eligibility for legal immigrants who are otherwise eligible for Medicaid under our State plan?" If a State answers this question in the negative, legal immigrants will be denied Medicaid in that State. Conversely, if a State answers affirmatively, legal immigrants will be treated *as if they were citizens* for purposes of Medicaid eligibility in that State. Immigrants who used to be receiving SSI payments will be "deemed" as if they were receiving SSI and will be eligible for Medicaid as part of that "categorically needy" group.

If a State fails to notify the Federal government of its decision regarding Medicaid eligibility for legal immigrants, such immigrants will continue to be eligible for Medicaid under current categories for which they qualify *as immigrants*. In other words, legal immigrants who were receiving Medicaid through the receipt of AFDC, as pregnant women or children, or through any category other than SSI, will automatically continue to be covered under Medicaid in any State that has not notified the Federal government of its desire to eliminate Medicaid coverage for such individuals.

Legal immigrants who previously received SSI cash payments and who live in a State that has elected to cover individuals who meet the income, resource, and disability requirements of SSI, but are not actually receiving SSI cash payments, will automatically fall into this "SSI/optional categorically needy" group and will receive Medicaid. Conversely, legal immigrants who previously received SSI payments in a State that has not elected to create a "SSI/optional categorically needy" group will lose Medicaid coverage if the State fails to notify the Federal government of its intention to cover such individuals.

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Georgetown University Law Center

II. STATE DISCRETION TO PROVIDE MEDICAID TO IMMIGRANTS

The discretion provided to States by §402(b) of the Welfare Act is both broad and limited. It is *broad* in the sense that States are allowed to decide, notwithstanding any previous restriction in the Medicaid statute, whether or not to provide Medicaid coverage to immigrants lawfully residing in the United States. It is *limited* because States were given the authority to decide only *one* question: whether or not they will treat legal immigrants *as citizens* for purposes of Medicaid eligibility.

The broad discretion granted to States was the end result of a long political process. The House-passed version of the Welfare Act had barred current legal immigrants from Medicaid. In contrast, the Senate-passed version of the legislation gave States discretion to bar legal immigrants from Medicaid. The final conference agreement for the Welfare Act followed the Senate approach, recognizing that a number of States that wished to maintain Medicaid coverage for current legal immigrants would lose considerable Federal funds if the House approach was adopted. Thus, Congress' ultimate political resolution was to provide States the broad discretion and flexibility to grant or deny Medicaid eligibility to legal immigrants.

The limitation on State discretion arises from the convergence of §402(b)(1) and §433 of the Welfare Act. Section 402(b)(1) provides the following:

Notwithstanding any other provision of law . . . a State is authorized to determine the *eligibility* of an alien who is a qualified alien for [Medicaid].

Section 433(a)(1) provides the following definition of "eligibility:"

For purposes of this title, eligibility relates only to the *general issue* of eligibility or ineligibility *on the basis of alienage* (emphasis added).

The combination of §402(b)(1) and §433 makes clear that States are allowed to make one decision: whether they will consider individuals eligible or ineligible *because of* their alienage. If a State decides aliens will be eligible, the State has decided to *disregard alienage* and to treat immigrants legally residing in the United States *as if they were citizens* for the purposes of Medicaid eligibility.

If a State exercises its authority to consider legal immigrants as if they were citizens, these immigrants will be "*deemed*" as if they were receiving SSI payments for purposes of Medicaid eligibility. The concept of "deeming" is not a foreign one. Congress has amended Medicaid to create several categories of individuals who are "deemed" to be receiving SSI or AFDC for purposes of Medicaid eligibility,¹ and the Health Care Financing Administration

¹ See, e.g., 42 U.S.C. §1396v(a)(3) (Medicaid eligibility maintained for foster children who would have been eligible for AFDC except for removal from the family home by court order

("HCFA") has often issued regulations implementing these statutory changes.² Indeed, Congress took an analogous action in the Welfare Act with regard to families losing AFDC as a result of the repeal of that program. In §114 of the Welfare Act (the "Chafee-Breaux provision"), Congress required States to continue providing Medicaid to individuals who *would have received AFDC* prior to the enactment of the Welfare Act. Section 114 states: "For purposes of this title . . . in determining eligibility for medical assistance, an individual *shall be treated as receiving [AFDC] aid or assistance.*" cut by other way? i.e. didn't do same w/ SSI

In the context of SSI and immigrants, however, rather than amend the Medicaid statute to create a category of individuals deemed as receiving SSI payments, and rather than mandate States to create such a category, Congress chose to delegate the *decision* to create such a category, and the *authority* to do so, to the States. Once a State decides to provide Medicaid coverage to legal immigrants, it has chosen to exercise the option provided it by Congress to deem such individuals as if they were receiving SSI payments. Thus, Congress acted to deny SSI *cash* payments to immigrants legally residing in the United States, but chose to delegate the consequential question of *Medicaid* coverage to the States. || *

By contrast, the reading of §402 offered by HCFA³ fails to give appropriate weight to Congress' ultimate political resolution with regard to Medicaid and the States, and fails to implement the discretion granted by Congress to the States as part of that resolution. Under HCFA's reading, many States would be required to *expand* their Medicaid program in order to continue covering the *same* people they cover now. At the present time, twenty-nine States have chosen to provide Medicaid to individuals who meet the income and resource requirements, and the disability standard, of SSI but do not actually receive SSI payments.⁴ If these States wish to cover legal immigrants as before, they need do nothing more than recertify such individuals as "SSI/optionally categorically needy." But if any of the remaining twenty-one States wishes to cover the same immigrants they had been covering before, these States must create a *new* "SSI/optional categorically needy" group for *both* citizens and immigrants. |

There is no evidence in the legislative history that Congress intended to require States to expand Medicaid coverage in order to serve the same people they were serving before. Indeed, such a result would have been contrary to the spirit of the political resolution reached by Congress to accommodate the States. |

or voluntary placement by deeming them as receiving AFDC); *see also* 42 U.S.C. § 1396v(a)(5)(E) (Medicaid eligibility restored for individuals who lost Medicaid because a Social Security cost of living increase made them ineligible for SSI by deeming them as receiving SSI); *see also* CFR cites.

² *See, e.g.*, 42 C.F.R. §435.113, 42 C.F.R. §435.122 .

³ *See* HCFA's October 4, 1996 letter to State Medicaid Directors (Fact Sheet #3).

⁴ In its fact sheet, HCFA calls this group "non-cash SSI-related." We call this group "SSI/optionally categorically needy," based on "Yellow Book" terminology.

Moreover, forcing a State to continue its identical Medicaid coverage for legal immigrants *only* by significantly expanding its existing Medicaid program would be a sufficiently dramatic change that one would expect to see such an intent reflected somewhere in the committee reports or the Congressional Record. As the time-honored principle of statutory interpretation teaches, the “dog didn’t bark” in this case.⁵

III. “NOTWITHSTANDING ANY OTHER PROVISION OF LAW”

Section 402(b)(1) provides the following:

Notwithstanding any other provision of law . . . a State is authorized to determine the eligibility of an alien who is a qualified alien for [Medicaid].

For States that wish to continue Medicaid coverage for legal aliens, the phrase “notwithstanding any other provision of law” provides these States with the necessary authority to do so. That is, *notwithstanding* §402(a), which bars SSI cash payments to immigrants lawfully residing in the United States, and *notwithstanding* 42 U.S.C. §1396a(a)(10)(i)(II), which mandates Medicaid coverage solely for individuals “with respect to whom supplemental security income benefits are being paid under title XVI,” States are authorized to deem such immigrants *as if* they were receiving SSI cash payments for purposes of Medicaid eligibility.

For States that wish to deny Medicaid coverage for legal immigrants, the phrase “notwithstanding any provision of law” provides States with the authority to take that course of action. That is, *notwithstanding* the legal requirements of the statute authorizing Medicaid,⁶ States may discriminate against immigrants as a group in their Medicaid programs.

Any broader reading of the phrase “notwithstanding any other provision of law” would be inappropriate. There is no evidence in the legislative history that the phrase was intended to encompass a wholesale repeal of all Medicaid rules, such as statewideness, comparability, and amount, duration, and scope, or a wholesale repeal of all statutory civil rights rules.⁷ Such an interpretation would have been a monumental change in healthcare and civil rights principles and would not have been accompanied by silence. (See, e.g., Shine v. Shine, 802 F.2d 583 (1986).)

⁵ See, e.g., Shine v. Shine, 802 F.2d 583 (1986)(explaining principle that a statute “should not be read to effect a reversal of . . . long-standing principles” without legislative history affirmatively evincing such Congressional intent, including “not[ation] in the congressional discussions”).

⁶ See, e.g., Medicaid Source Book: Background Data and Analysis (“Yellow Book”), CRS 103-A, Jan. 1993, p. 244.

⁷ For example, Title VI of the Civil Rights Act of 1964 provides that no person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of or be subject to discrimination under, any program or activity receiving Federal financial assistance. (42 U.S.C. § 2000(d) (1996).)

Instead of such a bizarre and far-reaching interpretation, the phrase "notwithstanding any other provision of law" must be understood in light of the explicit *limited* definition of "eligibility" provided by Congress in §433. Congress intended for States to be given the authority to decide whether alienage would *matter* in the initial decision of whether to provide Medicaid coverage. The phrase "notwithstanding any provision of law" was inserted to provide States with the statutory leeway to exercise this one particular decision. Thus, once States choose to disregard alienage and provide Medicaid, they remain bound by existing Medicaid requirements of statewideness, comparability, and amount, duration and scope.

IV. CONCLUSION

HCFA's guidance to States should read as follows:

The authority granted to States in §402(b)(1) to determine Medicaid eligibility for qualified immigrants requires States to answer a single question: "*Will we, as a State, consider qualified immigrants eligible for Medicaid?*" If a State answers in the negative, all qualified immigrants, subject to certain statutory exceptions, will be barred from receiving Medicaid in that State. If a State answers affirmatively, qualified immigrants will be treated as citizens for the purposes of Medicaid eligibility.

In States that elect to consider qualified immigrants eligible for Medicaid, immigrants who previously qualified because they received SSI cash payments will be deemed as if they were receiving those payments, notwithstanding §402(a), and will be eligible for Medicaid as members of that "categorically needy" group.

A State must inform the Health Care Financing Administration of its choice by stating explicitly in a letter signed by the State Medicaid Director that the State has elected or declined to consider qualified immigrants eligible for Medicaid. A State may also notify HCFA of its decision by amending its State plan.

Once a State makes a decision to provide Medicaid to qualified immigrants, the State must abide by existing Medicaid requirements of statewideness, comparability, and amount, duration, and scope with respect to the class of qualified immigrants.

If a State fails to notify the Federal government of its decision regarding Medicaid eligibility for immigrants, qualified immigrants will continue to be eligible for Medicaid under current categories for which they qualify *as immigrants*. In other words, qualified immigrants who were receiving Medicaid

through the receipt of AFDC, as pregnant women or children, or through any category other than SSI, will automatically continue to be covered under Medicaid in that State.

Qualified immigrants who previously received SSI cash payments in States that have elected to cover individuals who meet the income, resource, and disability requirements of SSI, but are not actually receiving SSI cash payments, will continue to be covered under Medicaid as members of that group. However, if a State has not previously elected to create such a group, and chooses not to do so at the present time, qualified immigrants who had previously received SSI will lose their Medicaid coverage through the State's failure to notify HCFA of its intentions regarding this group of individuals.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-Nov-1996 08:48pm

TO: Diana M. Fortuna

FROM: Christopher C. Jennings
 Domestic Policy Council

CC: Carol H. Rasco
CC: Jeremy D. Benami
CC: Pauline M. Abernathy

SUBJECT: RE: "all or none" issue

I personally believe that HHS is wrong on this one. I have never been comfortable with the all or nothing requirement on optional benefits. I believe it puts us in a position where some Governors may say, for example, I would not kick those elderly immigrants out of nursing homes if the Feds did not make me cover every eligibility category in order for me to prevent this. I simply do not have the money for everyone. Along these lines, the all or nothing approach serves, in my opinion, as a disincentive for some states to even consider covering these optional benefits.

As I understand it from Pauline and Nancy Ann, Diana, you did not reach final closure on this one yet? What is your reading on the state of play? What is your feeling on this issue at this point?

cj

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

18-Nov-1996 08:26am

TO: Diana M. Fortuna

FROM: Carol H. Rasco
 Domestic Policy Council

CC: Christopher C. Jennings
CC: Jeremy D. Benami
CC: Pauline M. Abernathy

SUBJECT: RE: "all or none" issue

I don't remember the specifics of that part of the conversation although I remember the meeting. We were primarily talking about expansions when we talked about states being able to expand.

However, let me strongly state I think it is wrong to go with all or nothing. The stories that could come out in the newspapers in the states are as bad as Chris indicates and worse. Financially many states will not be able to cover all without making some very serious cuts in other parts of medicaid or other parts of state budgets and with the public climate such as it is about immigrants I can assure you states will be politically forced to cut all if that is their only choice from the federal government.)

Thanks for the update.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

18-Nov-1996 10:41am

TO: Carol H. Rasco

FROM: Diana M. Fortuna
Domestic Policy Council

CC: Christopher C. Jennings
CC: Jeremy D. Benami
CC: Pauline M. Abernathy
CC: Stephen C. Warnath

SUBJECT: RE: "all or none" issue

We can -- and will -- pull back on this one and regroup.

I understand the arguments that have been put forth, and think they are good ones. Let me state a few arguments on the other side, though, just to make sure we are thinking of all the angles.

First, based on admittedly limited knowledge, it appears that most states are prepared to ante up on this. Therefore, giving them the option to pick and choose may open a door and encourage them to do so, and thereby reduce coverage we would otherwise get.

