

February 21, 2013

Sarah deLone and Stephanie Kaminsky
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2334-P
P.O. Box 8016
Baltimore, MD 21244-8016

Re: Proposed Rule for the Patient Protection and Affordable Care Act: Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing (Fed. Reg. Vol. 78, No. 14, 1/22/13)

Dear Ms. deLone and Ms. Kaminsky:

The undersigned organizations are writing to you because of our commitment to promoting and improving the well-being of children and youth who come to the attention of the child welfare system, including those in foster care. We are pleased that the proposed rule noted above take an important step toward implementing the Affordable Care Act's (ACA) provision to ensure Medicaid to age 26, beginning in January 2014, to all eligible former foster youth. This provision is intended to complement the ACA provision that allows other young adults to receive health coverage to age 26 under their parents' health insurance plans, beginning in some cases as early as 2010. This new mandate for Medicaid coverage for former foster care youth offers a promising opportunity to ensure that the health and mental health needs of these youth are better met in the future. It recognizes the challenges many young people, who leave foster care without returning to their families, being adopted or placed permanently with relative guardians, face in obtaining health coverage. For many of these young adults, Medicaid coverage to age 26 is critically important to their later success in life.

While many of our organizations have submitted individual comments on the proposed rule, we have come together here to strongly urge the Department of Health and Human Services (Department) to reverse its interpretation in the proposed rule that states will only be *required* to enroll eligible former foster care youth in Medicaid to age 26 if they remain living in the state where they were in foster care and enrolled in Medicaid. We also urge you to take steps either in the final regulations or through a joint letter or guidance from the Centers for Medicare & Medicaid Services and Administration on Children and Families/ Administration for Children, Youth and Families to states to ensure that these eligible former foster care youth will be automatically identified and enrolled in Medicaid and notified of the fact and how to access care. We discuss these major recommendations below.

First, we wanted to emphasize our support for a number of the important provisions in the Department's proposed rule that will help former foster care youth retain Medicaid to age 26.

We are pleased that Title IV-E and non-Title IV-E former foster care youth can be eligible for Medicaid to age 26, and that once eligible, if in a state that provides Medicaid coverage to them, may apply and be determined eligible at any time between attaining age 18 and losing eligibility at age 26. We recognize that these youth are eligible for Medicaid because of their status as former foster care youth and that other rules that sometimes apply to Medicaid, such as income, resource and asset tests, and premiums and co-pays, will not apply. We are also pleased that the ability of this group of young people to enroll in Medicaid is not contingent upon a state accepting new Medicaid funds. Finally, we thank you for making it clear that when a former foster youth approaches age 26 and the loss of Medicaid, he or she shall be terminated from Medicaid only if the individual is not eligible under any other adult Medicaid eligibility group.

Second, we recommend that the Department ensure in the final regulations that Medicaid to age 26 will truly be available to *all* eligible former foster care youth.

While recognizing the positive steps forward in the proposed rule and the generous coverage offered to eligible former foster care youth, we strongly recommend that all eligible former foster care youth be able to enroll in Medicaid to age 26, regardless of whether they are residing in the state where they were in foster care and enrolled in Medicaid. For former foster care youth who move to different states during the next eight or so years after they leave foster care, continued Medicaid is only *optional* – states may decide whether or not to extend Medicaid to age 26 for this group of former foster care youth, now young adults.

We strongly recommend that the final regulations replace this state option with a requirement that states must provide Medicaid to age 26 for *all* eligible former foster care youth, without regard to the state in which they are living. Such a change would better address the needs of this particularly vulnerable and sometimes transient group of young people. We have outlined below a series of facts and circumstances about these young people that we believe support such an interpretation.

1. The intent of the Congressional sponsors of this provision is to ensure that any young person who had been in foster care on their 18th birthday and was enrolled in Medicaid, regardless of where he or she had been in foster care and was now living, would be able to enroll in Medicaid to age 26.

- Senator Mary Landrieu (D-LA), the chief sponsor of the provision, made clear her intent to make all eligible former foster care youth able to receive Medicaid to age 26 in her remarks delivered on the Senate floor on December 22, 2009 (*Congressional Record*, Senate Legislative Action, pages S13731 – 13733). An excerpt from her statement follows:

“So the bill includes this important provision to allow kids to stay on their parents’ insurance for a bit longer as they transition into adulthood... But my question was where do the young people who age out of the foster care system sign up, because they do not have parents? I was proud to work on a provision that Leader Reid included in this bill to *ensure that every young person who ages out of the foster care system will be able to stay on Medicaid until the age of 26 starting in 2014 (italics added.)* Almost 30,000 young people age out of the foster care system every year, having never been adopted or reunified with their birth parents. The fact that they aged out is our failure as a government. We have failed them once and we just can’t fail them twice. We must support their transition to adulthood, and guaranteeing access to quality health care will help with that transition.”

