



STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

Paul R. LePage
GOVERNOR

Via U.S. Mail and Email

August 1, 2012

The Honorable Kathleen Sebelius, Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Sebelius:

I am writing to inform you directly of the request for expedited approval of the Medicaid plan amendments that the State of Maine filed today. It is important that we engage in direct communications on areas of mutual interest and concern to ensure that there are no misunderstandings of Maine's objectives. Enclosed for your convenience please find a copy of the August 1, 2012 letter (with attachments) from Commissioner Mary C. Mayhew to Associate Regional Administrator Richard R. McGreal requesting approval of the Medicaid State Plan Amendments by September 1, 2012.

Maine must comply with its constitutionally-mandated balanced budget provision. Maine and Mainers have tightened their belts in a variety of ways, from reforming Maine workers' retirement benefits to eliminating an entire state agency. Among the measures the Maine Legislature used to reach a balanced budget in this challenging economic period was to enact a mandate to decrease in State Medicaid costs in the amount of \$19.93 million. To achieve that directive, Maine plans to reduce Medicaid eligibility in three areas. I must emphasize that even after these reductions Maine's eligibility requirements in these three areas will still be higher than the Medicaid eligibility minimums. In order to balance Maine's budget, these modest decreases must be implemented by October 1 of this year. Because of that, we have made clear that if your Department does not approve of the amendments by September 1, we will be forced to go to court and seek appropriate relief. However, if you agree that CMS will pay Maine for its state share for coverage for these three groups, then Maine would agree not to file suit on or about September 1, 2012. If CMS' view is contrary to Maine's and is found to be correct, it can deduct these amounts from FMAP when that issue is resolved later.

This decision is easy for your Department to make quickly for at least three reasons. First, as noted, these modest changes will keep the eligibility standards in Maine above the Medicaid eligibility minimums.



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The Honorable Kathleen Sebelius, Secretary
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Second, the maintenance of effort (“MOE”) mandate of the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. 1396a(gg), which froze states’ Medicaid eligibility standards as of March 23, 2010, is part and parcel of the Medicaid expansion that was struck down on June 28, 2012, in *National Federation of Independent Businesses v. Sebelius* (“*NFIB*”), ___ U.S. ___, 132 S.Ct. 2556 (2012).

Third, and most clearly, the MOE violates fundamental constitutional principles. Previously, Congress had created an entirely voluntary program in response to the serious economic downturn by enacting the American Recovery and Reinvestment Act of 2009 (“ARRA”), Public Law 111-5. Under ARRA, a state could voluntarily obtain increased Federal Medical Assistance Percentage (“FMAP”) for a prescribed period of time (for 27 months between October 1, 2008, and December 31, 2010) in return for maintaining the Medicaid eligibility standards which were in effect on July 1, 2008 until December 31, 2010. ARRA allowed for a state to decrease its Medicaid eligibility standards after this period, when the enhanced FMAP was no longer available. Maine did voluntarily partake of this program, relying upon and expecting that ARRA’s maintenance of effort requirement would end on December 31, 2010. The enhanced ARRA FMAP was extended through June 30, 2011, pursuant to the Education, Jobs and Medicaid Assistance Act (P.L. 111-226), with the identical MOE provision.

The ACA, however, froze those eligibility standards on March 23, 2010, as part of its MOE mandate, 42 U.S.C. § 1396a(gg). As the Supreme Court reiterated in *NFIB*, slip opinion at 54 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 25 (1981)), “Though Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or ‘retroactive’ conditions.” That is exactly what the ACA does here – it attempts to turn an agreed upon voluntary program into a mandatory one extending voluntarily accepted requirements to 2014 for adults and 2019 for children – and does so while eliminating the very incentives that persuaded Maine to agree to the ARRA and P.L. 111-226 MOE.

Both as part of the mandatory expansion struck down in *NFIB* and as a “postacceptance” condition, the ACA MOE provision fails and cannot be enforced against Maine. Therefore, we have asked the United States Department of Health and Human Services to immediately amend the State Plan as requested.

Please note that under the Nonapplication provision of the ACA, states are allowed to terminate Medicaid coverage of nondisabled nonpregnant adults whose income is above 133% FPL. Maine has complied with the Nonapplication requirement that it file a certification of budget deficit with CMS. Accordingly, since there can be no dispute concerning this part of the SPA request, we ask that it be immediately approved.

The Honorable Kathleen Sebelius, Secretary
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Please feel free to call upon me at any time regarding this matter. Keeping the lines of communication between our offices open is critical to our continuing to work together.

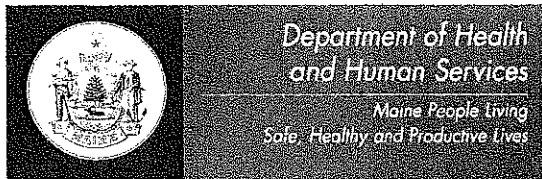
Sincerely,



Paul R. LePage
Governor

Enclosure: August 1, 2012 letter from M. Mayhew to R. McGreal (with attachments)

cc (w/enc.): Senator Olympia Snowe
Senator Susan Collins
Representative Michael Michaud
Representative Chellie Pingree
Kevin Raye, President of the Senate
Robert Nutting, Speaker of the House
Jon Courtney, Senate Majority Leader
Barry Hobbins, Senate Minority Leader
Philip Curtis, House Majority Leader
Emily Cain, House Minority Leader
Commissioner Mary C. Mayhew
Richard McGreal, Associate Regional Administrator
Earle McCormick, Co-Chair, Committee on Health and Human Services
Meredith Strang Burgess, Co-Chair, Committee on Health and Human Services
Richard Rosen, Co-Chair, Committee on Appropriations and Financial Affairs
Patrick Flood, Co-Chair, Committee on Appropriations and Financial Affairs
Margaret Craven, Committee on Health and Human Services
Mark Eves, Committee on Health and Human Services
Dawn Hill, Committee on Appropriations and Financial Affairs
Margaret Rotundo, Committee on Appropriations and Financial Affairs



