

**FACT SHEET: CITIZENSHIP DOCUMENTATION REQUIREMENTS
UNDER THE DEFICIT REDUCTION ACT AND INTERIM FINAL RULE¹**

Prepared by:
Manjusha P. Kulkarni
National Health Law Program
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I. Introduction

This fact sheet describes the citizenship documentation requirements found in the Deficit Reduction Act of 2005 (DRA), including the documents that can and must be used to verify citizenship for Medicaid eligibility purposes. Also, the fact sheet discusses recent developments in the implementation of the DRA citizenship documentation requirements, such as the release of the interim final regulations and the opinion issued in *Bell v. Leavitt*. Finally, it offers some advocacy strategies for advocates as their states implement the DRA.

II. The Deficit Reduction Act of 2005

To be eligible for full Medicaid benefits, an individual must be a citizen or national of the United States or a qualified legal immigrant. In the past, most states allowed U.S. citizens to attest to their citizenship under the penalty of perjury when applying for Medicaid benefits.² States required documentation of citizenship only when there was a reason to question an applicant's statement attesting citizenship.

On February 8, 2006, President Bush signed the DRA. Included in the DRA was a provision requiring applicants for and recipients of Medicaid who are U.S. citizens to provide documentation verifying their citizenship. Notably, this provision was added at the request of Representatives Charlie Norwood (R-Georgia) and Nathan Deal (R-Georgia) who claimed that they wanted to prevent undocumented immigrants from enrolling in Medicaid. However, a report by the HHS Office of the Inspector General found no substantial evidence that undocumented immigrants are fraudulently getting Medicaid coverage by claiming they are citizens. The report, thus, did not recommend requiring the documentation of citizenship. And state officials interviewed for the report noted that such a requirement would add significant administrative costs and burdens,

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² See 42 U.S.C. §§ 1320b-7(d), 1396a(b)(3).

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requiring the hiring of additional eligibility personnel.³ On February 16, 2006, Senator Akaka (D-Hawaii) and others introduced S. 2305, a bill to repeal these provisions.

The citizenship documentation requirements, which were ultimately included in Section 6036 of the DRA, mandate that states document the U.S. citizenship of some, but not all, Medicaid participants.⁴ Effective July 1, 2006, the provision applies to both new applicants and current recipients (at the time of recertification /redetermination), who declare themselves to be citizens or nationals of the United States under 42 U.S.C. § 1320b-7(d) for purposes of establishing Medicaid eligibility. The DRA provision conditions Federal Financial Participation (FFP) on state verification of documentation, but does not actually change eligibility requirements for Medicaid. The DRA provision does not impose any new documentation requirements on non-citizen immigrants.⁵ Thus, on its face, the provision is not an eligibility requirement.

The statute allows states to use only certain documents to verify U.S. citizenship:

- U.S. passport
- Certificate of Naturalization (Form N-550 or N-570)
- Certificate of U.S. Citizenship (Form N-560 or N-561)
- A valid state-issued driver's license or identity document described in 8 U.S.C. § 274A(b)(1)(D) (Immigration and Nationality Act), *but only* if the state requires proof of U.S. citizenship prior to issuance or obtains and verifies the individual's Social Security Number
- For individuals under age 16 or in a State which does not provide for issuance of an identification document (other than a driver's license), documentation of personal identity of such other type as the U.S. Attorney General finds, by regulation, provides a reliable means of identification *but only* if the state requires proof of U.S. citizenship prior to issuance or obtains the individual's Social Security Number and verifies its accuracy.
- Such other documentation as the Secretary of HHS may allow by regulation that provides proof of U.S. citizenship/nationality and "a reliable means of documentation of personal identity."⁶

³ See HHS, OIG, *Self-Declaration of U.S. Citizenship for Medicaid* (July 2005), at <http://oig.hhs.gov/oei/reports/oei-02-03-00190.pdf>.

⁴ Section 6036 adds 42 U.S.C. §§ 1396b(i)(22) and 1396b(x) to the Medicaid Act.

⁵ Qualified legal immigrants are eligible for Medicaid, but must provide proof of their immigration status as part of their application.

⁶ See DRA, § 6036 (adding 42 U.S.C. §§ 1396b(i)(22) and 1396b(x)).