- As noted above, this coverage provision for former foster care youth was intended to provide health coverage to this group of youth who could not benefit from the other ACA provision that extended health coverage to youth to age 26 under their parents’ insurance plans. Yet, no similar residency requirement is imposed on youth who can benefit from health coverage under their parents’ insurance to age 26. It seems unfair to treat young people who grew up with the state as a parent differently in this regard than those who grew up with their parents caring for them.
- 2. Other children age 18 or older who had been in foster care to age 21, adopted or placed with relative guardians as they leave foster care, continue, at least to age 21, to be able to receive Medicaid regardless of the state in which they are living. Similarly, all of the eligible former foster care youth should continue to be eligible regardless of their residence.**
- The Program Instruction (PI) implementing the Fostering Connections to Success and Increasing Adoptions Act (ACYF-CB-PI-10-11, pp. 4-5), for example, clarifies that Medicaid coverage is to continue for a youth if they move to a different state. Specifically, the PI states that youth on whose behalf Title IV-E foster care maintenance payments or guardianship payments are being made, or who are subject to adoption assistance agreements, are categorically eligible for Medicaid provided the state provides Medicaid to youth these ages. This includes youth up to age 21 “whether or not the title IV-E agency in the State of residence has taken the option to provide extended [foster care] assistance.”
- 3. The requirement of having to remain in the state where you were in foster care will be especially challenging for many eligible former foster care youth.**
- The proposed rule, for example, does not seem to take into account situations like the Metropolitan Washington Area (and there are others) where children often are placed in foster homes in a state other than that which has

responsibility for them. You may have a child with disabilities for whom the District of Columbia has legal responsibility, but who has been placed in a foster home in Maryland for several years. Often, one jurisdiction makes the foster care payment and the other pays for Medicaid. It is not clear where that youth, if eligible for Medicaid as a former foster care youth, must reside in order to be ensured of being able to enroll in Medicaid to age 26. At a minimum, children in such situations should be ensured of getting coverage in either state.

- It will be especially stressful and disruptive for young people with special needs to have to weigh the potential loss of continued treatment and Medicaid when considering a move to a new state. The security that continuing Medicaid offers, especially to young people who have disabilities, chronic illnesses, or are receiving specialized treatment for mental health or physical health problems, is extremely important. Their health may be jeopardized when considering a move to a new state to be closer to family, to attend school or to take a better job when they have to worry about whether it will mean discontinuation of needed treatment.
- A number of the young adults who move may end up in a state where no public support for Medicaid would be available for them. The new state has the option not to provide Medicaid to former foster care youth to age 26 who were not previously in foster care or enrolled in Medicaid in their state, and may elect not to accept Medicaid Expansion funds under the ACA, so young people making below 133 percent of poverty would not be eligible for assistance.

4. Given the vulnerability and size of this population, every effort should be made to enroll as many of the young adults in Medicaid as possible – rather than restricting enrollment from the beginning.

- The estimated 195,000 former foster care youth who might be eligible under this provision, assuming every youth aging out of care from January 1, 2007 to December 31, 2013, would only be a very small percentage of the 4.8 million young adults ages 18 to 24 who were enrolled in Medicaid in 2011. Most at that time were probably more likely part of the 7.6 million young adults in that age range who were uninsured.
- The only real data available on the mobility of former foster care youth seems to suggest that the number of young people who leave a state where they were in foster care for a new state may be relatively small. This makes it even more sensible to let all former foster care youth, regardless of where they are residing, to be automatically eligible for Medicaid.

5. The language cited by HHS in the commentary to the proposed rule as support for its interpretation is also subject to another interpretation.

- The commentary to the proposed rule (p. 4604) states that it is the language that requires an individual be in foster care under the responsibility of “*the state*” and be enrolled in Medicaid under the “*the state plan*” or an 1115 demonstration that led HHS to the decision that the Medicaid mandate only applies to children who remain in *the same* state after they leave foster care rather than in “*a state.*” However, another reading of that same language is possible. The reference to “under the responsibility of the state” could also be a reference to the fact that the children in foster care who are eligible for Medicaid must have been “under the responsibility of the state” as opposed to under the responsibility of a private child caring agency. In talking about children in care in the custody of a state, the use of the term “under the responsibility of the State” is a familiar term of art.

Third, in order for these former foster care youth to get the Medicaid coverage they deserve and need, the Department must help to ensure that all eligible former foster care youth are notified about their eligibility and that enrollment and re-enrollment in Medicaid are automatic.