Paul R. LePage, Governor

Mary C. Mayhew, Commissioner

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Via U.S. Mail and Email

August 1, 2012

Richard R. McGreal, Associate Regional Administrator
U.S. Department of Health and Human Services
Center for Medicare and Medicaid Services
JFK Federal Building, Government Center
Room 2275
Boston, MA 02203

Dear Mr. McGreal:

The State of Maine, through its Department of Health and Human Services, seeks to amend its State plan through the attached proposed Medicaid State Plan Amendment ("SPA") (Transmittal Number: 12-010) (Attachment A) which will make the eligibility changes described below, with an effective date of October 1, 2012. These SPA amendments would result in Maine's Medicaid eligibility remaining well above the mandated federal standards. The Maintenance of Effort ("MOE") provision of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. 1396a(gg), either is not applicable or is void under *National Federation of Independent Businesses v. Sebelius*, ___U.S. ___, 132 S.Ct. 2556 (2012). The State of Maine requests that your office expeditiously review and approve this SPA so that Maine can achieve its budget savings as directed by the Legislature and achieve a balanced budget as required by the Maine Constitution. While Maine would prefer not to resort to the courts for relief, Maine will incur irreparable financial injury absent your expeditious approval of the SPA or alternatively CMS's commitment to pay Maine for its costs while this SPA is pending. For the reasons discussed below, Maine is asking you to approve these SPA amendments by September 1, 2012, or agree that CMS will pay Maine for its costs while this SPA or any litigation is pending past October 1, 2012.

STATE PLAN AMENDMENT (SPA) REQUEST

I. Parents and Caretakers

The Federal Medicaid minimum for parents and caretaker relatives under Sections 1902(r)(2), 1902(a)(A)(10)(ii)(I) and 1905(a)(ii) of the Social Security Act is a state's 1996 eligibility requirement for the Aid for Families with Dependent Children ("AFDC"). For Maine, the Federal Medicaid minimum requirement is 51% of Federal Poverty Level ("FPL"). However, Maine's current State plan covers parents and other caretaker relatives up to 200% of FPL.

The amendment will reduce the coverage under Section 1902(r)(2) for parents and other caretaker relatives eligible under Sections 1902(a)(A)(10)(ii)(I) and 1905(a)(ii) of the Social Security Act from 200% to 100% of FPL. Even at the 100% FPL level, Maine will be far above the national average for this coverage group. "On average States cover only those unemployed who make less than 37 percent of the [FPL], and only those employed parents who make less than 63 percent of the poverty line." *NFIB*, slip opinion at 45, citing Kaiser Comm'n on Medicaid and the Uninsured, *Performing Under Pressure: Annual Findings of a 50-State Survey of Eligibility, Enrollment, Renewal, and Cost-Sharing Policies in Medicaid and CHIP*,¹ 2011-2012, p. 11, and fig. 11 (January 2012).

II. 19 and 20 Year Olds

Covering 19 and 20 year olds as children under federal Medicaid is an option, pursuant to Sections 1902(a)(10)(A)(ii) and 1905(a)(i) of the Social Security Act. Maine is requesting to decrease coverage of 19 and 20 year old individuals, so that only 19 and 20 year old independent foster care adolescents and state adoption children are covered.

III. Medicare Savings Program ("MSP")

The Social Security Act requires states to cover as a Medicaid group (to reimburse Medicare co-payments and deductibles) the following individuals who are also eligible for Medicare, and at these income levels:

Qualified Medicare Beneficiaries ("QMB"): at 100% FPL,
Section 1902a(10)(E)(i);
Specified Low Income Medicare Beneficiaries ("SLMB"): at 120% FPL,
Section 1902a(10)(E)(iii); and
Qualified Individuals ("QI"): at 135% of FPL, Section 1902a(10)(E)(iv).

Maine's coverage has been much more generous;² it has covered:

QMB at 150% ;
SLMB between 150% and 170%, and
QI between 170% and 185%.

¹ CHIP is a state/federal program that provides matching funds to states for health insurance to families with children. The program was designed to cover uninsured children in families with incomes that are modest but too high to qualify for Medicaid. 42 U.S.C. §§ 1397aa-1397mm.

² Only Maine, Connecticut and the District of Columbia cover QMB, SLMB and QI above the federal minimum. Kaiser Comm'n on Medicaid and the Uninsured, *Medicaid Financial Eligibility: Primary Pathways for the Elderly and People with Disabilities*, February 2010 p. 3-4.

Maine now requests to reduce the eligibility for these groups as follows:

QMB at 140% of FPL;
SLMB at between 140% and 160%; and
QI at between 160% and 175%.

MAINE HAS OR WILL COMPLY WITH ALL FEDERAL SPA REQUEST REQUIREMENTS

- I. Maine has Consulted with the Maine Tribes
Maine has complied with Tribal Consultation requirements set forth in its State plan.
- II. Notice Requirements
Maine will provide all applicable prior notice and appeal rights.
- III. Maine will Review other Eligibility Options for these Individuals
In accordance with federal law, the State will follow all existing rules regarding the termination of coverage, including determining whether an individual's eligibility should continue under another unaffected eligibility category.

BACKGROUND

Medicaid is a jointly funded state and federal program that provides medical services to low-income persons pursuant to Title XIX of the Social Security Act. "In order to receive that [federal] funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue." *NFIB*, slip opinion at 10. In Maine, for the state's fiscal year 2013 (July 1, 2012 to June 30, 2013) the Medicaid program, which is known as MaineCare, constitutes 33.7 percent of the total state budget, and the federal Medicaid funds constitute 21.97 percent of the state's budget.