Second, unless I am missing something, state budgets already assume at this point that they will cover all of these people. Governors may argue in the future that deficits have arisen, and they need to cut back in this area to reach balance, but at the moment I don't think anyone has an argument that covering all legal immigrants will cost them money they weren't planning to spend. (I know, that doesn't mean they won't make such an argument publicly....)

Finally, I understand the general desirability of offering options to states on Medicaid, and recognize that states may well try to shift blame onto us if we make them cover all legal aliens. But the state option we would offer them here is to offer citizens one Medicaid package and legal immigrants another. You could say we already crossed the line on making distinctions by citizenship status when we signed the bill... but immigration does have more of a Federal interest to it than many other state options.

Anyway, food for thought.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

25-Oct-1996 01:07pm

TO: Jeremy D. Benami

FROM: Diana M. Fortuna
 Domestic Policy Council

CC: Kenneth S. Apfel
CC: Emily Bromberg
CC: Elena Kagan
CC: Stephen C. Warnath

SUBJECT: RE: Top Ten List

My updates:

1. Medicaid waiver b vs. d issue: HHS did have their meeting, and now know that very few states are affected (3-4) even if you take the most draconian interpretation of the law. So it appears that this is less of a mega-issue than we had thought. But HHS is still trying to decide internally which legal interpretation to go with, and doesn't want to meet with us again until they decide. I told Monahan I want to be involved during, not after, and need to push this with him. He argues there is no big rush on this question because the states aren't pressing us.

2. Disability reg: meeting set today at 2:30 w/OIRA/OMB and INS to bring me up to speed on this. (Rm 211 if anyone's interested.)

1815 H STREET, NW, SUITE 700
WASHINGTON, DC 20006

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FACSIMILE COVER LETTER

PLEASE DELIVER THE FOLLOWING PAGES TO:

Name: David Nielson

Date: November 6, 1996

Firm: ASPE

Time: 3:53 PM

FAX #: 690-6562

From: Josh Bernstein

No. of Pages: 8
(Including cover page)

REMARKS:

Attached are some comments regarding key Medicaid issues in welfare reform implementation. I hope it is not too late to circulate to others who will be at the meeting tomorrow. at 9³⁰ a.m.

517-6909

~~HW~~
-
ass - surc.

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WELFARE REFORM IMPLEMENTATION
Continuing Medicaid Coverage for Qualified Aliens,

by

Claudia Schlosberg, National Health Law Program
Trish Nemore, National Senior Citizens Law Center
Josh Bernstein, National Immigration Law Center

Introduction

This memorandum analyzes key elements of the provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub.L. 104-192)(the welfare law) granting to states authority to determine eligibility of qualified aliens for Medicaid.

The analysis is premised on the principle that while the welfare law creates major new restrictions on receipt of public benefits by legal immigrants, it leaves the structure of the Medicaid program intact. To exercise their option to continue to serve their existing Medicaid population, including those who lose SSI cash assistance, states need not expand their current Medicaid program or incur additional administrative expenses and may not alter or amend their Medicaid programs beyond the particular changes explicitly authorized by this law. This interpretation gives states authority to exercise their lawful options without undue administrative burden and expense; at the same time, it gives effect to President Clinton's commitment to minimize the harshest impacts of the law and preserve Medicaid for the largest number of aged and disabled qualified aliens.

I. THE MEDICAID STATUS OF QUALIFIED ALIENS WHO LOSE SSI CASH ASSISTANCE

Policy: Qualified aliens who lose SSI cash assistance remain categorically needy for Medicaid unless a state affirmatively chooses to not cover qualified aliens at all. States do not need to expand their existing Medicaid programs to continue coverage for these otherwise qualified aliens.

Under Section 402(a), qualified aliens who are not otherwise exempted¹ lose SSI cash assistance. Since SSI cash assistance recipients are mandatory categorically needy under the

¹ Exemptions from the bar to receipt of SSI are provided for refugees, asylees and certain individuals whose deportation is being withheld, until five years after the grant of those statuses, veterans (and their spouses and dependents) on active duty or honorably discharged, and lawful permanent residents with 40 quarters of qualifying work coverage during none of which they received federal means tested benefits. §402(a)(2).

Medicaid program (in all except the twelve section 209(b) states), the loss of SSI by most qualified aliens will sever their automatic link to Medicaid. However, unless and until a state affirmatively exercises its choice to exclude qualified aliens from coverage in its Medicaid program, it must continue Medicaid coverage for these individuals.² This is because the loss of SSI benefits is due solely to the status of the recipient as an alien; such status is an eligibility requirement inconsistent with the alien eligibility requirements of Medicaid provisions.³

Congress set forth two separate alien eligibility schemes: one for SSI and one for Medicaid. Whereas non-exempt qualified aliens are excluded from SSI, Congress gave states the authority to determine their eligibility for Medicaid. It would be inconsistent with this scheme for HCFA to interpret the SSI provision to apply to Medicaid as well. Such an interpretation would require states to deny Medicaid to aliens who would have been eligible for assistance but for their immigration status.

By giving states the choice to determine eligibility for Medicaid based on alienage, Congress has delegated to the states authority to deem as receiving SSI those who would receive SSI but for their alienage. Thus, non-exempt, qualified aliens who lose SSI cash assistance are in much the same situation as "Pickle" people who lost Medicaid because a Social Security cost of living increase made them ineligible for SSI, or families with stepchildren who lost Medicaid because AFDC deeming rules made them ineligible for AFDC cash assistance. In both situations, Medicaid was restored for these beneficiaries by "deeming" them eligible for the respective cash assistance programs. Through this mechanism, these beneficiaries retained eligibility as "mandatory categorically needy."⁴

The decision of a state to continue coverage of non-exempt, qualified aliens, therefore, is effectively a decision to deem these individuals SSI eligible and thus categorically needy and to continue to provide Medicaid as before. Stated alternatively, a state can continue to provide Medicaid benefits to qualified aliens who, "but for" their status as aliens, would be eligible for

² HCFA's Medicaid Bureau has made it clear to states that to exercise their choice to exclude qualified aliens from coverage in their Medicaid programs, they must amend their State Medicaid plan. Letter from Judith D. Moore, Acting Director, Medicaid Bureau to State Medicaid Directors, October 4, 1996 and accompanying Fact Sheet #3: "Link Between Medicaid and the Immigration provisions of the Personal Responsibility and Work Opportunity Act of 1996."

³ 42 C.F.R. § 435.406 requires states to provide benefits to certain lawfully admitted aliens who are otherwise eligible. "Qualified aliens" as defined in the welfare law, are included in this group. 42 C.F.R. § 435.408. 42 C.F.R. § 435.122 requires states who cover SSI recipients to provide Medicaid to individuals who would be eligible for SSI but for an eligibility requirement prohibited under Title XIX.

⁴ Medicaid regulations incorporating the "deeming" requirements are found at 42 C.F.R. Section 435.113 (AFDC) and 42 C.F.R. Section 435.122 (SSI).

SSI cash assistance.

Absent the deeming approach, states would have to redetermine eligibility of those qualified aliens losing SSI under another existing category of their Medicaid program. If they had no applicable category, they would have to deny coverage or expand their entire program. This approach defeats the legislative intent of permitting states to choose to continue their Medicaid coverage of existing program beneficiaries. Moreover, the necessary redeterminations are administratively costly and burdensome. Those who would lose Medicaid due to loss of SSI (in states without another category for them to fit into) might lose their right to emergency Medicaid services, a right not even denied to those who are "not qualified aliens."

how many? which?

a. Absent deeming, some states would have to expand their Medicaid programs in order to continue to cover current SSI recipients.

Only 29 states and the District of Columbia include in their state plans optional categorically needy coverage of individuals meeting SSI requirements but not receiving cash assistance (SSI/OCN). Only 35 states and the District of Columbia provide coverage to medically needy individuals. At least six states have neither a medically needy nor optional categorically needy program. Qualified aliens who lose SSI and who live in states without the full scope of optional Medicaid eligibility categories would lose Medicaid benefits unless the state amended its State Plan. Under Medicaid rules, however, if the state provides Medicaid to any individual in an optional group, the state must provide Medicaid to all individuals who apply and are found eligible in that group. 42 C.F.R. Section 435.201(b). Thus, in order to continue covering qualified aliens who lose cash assistance, states would actually have to expand Medicaid eligibility to all individuals within those other optional eligibility categories. Clearly, neither the automatic loss of Medicaid by recipients nor the mandated expansion of programs by states was intended by Congress.

Texas is one example of a State that, absent the ability to deem individuals SSI eligible, will not be able to continue Medicaid coverage of qualified aliens without expanding its Medicaid program. Over 7% of qualified aliens affected by the welfare bill live in Texas, and the Governor has indicated his interest in continuing Medicaid coverage for those individuals who will lose SSI. However, Texas has neither a medically needy program, nor a program for non-cash SSI-related individuals. The Texas Interagency Workgroup on Welfare Reform estimates that 37,283 aged and disabled qualified aliens receiving SSI in July 1996 would lose Medicaid even if the state opted to continue coverage "because their only access to Medicaid . . . is now being denied under the new federal statute."⁵

In sum, states should not have to expand Medicaid eligibility to order to exercise the option to continue to provide Medicaid benefits to non-exempt, qualified aliens who previously received SSI. To require states to do so would effectively nullify Congress' intent and would

⁵ "1996 Federal Welfare Reform: Major Implications for the State of Texas," Report of the Texas Interagency Workgroup on Welfare Reform, November 1, 1996 at A-M-15.

produce extraordinarily harsh results. Instead, HCFA must issue guidance to the states informing them that if they opt to continue coverage for non-exempt qualified aliens, and such aliens qualify for SSI "but for" their alien status, they remain categorically needy under the Medicaid program.

b. Absent deeming, states will be required to undertake administratively costly and burdensome redeterminations.

When individuals lose SSI cash assistance, states are required by Medicaid law to redetermine their eligibility under different categories of coverage provided by the State plan.⁶ HCFA has already reminded the states of their obligations in this regard. While such protection is critical to Medicaid recipients, to ensure that they do not experience an unnecessary break in coverage, it will be difficult for states to effectively undertake the volume of redeterminations that will be required, absent deeming. California will have to redetermine eligibility for over 270,000 recipients; New York will have to review nearly 105,000 cases. Significantly, the effect of requiring states to find other categories into which to move those losing SSI is to shift enormous administrative costs to the states. Yet, the welfare law provided no additional money for the states to undertake this reprocessing. Thus, the most effective, least costly path for assuring continued Medicaid for those who meet all SSI requirements except the new alienage restriction is to treat them as deemed SSI recipients and avoid the redetermination process.

c. Loss of Medicaid due to loss of SSI cash assistance might also result in loss of the right to emergency Medicaid services, services provided even to those who are "not qualified aliens."

In all cases where Congress has denied Medicaid to persons due to their alienage status, it has preserved emergency services. The welfare law requires states to provide emergency Medicaid services to an "alien who is not a qualified alien," who is otherwise denied access to a whole array of federal and state benefits.⁷ Moreover, if a state chooses its option under Section 402(b)(1) to not provide Medicaid services to "qualified aliens," it must, nevertheless, provide emergency services to those individuals who otherwise meet program requirements. Nothing in the law, however, requires, or even permits, states to provide emergency Medicaid to individuals who stand to lose SSI due to their immigration status. Thus, if Texas is unable effectively to exercise its option to continue coverage of those losing SSI without expanding its Medicaid program, it will not even be able to provide those individuals emergency services and receive federal payments for them. Surely, Congress did not intend that penniless elderly and disabled "qualified aliens" would lose access to emergency services available to certain "not qualified aliens."

⁶ 42 C.F.R. § 435.916(c); *Crippen v. Kheder*, 741 F.2d 106 (6th Cir. 1984); *Massachusetts Association of Older Americans v. Sharp*, 700 F.2d 749 (1st Cir. 1983).

⁷ Pub. L. 104-208 § 401(b).

d. HCFA has authority to formulate policy consistent with the purpose of the law.

While it is clear that Congress delegated authority to the states to determine eligibility based on alienage, and thus implicitly, to deem as categorically eligible those who would receive SSI "but for" their alien status, any doubt about the meaning of the statute can be resolved by HCFA's interpretation. It is the job of the Administration to make policy judgments that choose among competing reasonable interpretations of a statute. *See Pauly v. Bethenergy Minas*, 501 U.S. 680, 698-99 (1991). "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress..." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Rutz*, 415 U.S. 199, 231 (1974)). Courts will accept such policy-based determinations, and will not substitute their own constructions of ambiguous provisions, so long as the Administration's interpretation of the statute is "reasonable." *Id.* at 844. Thus, HCFA's interpretation of the law will be accorded weight by the courts both because of HCFA's expertise in administering the Medicaid statute and because of its authority and responsibility to elucidate the policy underlying the Congressional enactment.

II. STATES OPTING TO COVER QUALIFIED ALIENS UNDER SECTION 402(B)(1) MUST COMPLY WITH REQUIREMENTS OF THE MEDICAID PROGRAM.

***Policy:* States exercising their choice to cover qualified aliens must cover all qualified aliens with the full range of eligibility categories and services available to other Medicaid recipients in the state.**

Section 402(b)(1) provides "Notwithstanding any other provision of law . . . a state is authorized to determine the eligibility of an alien who is a qualified alien . . ." Section 402(b)(1), however, does not give states authority to selectively repeal provisions of the Medicaid statute. In fact, nothing in Title IV of the welfare law -- the segment addressing benefits for non-citizens -- amends the Medicaid statute. The clearest and most reasonable interpretation of section 402(b)(1) is that it authorizes states to elect to cover qualified aliens in their Medicaid program or not to cover qualified aliens in their Medicaid program. Once a state chooses to cover qualified aliens, it must do so within the existing framework of federal and state Medicaid law.