If a person does not have one of the above documents, he/she must provide one document from each of the following columns:

Column 1	Column 2
<ul style="list-style-type: none"> • Birth certificate from U.S. birth • Certificate of birth abroad (Form FS-545 or DS-1350) • U.S. Citizen Identification Card (Form I-97) • Report of Birth Abroad of a Citizen of the U.S. (Form FS-240) • Such other document as the Secretary of HHS may specify that provides proof of citizenship or nationality 	<ul style="list-style-type: none"> • A state driver's license or similar identity document if it contains a photograph of the individual or identifying information found sufficient by the Attorney General, <i>but only</i> if the state requires proof of U.S. citizenship prior to issuance or obtains the individual's Social Security Number and verifies its accuracy.⁷ • In the case of individuals under age 16 or in a State which does not issue identification documents (other than a driver's license), documentation of personal identity as the Attorney General finds provides a reliable means of identification <i>but only</i> if the state requires proof of U.S. citizenship prior to issuance or obtains the individual's Social Security Number and verifies its accuracy.⁸ • Other documentation specified by the Secretary of HHS that provides a reliable means of identification.

III. Key Provisions of the Interim Final Regulations

On July 12, Centers for Medicare & Medicaid Services (CMS) published an Interim Final Rule on Citizenship Documentation, implementing §6036 of the DRA.⁹ While the regulations were released with a notice and comment period, they became effective immediately. Highlights of the Rule include the following:

- Medicare beneficiaries and SSI recipients in non-209b states are exempted from providing documentation to verify citizenship when applying for Medicaid.

⁷ See 8 U.S.C. 1324a(b)(1)(D); 8 C.F.R. §274a.2. Note that 8 U.S.C. 1324a(b)(1)(D) is specifically referenced in § 6036(a)(3)(D) for its list of documents that can be used to prove identity if birth certificates, Certification of Birth Abroad or other documents are offered to verify citizenship.

⁸ *Id.*

⁹ See 71 Fed. Reg. 39214 (July 12, 2006).

- SSI recipients in 209b states are not exempted, but states can verify their citizenship through the State Database Exchange (SDX) system.
- Children receiving foster care or adoption assistance are not exempted from the citizenship documentation mandates.
- When proving citizenship, applicants for and recipients of Medicaid benefits must provide documents according to a four-tiered hierarchy created by CMS. Documents in the first tier are preferred over those on the second tier and those on the second tier are preferred over those in the third tier. To prove their citizenship, those unable to obtain documents outlined in the top three tiers can submit other records or written affidavits of other citizens who can prove their own citizenship and identity.
- Only citizen infants born to citizens and qualified legal immigrants do not need to document their citizenship. Citizen infants born to immigrant women with restricted benefits have to provide documentation.
- Medicaid benefits do not have to be offered to applicants during the “reasonable opportunity” period which they have to submit citizenship documentation.
- The citizenship documentation requirement is transformed from a condition on states to receive Federal Financial Participation to an eligibility requirement on applicants for Medicaid benefits.¹⁰

A. Exemptions Provided for Medicare Beneficiaries and Most SSI Recipients

One key provision of the interim final regulations exempts those who do not need to declare citizenship in order to receive Medicaid, including all Medicare beneficiaries and individuals in non-209b states who receive Supplemental Security Income (SSI).¹¹ For those SSI recipients in 209b states who are not exempted from citizenship documentation requirements, the interim final regulations clarify that states may use the SDX system to verify their citizenship.¹² The SDX system will offer proof of citizenship, but these individuals will still have to provide verification of identity.

B. Children Receiving Federal Foster Care or Adoption Assistance Still Required to Provide Documentation

While the regulations exempt Medicare beneficiaries and most individuals who qualify for Medicaid because of receipt of SSI benefits, it fails to exempt similarly situated foster care children and others who do not declare citizenship.¹³ Congress is explicit in directing that the new documentation requirements would apply only to an individual who:

¹⁰ For additional information about the contents of the Rule, see Final NHeLP Comments on HHS Interim Rule on Citizenship Documentation, at <http://www.healthlaw.org/library.cfm?fa=detailItem&fromFa=detail&id=110925&folderID=103219&appView=folder&r=id~~103219,appview~~folder,rootfolder~~23177,fa~~detail>.

¹¹ See 71 Fed. Reg. 39214, 39216. Individuals in non-209b states automatically qualify for Medicaid if they receive SSI benefits. Note that the description in the statute, 42 U.S.C. § 1396b(x)(2), contains a “scrivener’s error” and should be interpreted to apply to “individuals” and not “aliens.” See *id.* at 39215.

¹² See *id.* at 39222 (to be codified at 42 C.F.R. § 435.407(a)(5)).