Prior to the ACA, under the American Recovery and Reinvestment Act of 2009, Public Law 111-5 ("ARRA") States that chose to participate were already complying with the ARRA Medicaid MOE requirement based on the eligibility standards that they had in effect on July 1, 2008 as a condition of securing the enhanced Federal Medical Assistance Percentage ("FMAP") provided by ARRA, § 5001(f)(1)(A). Maine did voluntarily participate in that program, expecting as stated in that statute that the ARRA Medicaid MOE was originally slated to expire on December 31, 2010, along with the enhanced FMAP. ARRA, § 5001(h)(3).

The ACA requires states to maintain eligibility standards in effect on the date of enactment -- March 23, 2010³ -- for adults in Medicaid until January 1, 2014, and for children in Medicaid and the Children's Health Insurance Program (CHIP) until October 1, 2019. In particular, the statute reads, in pertinent part:

MAINTENANCE OF EFFORT.

(1) GENERAL REQUIREMENT TO MAINTAIN ELIGIBILITY STANDARDS UNTIL STATE EXCHANGE IS FULLY OPERATIONAL.—

...[D]uring the period that begins on the date of enactment of the Patient Protection and Affordable Care Act and ends on the date on which the Secretary determines that an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act is fully operational, as a condition for receiving any Federal payments ... for calendar quarters occurring during such period, a State shall not have in effect eligibility standards, methodologies, or procedures under the State plan under this title or under any waiver of such plan that is in effect during that period, that are more restrictive than the eligibility standards, methodologies, or procedures, respectively, under the plan or waiver that are in effect on the date of enactment of the Patient Protection and Affordable Care Act.

(2) CONTINUATION OF ELIGIBILITY STANDARDS FOR CHILDREN UNTIL OCTOBER 1, 2019.—

The requirement under paragraph (1) shall continue to apply to a State through September 30, 2019, with respect to the eligibility standards, methodologies, and procedures under the State plan under this title or under any waiver of such plan that are applicable to determining the eligibility for medical assistance of any child who is under 19 years of age (or such higher age as the State may have elected).

(3) NONAPPLICATION.—During the period that begins on January 1, 2011, and ends on December 31, 2013, the requirement under paragraph (1) shall not apply to a State with respect to nonpregnant, nondisabled adults who are eligible for medical assistance under the State plan or under a waiver of the plan at the option of the State and whose income exceeds 133 percent of the poverty line ... applicable to a family of the size involved if, on or after December 31, 2010, the State certifies to the Secretary that, with respect to the State fiscal year during which the certification is made, the State has a budget deficit, or with respect to the succeeding State fiscal year, the State is projected to have a budget deficit.

³ As a practical matter Medicaid eligibility standards were frozen on October 1, 2008, because on March 23, 2010 (the ARRA MOE eligibility freeze date), eligibility was already frozen back to October 1, 2008.

Upon submission of such a certification to the Secretary, the requirement under paragraph (1) shall not apply to the State with respect to any remaining portion of the period described in the preceding sentence.

ACA, § 2001(b) (codified at 42 U.S.C. § 1396a(gg)).

If a State fails to maintain its Medicaid eligibility at the levels in effect on March 23, 2010, it risks losing all federal Medicaid funding. 42 U.S.C. § 1396c. The MOE provision (42 U.S.C. § 1396a(gg)), was enacted as part of the Medicaid expansion section – ACA, § 2001 (“TITLE II—ROLE OF PUBLIC PROGRAMS, Subtitle A—Improved Access to Medicaid, Medicaid coverage for the lowest income populations.”) Effectively, the ACA expands Medicaid by extending the voluntary program that ended on June 30, 2011, to the 2014 and 2019 dates for adults and children, respectively. This retroactive change was made unilaterally by the Federal Government.

Maine, like other states, is dealing with the most serious economic downturn since the Great Depression. Maine, unlike the Federal Government, must have a balanced budget. ME. CONST., Art. V, Part Third, § 5; Art IX, § 14. Maine developed a number of legislative and administrative initiatives to address its economic crisis. These initiatives include, but are not limited to, state employee pension reform, unpaid shut-down days for state employees, a salary freeze for state employees, a hiring freeze for state employees and elimination of a state agency.

In particular, many states are struggling to balance their budgets as the enhanced FMAP of ARRA and P.L. 111-226 ended, and they are faced with the MOE restriction. In February 2011 Secretary Sebelius sent a letter to all state Governors, explaining that although their hands were tied with the MOE, states could realize savings in their Medicaid programs by reducing Medicaid benefits, managing care for high-cost enrollees more effectively, purchasing drugs more efficiently, and assuring Program Integrity. Maine responded by reducing the following MaineCare services: Targeted Case Management, Home and Community Benefits for Members with Intellectual Disabilities or Autistic Disorder, Home and Community Benefits for the Elderly and Adults with Disabilities, Physical Therapy, Occupational Therapy, Chiropractic Services, Vision Services, and Support Services for Adults with Intellectual Disabilities or Autistic Disorders. Since 2010 Maine has reduced reimbursement rates for the following services: Support Services for Adults with Intellectual Disabilities or Autistic Disorders, Nursing Facilities, Rehabilitative and Community Support Services for Children with Cognitive Impairments and Functional Limitations, Developmental and Behavioral Evaluation Clinic Services, Behavioral Health Services, Transportation Services, Occupational Therapy, Physical Therapy, Podiatric Services, Private Non-Medical Services-Appendix D (Child Care Services), Family Planning Services, and Community Support Services.