If Congress wants to repeal the Medicaid statute or give states authority to do so, it must act "with clear and manifest intent." *Watt v. Alaska*, 101 S. Ct. 1673, 451 U.S. 259, 68 L.Ed. 2d 80 (1981). Thus, Section 402(b)(1) must be construed narrowly. Rather than a broad grant of authority to rewrite the Medicaid statute, it merely gives states the option of restricting eligibility on the basis of alienage or not. Support for this position is found in Section 433(a)(1), which provides:

Nothing in this title may be construed as an entitlement or a determination of an individual's eligibility or fulfillment of the

requirements for any Federal, State, or local governmental program, assistance, or benefits. For purpose of this title, eligibility relates only to the general issue of eligibility or ineligibility on the basis of alienage.

(Emphasis added).

The "notwithstanding any other law" clause must be construed only to preclude operation of any law that would prohibit a state from denying Medicaid benefits on the basis of alienage. No legislative history suggests that Congress intended to repeal Medicaid provisions not related to alienage status and such a broad reading of the "notwithstanding" clause would be anathema to the way courts interpret laws. A fundamental tenet of statutory construction is that repeals by implication are not favored. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Morton v. Mancari*, 417 U.S. 535, 550 (1974). "Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then *only to the minimum extent necessary.*" (Emphasis added) *Radzanower*, 426 U.S. at 155 citing *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). The Medicaid statute's requirements and the welfare law's option to the states can be reconciled by the narrow interpretation stated above.

This narrow interpretation of the "notwithstanding" clause is necessary for another reason: to allow states to do other than choose "up or down" as to whether they will cover legal aliens in their Medicaid programs would result in violations of the 14th Amendment's equal protection clause. Agencies have a duty to construe a statute, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). Classifications "based on alienage, . . . are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. 371, 372 (1971) Thus, Congress may not have the authority to permit states to discriminate based on legal alienage. "A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity." *Id.* at 382. Even if Congress has such authority, such choices by the states must be exercised within the narrowest parameters. For example, a state could not choose to cover Russian immigrants in its program, but not Chinese immigrants. Similarly, a state cannot choose to offer some qualified aliens some services under one category of its Medicaid program, but exclude qualified aliens from other portions of the program.

Point this is being done even under narrow interp!

clarify based on ethnicity (not just alienage)

Statutory construction also compels a narrow interpretation of how states can exercise their choice under section 402(b). When Congress wants to give states wider latitude to pick and choose among aliens, it knows how to use language to do so. In contrast to the welfare law, the immigration law, Pub. L. 104-208 authorizes states to "prohibit or otherwise limit or restrict the eligibility of aliens or *classes of aliens* for programs of general cash public assistance..." Sec.

difficult

553(a) (Emphasis added.) No such distinction is offered in the welfare law, and none should be implied. *See Russello v. United States*, 464 U.S. 16, 23 (1983). (General assumption is Congress acts intentionally and purposely in the disparate inclusion or exclusion of specific language.)

Accordingly, the only question for states is whether they intend to continue to provide Medicaid coverage for qualified aliens or not. If a state chooses to continue coverage, it must comport with all Medicaid provisions (unless waived) including those regarding eligibility, statewideness and comparability.

November 1996



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November 1, 1996

Dennis Hayashi
Director, Office of Civil Rights
330 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. Hayashi:

I wanted to follow-up our brief conversation at the "Immigration and the '96 Welfare Law" Conference regarding implementation of the welfare law and its impact on Medicaid. As I explained, there is widespread concern that many legal aliens will unnecessarily lose Medicaid because of HCFA's narrow interpretation of section 402(b)(1) of the Personal Responsibility and Work Opportunities Act.

On October 4, 1996, HCFA mailed a letter to State Medicaid Directors that, in essence, tells states that qualified aliens who lose SSI under the law will not be able to continue to receive Medicaid unless "[a] State ... has opted under its Medicaid plan to cover non-cash SSI related groups" HCFA further advises states that if a State has not previously opted to cover non-cash SSI-related groups under its Medicaid State plan, it can submit a State plan amendment. In addition, HCFA notes that States "may still be able to cover some of the "qualified aliens" under other [optional] provisions of current Medicaid law (i.e., poverty-related pregnant woman and children, medically needy, etc.)."

Although the PRWOA plainly gives states the option to continue Medicaid coverage to qualified aliens who lose SSI cash assistance, HCFA's guidance to states severely limits that option. For example, over 7% of qualified aliens live in Texas, and Governor Bush has indicated he wants to continue to provide Medicaid benefits to these individuals. However, under HCFA's scheme, the only qualified aliens who could continue to receive Medicaid under Texas' current Medicaid State Plan are those who reside in nursing homes. If Texas wants to continue to provide Medicaid to qualified aliens in the community, it will have to amend its state plan. However, any amendment would constitute an expansion of the State's Medicaid program. The likelihood that Texas would undertake such an expansion in order to continue to provide Medicaid to current recipients who are qualified aliens is slim to none. The result is that, notwithstanding the Governor's interest in maintaining coverage, tens of thousands of aged, blind and disabled legal immigrants will lose their health coverage.

Texas is but one example of a State that will not be able to continue Medicaid coverage of qualified aliens because of HCFA's directive. Overall, there are 21 states that, like Texas, do not

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provide Medicaid to non-cash, SSI related groups. Although HCFA also suggests that states could continue coverage under other optional categories of coverage, optional State Medicaid programs are idiosyncratic and overall, will not assure that qualified aliens who lose SSI will have an alternative route to Medicaid.

Another serious drawback of HCFA's policy is that it imposes tremendous administrative burden and expense on states. In California, the state Medicaid office will be forced to undertake well over 200,000 eligibility redeterminations. New York's already beleaguered Medicaid program will have to review nearly 105,000 cases. Unlike the TANF provisions of the welfare law, the immigrant provisions includes no additional administrative money for undertaking these redeterminations.

There is a legally supportable alternative to HCFA's position. As is more explicitly detailed in the September 24, 1996 memo I gave to you at the conference, HCFA has the legal authority to permit states to deem qualified aliens who meet the SSI income and resource standard, categorically eligible for Medicaid. This would allow states that want to continue coverage to do so without expanding their Medicaid program or undertaking costly administrative reviews.

President Clinton has repeatedly stated his commitment to minimizing the pain of the welfare law. He also has repeatedly stated his commitment to preserving Medicaid. Many states want to exercise their option to provide Medicaid to qualified aliens who lose SSI but will be stymied by HCFA's guidance. I trust that the National Health Law Program and other interested stakeholders will be consulted before a final decision is reached on this issue.

Thank you for your interest.

Sincerely,

Claudia Schlosberg
Claudia Schlosberg

Medicaid / 88 11-7-96

Schlesinger - 4021 - st. opt to continue coverage
Start w/ pos that Medicaid statute remains intact
402 not a repeal
402 gives states opt on alien elig. for Med. - if you
don't change, it continues to give Med to g.a.'s
If st chooses to stay in M prog, then M rules apply

Issue: how do these p. get covered?

Under current M law, states can't deny based on alienage.

So st that opts to continue, it can continue to treat

Then people as categorically needy - bec alien criteria
not permitted under current M law.

AD - Then folks lose elig bec they've lost SSI - not
based on alienage

es - But they've lost SSI only bec of alien status

DB - 2 systems. One for ^{them} benefits / other for Medicaid.
Intent of Cong - wanted Med to continue for aliens if
you want to.

AD - States decide to cover p. ^{who} are otherwise qualified.
They aren't
(aliens)

True -
CM '08 course there has to be categorical eligibility.
But CE exists if someone doesn't qualify for it
just because of alienage.

AD - Any similar situations?

- Pickle example. P lost \$51 bc of COL increases.

[But there folks specifically deemed by statute.]

CS: Statutory auth in 40261 - giving states opt. of determining elig.

Give effect to Cong's intent

DS: No prohibition in M. statute.
That's reserved by 435.122.

JB: Rep came from same unit -
If there's an incurry, M. prog
should bump.

CM: If state opts to provide M to aliens, then alienage
is not a permis basis - it's now prohibited.
Becomes "prohibited" by virtue of st. exercising auth
to confer.

JB - Are you saying this is not ambiguous.

AD - It's ambiguous.

JB - So decide better way to proceed.

CM - No one will see. No one is on the other side!

Arg. applies to anyone who would qualify for SS1.
(Part 7 - who arrive now - 5 yr bar of 403 continues)
SSA criteria would be used / Perhaps SSA could
continue to make detems.

DS-1902b3 -

||

735.406

2nd question -

DS - argument either way.
This is a policy issue.

ME -

When they want to enter,
it knows how.

Part this is a bit
where they give even
indic of wanting to
continue to
^ enter (assuming of
an then people
express) - and what's
shaking in way is
slip. neg applying to
a whole other part.

MEDICAID AND WELFARE REFORM.
October 15, 1996

1. Waiver issue
2. Automatic "bucket" for legal immigrants losing SSI
3. Section 415 issues?
4. Advocates' request for fast-track eligibility process
5. Action to extend time for redeterminations?

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

04-Oct-1996 03:03pm

TO: Elena Kagan

FROM: Diana M. Fortuna
 Domestic Policy Council

SUBJECT: 2 bullets

1. A state that has opted under its medicaid plan to cover non cash SSI-related groups would automatically continue Medicaid for qualified aliens after January 1.

2. A state that has not previously opted under its Medicaid state plan to cover non-cash SSI related groups could, as always, submit a state plan amendment to do so.

Latter is the problem. - Key: Do you need a state plan amend to do this?

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

04-Oct-1996 02:16pm

TO: Elena Kagan

FROM: Diana M. Fortuna
 Domestic Policy Council

SUBJECT: This is the Medicaid issue

advocates believe the attached Medicaid reg offers the opportunity to keep all legal immigrants who lose SSI on Medicaid automatically, without the state having to take any action.

I am pretty sure HCFA doesn't buy this argument legally. I am now trying to hear why, although Laura Oliven has a guess in the attached email.

What do you think? I would appreciate a read today; they are pushing me to get out a fact sheet today and I am unclear as to whether it would foreclose this interpretation.

EXECUTIVE OFFICE OF THE PRESIDENT

04-Oct-1996 01:33pm

TO: FORTUNA_D
FROM: Laura Oliven Silberfarb
CC: Barbara E. Washington
SUBJECT: 42 CFR 435.122

Message Creation Date was at 4-OCT-1996 13:33:00

"If an agency provides Medicaid to aged, blind, or disabled individuals receiving SSI or optional State supplements, it must provide Medicaid to individuals who would be eligible for SSI or optional State supplements except for an eligibility requirement used in those programs that is specifically prohibited under title XIX."

We think that this means if a person is determined ineligible for SSI based on an eligibility requirement that Medicaid specifically prohibits, those people can be deemed as receiving SSI for the purposes of Medicaid eligibility.

The Medicaid Bureau listed two examples of this: SSI deeming rules on alien sponsors and essential persons. So, for example, if an immigrant was found ineligible for SSI because of the SSI deeming rules, then for the purposes of Medicaid eligibility they would be considered as receiving cash, and therefore, categorically eligible for Medicaid [because Medicaid did not have deeming rules.]

Advocates may believe that the problem of immigrants currently in the country being kicked off of SSI and not being able to get back on Medicaid in those states that 1) did not decide to kick current immigrants off of Medicaid and 2) do not have a non-cash SSI-related eligibility category that the immigrants would fall under.

There is one part that is subject to interpretation though: the reg language refers to SSI eligibility requirements that are "specifically prohibited under title XIX." Kicking current immigrants off of Medicaid is not "specifically prohibited," instead it is a state option. We suspect that this is why HCFA does not believe this provision retains eligibility for the population in question.

Pwb:

- 1) State allows Medicaid to current imm.
- 2) But im status precludes ssi bens, which leads to medicaid bens
- 3) ~~im~~ other doesn't qualify for med bens in any other way.

Just that? Has to "specifically prohibit," no?

HCFA seems it to me.

EXECUTIVE OFFICE OF THE PRESIDENT

04-Oct-1996 12:06pm

TO: Mark E. Miller
TO: Elena Kagan

FROM: Diana M. Fortuna
Domestic Policy Council

SUBJECT: fyi on how long before ssi people lose Medicaid

EXECUTIVE OFFICE OF THE PRESIDENT

04-Oct-1996 10:11am

TO: FORTUNA_D

FROM: Laura Oliven Silberfarb

CC: Daniel J. Chenok
CC: Richard E. Green
CC: Wendy A. Taylor
CC: Nicolette Highsmith

SUBJECT: FYI - Redetermination of Medicaid for Individuals Losing SSI

Message Creation Date was at 4-OCT-1996 10:11:00

I have done some quick research on the redetermination process for Medicaid, once an individual is cut-off of SSI and would otherwise lose their categorical Medicaid eligibility. Current Medicaid regulations state that:

the Agency must promptly redetermine eligibility when it receives information about changes in the recipients status that affects eligibility. (42 CFR 435.916)

for recipients determined ineligible for SSI, FFP is available in Medicaid expenditures for services 1) through the end of the month, if the Agency receives the SSA notice before the 10th, unless the recipient requests a hearing; or 2) through the end of the following month, if the Agency receives notice after the 10th, unless the recipient requests a hearing. (42 CFR 435.1003)

The rule explicitly states that FFP is only available during these strict timeframes. This means that the individual will retain their Medicaid eligibility through the redetermination process, but only within the 20-50 day time period (depending when the SSA notifies the Medicaid office), unless they request a hearing.

Thus, it would appear that if a Medicaid office could not complete a recipient's redetermination in a high workload period, that individual could lose Medicaid eligibility, unless they request a hearing.

To address this, HCFA could (issue a direct final rule,) extending the time frames for redetermination, in certain circumstances. This would provide State Medicaid offices with the flexibility to handle the likely surge in applications for redetermination from the disabled child and immigrant populations.

What % request hearings?