¹³ See *id.* at 39216.

declares under section 1137(d)(1)(A) to be a citizen or national of the United States for purposes of establishing eligibility for benefits under this title [*i.e.*, Medicaid]¹⁴

As applicants who not have to declare under § 1137(d)(1)(A) of the SSA to be citizens or nationals of the United States for the purpose of getting Medicaid, children receiving foster care benefits under Title IV-E should not be required to provide citizenship documentation.¹⁵ These children need only demonstrate their citizenship in order to obtain foster care benefits. They then get Medicaid benefits because they have been found to qualify for foster care, not because they independently meet all of the other Medicaid eligibility requirements.

C. Rule Creates Elaborate Hierarchy of Documents to Prove Citizenship

The Rule establishes an elaborate four-tiered priority structure for the documents that are deemed acceptable to verify citizenship status.¹⁶ Primary evidence of citizenship, considered to be the most reliable, includes U.S. passports, Certificate of Naturalization, Certificate of U.S. Citizenship, a state-issued driver's license only if it requires proof of citizenship, and SDX data for those in 209b states.¹⁷ Secondary evidence can be offered only if primary evidence is unavailable; examples include birth certificate, U.S. citizen I.D. card, U.S. Military Record and an American Indian card. Proof of identity must also be provided along with the secondary evidence. The third level of citizenship may be used when neither primary or secondary evidence is available. Examples are life, health or other insurance record showing the U.S. as a place of birth or a hospital record extract on hospital letterhead established at the time of birth; however, these documents can only be offered if they were created at least five years before the initial application date and indicate a U.S. place of birth. Proof of identity must be provided with evidence from the third level as well. The fourth level of citizenship proof, which is to be used only in "the rarest of circumstances," consists of federal or state census records, institutional admission papers, medical records, and written affidavits, signed under the penalty of perjury. Affidavits must be offered by at least two other citizens who have knowledge of the applicant or recipient's claim of citizenship. At least one of the individuals providing an affidavit cannot be a relative and all of them must be able to prove their own citizenship and identity. The Medicaid applicant or recipient must provide a separate affidavit explaining why other documentary evidence cannot be obtained as well as proof of identity.

D. Medicaid Benefits Not Offered to Applicants Seeking Citizenship Documents During "Reasonable Opportunity" Period

The interim federal regulations fail to provide Medicaid benefits to applicants while they seek to obtain necessary citizenship documentation. While states are required to offer a "reasonable opportunity" period for applicants to secure their citizenship documents, they are not mandated to

¹⁴ 42 U.S.C. § 1396b(i)(22).

¹⁵ In fact, that section of the SSA does not require that they file any declaration in order to receive Title IV-E foster care benefits, for Title IV –E is not a program to which the declaration process applies. *See* 42 U.S.C. § 1320b-7(b).

¹⁶ *See* 71 Fed. Reg. 39214, 39222 (to be codified at 42 C.F.R. § 435.407).

¹⁷ Note that those individuals who were born outside the U.S. who were not citizens at birth must submit a document listed under primary evidence of U.S. citizenship. *See id.* at 39218.

provide Medicaid benefits during this period.¹⁸ If they choose to do so, states must use state only funds. In this way, the Rule offers less to citizen applicants than it does to qualified legal immigrants who do get Medicaid benefits during the reasonable opportunity period.¹⁹

E. Citizen Children of Unqualified Immigrants Treated Differently Than Citizen Children of Citizen Parents

The Rule provides that children born in this country to women who receive full scope Medicaid can receive Medicaid without the need to document their citizenship, at least until their first birthdays.²⁰ However, it does not provide the same treatment to children born in this country to women who are also Medicaid recipients, but whose benefits are limited in scope to labor and delivery because of their immigration status. A child in either situation is by definition a U.S. citizen, a fact known to the Medicaid agency because it paid for the child's birth in a U.S. hospital.

F. Rule Imposes New Eligibility Requirement Not Intended by Act

§ 6036 of the DRA did not impose a new eligibility requirement on applicants for or beneficiaries of Medicaid, but, rather, established a new condition on states for receipt of Federal Financial Participation. The Rule as written, however, converts the provision of documentary evidence of citizenship into an eligibility requirement for citizen Medicaid applicants, as it prohibits states from providing medical assistance to a person before (s)he has presented that evidence.²¹

This conversion ignores the plain language of § 1137(d)(1)(A), specifically referenced by § 6036 of the DRA, which makes the “condition of eligibility” for Medicaid “a declaration in writing, under penalty of perjury” that the individual “is a citizen or national of the United States” Nothing in § 6036 purports to change this eligibility requirement, as all the amendments to the Medicaid Act in that section are made to 42 U.S.C. § 1396b, which deals with financial reimbursement to the states, not individual eligibility for benefits.