In addition, Maine continues to manage its high-cost MaineCare members more effectively through the use of improved assessments, prior authorization, utilization review and retrospective review. Maine is a national leader in its MaineCare drug purchasing program due to the use of supplemental rebates and its participation in a multi-state drug purchasing pool. Consistent with federal law, Maine has enacted legislation to suspend payments to MaineCare providers upon a credible allegation of fraud (22 M.R.S. § 1714-D) and to allow Maine to enter into contingency fee contracts with an audit recovery vendor (22 M.R.S. § 13-A). The legislation will enhance Maine's ability to assure MaineCare Program Integrity.

It is important to note that fewer than one-half of the states cover the Medicaid expansion group (the non-categorical childless adults) prior to the ACA.⁴ Maine was one of them. Currently, the MaineCare non-categorical group covers approximately 13,000 individuals. The total expenditures for the Maine non-categorical group for Maine state fiscal year 2012 are estimated at \$65 million total (\$24 million in state funds, and \$41 million in federal matching funds).

The Maine Legislature struggled with what to do with the non-categorical group and other MaineCare eligibility groups in light of the dire economic situation. The Maine Legislature, as part of its supplemental balanced budget for state fiscal year 2013, directed that the Department maintain the non-categorical group (but at a frozen enrollment and decreased budget), and to make smaller cuts to the three eligibility groups outlined below at issue in this SPA request, subject to CMS approval.⁵ Maine's Medicaid program has been one of the most generous in the country for some time, and the proposed decreases would still place Maine well above the federal minimum Medicaid eligibility requirements.

⁴ Kaiser Family Foundation, *Medicaid Income Eligibility Limits for Adults as a Percent of Federal Poverty Level, July 2012*, (July 2012)..

⁵ See: P.L. 2011, ch. 477.

PART AA, Sec. AA-1, reduces total spending on non-categorical group to within \$40 million, and continues a freeze on enrollment.

See: P.L. 2011, ch. 477.

PART Z, Sec. Z-1, reduces Medicaid coverage to parent or caretaker relative of child from 200% to 133% of FPL.

See: P.L.2012, ch. 657.

Part Z, Sec. Z-1, reduces Medicaid coverage to parent or caretaker relative of child from 133% to 100% of FPL.

Part GG, Sec. GG-1, eliminates Medicaid coverage to 19 and 20 year olds.

Part HH, Sec. HH-2, reduces income eligibility levels for the Medicare savings program as follows: for the Qualified Medicare Beneficiary coverage group (QMB), to income not more than 140% of the FPL, for the Specified Low-Income Medicare Beneficiary coverage group (SLMB), to income more than 140% but not more than 160% of the FPL, and for the Qualified Individuals coverage group (QI), to income more than 160% but not more than 175% of the FPL.

**MAINE ELIGIBILITY CHANGES COMPARED WITH
 FEDERAL MINIMUM MEDICAID REQUIREMENTS**

ELIGIBILITY CATEGORY	PRESENT MAINE LEVEL	PROPOSED MAINE LEVEL	FEDERAL MINIMUM
Parent/Caretaker Relative	200% FPL	100% FPL	51% FPL (1996 AFDC Full Need Standard)
19- And 20-Year-Olds	Included	Decrease coverage to include coverage only for independent foster care adolescents and state adoption children	optional group
Medicare Savings Program	QMB – 150% FPL SLMB – 170% FPL QI – 185% FPL	QMB – 140% FPL SLMB – 160% FPL QI – 175% FPL	QMB – 100% FPL SLMB – 120% FPL QI – 135% FPL

As this chart makes clear, even after the eligibility changes are made, Maine recipients will remain well above the federal minimum requirements. These modest changes will save Maine \$19.93 million in state dollars. The savings are to go into effect on October 1, 2012 – therefore, time is of the essence. Failure to grant this plan amendment immediately will prevent Maine from using the commensurate savings to balance its budget, and thus other state services and responsibilities will suffer.

**THE ACA EXPRESSLY AUTHORIZES STATES TO DELETE COVERAGE FOR
 NONDISABLED, NONPREGNANT PARENTS AND CAREGIVERS
 WHOSE INCOME IS ABOVE 133% FPL**

The ACA contains an exception to the MOE, the “nonapplication provision”, 42 U.S.C. § 1396a(a)(gg)(3). Under the nonapplication provision states can eliminate Medicaid coverage for nonpregnant, nondisabled adults whose income exceeds 133% of FPL. Under federal law, two conditions must first be met before this population can be eliminated from Medicaid coverage: (1) the state must file with the DHHS Secretary a certification that the state has a budget deficit; and (2) the State plan must be amended to delete that population. Maine had a third condition; it needed legislative approval. Maine has met two of the three conditions; it received legislative approval, and on December 20, 2011 Maine filed a certification of budget deficit with Secretary Sebelius (for the state fiscal year period from July 1, 2012 to June 30, 2013). Attachment B. There can be no dispute that CMS is required to approve the Maine State plan removing nonpregnant, nondisabled adults whose income exceeds 133% of FPL.⁶

⁶ The MOE Nonapplication provision [42 U.S.C. § 1396a(gg)(3)], states, in relevant part:

THE ACA MOE IS UNCONSTITUTIONAL

Particularly following the Supreme Court's decision in *NFIB*, this issue is not a difficult one to resolve. Indeed, this is an even more clear case of an unconstitutional condition than dealt with in *NFIB*.

On June 28, 2012, the Supreme Court issued its decision in *National Federation of Independent Businesses v. Sebelius* ("*NFIB*"), ___ U.S. ___, 132 S.Ct. 2556 (2012), which held, *inter alia*, that the ACA was unconstitutional insofar as it conditioned the receipt of Federal Medicaid funding for prior programs upon the State's complying with the ACA's Medicaid expansion. Part and parcel of that expansion was the maintenance of effort ("MOE") mandate which froze States' Medicaid eligibility standards as of March 23, 2010 – the date the ACA became law. ACA, § 2001. Simply put, the ACA required Maine to expand its Medicaid program by requiring Maine to cover until 2014 or 2019, individuals who previously were not required by agreement to be covered past 2011.