SSI/Medicaid - phone call 10/4/96

... Must lose SSI because of legal immigrants

... Jan 1 - opt out -

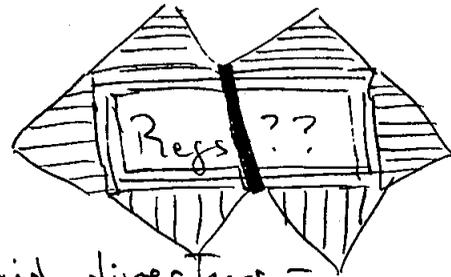
... But if gov. doesn't - LI's are covered.

... But even if - once thrown off SSI - loses ~~of~~ down to Medicaid.

Is there way to allow all states - opt in to continue MC -
lose SSI, but don't lose Medicaid.

David S. - Can't get there.

Non-SSI recip's. / How can we deem them to be so?



... Fact sheet to state Medicaid directors -

... starting on Sunday.

... discussing on Wednesday.

Department of Health &
Human Services
Office of the General Counsel
Health Care Financing Division
Room 5309 - Cohen Building
330 Independence Avenue, SW
Washington, D.C. 20201
TELEFAX NO. (202) 401-1405

FACSIMILE

TRANSMISSION

REQUEST

ADDRESSEE: (Name, Organization, City, State & Phone #))	FROM: (Name, Organization, & Phone #))
Elena Kagan)	David R. Smith)
)	(NAME))
)	Dept. of Health & Human Services)
)	Health Care Financing Division)
)	Room 5309 - Cohen Bldg.)
)	330 Independence Ave., SW)
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PHONE: (202) 456-7594)	PHONE: (202) 619-3601)
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REMARKS: I am faxing you 4 pages. A=the reg relied on by NHelp's analysis for the authority to provide Medicaid to individuals who lose cash assistance because of cash rules specifically prohibited by Medicaid. B=Medicaid provision implicitly recognizing distinctions made on basis of citizenship are permitted. C=an example of a cash rule (standard filing unit deeming) which is specifically prohibited by the Medicaid statute. and D=the Pickle amendment, where Congress essentially deems certain former SSI recipients to be treated as SSI recipients for Medicaid purposes. 117

IF RETRANSMISSION IS NECESSARY CALL: (202) 619-0736

§ 435.122

under the approved State's January 1, 1972 Medicaid plan.

(3) If the categorically needy income standard established under paragraph (e)(2) of this section is less than the optional categorically needy standard established under § 435.230, the agency must provide Medicaid to all aged, blind, and disabled individuals who have income equal to or below the higher standard.

(4) In a State that does not have a medically needy program that covers aged, blind, and disabled individuals, the agency must allow individuals to deduct from income incurred medical and remedial expenses (that is, spend down) to become eligible under this section. However, individuals with income above the categorically needy standards may only spend down to the standard selected by the State under paragraph (e)(2) of this section which applies to the individual's living arrangement.

(5) In a State that elects to provide medically needy coverage to aged, blind, and disabled individuals, the agency must allow individuals to deduct from income incurred medical and remedial care expenses (spend down) to become categorically needy when they are SSI recipients (including individuals deemed to be SSI recipients under §§ 435.135, 435.137, and 435.138), eligible spouses of SSI recipients, State supplement recipients, and individuals who are eligible for a supplement but who do not receive supplementary payments. Such persons may only spend down to the standard selected by the State under paragraph (e)(2) of this section. Individuals who are not SSI recipients, eligible spouses of SSI recipients, State supplement recipients, or individuals who are eligible for a supplement must spend down to the State's medically needy income standards for aged, blind, and disabled individuals in order to become Medicaid eligible.

(f) *Deductions from income.* (1) In addition to any income disregards specified in the approved State plan in accordance with § 435.601(b), the agency must deduct from income:

(1) SSI payments;

42 CFR Ch. IV (10-1-95 Edition)

(ii) State supplementary payments that meet the conditions specified in §§ 435.232 and 435.234; and

(iii) Expenses incurred by the individual or financially responsible relatives for necessary medical and remedial services that are recognized under State law and are not subject to payment by a third party, unless the third party is a public program of a State or political subdivision of a State. These expenses include Medicare and other health insurance premiums, deductions and coinsurance charges, and copayments or deductibles imposed under § 447.51 or § 447.53 of this chapter. The agency may set reasonable limits on the amounts of incurred medical expenses that are deducted.

(2) For purposes of counting income with respect to individuals who are receiving benefits under section 1619(a) of the Act or are in section 1619(b)(1) of the Act status but who do not meet the requirements of paragraph (b)(3)(ii) of this section, the agency may disregard some or all of the amount of the individual's income that is in excess of the SSI Federal benefit rate under section 1611(b) of the Act.

[58 FR 4926, Jan. 19, 1993]

§ 435.122 Individuals who are ineligible for SSI or optional State supplements because of requirements that do not apply under title XIX of the Act.

If an agency provides Medicaid to aged, blind, or disabled individuals receiving SSI or optional State supplements, it must provide Medicaid to individuals who would be eligible for SSI or optional State supplements except for an eligibility requirement used in those programs that is specifically prohibited under title XIX.

[47 FR 43648, Oct. 1, 1982; 47 FR 49647, Nov. 3, 1982]

§ 435.130 Individuals receiving mandatory State supplements.

The agency must provide Medicaid to individuals receiving mandatory State supplements.

§ 435.131 Individuals eligible as essential spouses in December 1973.

(a) The agency must provide Medicaid to any person who was eligible for

SOCIAL SECURITY ACT—§ 1902(e)

1105

recipient of aid to families with dependent children under part A of title IV in the State where such child resides. Notwithstanding paragraph (10)(B) or any other provision of this subsection, a State plan shall provide medical assistance with respect to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law only in accordance with section 1903(v).⁵²

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for medical assistance under the plan—

(1) an age requirement of more than 65 years; or

(2) any residence requirement which excludes any individual who resides in the State, regardless of whether or not the residence is maintained permanently or at a fixed address; or

(3) any citizenship requirement which excludes any citizen of the United States.

(c) Notwithstanding subsection (b), the Secretary shall not approve any State plan for medical assistance if—

(1) the State has in effect, under its plan established under part A of title IV, payment levels that are less than the payment levels in effect under such plan on May 1, 1988; or

(2) the State requires individuals described in subsection (1)(1) to apply for benefits under such part as a condition of applying for, or receiving, medical assistance under this title.

(d) If a State contracts with an entity which meets the requirements of section 1152, as determined by the Secretary, for the performance of the quality review functions described in subsection (a)(30)(C), or a utilization and quality control peer review organization having a contract with the Secretary under part B of title XI for the performance of medical or utilization review functions (including quality review functions described in subsection (a)(30)(C)) required under this title of a State plan with respect to specific services or providers (or services or providers in a geographic area of the State), such requirements shall be deemed to be met for those services or providers (or services or providers in that area) by delegation to such an entity or organization under the contract of the State's authority to conduct such review activities if the contract provides for the performance of activities not inconsistent with part B of title XI and provides for such assurances of satisfactory performance by such an entity or organization as the Secretary may prescribe.

(e)(1)(A) Notwithstanding any other provision of this title, effective January 1, 1974, subject to subparagraph (B) each State plan approved under this title must provide that each family which was receiving aid pursuant to a plan of the State approved under part A of title IV in at least 3 of the 6 months immediately preceding the month in which such family became ineligible for such aid because of increased hours of, or increased income from, employment, shall, while a member of such family is employed, remain eligible for assistance

⁵²See Vol. II, 31 U.S.C. 3803(c)(2)(C), with respect to benefits not affected by P.L. 100-383.

See Vol. II, P.L. 100-383, §§105(f)(2) and 206(d)(2), with respect to exclusion from income and resources of certain payments to certain individuals.

See Vol. II, P.L. 100-407, §105(c), with respect to the effect of financial assistance under that Act.

See Vol. II, P.L. 100-409, §5, with respect to the effect of this Act on P.L. 92-203 or P.L. 96-487.

See Vol. II, P.L. 100-411, §2(d)(3)(B), with respect to the effect of per capita payments.

B

SOCIAL SECURITY ACT—§ 1902(a)(17)

1091

rates which are reasonable and adequate to meet the costs of providing care, efficiently and economically, in conformity with applicable State and Federal laws, regulations, and quality and safety standards;

(14) provide that enrollment fees, premiums, or similar charges, and deductions, cost sharing, or similar charges, may be imposed only as provided in section 1916;

[(15) Stricken.]

(16) provide for inclusion, to the extent required by regulations prescribed by the Secretary, of provisions (conforming to such regulations) with respect to the furnishing of medical assistance under the plan to individuals who are residents of the State but are absent therefrom;

(17) except as provided in subsections (l)(3), (m)(3), and (m)(4), include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV, and with respect to whom supplemental security income benefits are not being paid under title XVI, based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this title, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV, or to have paid with respect to him supplemental security income benefits under title XVI) as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under title XVI), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1614 (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums, payments made to the State under section 1903(f)(2)(B), or otherwise and regardless of whether such costs are reimbursed under another public program of the State or political subdivision thereof) incurred for medical care or for any other type of remedial care recognized under State law;²²

(b) * * *

(2)(A) Persons receiving health services provided by the Service by reason of this subsection shall be liable for payment of such health services under a schedule of charges prescribed by the Secretary which, in the judgment of the Secretary, results in reimbursement in an amount not less than the actual cost of providing the health services. Notwithstanding section 1880(c) of the Social Security Act, section 402(a) of this Act, or any other provision of law, amounts collected under this subsection, including medicare or medicaid reimbursements under titles XVIII and XIX of the Social Security Act, shall be credited to the account of the facility providing the service and shall be used solely for the provision of health services within that facility. Amounts collected under this subsection shall be available for expenditure within such facility for not to exceed one fiscal year after the fiscal year in which collected.

[*Internal References.*—S.S. Act §§1880(a) and (d), 1905(b), 1911(a), 1920(b) and 1928(c) and (h) cite the Indian Health Care Improvement Act and S.S. Act title XVIII and §§1102, 1861, 1880, 1892, 1902, and 1911 catchlines and §1880(c) have footnotes referring to P.L. 94-437.]

P.L. 94-566, Approved October 20, 1976 (90 Stat. 2667)
Unemployment Compensation Amendments of 1976

Pickle Amendment

PRESERVATION OF MEDICAID ELIGIBILITY FOR INDIVIDUALS WHO CEASE TO BE ELIGIBLE
FOR SUPPLEMENTAL SECURITY INCOME BENEFITS ON ACCOUNT OF COST-OF-LIVING
INCREASES IN SOCIAL SECURITY BENEFITS

SEC. 503. [42 U.S.C. 1396a note] In addition to other requirements imposed by law as a condition for the approval of any State plan under title XIX of the Social Security Act, there is hereby imposed the requirement (and each such State plan shall be deemed to require) that medical assistance under such plan shall be provided to any individual, for any month after June 1977 for which such individual is entitled to a monthly insurance benefit under title II of such Act but is not eligible for benefits under title XVI of such Act, in like manner and subject to the same terms and conditions as are applicable under such State plan in the case of individuals who are eligible for and receiving benefits under such title XVI for such month, if for such month such individual would be (or could become) eligible for benefits under such title XVI except for amounts of income received by such individual and his spouse (if any) which are attributable to increases in the level of monthly insurance benefits payable under title II of such Act which have occurred pursuant to section 215(i) of such Act, in the case of such individual, since the last month after April 1977 for which such individual was both eligible for (and received) benefits under such title XVI and was entitled to a monthly insurance benefit under such title II, and, in the case of such individual's spouse (if any), since the last such month for which such spouse was both eligible for (and received) benefits under such title XVI and was entitled to a monthly insurance benefit under such title II. Solely for purposes of this section, payments of the type described in section 1616(a) of the Social Security Act or of the type described in section 212(a) of Public Law 93-66 shall be deemed to be benefits under title XVI of the Social Security Act.

SEC. 508. * * *

(b) [42 U.S.C. 603a] PROVISION FOR REIMBURSEMENT OF EXPENSES.—For purposes of section 403 of the Social Security Act, expenses incurred to reimburse State employment offices for furnishing information requested of such offices pursuant to the third sentence of section 3(a) of the Act entitled "An Act to provide for the establishment of a national employment system and for cooperation with the States in the promotion of such system, and for other purposes", approved June 6, 1933 (29 U.S.C. 49b(a)), by a State or local agency administering a State plan approved under part A of title IV of the Social Security Act shall be considered to constitute expenses incurred in the administration of such State plan; and for purposes of section 455 of the Social

¹As in original; probably should have a closing parenthesis.

D

Cindy Mann Telecon - 10/8/96

No impu quality for SSI

How to get Medicaid - where st doesn't have med needy
prop to pick up.

435.122 - ~~index~~ who'd be elig for SSI - but for neg

"specif prohibited" under T. XIX,
- and indiv st does --

Welf Act gives states auth to prohibit elig negs w.r.t.

Medicaid - T. XIX."

NOT by but under.

Thur: CBO scoring assumes states
wouldn't make any changes in
Medicaid prop - states would exercise
opt in - if they had approp colegs,
but states would NOT create
new catlegs.

David Smith 619-3601

Loss SSI be immigs

Does this result in loss of Medic. aged/blind/disabled

38 states: SSI → Medi

Also - various optics to not be related to SSI
~~aged/blind/disabled~~

1. poverty level - if state has this, pe will be ~~covered~~ ^{put in/}

2. meet inc/resources regs of cash progs (AFDC/SSI etc)
(immig status doesn't wh)

1/2 states have this optic

If no optic above - lose MC.

WHP Theory -

Med reg - if cond of elig for cash there's specific prohibited in context of Med program ...

only one can think of -

deeming rules - Med can't deem income broadly.

No such condition here -

19026 - Med stat. says can't approve Med plan
discriminating aft citr

implic - can discrim aft non-cit.