IV. *Bell v. Leavitt* decision

On Friday, September 15, 2006, Federal Judge Ronald Guzman issued an interim ruling regarding Plaintiffs' motion for a preliminary injunction in the national class action lawsuit, *Bell v. Leavitt*. The lawsuit, filed on June 28, 2006, against the Secretary of the U.S. Department of Health and Human Services, Mike Leavitt, sought to enjoin Leavitt from enforcing the regulations that require

¹⁸ See *id.* at 39222 (to be codified at 42 C.F.R. § 435.407(j)).

¹⁹ This is required by § 1137(d)(4), which provides in relevant part that:

(A) the State – (i) shall provide a reasonable opportunity to submit . . . evidence indicating satisfactory immigration status, and (ii) may not delay, deny, reduce or terminate the individual's eligibility for benefits under the program on the basis of . . . immigration status until such reasonable opportunity has been provided. . . .

See 42 U.S.C. § 1320b-7(d)(4)(A).

²⁰ See 71 Fed. Reg. 39214, 39216.

²¹ See *id.* at 39222 (to be codified at 42 C.F.R. § 435.406(a)(iv)).

states to obtain proof of citizenship from certain applicants for and recipients of Medicaid benefits. Plaintiffs in the case included Medicare recipients, adults receiving SSI benefits, and children who receive foster care or adoption assistance.

Judge Guzman granted class certification to children receiving foster care and adoption assistance under Title IV-E of the Social Security Act. He held that the Administrative Procedures Act claim of plaintiff A.L., who receives foster care and adoption assistance, did allege sufficient injury traceable to the regulations, which required her prove to her citizenship despite the documentation exemption found in Title IV-E. Judge Guzman, however, did not grant a temporary restraining order with regard to that claim because the plaintiff failed to demonstrate that she would suffer irreparable harm as a result of trying to satisfy the documentation requirements.

Regarding the other plaintiffs, he ruled that they did not have standing at the time to challenge the U.S. Health and Human Services' regulation. Specifically, he found that the claims of seven of the plaintiffs, who were Medicare beneficiaries or SSI recipients, were moot because they were exempt from the citizenship documentation requirement. The Court found that a ninth plaintiff's claims were also moot because while his state of residence Illinois did not confer automatic Medicaid eligibility to SSI recipients, the regulations allowed Illinois to use the SDX system to verify his citizenship. Judge Guzman found that six other plaintiffs did not have standing to pursue their equal protection claim and due process and APA claims.

It is interesting to note that the interim final regulations had not been issued at the time the lawsuit was filed. However, the evening before Judge Guzman was to hear the first motion for a temporary restraining order, CMS released the regulations, which included a provision exempting Medicare beneficiaries and individuals receiving SSI benefits in non-209(b) states.

V. State Implementation

Federal DRA regulations mandate that states implement the citizenship documentation requirements beginning July 1, 2006. Not all states have begun implementation, but several have made systematic changes in their Medicaid programs to satisfy federal mandates. Additionally, some states have set up data matching procedures while others have created mechanisms to ensure continued receipt of Medicaid benefits while recipients obtain necessary documents.²² The following examples illustrate the steps states are taking to meet the citizenship documentation requirements:

- Arizona is mailing information about documentation requirements to all current Medicaid recipients approximately ninety days before their review.²³ The first letters were sent in May 2006 for individuals with reviews scheduled for July and August.²⁴ Informational

²² In the National Health Law Program's initial survey of 209b states, it found that most, including Connecticut, Illinois, Montana, Minnesota, Ohio and Virginia, are using the SDX system to prevent SSI recipients from having to provide citizenship documentation.

²³ See Arizona Health Care Cost Containment System, Frequently Asked Questions AHCCCS Citizenship Requirements, at

http://www.ahcccs.state.az.us/Members/citizenship_FAQs_English.asp.