In addition, Congress previously had created an entirely voluntary program in response to the serious economic downturn by enacting ARRA. Under ARRA, a state could voluntarily obtain increased FMAP for a prescribed period of time (for 27 months between October 1, 2008, and December 31, 2010) in return for maintaining its Medicaid eligibility standards that were in effect on July 1, 2008 through December 31, 2010.⁷ *See generally*, ARRA, § 5001(h)(3). The ARRA allowed for a state to decrease its Medicaid eligibility standards after December 31, 2010, when the enhanced FMAP was no longer available. Maine did voluntarily participate in that program, relying upon and expecting that ARRA's maintenance of effort requirement would end on December 31, 2010. On August 10, 2010, the Education, Jobs and Medicaid Assistance Act (P.L. 111-226), was enacted. Among other things, the legislation, in Section 201, extended the enhanced FMAP under Section 5001 of the ARRA for the period of January 1, 2011 through June 30, 2011. Additional funds were available to states on the condition that states maintain the Medicaid eligibility standards in effect as of July 1, 2008. Maine voluntarily participated in the programs for the extension of enhanced ARRA and P.L. 111-226 FMAP rates.

Upon submission of such a certification to the Secretary, the requirement under paragraph (1) shall not apply to the State with respect to any remaining portion of the period described in the preceding sentence.

⁷ The ARRA provided:

STATE INELIGIBILITY; LIMITATION; SPECIAL RULES.
(1) MAINTENANCE OF ELIGIBILITY REQUIREMENTS.

[A] State is not eligible for an increase ... if eligibility standards, methodologies, or procedures under its State plan ... are more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) as in effect on July 1, 2008.

ARRA, § 5001(f)(1)(A).

The ACA, as part of its expansion of Medicaid, however, froze those eligibility standards as of March 23, 2010, as part of its MOE mandate, 42 U.S.C. § 1396a(gg), although the extended ARRA incentives ended on June 30, 2011. As the Supreme Court reiterated in *NFIB*, slip opinion at 54 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 25 (1981)), “Though Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or ‘retroactive’ conditions.” That is exactly what the ACA does here – it attempts to turn a voluntary program that ended on June 30, 2011, into a mandatory one extending voluntarily accepted requirements to 2014 for adults and 2019 for children. Both as part of the mandatory expansion struck down in *NFIB* and as a “postacceptance” condition, the MOE provision fails and cannot be enforced against Maine. Therefore, we ask that the United States Department of Health and Human Services immediately amend the State Plan as requested.

First, in *NFIB* the Supreme Court held that the Medicaid expansion of the ACA could not constitutionally be pressed upon the States. The MOE is part and parcel of that Medicaid expansion. One need only look at the ACA itself. The particular portions of the expansion in dispute in *NFIB* are contained in the very same provision of the ACA as the MOE, entitled “MEDICAID COVERAGE FOR THE LOWEST INCOME POPULATIONS.” ACA, § 2001(a) & (b). While the ACA provides incentives of 100 percent federal coverage for the costs of the required expansion to all individuals under the age of 65 with incomes below 133 percent of the federal poverty line, the ACA does not pay for its extension of the previously voluntary MOE. *Id.* This provision clearly “is a gun to the head” of Maine. *NFIB*, slip opinion at 51. “Section 1396c of the Medicaid Act provides that if a State’s Medicaid plan does not comply with the *Act’s requirements*, the Secretary of Health and Human Services may declare that ‘further payments will not be made to the State.’” *Id.* (emphasis added). The United States Supreme Court held this is unconstitutional. The MOE is one of the “*Act’s requirements*”—Maine was not required to freeze its Medicaid eligibility standards to 2014 and 2019 before the ACA. If Maine “opts out of” that provision it “stands to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but *all* of it.” *Id.* That is, over 20 percent of the Maine’s entire budget. This “economic dragooning” is unconstitutional. *Id.*

Second, the MOE provision is more problematic than other aspects of Medicaid expansion specifically mentioned in *NFIB*. The Supreme Court explained that use of the Spending Clause with the states is in the nature of a contract, whereby “The legitimacy of Congress’s exercise of the spending power ‘thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”” *NFIB*, slip opinion at 46-47 (quoting *Pennhurst*, 451 U. S. at 17). Here, in the ACA, Congress has done exactly that which the Constitution prevents it from doing – “surprising participating States with postacceptance or ‘retroactive’ conditions.” *Id.* (quoting *Pennhurst*, 451 U. S. at 25). And, the penalty for reducing Medicaid eligibility under ARRA and P.L. 111-226, was a take-back only of the enhanced federal Medicaid matching funds. In contrast, the penalty under the ACA for reducing Medicaid eligibility is a take-back of 100% of the federal Medicaid matching funds.

Under the ARRA and P.L. 111-226, Maine voluntarily agreed to freeze its July 1, 2008, eligibility standards through June 30, 2011, in order to receive extra Medicaid funds until the latter date. Maine had the option of not accepting the funds and therefore not freezing its standards for that period. The ACA, however, expanded that freeze after June 30, 2011, until 2014 for adults and 2019 for children, and put the “gun to the head” of Maine with the loss of *all* of its federal Medicaid funding (*i.e.*, 20.58 percent of Maine’s entire budget) if Maine refused to do so. Congress took a *voluntary* program and turned it into a *mandatory* one. This post-acceptance, retroactive condition, therefore, is more constitutionally troublesome than those specifically identified in *NFIB*. In *NFIB*, the Court discussed and rejected the new eligibility requirements of the ACA. Here, the preexisting “contract” was Maine’s agreement to freeze its eligibility standards until June 30, 2011; the ACA specifically changed that “contract” by extending the eligibility standards for years beyond that date – and did that even though the incentives the enhanced FMAP of the ARRA and P.L. 111-226 ended on June 30, 2011. The provisions of the ARRA’s “genuine choice whether to accept the offer” are what should stand, not the ACA’s unilateral, postacceptance ultimatum where Maine and other states are “given no . . . choice”. *NFIB*, slip opinion at 58.