- We recommend that the Department ensure that enrollment in Medicaid is as automatic as possible for former foster care youth by requiring states to implement presumptive eligibility, passive enrollment and passive renewal for them, where appropriate. We are very pleased that the ACA and proposed rule make clear that if a state has elected to provide presumptive eligibility for children or pregnant women that the state *may* also elect to provide presumptive eligibility for former foster care youth. (p. 4611, §435.1103, p. 4697) We recommend that former foster care youth should be allowed, on their own, to be a presumptive eligibility group.

Fourth, we also recommend that the Department include in the final regulations, or in a joint letter or guidance from the Centers for Medicare & Medicaid Services and the Administration on Children and Families/the Administration for Children, Youth and Families suggested steps that state Medicaid and child welfare agencies should take to ensure that all eligible youth are notified that they are eligible to receive Medicaid to age 26 and told how to enroll in Medicaid.

- State Medicaid and child welfare agencies and Health Exchanges should be required or at least encouraged to put in place procedures in advance of January 1, 2014, that will make verification of a former foster care youth’s eligibility for Medicaid as automatic as possible. These procedures also must be described in the joint oversight plan that child welfare agencies are required to develop in collaboration with Medicaid agencies.

- Steps also should be taken immediately, in collaboration with alumni of foster care and others working on behalf of these young people, to begin extensive outreach efforts to notify foster youth preparing to leave care or those who will likely to be eligible who left since January 1, 2007 of their potential eligibility for Medicaid to age 26 and how to enroll. Notice of eligibility and enrollment procedures should be included in youth's transition plans as they prepare to leave care, in their Educational Transition Vouchers, and efforts to contact them through the National Youth in Transition Database. In addition, we recommend that the Department initiate a toll-free telephone number for these former foster youth to call with questions about their eligibility and enrollment procedures.

Thank you for your leadership in ensuring that the ACA reaches the additional children it is intended to serve and for your consideration of our comments. We strongly urge you to make the modifications noted above in your final regulations to ensure all eligible former foster care youth, many of whom often have special health and mental health needs, can receive Medicaid to age 26. It is the lifeline to a successful future for many of them.

We would appreciate the opportunity to discuss any or all of our comments with you in further detail. Please contact MaryLee Allen at the Children's Defense Fund ([202-662-3573](tel:202-662-3573)/mallen@childrensdefense.org), who will notify us about the opportunity for such a discussion and any additional questions you may have about our comments.

Sincerely yours,

National Organizations:

American Academy of Child and Adolescent Psychiatry
 American Academy of Pediatrics
 American Federation of State, County and Municipal Employees
 Association of Community Human Service Agencies
 Association on American Indian Affairs
 Bazelon Center for Mental Health Law
 Black Administrators in Child Welfare, Inc.
 Children and Family Futures
 Children's Action Network
 Children's Advocacy Institute
 Children's Defense Fund
 Children's Home Society of America
 CLASP
 Child Welfare League of America
 First Focus
 Foster Care to Success Foundation
 Foster Family-based Treatment Association
 FosterClub
 Generations United

Healthy Teen Network
Human Rights Project for Girls
John Burton Foundation
Juvenile Law Center
National African American Drug Policy Coalition, Inc.
National Association for Children of Alcoholics
National Association for Children's Behavioral Health
National Association of County Human Services Administrators
National Association of Social Workers
National CASA for Children Association
National Center for Housing and Child Welfare
National Center for Youth Law
National Council for Community and Education Partnerships
National Foster Care Coalition
National Foster Youth Action Network
National Indian Child Welfare Association
National Urban League
North American Council on Adoptable Children
The Alliance for Children's Rights
The Center for the Study of Social Policy
The Children's Partnership
The National Campaign to Prevent Teen and Unplanned Pregnancy
The National Foster Youth and Alumni Policy Council
Voice for Adoption
Voices for America's Children
Youth Law Center
Youth Villages, Inc

State and Local Organizations:

Accessing Health Services For California's Children In Foster Care Task Force
Bay Area Youth Center
Bill Wilson Center
Casa Pacifica Centers for Children and Families
Children Now
County Welfare Directors Association of California
Creative Alternatives, Inc.
Five Acres
Foster Care Counts
Gavilan College, Extended Opportunity Programs and Services
Legal Advocates for Children and Youth
Legal Services for Children
Nebraska Families Collaborative
New Beginnings Supportive Services
Northern California Association of Counsel for Children
Oklahoma Therapeutic Foster Care Association
Public Counsel Children's Rights Project

San Francisco Court Appointed Special Advocates Program
San Gabriel Children's Center, Inc.
University of Miami School of Law Children & Youth Law Clinic
Ventura College Foster & Kinship Care Education
Voices for Children (CASA of San Diego)
Young Minds Advocacy Project