Cindy - new theory - 433 "Nothing in This title"

Inherent auth to deem p. to be eligible for cash assistance.

FAX TRANSMISSION

CENTER ON BUDGET AND POLICY PRIORITIES

820 FIRST STREET, NE SUITE 510

WASHINGTON, DC 20002

202-408-1080

FAX: 202-408-1056

To: Elena Kagen; Diana Fortuna **Date:** October 8, 1996
Fax #: 456-1647 **Pages:** 10, including this cover sheet.
From: Cindy Mann
Subject: Medicaid /SSI

Attached is a memo on a number of Medicaid-related issues that was prepared by the National Senior Citizen's Law Center and the National Health Law Program. The matter of Medicaid categorical eligibility for qualified immigrants who are losing eligibility for SSI is discussed beginning at page 5. The memo gives some background and examples of other situations where eligibility under the related cash assistance program has been curtailed while categorical eligibility for Medicaid has been maintained. It references the regulation we have discussed, 435.122, but does not describe its history.

In general, the argument is that the intent of the new law was to allow states to continue to cover all currently Medicaid eligible categories of qualified legal immigrants who entered the country before August 22, 1996. This would include persons who qualify under SSI rules. The alienage changes in the law were not meant to change or restrict other basic Medicaid eligibility criteria. (See, section 433(a)(1) which states, "for purposes of this title, eligibility relates only to the general issue of eligibility or ineligibility on the basis of alienage".)

The regulation we discussed, section 433.122, may be a convenient, already-existing handle for making it clear that states may continue to cover on Medicaid those people who would qualify for SSI but for their citizenship status, assuming the state has decided to prohibit the SSI alienage rules from applying under Title XIX.

The result would be to allow states to cover groups they now cover without forcing states to create a new optional category and perhaps opening up eligibility to a wider group of people (thus risking that the new category would have costs and may not be adopted at the state level). This approach increases state flexibility and allows for the widest possible scope of coverage, without creating any mandate regarding coverage.

HCFA has released the attached "fact sheet" which is not definitive, but which suggests that they may not be heading in this direction.

I hope this is helpful.

WELFARE REFORM IMPLEMENTATION: ISSUE PAPER 1

Continuing Medicaid Coverage for Qualified Aliens, SSI Children and former AFDC Recipients
by

Claudia Schlosberg, National Health Law Program
Trish Nemore, National Senior Citizens Law Center

Introduction

This memorandum identifies several key "first order" issues concerning the implementation of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, (P.L. 104-192) and its effect on Medicaid. The analysis is premised on the principle that while the welfare law makes radical changes in the structure of welfare programs and creates major new restrictions on receipt of public benefits by legal immigrants, the structure of the Medicaid program was left intact. In order to implement the new welfare policies and restrictions, states need not and cannot alter or amend their Medicaid programs beyond the narrow changes authorized by this law.

ISSUE ONE - DUE PROCESS REQUIREMENTS

Policy: The loss of cash assistance under the AFDC or SSI programs does not result in automatic termination from the Medicaid program. States must undertake an automatic, *ex parte* redetermination of eligibility and, if a beneficiary's eligibility is not otherwise established, issue timely and adequate notice and provide an opportunity for hearing. Pending final determination, Medicaid benefits must be continued.

Rationale: Under the welfare law, families with dependent children, certain children on SSI and lawful aliens will no longer be eligible for cash assistance under the AFDC and SSI programs. The loss of cash assistance, alone, however, does not result in automatic termination from the Medicaid program. To the contrary, federal regulations establish that Medicaid beneficiaries must continue to receive benefits until they are found ineligible. 42 C.F.R. Section 435.930. The general rule is that states must redetermine eligibility before finding that a recipient can be terminated. Specifically, 42 C.F.R. 435.916 requires that the state agency responsible for administering the Medicaid program must promptly redetermine eligibility when it receives information about changes in a recipient's circumstances that may affect his or her eligibility. 42 C.F.R. 435.916(c)(1). Under 42 C.F.R. Section 435.916(c)(2), "[i]f the agency has information about anticipated changes in a recipient's circumstances, it must redetermine eligibility at the appropriate time based on those changes." (Emphasis supplied). In other words, states cannot terminate Medicaid based on an anticipated change in a recipient's status. States must wait for the change to actually occur and then proceed with the required redetermination. Redetermination reviews, moreover, are conducted *ex parte*. Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749, 753 (1983).

If the Medicaid agency reviews the recipient's case and makes a determination that the recipient is no longer eligible, the Medicaid agency must still provide the beneficiary with notice

and an opportunity for hearing, prior to the actual termination of benefits. 42 C.F.R. Sec. 435.919. Specifically, "[t]he agency must give recipients timely and adequate notice of proposed action to terminate, discontinue, or suspend their eligibility or to reduce or discontinue services they may receive under Medicaid." 42 C.F.R. Section 435.919(a). The notice also must meet the requirements of 42 C.F.R. Section 431, Subpart E. *Id.* at Section 435.919(b). The requirements of Subpart of E of Section 431 set forth in detail the notice and fair hearing requirements of the Medicaid program. These procedural requirements are based on the Constitutional requirements of due process of law, Goldberg v. Kelly, 397 U.S. 254 (1970), and are fundamental requisites of the Medicaid program. Federal regulations therefore provide that at the time of any action affecting a recipient's claim, the State must provide the recipient with written notice stating 1) what action the agency intends to take, (2) the reasons for the intended action, the specific regulations that support the action and the recipients right to a hearing. 42 C.F.R. Section 421.210. With limited exception, recipients must be notified at least 10 days before the date of action, 42 C.F.R. Section 431.211, and the state must provide a hearing to "[a]ny recipient who requests it because he believes the agency has taken action erroneously." 42 C.F.R. Section 431.220(a)(2).

Significantly, Medicaid benefits must continue during the redetermination process, 42 C.F.R. Section 435.930(b), and at least ten days after notice of ineligibility is mailed to the recipient. 42 C.F.R. Section 431.211. If the recipient requests a hearing before the date of action, however, Medicaid benefits must continue pending a decision following the hearing. 42 C.F.R. Section 431.230. The agency also has discretion to reinstate benefits pending a hearing decision if the request for hearing is made not more than 10 days after the date of action. 42 C.F.R. Section 431.231. These procedural protections in the Medicaid program have not been abrogated by any provisions of the welfare law. Furthermore, they apply to all individuals who qualify for Medicaid under any eligibility category. Massachusetts Ass'n of Older Americans, supra at 753.

Accordingly, HCFA must notify States that the loss of cash assistance does not trigger an automatic termination from the Medicaid program. Instead, states must conduct an ex parte redetermination of eligibility. If it is determined that Medicaid eligibility is not otherwise established, the state must comport with due process and issue notice and provide the beneficiary with the opportunity for a fair hearing.

ISSUE TWO - THE STATUS OF QUALIFIED LEGAL ALIENS WHO LOSE SSI CASH ASSISTANCE

Policy: Qualified legal aliens who lose SSI cash assistance remain categorically needy and therefore eligible for Medicaid unless a state opts to discontinue coverage. This is because the state's authority under Section 402(b)(1) to determine the eligibility of non-exempt qualified aliens to Medicaid relates only to the general issue of eligibility or ineligibility on the basis of alienage. States do not need to expand their existing Medicaid programs to continue coverage

for these otherwise qualified aliens.

a. States need only act affirmatively if they opt to discontinue coverage.

Section 402 (a) makes clear that only qualified aliens who are refugees and asylees, veterans or on active duty or who have worked for 40 quarters remain eligible for SSI cash benefits. Under Section 402(b)(2), these same qualified aliens remain categorically needy and therefore "shall be" eligible for Medicaid (as well as other "designated federal programs"). The question of whether other qualified aliens who lose SSI cash assistance under Sec. 402 (a) remain eligible for Medicaid is controlled by Sec. 402 (b)(1). In pertinent part, Section 402(b)(1) provides: "Notwithstanding any other provision of law and except as provided in section 403 and paragraph (2), a State is authorized to determine the eligibility of an alien who is a qualified alien (as defined in section 431) for any designated Federal program (as defined in paragraph (3))." Section 403 bars new legal immigrants (with some exceptions) who enter the country on or after the date of enactment from receiving most federal means-tested benefits for five years. Section 402(3) defines the term "designated Federal program." In pertinent part, "Medicaid" is defined as "[a] State plan approved under title XIX of the Social Security Act, other than [emergency] medical assistance described in section 401(b)(1)(A).

"As in all cases involving statutory construction, the starting point must be the language employed by Congress." Lynch v. Rank, 747 F.2d 528, 531 (1984), quoting Reiter v. Sonotone Corp., 442 U.S. 330, 337. 99 S. Ct. 2326, 2330, 60 L.Ed. 2d 931 (1979)). Faced with a statute containing "plain and unambiguous language," a court should ordinarily simply "enforce it according to its terms." Ciampa v. Secretary Of Health and Human Services, 687 F.2d 518, 524 (1st Cir. 1982), citing Mass. Financial Services, Inc. v. SIPC, 545 F.2d 754, 756 (1st Cir. 1976), quoting Caminetti v. U.S., 242 U.S. 470 (1917), cert. denied, 431 U.S. 904 (1977).

Here, the language of the statute clearly authorizes states to determine the Medicaid eligibility of qualified aliens (other than those excepted under Section 402(b)(2)). In other words, states can decide to continue Medicaid eligibility of qualified aliens under the state's Medicaid plan. Some have argued however that section 402(b)(1) automatically terminates benefits for qualified aliens and that states desiring to continue coverage will have to take affirmative action including enacting legislation to do so. The language of Section 402(b)(1) however does not plainly address this issue. Where, as here, the meaning of the statutory language is ambiguous, congressional intent is ascertained by examining materials extrinsic to the statute such as the statute's legislative history. Moore Bayou Water Ass'n Inc. v. Town of Ioneatown, 628 F. Supp. 1367 (N.D. Miss. 1986).

As that legislative history reveals, the original House-passed version of HR-3437 barred qualified aliens (with some exceptions) from receipt of SSI, food stamps and Medicaid. Included within the House bill were provisions that allowed beneficiaries who were receiving benefits on the date of enactment to continue to receive them for at most one year. If, after a review, the qualified alien failed to meet an exceptional category, benefits would cease immediately. States

were also given "the option of ending cash welfare payments and social service benefits for current recipients after January 1, 1997." H. R. Conf. Rep. No. 725, 104th Cong. 2nd. Sess 380 (1996). The blanket bar to Medicaid however was rejected by the full Congress in the final vote on the bill. Instead, Medicaid was included with cash welfare and social services as benefits that states could opt to terminate. Furthermore, the final version of the law retains the House provision prohibiting states from taking action to terminate benefits for current enrollees prior to January 1, 1997. Sec. 402(D)

The language of Section 411 is further evidence that Congress did not intend States to terminate qualified aliens' Medicaid benefits automatically or to require states to enact legislation in order to provide Medicaid benefits to these enrollees. Under Section 411(a), Congress clearly pronounces that illegal aliens are not eligible for most State or local public benefits. In Section 411(d), however, Congress authorized states to opt to provide such benefits but makes clear that states can exercise this option "only through the enactment of a State law after the date of the enactment of this Act which affirmatively provides for such eligibility." Section 411(d). Had Congress wanted to require States to enact legislation in order to provide Medicaid benefits to non-exempt qualified beneficiaries, Congress clearly knew how to draft such a provision.

Finally, as is discussed in Issue #1 above, due process and the explicit requirements of the Medicaid program require that States conduct redetermination reviews and provide notice and an opportunity for a fair hearing before Medicaid benefits are terminated. Nothing in the welfare law nullifies these procedural protections. The only provision which is arguably relevant is the phrase in Section 402(b)(1): "Notwithstanding any other law. . . ." This provision however cannot be read to mean that the procedural due process protections of Title XIX and the U.S. Constitution are nullified. As the Supreme Court has noted on frequent occasion, "such indefinite congressional expressions cannot negate plain statutory language and cannot work a repeal or amendment by implication." St. Martin Lutheran Church v. South Dakota, 451 U.S. 772, 788, 68 L.Ed. 612, 623, 101 S.Ct. 2142 (1981). This long-established canon of construction moreover, "carries special weight when an implied repeal or amendment might raise constitutional questions." Id. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 59 L.Ed. 2d 533, 99 S.Ct. 1313 (1979); Brown v. Consol. Rail Corp., 605 F. Supp. 629 (N.D. Ohio 1985) (where a statute is created to afford protection, passage of a later piece of legislation that at first glance may be construed to defeat earlier protections should not be deemed to repeal earlier conferred benefits).

In sum, qualified legal aliens remain eligible for Medicaid, unless states opt to discontinue coverage. States need not take any affirmative action to maintain the status quo.

b. States opting to cover qualified aliens under Section 402(b)(1) must comply with requirements of the Medicaid program.

Section 402(b)(1) provides "Notwithstanding any other provision of law . . . a state is authorized to determine the eligibility of an alien who is a qualified alien" Section

402(b)(1), however, does not give states authority to selectively repeal provisions of the Medicaid statute. As noted above, if Congress wanted to repeal the Medicaid statute or give states authority to do so, it must act "with clear and manifest intent." Watt v. Alaska, 101 S. Ct. 1673, 451 U.S. 259, 68 L.Ed. 2d 80 (1981). Thus, Section 402(b)(1) must be construed narrowly. Rather than a broad grant of authority to rewrite the Medicaid statute, it merely gives states the option of restricting eligibility on the basis of alienage or not. Support for this position is found in Section 433(a)(1), which provides:

Nothing in this title may be construed as an entitlement or a determination of an individual's eligibility or fulfillment of the requirements for any Federal, State, or local governmental program, assistance, or benefits. For purpose of this title, eligibility relates only to the general issue of eligibility or ineligibility on the basis of alienage.