Allowing the MOE to stand permits the Federal Government to force the States to implement a federal government program. This “threaten[s] the political accountability key to our federal system.” *NFIB*, slip opinion at 48. The MOE forces Maine to cover in its Medicaid program individuals above and beyond the original mandatory groups. This is “no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.” *Id.* At 53-54. Just as the Medicaid expansion requirement is unconstitutional under *NFIB*, so too is the MOE requirement.

FEDERAL MEDICAID LAW DOES NOT REQUIRE MAINE TO PROVIDE TRANSITIONAL MEDICAID TO THE PARENT CARETAKER GROUP

In addition, Maine should not be required to provide Transitional Medicaid (42 U.S.C. § 1396r-6) to the parent/caretaker group. Federal Medicaid law requires that states provide transitional Medicaid for at least a six-month extension, to those parents/caretakers who have been deemed ineligible because of increased revenue from employment.⁸

Here, however, the parents/caretakers will become ineligible because of a change in the State plan making the entire group ineligible for MaineCare, they are not becoming ineligible because of an increase in their income levels. The plain language of the statute does not require Maine to extend MaineCare benefits to a group of individuals who are no longer covered at all under the State plan. The purpose of Transitional Medicaid is to allow recipients to continue to receive Medicaid, because in all likelihood, some or all of those individuals will suffer a

⁸ Title 42 U.S.C. § 1396r-6(a)(1)(A) requires in relevant part:

...each State plan...must provide that each family which was receiving aid pursuant to ...in at least 3 of the 6 months immediately preceding the month in which such family becomes ineligible for such aid, because of hours of, or income from, employment of the caretaker relative...remain eligible for assistance under the plan ...during the immediately succeeding 6-month period in accordance with this subsection.

Richard R. McGreal, Associate Regional Administrator
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Page 11

decrease in their income and become eligible once again for Medicaid. The Transitional Medicaid serves the purpose of not allowing a gap in Medicaid coverage.

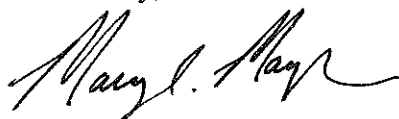
This is especially true with regard to the parents/caretaker individuals who are above 133% of the FPL. There is no dispute that Maine can eliminate that group, because under the ACA, the MOE does not apply to those individuals. *See* discussion above. 42 U.S.C. § 1396a(a)(gg)(3)(non-application provision). Any other interpretation would render the non-application provision meaningless. For these reasons, the State should not be required to provide Transitional Medicaid to the parent/caretaker group.

CONCLUSION

For these reasons, the plan amendment is required to be immediately approved. If not done so by September 1, 2012, Maine will be forced to go to the court for relief. Any delays in the process would render the amendments to the State Plan futile in view of Maine's need to balance its budget. If you agree that CMS will pay Maine for its state share for coverage for these three groups, then Maine would agree not to file suit on or about September 1, 2012. If CMS' view is contrary to Maine's and is found to be correct, it can deduct these amounts from FMAP when that issue is resolved later.

I look forward to receiving your approval of Maine's State Plan Amendment. If you have any questions, please contact Stefanie Nadeau, Director, Office of MaineCare Services at 207-287-2093.

Sincerely,



Mary C. Mayhew
Commissioner

Attachments:

- (A) Proposed Medicaid State Plan Amendment (SPA) (Transmittal Number: 12-010)
- (B) December 20, 2011 State of Maine Certification of Budget Deficit and Request for a period of nonapplication of the MOE provisions in 1902(gg) of the Social Security Act.

cc (w/enc.): Kathleen Sebelius, Secretary, US DHHS
Cindy Mann, Director, Center for Medicaid and CHIP Services, CMS, US DHHS
William J. Schneider, Attorney General, State of Maine
Stefanie Nadeau, Director, Office of MaineCare Services
Dale Denno, Director, Office for Family Independence
Bethany Hamm, Director, Policy and Programs, Office for Family Independence
Doreen McDaniel, MaineCare Program Manager, Office for Family Independence

Attachment A

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL FOR: CENTER FOR MEDICARE AND MEDICAID SERVICES	1. TRANSMITTAL NUMBER: 12-- 010	2. STATE: MAINE
TO: REGIONAL ADMINISTRATOR CENTER FOR MEDICARE AND MEDICAID SERVICES DEPARTMENT OF HEALTH AND HUMAN SERVICES	3. PROGRAM IDENTIFICATION: TITLE XIX OF THE SOCIAL SECURITY ACT (MEDICAID)	
4. PROPOSED EFFECTIVE DATE(S) OCTOBER 1, 2012		

5. TYPE OF PLAN MATERIAL (CHECK ONE):

NEW STATE PLAN
 AMENDMENT TO BE CONSIDERED AS NEW PLAN
 AMENDMENT

COMPLETE BLOCKS 6 THRU 10 IF THIS IS AN AMENDMENT (*Separate Transmittal for each amendment*)