²⁴ *Id.*

briefings are taking place across the state in Phoenix, Tucson, Flagstaff, Casa Grande, Yuma, Sierra Vista, Page, Lake Havasu and Nogales.²⁵

- Vermont will offer recipients a “significant opportunity” to obtain citizenship documents and provide continued Medicaid benefits to them during this period.²⁶ Implementation was to begin on an incremental basis on September 1, with additional phase-in stages to take place October 1, November 1, and February 1.²⁷
- Washington state established a new Citizenship Central Unit (CCU) to help Community Services Office (CSO) staff who conduct eligibility determinations, to obtain citizenship documentation that is not readily available.²⁸ Additionally, CSO staff can contact their Regional Medical Eligibility Representative.²⁹
- Wisconsin is utilizing CARES data, which contains Medicaid eligibility information and data matches to reduce the number of recipients who need to document their citizenship and identity at the time of their next review.³⁰ The state is also using paid Medicaid Birth Claims as proof that a baby was born in Wisconsin and is, therefore, a U.S. citizen.³¹

VI. Advocacy Strategies

As the citizenship documentation requirement will have a significant impact on clients applying for and already receiving Medicaid benefits, advocates must be prepared to provide assistance. The following are suggested strategies advocates can employ to help clients apply for Medicaid or retain benefits and conduct policy advocacy to ease the burden on clients to the greatest extent possible.

A. Provide Education

Advocates should inform their clients of the provisions in the DRA and the Interim Final Rule. In particular, clients should be made aware that the passport/documentation process can be time

²⁵ *Id.*

²⁶ *See* State of Vermont Agency of Human Services, AHS Secretary Announced Strategy to Comply with New Medicaid Citizenship Requirements, July 5, 2006.

²⁷ *Id.*

²⁸ State of Washington Health and Recovery Services Administration, Update I --- Citizenship and Identity Requirements August 14, 2006, at <http://fortress.wa.gov/dshs/maa/Eligibility/Citizenship/CSO%20Memo%202%20Citizenship%206.pdf>.

²⁹ State of Washington Health and Recovery Services Administration, Update II – Citizenship and Identity Requirements August 28, 2006, at <http://fortress.wa.gov/dshs/maa/Eligibility/Citizenship/citizens.pdf>.

³⁰ Wisconsin Department of Health and Family Services, New non-financial Medicaid Eligibility Requirement – Federal Citizenship Documentation Requirement, July 11, 2006, at <http://dhfs.wisconsin.gov/em/ops-memos/2006/pdf/06-32.pdf#search=%22wisconsin%20DRA%20citizenship%20document%22>.

³¹ *Id.*

consuming and could result in delays in application and receipt of Medicaid if not initiated well ahead of time. Immigrant clients should be reassured that nothing has changed for them.

B. Encourage State to Use Electronic Data Matches

Advocates should encourage states to use electronic data matches and search state records of other programs for proof of citizenship. Where states can obtain this proof in other ways, they should do so rather than requiring beneficiaries to obtain documentation.

C. Monitor Adverse Impact

The DRA provision will likely lead to many citizens losing Medicaid eligibility or not seeking it in the first place. Advocates must make clients aware of this provision and monitor its impact on them. Advocates may want to consider keeping their state and federal policy makers informed of the extent to which the citizenship documentation requirement is foreclosing eligibility for citizens.

Some populations are particularly vulnerable. Obtaining a birth certificate or passport is costly. Elderly persons and persons with disabilities who are in nursing care settings, with only a personal needs allowance, have no excess resources. A passport currently costs up to \$97.00. Copies of a birth certificate can cost from \$5 to \$23. As a result, native-born citizens poor enough to qualify for Medicaid will often be too poor to prove that they qualify for Medicaid.

The provision may also have a great impact on people with mental illness who may not be able to identify where they were born and cannot obtain a copy of their birth certificate. Survivors of Hurricane Katrina and Rita who have lost all documentation may not be able to obtain replacement copies where county, parish and state records were also lost. It could affect foster children if Medicaid eligibility workers are not permitted access to these children's confidential, child welfare agency files. Finally, the provision will likely have a disproportionate impact on people of color and the rural poor. For much of the 20th century, many hospitals in this country, especially in the South, would not admit African-Americans; and many other disadvantaged citizens, including Native Americans and rural Whites, simply could not afford, or did not have access to, a hospital birth (which provided a birth certificate). As a result, members of these groups were born at home and simply do not have birth certificates.

D. Stay in Touch with *Bell* Counsel

A nationwide class of individuals in the foster care system has been certified in the *Bell* citizenship documentation case. NHeLP and other attorneys argue that these children and youth should not be required to meet the new documentation requirement because the statute, on its fact, does not include them. A number of important hearings in the case will take place soon. If you have clients who are class members and whose initial Medicaid applications or Medicaid redeterminations are being affected by the documentation requirements (*e.g.* Medicaid terminated or delayed), please contact Jane Perkins or Sarah Somers at 919-968-6308 or perkins@healthlaw.org or somers@healthlaw.org.