(Emphasis added).³ Accordingly, the only question for states is whether they intend to continue to provide Medicaid coverage for qualified aliens or not. If a state chooses to continue coverage, it must comport with all Medicaid provisions (unless waived) including those regarding eligibility, statewideness and comparability.

c. States continuing coverage for qualified aliens who lose SSI cash assistance may continue Medicaid coverage under the state's existing state plan.

Under Section 402(a), qualified aliens who are neither refugees nor asylees, veterans nor on active duty in the armed forces or who have not worked 40 qualifying quarters lose SSI cash assistance. Since SSI cash assistance recipients are deemed categorically needy under the Medicaid program, the loss of SSI will trigger a redetermination and could lead to a loss of Medicaid benefits. The loss of SSI benefits however is linked solely to the status of the recipient as an alien and not on any program eligibility requirement of Medicaid program. Thus, non-exempt, qualified aliens who lose SSI cash assistance are in much the same situation as "Pickle" people who lost Medicaid because a Social Security cost of living increase made them ineligible for SSI, or families with stepchildren who lost Medicaid because AFDC deeming rules made them ineligible for AFDC cash assistance. In both situations, Medicaid was restored for these beneficiaries by "deeming" them eligible for the respective cash assistance programs. Through this mechanism, these beneficiaries retained eligibility as "categorically needy."⁴ The difference

³ Thus, the phrase "notwithstanding any other provision of law," must also be construed only to preclude operation of any law that would prohibit a state from not providing Medicaid benefits on the basis of alienage.

⁴ Medicaid regulations incorporating the "deeming" requirements are found at 42 C.F.R. Section 435.113 (AFDC) and 42 C.F.R. Section 435.122 (SSI).

in the instant case is that Congress has delegated its authority to the States and given each state the option to continue providing Medicaid benefits to these enrollees.

The decision of a state to opt to continue coverage of non-exempt, qualified aliens, therefore, is effectively a decision to deem these individuals categorically needy and to continue to provide Medicaid as before. Stated alternatively, a state can continue to provide Medicaid benefits to qualified aliens who, "but for" their status as aliens, would be eligible for SSI cash assistance.

Absent the deeming approach, states would have to redetermine eligibility of those qualified aliens losing SSI under another existing category of their Medicaid program. However, only 35 states and the District of Columbia provide coverage to medically needy individuals, and only 29 states and the District of Columbia include optional categorically needy coverage in their state plans. At least six states have neither a medically needy nor optional categorically needy program. Thus, qualified aliens who lose SSI and who live in states without the full scope of optional Medicaid eligibility categories would lose Medicaid benefits unless the state amended its State Plan. Under Medicaid rules, however, if the state provides Medicaid to any individual in an optional group, the state must provide Medicaid to all individuals who apply and are found eligible in that group. 42 C.F.R. Section 435.201(b). Thus, in order to continue covering qualified aliens who lose cash assistance, states would actually have to expand Medicaid eligibility to all individuals within those other optional eligibility categories. Clearly, neither the automatic loss of Medicaid by recipients nor the mandated expansion of programs by states was intended by Congress.

In sum, states should not have to expand Medicaid eligibility in order to exercise the option to continue to provide Medicaid benefits to non-exempt, qualified aliens who previously received SSI. To require states to do so would effectively nullify Congress' intent and would produce extraordinarily harsh results. Instead, HCFA must issue guidance to the states informing them that if they opt to continue coverage for non-exempt qualified aliens, and such aliens qualify for SSI "but for" their alien status, they remain categorically needy under the Medicaid program.

ISSUE THREE: VERIFICATION AND REPORTING REQUIREMENTS

Policy: As a matter of sound public health policy, reporting and verification requirements in the welfare law must be construed narrowly.

Rationale: The welfare law contains new provisions relating to reporting and verification of the legal status of immigrants. These provisions are already raising concerns in immigrant communities and will deter aliens from seeking and obtaining treatment, even when they are lawfully entitled to care. To minimize the adverse impact of these provisions, HCFA must issue guidance to the States clarifying that these provisions do not impose any new requirements on

health providers and do not eliminate the confidentiality protections in the SAVE program. Of particular importance is the need to instruct states that persons seeking Medicaid emergency medical care including women in active labor are exempt from verification requirements. This interpretation is clearly supported by the language and structure of the statute itself.

In relevant part, Section 404 amends Title IVA of the Social Security Act, 42 U.S.C. Section 601 et. seq. by adding a new section which states:

Each state to which a grant is made under section 403 [of the Social Security Act, 42 U.S.C. Section 603] shall, at least 4 times annually and upon request of the Immigration and Naturalization Service, furnish the Immigration and Naturalization Service with the name and address of, and other identifying information, on any individual who the State knows is unlawfully in the United States.

The welfare law contains similar reporting requirements for the Social Security Administration and Department of Housing and Urban Development. Significantly, however, there is no similar provision amending Title XIX or imposing any new reporting requirements on any health provider. Thus, by its terms, Section 404(b)'s mandatory reporting requirements apply only to the reporting of persons seeking AFDC services, not Medicaid services or health care.⁵

Section 432 provides additional support for maintaining the status quo with respect to undocumented aliens seeking health services. Under Section 432, the Attorney General, after consultation with the Secretary of Health and Human Services, must promulgate regulations requiring verification that an alien, who is not a qualified alien, is eligible to receive services under Section 401(b)(1). Section 432 further provides that "[s]uch regulations, to the extent feasible, require that information requested and exchanged be similar in form and manner to information requested and exchanged under section 1137 of the Social Security Act."

Section 1137 codifies the requirements of the current verification system, the Systematic Alien Verification for Eligibility (SAVE) program. Recognizing that access to emergency care is a public health imperative, SAVE exempts Medicaid emergency medical care from the verification requirements. 42 U.S.C. Section 1320b-7(f). In addition, the statute prohibits INS from using information obtained through the verification system for civil immigration law

⁵Arguably, these mandatory reporting requirements apply only when a person has sought AFDC benefits to which they were not entitled. See *Doe v. Miller*, 573 F.Supp. 461 (N.D.Ill. 1983)(A provision requiring state AFDC agencies to report to the INS [persons who are ineligible to receive food stamps because they are unlawfully present were anti-fraud measures, requiring state to only report persons fraudulently seeking food stamps). In any event, Section 404(b) requires agency knowledge.

enforcement. 42 U.S.C. 1320(c)(1).

Although Section 434⁶ of the welfare law appears to authorize an "open season" for reporting to INS, the language of Section 434 fails to evidence a clear and manifest intention to repeal SAVE. Nor does any other provision in the law repeal SAVE. Thus, Section 434 and SAVE must be read together. Read in this manner, Section 434 merely authorizes states and localities to exchange with the INS the information that they are currently authorized to collect.

In sum, nothing in the welfare law changes current reporting requirements or restrictions with respect to unqualified or qualified aliens seeking health care and benefits.

ISSUE FOUR: EMERGENCY MEDICAL CARE

Policy: HCFA must instruct States that aliens, regardless of immigration status, remain eligible for emergency medical care including care and treatment for labor and delivery.

Although undocumented aliens are barred from most public benefits, Section 401(b)(1)(A) makes an exception for "[m]edical assistance under Title XIX of the Social Security Act . . . for care and services that are necessary for the treatment of an emergency condition (as defined in section 1903(v)(3) of such Act)." Section 403(c)(2)(A) recognizes a similar exception for lawful aliens entering the country after the act takes effect.

Section 1903(v)(3) defines an emergency medical condition as "a medical condition (including labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in -- (A) placing the patient's health in serious jeopardy, (B) serious impairment to bodily functions; or (C) serious dysfunction of any bodily organ or part." 42 U.S.C.b(v).

Although the conference report contains some language that might be construed to narrow this definition to exclude women in active labor, such an exclusion is not apparent on the face of the statute. In fact, the statute is unambiguous. The definition of emergency medical condition is the definition currently in effect under Title XIX. Under well-established rules of statutory construction, indefinite Congressional expressions cannot negate the plain language of a statute. The language of the statute, and not the conference report, controls. St. Martin Lutheran Church v.

⁶Section 434 provides:

Notwithstanding any other provision of Federal, State or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

South Dakota, supra. Accordingly, states must be instructed that FFP for treatment of aliens who are experiencing an emergency medical condition, including active labor and delivery, will be provided under the same terms and conditions as before the passage of welfare reform.

ISSUE FIVE: WAIVERS

Policy: Under Section 114(d), states with waivers that affect eligibility for medical assistance have the option to continue to apply the eligibility criteria under the state's waiver after the date the waiver would otherwise expire. Section 114(d), however, does not repeal Title XIX.

Rationale: Section 114, the "Chafee-Breaux Amendment," contains critically important provisions designed to assure that low-income families continue to receive Medicaid. According to its chief sponsor, Senator Chafee, the amendment was designed to "assure that no low-income mothers and children who are eligible for Medicaid under current law, under the existing law, will lose their health care coverage under Medicaid if the state lowers its eligibility standards for cash assistance or AFDC." Congressional Record, S8345, July 19, 1996.

Sections (a) and (b) direct states to use AFDC criteria in effect as of July 16, 1996. Section (c) addresses the treatment of transitional Medicaid, while section (d) refers to the effect of waivers. Specifically, Section 114(d) provides:

In the case of a waiver of a provision of part A of title IV with respect to a State as of July 16, 1996, or which is submitted to the Secretary before the date of the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and approved by the Secretary on or before July 1, 1997, if the waiver affects eligibility of individuals for medical assistance under this title, such waiver may (but need not) continue to be applied, at the option of the State, in relation to this title after the date the waiver would otherwise expire.

By its plain language, Section 114(d) merely gives states with waivers flexibility to continue using eligibility standards established in their approved waivers in lieu of rigidly applying the July 16, 1996 income and asset standards and methodologies. Thus, if a state has established resource limits or income standards for purposes of qualifying for welfare under a waiver that are different than the resource and income standards in effect as of July 16, 1996, and those standards also provide a basis for receipt of medical assistance, the state can opt to continue applying the standards as modified by the waiver.

Section 114(d) does not authorize states to utilize eligibility criteria for Medicaid that is not now permitted under Title XIX, nor can Section 114(d) be read to give states the option of applying TANF eligibility criteria to the Medicaid program. Such an interpretation would effectively give states authority to selectively repeal requirements of the Medicaid program and would undermine the Congressional intent to preserve Medicaid eligibility even if a state applies more restrictive criteria for TANF.

FACT SHEET #3**LINK BETWEEN MEDICAID AND THE IMMIGRATION PROVISIONS OF
THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY ACT OF 1996****Medicaid Eligibility of Legal Immigrants**

The Personal Responsibility and Work Opportunity Act of 1996 (P.L. 104-193) identifies two categories of legal immigrants: "qualified aliens" and others.

"Qualified Alien" Defined: A "qualified alien" is an alien who is lawfully admitted for permanent residence under various sections of the Immigration and Nationality Act (INA) including: an asylee, a refugee, an individual who has been paroled into the U.S. for a period of one year, an individual who has had his/her deportation withheld, and who has been granted conditional entry. This definition also includes battered immigrants, and/or immigrants who would be indigent without assistance, because their sponsors are not providing adequate support.

States have the following options to cover legal immigrants, as long as these individuals meet the financial and other eligibility requirements of the program.

Immigrants Residing in the U.S.

States are not required to end Medicaid coverage or eligibility for any "qualified aliens" residing in the U.S. before August 22, 1996. If the State Plan already provides such coverage and eligibility, HCFA will presume the State will continue to provide Medicaid to these individuals, until a State Plan Amendment is submitted to the contrary.

- o For immigrants who are "qualified aliens" receiving Medicaid benefits (were enrolled in the State's Medicaid program) on August 22, 1996, States must continue Medicaid coverage until at least January 1, 1997. After that date, HCFA will assume that States are continuing to cover these individuals, unless the State amends its State Plan to discontinue coverage of these individuals.
- o For immigrants who are "qualified aliens" residing in the United States before August 22, 1996, but were not enrolled on that date, whether eligible or not, States have the option not to provide Medicaid beginning on August 22, 1996. To do so, the State must amend its State Plan.
- o For other immigrants who are not "qualified aliens," Medicaid eligibility was terminated on August 22, 1996 under P.L. 104-193, except for those receiving SSI. For these immigrants, Medicaid eligibility continues until SSA redetermines eligibility (see page 4).

Excepted Groups of Immigrants

There is an excepted group of immigrants to whom the State *must* provide Medicaid coverage, provided the individuals are otherwise eligible. The following groups of immigrants are considered part of the excepted group:

- o Refugees -- For the first 5 years after entry to U.S. in that status
- o Asylees -- For the first 5 years after granted asylum
- o Individuals whose deportation is being withheld by the INS -- For the first 5 years after grant of deportation withholding
- o Lawful Permanent Residents -- After they have been credited with 40 quarters of coverage under Social Security (based upon their own work and/or that of spouses or parents) and no Federal means-tested public benefits were received by the individual in the quarter to be credited (or the spouse/parent on whose work record quarters were credited). Members of this group are not excepted if the immigrant arrives in the U.S. after August 22, 1996.
- o Honorably discharged U.S. military veterans, active duty military personnel, and their spouses and unmarried dependent children -- At any time.

Immigrants Admitted to the U.S. On or After August 22, 1996

There is a mandatory ban on Medicaid eligibility for immigrants who are "qualified aliens" newly admitted to the U.S. on or after August 22, 1996. The ban is in effect for the first five years they are in the U.S. in that status, unless the individual is a member of one of the excepted groups. After the five-year ban expires, an immigrant's access to Medicaid is at State option (for those otherwise eligible). For those who have individual sponsors who sign new, legally binding affidavits of support (required elsewhere in welfare reform, beginning no later than February 1997), States must deem the income and resources of the immigrant's sponsor (and sponsor's spouse) to be available to support the immigrant when determining the immigrant's eligibility for Medicaid. For most immigrants, deeming will not take effect for five years.