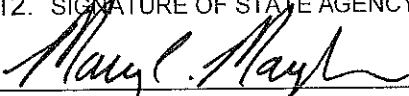
6. FEDERAL STATUTE/REGULATION CITATION: 1902(a)(10)(A)(ii)(I) of the Social Security Act; 1902(a)(10)(A)(ii)(XVII) of the Social Security Act; 1902(r)(2) of the Social Security Act; 1905(a)(i) and 1905(w) of the Social Security Act; and, 1931 of the Social Security Act	7. FEDERAL BUDGET IMPACT: a. FFY <u>2013</u> \$ (33,558,790) b. FFY <u>2014</u> \$ (33,308,729)
--	---

8. PAGE NUMBER OF THE PLAN SECTION OR ATTACHMENT: SUPPLEMENT 8A TO ATTACHMENT 2.6-A, PAGE 2 SUPPLEMENT 12 TO ATTACHMENT 2.6-A, PAGE 2 (A-1) ATTACHMENT 2.2-A, PAGES 12, 13, 13A AND 23 SUPPLEMENT 1 TO ATTACHMENT 2.2-A, PAGE 1	9. PAGE NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT (<i>If Applicable</i>): REPLACES PAGES OF SAME NUMBER
---	--

10. SUBJECT OF AMENDMENT:
 MORE LIBERAL METHODS OF TREATING INCOME UNDER SECTION 1902(R)(2) OF THE ACT - 1902(a)(10)(A)(ii)(I); 1931; and 1902(a)(10)(E)(i)(iii)(iv) of the Social Security Act
 COVERAGE OF OPTIONAL GROUPS OTHER THAN MEDICALLY NEEDY - 1902(a)(10)(A)(ii); and 1905(a)(i) of the Social Security Act
 REASONABLE CLASSIFICATIONS OF INDIVIDUALS UNDER THE AGE OF 21, 20, 19 AND 18

11. GOVERNOR'S REVIEW (*Check One*):

GOVERNOR'S OFFICE REPORTED NO COMMENT
 OTHER, AS SPECIFIED
 COMMENTS OF GOVERNOR'S OFFICE ENCLOSED
 COMMISSIONER, DEPT. OF HEALTH AND HUMAN SERVICES
 NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL

12. SIGNATURE OF STATE AGENCY OFFICIAL: 	16. RETURN TO: STEFANIE NADEAU, DIRECTOR Office of MaineCare Services #11 State House Station 242 State Street Augusta, ME 04333-0011
13. TYPED NAME: MARY C. MAYHEW	
14. TITLE: COMMISSIONER, DEPARTMENT OF HEALTH AND HUMAN SERVICES	
15. DATE SUBMITTED:	

FOR REGIONAL OFFICE USE ONLY

17. DATE RECEIVED:	18. DATE APPROVED:
--------------------	--------------------

PLAN APPROVED - ONE COPY ATTACHED

19. EFFECTIVE DATE OF APPROVED MATERIAL:	20. SIGNATURE OF REGIONAL OFFICIAL:
21. TYPED NAME:	22. TITLE:

23. REMARKS

INSTRUCTIONS FOR COMPLETING FORM HCFA-179

Use Form HCFA-179 to transmit State plan material to the regional office for approval. A separate typed transmittal form should be completed for each plan/amendment submitted.

Block 1 - Transmittal Number - Enter the State Plan Amendment transmittal number. Assign consecutive numbers on a calendar basis (e.g., 92-001, 92-002, etc.).

Block 2 - State - Type the name of the State submitting the plan material.

Block 3 - Program Identification - Title XIX of the Social Security Act (Medicaid)

Block 4 - Proposed Effective Date - Enter the proposed effective date of material.

Block 5 - Type of Plan Material - Check the appropriate box.

Block 6 - Federal Statute/Regulation Citation - Enter the appropriate statutory/regulatory citation.

Block 7 - Federal Budget Impact - 7(a) - Enter 1st **Federal Fiscal Year** (FFY) impacted by the SPA & estimated Federal share of the cost of the SPA (in thousands) for 1st FFY. 7(b) - Enter 2nd FFY impacted by the SPA & estimated Federal share of the cost for 2nd FFY. See SMM section 13026.

Block 8 - Page No.(s) of Plan Section or Attachment - Enter the page number(s) of plan material transmitted. If additional space needed, use bond paper.

Block 9 - Page No.(s) of the Superseded Plan Section or Attachment (if applicable) - Enter the page number(s) (including the transmittal sheet number) that is being superseded. If additional space needed, use bond paper.

Block 10 - Subject of Amendment - Briefly describe the plan material being transmitted.

Block 11 - Governor's Review - Check the appropriate box. See SMM section 13026 B.

Block 12 - Signature of State Agency Official - Authorized State official signs this block.

Block 13 - Typed Name - Type name of State official who signed block 12.

Block 14 - Title - Type title of State official who signed block 12.

Block 15 - Date Submitted - Enter the date you mail plan material to RO.

Block 16 - Return To - Type the name and address of State official this form should be returned to.

Block 17-23 (FOR REGIONAL OFFICE USE ONLY)

Block 17 - Date Received - Enter the date plan material is received in RO. See ROM section 6003.2.

Block 18 - Date Approved - Enter the date RO approved the plan material.

Block 19 - Effective Date of Approved Material - Enter the date the plan material becomes effective. If more than one effective date, list each provision and its effective date in Block 23 or attach a sheet.

Block 20 - Signature of Regional Official - Approving RO official signs this block.

Block 21 - Typed Name - Type approving official's name.

Block 22 - Title - Type approving official's title.

Block 23 - Remarks - Use this block to reference pen and ink changes, a partial approval, more than one effective date, etc. If additional space needed, use bond paper.

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: Maine

ELIGIBILITY CONDITIONS AND REQUIREMENTS

MORE LIBERAL METHODS OF TREATING INCOME
UNDER SECTION 1902(r)(2) OF THE ACT

Section 1902(f) State

Non-Section 1902(f) State

For caretaker relatives eligible (using AFDC income and asset requirements) under
1902(a)(A)(10)(ii)(I) and 1905(a)(ii)

- (1) Disregard income in the amount of the difference between 100% of the AFDC Full
Need Standard in the 7/16/96 state plan and 100% of the federal poverty level for the
size family involved as revised annually in the Federal Register.

Revision:

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State: Maine

The agency uses less restrictive income and/or resource methodologies than those in effect as of July 16, 1996, as follows:

Effective 1/1/98:

1. In determining countable income, exclude income in the amount of the difference between 100% of the AFDC Full Need Standard in the 7/16/96 state plan and 100% of the federal poverty level for the size family involved as reissued annually in the federal register.

The income and resource methodologies that the less restrictive methodologies replace are as follows:

- a. \$30 and 1/3 income disregard.
- b. 185% of Full Need gross income test.
- c. 100% of Full Need countable income test.

NOTE: This change provides that anyone now eligible remains eligible.

TN No. 12-010
Supersedes
TN No. 00-009

Approval Date: _____

Effective Date: 10/1/2012

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State: Maine

INCOME ELIGIBILITY LEVELS (Continued)

B. OPTIONAL GROUPS OTHER THAN THE MEDICALLY NEEDY
(Continued)

42 CFR 435.220 6. Individuals who would be eligible for AFDC if their work-related child care costs were paid from earnings rather than by a State agency as a service expenditure. The State's AFDC plan deducts work-related child care costs from income to determine the amount of AFDC.

The State covers all individuals as described above.

The State covers only the following group or groups of individuals:

1902 (a) (10) (A) — Individuals under the age of
(ii) and 1905 (a)
Of the Act

- 21
- 20
- 19
- 18

- Caretaker relatives
- Pregnant women

42 CFR 435.222 7. a. All individuals who are not described in section 1902 (a) (10) (A) (i) of the Act who meet the income and resource requirements of the AFDC State plan, and who are under the age of 21 as indicated below.

1902 (a) (10)
(A) (ii) and
1905 (a) (i)
of the Act

- 21
- 20
- X 19
- 18

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State:

Maine

B. Optional Groups Other Than the Medically Needy
(Continued)

42 CFR 435.222

b. Reasonable classifications of individuals described in (a) above, as follows:

___ 1) Individuals for whom public agencies are assuming full or partial financial responsibility and who are:

___ (a) In foster homes (and are under the age of ___.)

___ (b) In private institutions (and are under the age of ___).

___ (c) In addition to the group under b. (1) (a) and (b), individuals placed in foster homes or private institutions by private, nonprofit agencies (and are under the age of ___).

___ (2) Individuals in adoptions subsidized in full or part by a public agency (who are under the age of ___).

___ (3) Individuals in NFs (who are under the age of ___). NF services are provided under this plan.

___ (4) In addition to the group under (b) (3), individuals in ICFs/MR (who are under the age of ___).

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State: Maine

B. Optional Groups Other Than the Medically Needy
(Continued)

1902 (a)(10)(A)(ii)(XVII)
And 1905(w) of the Act

X

19. Independent Foster Care Adolescents. Individuals who were in foster care when they left the custody of the Maine Department of Health and Human Services on their 18th birthday, until they reach age 21. The income and resource requirements are described on Supplement 12 to Attachment 2.6-A, page 2 (a-1).

Revision: HCFA-PM-91-4 (BPD)
August 1991

SUPPLEMENT 1 TO ATTACHMENT 2.2-A
Page 1
OMB No.: 0938-

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State:

Maine

REASONABLE CLASSIFICATIONS OF INDIVIDUALS UNDER
THE AGE OF 21, 20, 19 AND 18

1902(a)(10)(A)(ii)(XVII) and
1905(w) of the Act

Independent foster care adolescents who are within any reasonable
categories of such adolescents specified by the State.

TN No. 12-010
Supersedes
TN No. 91-14

Approval Date: _____

Effective Date: 10/1/2012

HCFA ID: 7985E

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: Maine

ELIGIBILITY CONDITIONS AND REQUIREMENTS

MORE LIBERAL METHODS OF TREATING INCOME
UNDER SECTION 1902(r)(2) OF THE ACT

Section 1902(f) State

Non-Section 1902(f) State

For Qualified Medicare Beneficiaries (QMB) 1902(a) (10) (E) (i), disregard income in the amount of the difference between 100% of the Federal Poverty Level and 140% of the Federal Poverty Level.

For Specified Low Income Beneficiaries (SLMB) 1902(a) (10) (E) (iii), disregard income in the amount of the difference between 120% of the Federal Poverty Level and 160% of the Federal Poverty Level.

For Qualifying Individuals (QI) 1902(a) (10) (E) (iv) (Public Law 105-33) disregard income in the amount of the difference between 135% of the Federal Poverty Level and 175% of the Federal Poverty Level.

Attachment B



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE AND
FINANCIAL SERVICES
78 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0078

Paul R. LePage
GOVERNOR

H. Sawin Millett, Jr
COMMISSIONER

December 20, 2011

Health & Human Services

DEC 22 2011

Commissioner's Office

The Honorable Kathleen Sebelius, Secretary
US Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Sebelius:

In accordance with and for the purposes of section 1902(gg)(3) of the Social Security Act, as amended by the Affordable Care Act, I certify that the State of Maine:

Projects a budget deficit for the State Fiscal Year 2013 representing the period 07/01/2012 – 06/30/2013 following the State Fiscal Year in which this certification is submitted.

The State of Maine requests an effective period of non-application of the Affordable Care Act Medicaid MOE of July 1, 2012 through June 30, 2013.

Sincerely,

H. Sawin Millett, Jr.
Commissioner