Individuals who have been credited with 40 quarters of work without receiving assistance are not considered an excepted group under these provisions.

Sponsor to "Qualified Alien" Deeming of Income and Resources

There is no deeming of sponsors' income and resources for individuals who entered the U.S. under the old affidavits of support. The new deeming requirements apply to Medicaid in the following situations:

- o Deeming applies only to sponsors signing new, legally binding affidavits of support.
- o The sponsor's and sponsor spouse's income and resources will be counted when determining the income and resources available to the immigrant they sponsor.
- o Deeming applies only to immigrants who are sponsored by individuals.
- o Under the omnibus appropriations amendments, deeming does not apply to battered immigrants or to those who would be indigent, defined as unable to obtain food and shelter without assistance, because their sponsors are not providing adequate support.
- o Deeming continues until the earlier of naturalization by the immigrant or the immigrant's being credited with 40 quarters of Social Security coverage. Such quarters do not include any quarters after December 31, 1996 in which the immigrant (or the immigrant's spouse/parent on whose work record the immigrant is credited with quarters) receives Federal means-tested benefits.
- o Sponsors must reimburse Federal, State, and local governments for the cost of means-tested benefits received by the sponsored immigrant during the deeming period, but excluding the costs of emergency medical services.

Emergency Services

Provided they meet the financial and categorical eligibility requirements, both qualified aliens and non-qualified aliens continue to be eligible for emergency services under Medicaid.

SSI/Medicaid Connection for "Qualified Aliens"

Other provisions of welfare reform ban receipt of SSI cash benefits for both current and new otherwise eligible "qualified aliens," unless they are a member of one of the excepted groups listed above.

Individuals who continue to receive SSI cash benefits would be eligible for Medicaid under the usual rules. The Social Security Administration must redetermine the SSI eligibility of all immigrants within one year of enactment. Upon redetermination, the immigrant may lose cash assistance if he/she is not a member of one of the above excepted groups.

States are required to perform a redetermination of Medicaid eligibility in any case where an individual loses SSI and that termination affects the individual's eligibility for Medicaid. Those losing or barred in the future from receiving SSI cash benefits will find their Medicaid benefits affected in the following ways:

- o A State that has opted under its Medicaid plan to cover non-cash SSI-related groups would automatically continue Medicaid for "qualified aliens" who fit into those groups.
- o A State that has not previously opted under its Medicaid State plan to cover non-cash SSI-related groups could, as always, submit a State plan amendment to provide coverage for non-cash SSI-related groups. HCFA is exploring options to permit States to do this as simply as possible.

In addition, a State that opts to cover only SSI cash recipients may still be able to cover some of the "qualified aliens" under other provisions of current Medicaid law (i.e., poverty-related pregnant women and children, medically needy, etc.).

An immigrant who loses SSI cash benefits would continue to be eligible for Medicaid until the State conducts a Medicaid eligibility redetermination (which requires consideration of other bases for Medicaid eligibility for which the individual may qualify) and has found that the individual does not qualify for Medicaid by any other means.

Related Fact Sheets:

[Link Between Medicaid and Temporary Assistance for Needy Families \(TANF\)](#)

[Link Between Medicaid and Coverage of SSI Children under Welfare Reform](#)

[Link Between Medicaid and the Immigration Provisions of the Personal Responsibility and Work Opportunity Act of 1996](#)

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

23-Sep-1996 06:57pm

TO: (See Below)

FROM: Diana M. Fortuna
 Domestic Policy Council

SUBJECT: For you Medicaid afficianados....

here are comments from Nancy-Ann Min's staff on implementation issues in Medicaid.

I am debating whether to send you my equally lengthy response. You can ignore all this if you like for now -- but, Elena, I think there are some legal questions that you will have to get involved in eventually.

I am hoping there is discretion here to do interesting things to blunt the legal immigrant cuts, within the parameters of the law.

Distribution:

TO: Jeremy D. Benami
TO: Stephen C. Warnath
TO: Elena Kagan
TO: Emily Bromberg
TO: Keith J. Fontenot
TO: Richard E. Green

EXECUTIVE OFFICE OF THE PRESIDENT

12-Sep-1996 05:39pm

TO: Diana M. Fortuna
TO: Nancy-Ann E. Min

FROM: Nicolette Highsmith
Office of Mgmt and Budget, HD

CC: Barry T. Clendenin
CC: Mark E. Miller
CC: barbara E. Washington

SUBJECT: Comments on HCFA's Draft White House Report

At a meeting of the welfare implementation work group, you requested that HCFA provide a summary of issues facing Medicaid in light of welfare reform. Last week, you sent us a document from HCFA entitled, "White House Report - Delinking Medicaid from AFDC," which addressed such Medicaid issues.

We wanted to clarify a couple of points made in the document to avoid confusion.

1) HCFA's first paragraph notes that "regardless of whether an individual is eligible for TANF, states in general will be required to maintain Medicaid eligibility for individuals eligible for benefits as of July 16, 1996.

The law states that an individual's eligibility for Medicaid will be based on the income and asset standards used to determine AFDC eligibility as of July 16, 1996. This means two things: 1) Medicaid is no longer linked to TANF cash assistance. This could result in families receiving TANF without being eligible for Medicaid, and 2) It is not a "grandfather" provision for people receiving AFDC on 7/16/96. If individual circumstances change, such that they no longer meet the AFDC eligibility standards as of 7/16/96, they would lose Medicaid.

2) HCFA also made the point that "a number of currently eligible individuals may fall through the cracks as a result of the transition from AFDC to TANF and the delinking of AFDC and Medicaid eligibility systems."

"Theoretically," individuals eligible for Medicaid as of 7/16/96 would not lose coverage under the law. What could happen, is that, in implementing the law, states' systems that are currently in place for tracking eligibility may not accurately track the transition from AFDC to Medicaid. Furthermore, Medicaid offices will have the added responsibility of determining Medicaid eligibility for individuals on cash assistance, which could cause administrative complications. Thus, due to the result of systems or administrative problems (not the law), some eligible individuals might lose coverage.

HCFA's document did not fully explain the subtle technicalities of the Medicaid

issues. As Judy Moore mentioned in the last meeting, some of these Medicaid issues are extremely technical, but some of them have the impact of either retaining or eliminating Medicaid coverage for individuals.

We wanted you to be aware of our understanding of what the major outstanding issues for Medicaid are:

Immigration

1) Mandatory SSI Ban - In general, SSI eligibility also confers Medicaid eligibility. It is unclear if an immigrant continues to be eligible for Medicaid, if they lose SSI coverage due to the mandatory ban on SSI for current immigrants in the country. The law is vague on this point and HCFA has had different interpretations. HCFA is working through this eligibility complication.

2) Deeming - As you know, this issue cuts across many agencies. The general issue is what types of exclusions (i.e. car, house) are used in the determining income level of the sponsor for the purposes of determining the immigrant's eligibility for federal benefits.

1115 Waivers

HCFA is looking into issues surrounding Medicaid 1115 waivers and eligibility. HCFA is looking into the question of whether states can cover individuals under their 1115 Medicaid waivers (if currently eligible under the 1115 waiver), who could lose coverage under the welfare law (i.e. immigrants).

SSI Kids

HCFA partly addressed this issue in their document by noting that guidance would go out to the states on SSI children losing SSI benefits, and therefore Medicaid eligibility. SSA intends to send letters to beneficiaries that will lose coverage as a result of the redetermination policy. We are not sure if HCFA has consulted with SSA on inserting a Medicaid part to the SSA letter or whether HCFA intends to send out letters to beneficiaries noting the policy change and noting that individuals can reapply for Medicaid, based on other criteria.

Administrative Allocation

The Welfare bill includes \$500 million for increased Federal Medicaid Administrative Matching funds for states to set up new eligibility systems (because Medicaid will have to determine eligibility for individuals who would have received AFDC). The law gives the Secretary the authority to determine the appropriate FMAP percentage (i.e. % Federal versus % state funds). HCFA will also have to determine how the funds will be allocated across the states.

We assume that these would be the issues that HCFA would present to the DPC in a more detailed meeting.

EXECUTIVE OFFICE OF THE PRESIDENT

23-Sep-1996 06:23pm

TO: Nicolette Highsmith

FROM: Diana M. Fortuna
Domestic Policy Council

CC: Nancy-Ann E. Min
CC: Barry T. Clendenin
CC: Mark E. Miller
CC: barbara E. Washington

SUBJECT: RE: Comments on HCFA's Draft White House Report

Thank you so much for your helpful analysis. Here are several thoughts and questions about these issues.

1. I am very interested in your point that immigrants losing SSI may not automatically lose Medicaid too. Would this be true even if the state chose not to exercise their option to keep Medicaid for legal immigrants as of 1/1/97?

Your point about waivers being a vehicle to keep legal immigrants is also very interesting. I imagine we will want to pursue this. You probably know that, on the food stamp side, we worked hard to design a waiver to delay the implementation in several states so that they have a bit more time to develop an interim verification system for immigration status.

2. If legal immigrants don't lose SSI until, say, June of next year, when SSA gets around to looking at their case, but the Governor of the state declares on 1/1/97 that his state no longer provides Medicaid to legal immigrants, does the person have Medicaid from January through June? (I think the issue of legal immigrants in nursing homes will become big on the radar screen in the coming weeks, and this would be relevant to that.)

3. On SSI kids, I am very interested in how many will be able to keep Medicaid under Waxman and other provisions, and how many will lose Medicaid altogether. Is this a HCFA question only, or do you guys have any thoughts here? DPC thinks we should be proactive in reaching out to families here, so that those who have a right to continuing Medicaid know about it.

4. On Medicaid vs. TANF eligibility, I understand your point. So, if a woman now on Medicaid goes to work as a result of a work program/work requirement and raises her income beyond the AFDC

level in effect on 7/16/96, then she is no longer eligible for Medicaid beyond the one year of transitional Medicaid that the law offers, right? Her kids may qualify under Waxman's provisions, but probably not her.

At the NGA/NCLS/APWA conference, someone from one of those organizations said they thought there was potentially a chance for states to add a SECOND year of transitional Medicaid coverage. But I have never seen any basis for that in the law, have you? I assume this could be done through a (budget neutral) waiver, though.

5. Also at the NGA conference, there was discussion of some limitation in the law in Medicaid growth to the CPI. Can you explain how that works?

I have been pushing HHS/HCFR to sit down and meet with us on all this soon. At the moment, Monahan has promised me a meeting on October 1, with paper to arrive in advance. (I will let you know time and place as soon as I do.) I am a bit concerned about whether this is early enough, given that the State Medicaid Directors are meeting 10/7-9, and people will certainly be expecting some straight answers from HCFR by then -- not on everything, but on some things. At the moment, I think HCFR is not as far along in terms of giving NGA/NCSL/APWA guidance as other agencies.

By the way, I hear from Monahan that HHS is discussing the mechanism by which states can signal their intention on whether legal immigrants are still eligible for Medicaid. One option is to make the default position that they ARE covered. This way, a Governor would have to take a proactive position to drop them.

I also assume the state legislature can get involved in this decision if they pass a law, but otherwise the Governor's actions control.

Hope someone from your unit is coming to our welfare reform subgroup meeting tomorrow (Tuesday) at 3 in room 211. We are going to try to make it at the same time every week.

Let me know if you think we need a WH/OMB meeting to take stock of where we are on Medicaid, with counsel's office and intergovernmental in attendance as well.

I am also going to send Mark and Nicolette a copy of a draft timeline of critical dates that I am just beginning. Let me know if you have any comments.

Sorry for the long note!



OCT - 4 1996

7500 SECURITY BOULEVARD
BALTIMORE MD 21244-1850

Dear State Medicaid Director:

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) has substantial implications for Medicaid eligibility systems and responsibilities. In order to address implementation issues carefully, we have been working very closely with the joint Federal/State Eligibility Technical Advisory Group (E-TAG). That process is continuing, and will culminate in the issuance of a State Medicaid Manual issuance in December which will address many of the eligibility issues.

In the meantime, we understand that some States are moving ahead to submit Temporary Assistance to Needy Families (TANF) plans. In such cases, we will presume that you will continue to provide Medicaid eligibility for all the groups you covered on July 16, 1996, including permissible legal immigrants. For administrative purposes, we request that you notify us to that effect. If you are going to make any change to Medicaid coverage of eligibility groups, please submit a State Plan Amendment to do so. Plan Amendments may be submitted to us using whatever format you think appropriate, but providing as much information as necessary to describe the eligibility options you are electing for Medicaid. We are happy to work with you on the details of plan amendments as you proceed with implementation.

Please recognize that many legal immigrants (who might otherwise qualify for Medicaid) entering the country on or after August 22, 1996, are not eligible for Medicaid for five (5) years. However, under Section 402 of P. L. 104-193, States must continue to provide Medicaid eligibility, until at least January 1, 1997, to any qualified immigrant receiving Medicaid on August 22, 1996. States should be aware that Section 402 also permits states to continue coverage for most legal immigrants and to receive Federal matching funds for coverage of these individuals. In any event, States must continue to cover immigrants enrolled in Medicaid prior to August 22, 1996 until the State submits a State Plan Amendment to the contrary.

To sum up, in the absence of submitting a State Plan Amendment, you are expected to continue providing Medicaid eligibility for all the groups you covered on July 16, 1996, including permissible legal immigrants.

We will keep you informed as we develop Federal policy to implement this Act and will issue further policy guidance as soon as possible. Thank you for your cooperation in implementing this program.

Sincerely,



Judith D. Moore
Acting Director
Medicaid Bureau

cc:

All Regional Administrators
All Associate Administrators for Medicaid
Lloyd Bishop, OLIGA
Jennifer Baxendall, NGA
Lee Partridge, APWA
Joy Wilson, NCSL

FACT SHEET #1

LINK BETWEEN MEDICAID AND TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF)

Prior to enactment of P.L. 104-193, the Personal Responsibility and Work Opportunities Act of 1996:

- o Individuals who received AFDC cash assistance or who were deemed to have received AFDC were automatically eligible for Medicaid. (Section 1902(a)(10)(A)(i)(I) of the Social Security Act)
- o Families who lost AFDC cash assistance because of employment or receipt of child (or spousal) support payments were eligible for transitional Medicaid assistance for an additional period of time. (Sections 1902(a)(10)(A)(i)(I) and 1925 of the Social Security Act)
- o Various rules of the AFDC program were used to establish Medicaid eligibility for other Medicaid-only eligibility groups (e.g., pregnant women and children whose eligibility is related to the poverty level, optional groups of children and caretaker relatives who do not receive AFDC, and the medically needy.) (Section 1902 of the Social Security Act)

The new welfare reform law eliminates the AFDC cash assistance program and replaces it with a block grant program called Temporary Assistance for Needy Families (TANF) (Section 103 of the new law). However, families who meet the AFDC eligibility criteria prior to welfare reform will be eligible for Medicaid. States are not required to make a complete eligibility determination using all the pre-reform AFDC program rules. This determination is replaced by two basic eligibility requirements:

- o The family income and resources must meet the pre-reform AFDC standards (Section 1931(b)(1)(I) of the Social Security Act).
- o The pre-reform AFDC deprivation requirement must be met. (i.e., a child must be living with a parent or other relative and deprived of parental support or care by the death, absence, incapacity or unemployment of a parent.) (Section 1931(b)(1)(A)(ii) of the Social Security Act)

As under pre-reform law, if a family loses Medicaid eligibility because of employment or receipt of support payments or employment and received Medicaid in three of the preceding six months, the family is eligible for a period of extended Medicaid benefits. (Sections 408(a)(11) and 1931(c) of the Social Security Act)

States are permitted to deny Medicaid benefits to adults and heads of household who lose TANF benefits because of refusal to work. However, welfare reform law specifically exempts poverty-related pregnant

women and children from this provision and mandates their continued Medicaid eligibility. (Section 1931(b)(3) of the Social Security Act)

Because the AFDC cash assistance program is eliminated, welfare reform provides that any reference in Title XIX to an AFDC provision or an AFDC State Plan will be considered a reference to the AFDC provision or plan in effect for the State on July 16, 1996, i.e. "pre-reform" AFDC. This effectively freezes the pre-reform AFDC program for all Medicaid eligibility purposes, except that welfare reform also permits States to retain flexibility to change the applicable income and resource methodologies, as follows:

- o A State may lower its income standards, but not below the standards it applied on May 1, 1988. (Section 1931(b)(2)(A) of the Social Security Act)
- o A State may increase its income and resource standards up to the percentage increase in the CPI subsequent to July 16, 1996. (Section 1931(b)(2)(B) of the Social Security Act)
- o A State may also use less restrictive income and resource methodologies than those in effect on July 16, 1996. (Section 1931(b)(2)(C) of the Social Security Act)

Related Fact Sheets:

[Link Between Medicaid and SSI Coverage of Children under Welfare Reform](#)

[Link Between Medicaid and the Immigration Provisions of the Personal Responsibility and Work Opportunity Act of 1996](#)

[Increased Federal Matching Rates for Increased Administrative Costs of Eligibility Determinations under Welfare Reform](#)

FACT SHEET #2

LINK BETWEEN MEDICAID AND SSI COVERAGE OF CHILDREN UNDER WELFARE REFORM

Under the new law, the definition of childhood disability is no longer linked to the definition of disability for adults. The reference to "comparable severity" in the old law has been deleted.

The new definition says: (1) an individual under the age of 18 shall be considered to be disabled under SSI if that child has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least twelve months; and (2) no individual under the age of 18 who engages in substantial gainful activity may be considered disabled.

In addition to the new definition of disability for children, the law mandates two changes to current evaluation criteria in SSA's regulations. SSA must: (1) discontinue the individualized functional assessment (IFA) for children; and (2) eliminate maladaptive behavior in the domain of personal/behavioral function in determining whether a child is disabled.

In most States, individuals who are eligible for SSI are also eligible for Medicaid. These changes will result in some children losing SSI, and therefore Medicaid eligibility. However, many of the children affected could still continue to be covered under Medicaid because they meet other Medicaid eligibility criteria. States are required to perform a redetermination of Medicaid eligibility in any case where an individual loses SSI and that determination affects the individual's Medicaid eligibility.

Section 204(a) of the new law provides that SSI payments, for all beneficiaries, including children, may only begin as of the first day of the month following: (1) the date the application is filed or, if later, (2) the date the person first meets all eligibility factors. This is a delay in SSI eligibility in comparison with the old law.

Under Section 211 of the new law, SSA is required to redetermine the eligibility of recipients under age 18 by August 22, 1997. No SSI-eligible child may lose benefits by reason of a redetermination of disability using the new definition earlier than July 1, 1997.

Also under Section 211, SSA is required to send notices to the representative payees of all affected recipients no later than January 1, 1997.

Related Fact Sheets:

Link Between Medicaid and Temporary Assistance for Needy Families (TANF)

Link Between Medicaid and the Immigration Provisions of the Personal Responsibility and Work Opportunity Act of 1996

Increased Federal Matching Rates for Increased Administrative Costs of Eligibility Determinations Under Welfare Reform

FACT SHEET #3

LINK BETWEEN MEDICAID AND THE IMMIGRATION PROVISIONS OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY ACT OF 1996

Medicaid Eligibility of Legal Immigrants

The Personal Responsibility and Work Opportunity Act of 1996 (P.L. 104-193) identifies two categories of legal immigrants: "qualified aliens" and others.

***"Qualified Alien" Defined:** A "qualified alien" is an alien who is lawfully admitted for permanent residence under various sections of the Immigration and Nationality Act (INA) including: an asylee, a refugee, an individual who has been paroled into the U.S. for a period of one year, an individual who has had his/her deportation withheld, and who has been granted conditional entry. This definition also includes battered immigrants, and/or immigrants who would be indigent without assistance, because their sponsors are not providing adequate support.*

States have the following options to cover legal immigrants, as long as these individuals meet the financial and other eligibility requirements of the program.

Immigrants Residing in the U.S.

States are not required to end Medicaid coverage or eligibility for any "qualified aliens" residing in the U.S. before August 22, 1996. If the State Plan already provides such coverage and eligibility, HCFA will presume the State will continue to provide Medicaid to these individuals, until a State Plan Amendment is submitted to the contrary.

- o For immigrants who are "qualified aliens" receiving Medicaid benefits (were enrolled in the State's Medicaid program) on August 22, 1996, States must continue Medicaid coverage until at least January 1, 1997. After that date, HCFA will assume that States are continuing to cover these individuals, unless the State amends its State Plan to discontinue coverage of these individuals.
- o For immigrants who are "qualified aliens" residing in the United States before August 22, 1996, but were not enrolled on that date, whether eligible or not, States have the option not to provide Medicaid beginning on August 22, 1996. To do so, the State must amend its State Plan.
- o For other immigrants who are not "qualified aliens," Medicaid eligibility was terminated on August 22, 1996 under P.L. 104-193, except for those receiving SSI. For these immigrants, Medicaid eligibility continues until SSA redetermines eligibility (see page 4).

Excepted Groups of Immigrants

There is an excepted group of immigrants to whom the State *must* provide Medicaid coverage, provided the individuals are otherwise eligible. The following groups of immigrants are considered part of the excepted group:

- o Refugees -- For the first 5 years after entry to U.S. in that status
- o Asylees -- For the first 5 years after granted asylum
- o Individuals whose deportation is being withheld by the INS -- For the first 5 years after grant of deportation withholding
- o Lawful Permanent Residents -- After they have been credited with 40 quarters of coverage under Social Security (based upon their own work and/or that of spouses or parents) and no Federal means-tested public benefits were received by the individual in the quarter to be credited (or the spouse/parent on whose work record quarters were credited). Members of this group are not excepted if the immigrant arrives in the U.S. after August 22, 1996.
- o Honorably discharged U.S. military veterans, active duty military personnel, and their spouses and unmarried dependent children -- At any time.

Immigrants Admitted to the U.S. On or After August 22, 1996

There is a mandatory ban on Medicaid eligibility for immigrants who are "qualified aliens" newly admitted to the U.S. on or after August 22, 1996. The ban is in effect for the first five years they are in the U.S. in that status, unless the individual is a member of one of the excepted groups. After the five-year ban expires, an immigrant's access to Medicaid is at State option (for those otherwise eligible). For those who have individual sponsors who sign new, legally binding affidavits of support (required elsewhere in welfare reform, beginning no later than February 1997), States must deem the income and resources of the immigrant's sponsor (and sponsor's spouse) to be available to support the immigrant when determining the immigrant's eligibility for Medicaid. For most immigrants, deeming will not take effect for five years.

Individuals who have been credited with 40 quarters of work without receiving assistance are not considered an excepted group under these provisions.

Sponsor to “Qualified Alien” Deeming of Income and Resources

There is no deeming of sponsors’ income and resources for individuals who entered the U.S. under the old affidavits of support. The new deeming requirements apply to Medicaid in the following situations:

- o Deeming applies only to sponsors signing new, legally binding affidavits of support.
- o The sponsor’s and sponsor spouse’s income and resources will be counted when determining the income and resources available to the immigrant they sponsor.
- o Deeming applies only to immigrants who are sponsored by individuals.
- o Under the omnibus appropriations amendments, deeming does not apply to battered immigrants or to those who would be indigent, defined as unable to obtain food and shelter without assistance, because their sponsors are not providing adequate support.
- o Deeming continues until the earlier of naturalization by the immigrant or the immigrant’s being credited with 40 quarters of Social Security coverage. Such quarters do not include any quarters after December 31, 1996 in which the immigrant (or the immigrant’s spouse/parent on whose work record the immigrant is credited with quarters) receives Federal means-tested benefits.
- o Sponsors must reimburse Federal, State, and local governments for the cost of means-tested benefits received by the sponsored immigrant during the deeming period, but excluding the costs of emergency medical services.

Emergency Services

Provided they meet the financial and categorical eligibility requirements, both qualified aliens and non-qualified aliens continue to be eligible for emergency services under Medicaid.

SSI/ Medicaid Connection for “Qualified Aliens”

Other provisions of welfare reform ban receipt of SSI cash benefits for both current and new otherwise eligible “qualified aliens,” unless they are a member of one of the excepted groups listed above.

Individuals who continue to receive SSI cash benefits would be eligible for Medicaid under the usual rules. The Social Security Administration must redetermine the SSI eligibility of all immigrants within one year of enactment. Upon redetermination, the immigrant may lose cash assistance if he/she is not a member of one of the above excepted groups.

States are required to perform a redetermination of Medicaid eligibility in any case where an individual loses SSI and that termination affects the individual's eligibility for Medicaid. Those losing or barred in the future from receiving SSI cash benefits will find their Medicaid benefits affected in the following ways:

- o A State that has opted under its Medicaid plan to cover non-cash SSI-related groups would automatically continue Medicaid for "qualified aliens" who fit into those groups.
- o A State that has not previously opted under its Medicaid State plan to cover non-cash SSI-related groups could, as always, submit a State plan amendment to provide coverage for non-cash SSI-related groups. HCFA is exploring options to permit States to do this as simply as possible.

In addition, a State that opts to cover only SSI cash recipients may still be able to cover some of the "qualified aliens" under other provisions of current Medicaid law (i.e., poverty-related pregnant women and children, medically needy, etc.).

An immigrant who loses SSI cash benefits would continue to be eligible for Medicaid until the State conducts a Medicaid eligibility redetermination (which requires consideration of other bases for Medicaid eligibility for which the individual may qualify) and has found that the individual does not qualify for Medicaid by any other means.

Related Fact Sheets:

[Link Between Medicaid and Temporary Assistance for Needy Families \(TANF\)](#)

[Link Between Medicaid and Coverage of SSI Children under Welfare Reform](#)

[Link Between Medicaid and the Immigration Provisions of the Personal Responsibility and Work Opportunity Act of 1996](#)

FACT SHEET #4

INCREASED FEDERAL MATCHING RATES FOR EXTRA ADMINISTRATIVE COSTS OF ELIGIBILITY DETERMINATION UNDER WELFARE REFORM

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) has substantial implications for Medicaid eligibility systems and responsibilities. Section 114 of the law (Section 1931(h) of the Social Security Act) provides a special fund of \$500 million for enhanced Federal matching for States' expenditures attributable to the administrative costs of Medicaid eligibility determinations due to the law. The specific features of this provision are described below:

Federal Financial Participation (FFP) Rates

The normal FFP rate for States' administrative costs for eligibility determinations in the Medicaid program is 50 percent. However, under this new law, the Secretary is given discretion to increase the FFP rate above 50 percent, up to a fixed national cap of \$500 million for this enhanced funding. This enhanced funding is for extra administrative costs applicable to the increased cost of eligibility determinations due to welfare reform.

National Limitation on Total Funding

The total Federal funds available for enhanced match are limited to \$500 million.

Time Limitations

The \$500 million is available nationally for expenditures during the Fiscal Years 1997 through 2000. For each state, however, the enhanced funding is available for only the first 12 calendar quarters in which a State's Temporary Assistance to Needy Families (TANF) program is in effect after August 21, 1996.

Related Fact Sheets:

[Link Between Medicaid and Temporary Assistance for Needy Families \(TANF\)](#)

[Link Between Medicaid and Coverage of SSI Children under Welfare Reform](#)

[Link Between Medicaid and the Immigration Provisions of the Personal Responsibility and Work Opportunity Act of 1996](#)