national foster care coalition

February 13, 2013

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Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2334-P
P.O. Box 8016
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Request for Comments on Proposed Rule
File code CMS–2334–P
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

On January 22, 2013 the Centers for Medicare & Medicaid Services (CMS) in the Department of Health and Human Services (HHS) issued a proposed rule that would implement provisions of the Patient Protection and Affordable Care Act of 2010 and the Health Care and Education Reconciliation Act of 2010 (Affordable Care Act), and the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA).

We submit the comments to address one specific area of implementation that you have directly asked for comment on. That provision is the part that allows a youth less than 26 years of age and formerly in foster care to be categorically eligible for continued Medicaid coverage.

Proposed Rule for Former Foster Youth
CMS proposes that under Section § 435.150 Former foster care children, under the (b) *Eligibility.* The agency must provide Medicaid to individuals who:

(1) Are under age 26;
(2) Are not eligible and enrolled for mandatory coverage under §§ 435.110 through 435.118 or §§ 435.120 through 435.145 of this part; and

(3) Were in foster care under the responsibility of the State or Tribe and enrolled in Medicaid under the State's Medicaid State plan or 1115 demonstration (or at State option were in foster care and Medicaid in any State) upon attaining:
(i) Age 18; or
(ii) Such higher age at which the State's or Tribe's foster care assistance ends under title IV–E of the Act.

Preamble Solicitation for Comment:
Within the preamble to the rule on this specific issue CMS explains:

"*We are proposing an interpretation of the statute that an individual qualifies for this mandatory Medicaid coverage if the individual was concurrently enrolled in foster care and Medicaid either when attaining age 18 or at the point of ''aging out'' of foster care.*

This interpretation is based on the statute's use of the word ''or'' to permit either alternative. We considered a different interpretation that would limit eligibility to individuals who ''age out'' of foster care. Among the states that have extended foster care programs beyond age 18, all but two states end foster care at age 21.

The statute requires that an individual be in foster care under the responsibility of ''the state'' and be enrolled in Medicaid under ''the state plan'' or an 1115 demonstration. In this proposed rule, we are interpreting that requirement as meaning that the individual was in foster care and enrolled in Medicaid in the same state in which coverage under this eligibility group is sought.

However, we are proposing to ***give states the option to cover individuals under this group who were in foster care and Medicaid in any state at*** *the relevant point in time. We request comments on this interpretation of the statute."*
(Emphasis added)

Concerns by the National Foster Care Coalition
We appreciate the fact that a young person is not limited to "aging-out" of foster care as a condition of Medicaid eligibility but he or she can also qualify by reaching the age of 18. Less than half the states have chosen the option to extend foster care to age 21 under the 2008 Fostering Connections to Success Act (PL 110-351). The remaining states have limited categories of foster care to age 21 and others provide limited independent living services. As a result services and support vary by state.

While we are pleased with this part of the proposed rule, we are greatly concerned about the ***option*** for states to cover a youth formerly in foster care if they were in care in another state. We urge the rule be revised so that all youth leaving foster care will be eligible for this Medicaid coverage regardless of the state they reside in immediately or later on. Due to the fact that child welfare services can vary dramatically between states we ask that this health benefit be made as seamless as possible.

We believe the goal of this legislative language was to assure that a child formerly in foster care be extended the same protections that a young person of the same age has by being able to access

health insurance coverage under their parents' plan. That provision is already in effect and currently extends health insurance to over six million young people who might not be able to afford or access health care on their own.

We would also argue that while the rule will require a foster child to be enrolled in Medicaid on the date of attaining 18 years of age, the statute never links enrollment in Medicaid to a particular age or date. It only requires that an individual was "enrolled in the State plan under this title or under a waiver of the plan while in such foster care." 42 U.S.C. § 1396a(a)(10)(A)(i)(IX)(dd).

Enrollment in Medicaid at any point while in foster care qualifies the individual for Medicaid eligibility under this category. There are numerous circumstances where individuals may be eligible but not enrolled in Medicaid on their 18th birthday or the day they age out of foster care, and such individuals should not be penalized under the regulation. For example, state administrative error, erroneous termination if a youth has run away from a placement, and termination when a youth becomes an inmate of a public institution could all cause the youth not to be on Medicaid on his 18th birth date.

Youth in foster care have some unique and at times unfortunate barriers to health care access. In 2011 more than 26,000 young people "aged-out" or left foster care due to their age. Frequently these young people have limited education and limited employment opportunities and as a result, limited access to health care.

As a 2012 review of literature and report to the U.S. Department of Housing and Urban Development indicated:

> "Deficits in human and social capital are not the only factors that may limit the ability of young people aging out of foster care to secure adequate income and hence pay for suitable housing. Former foster youth are more likely than their non–foster care counterparts to describe their health as fair or poor (Courtney et al. 2007) or to report a serious health problem (Reilly 2003). They exhibit higher rates of mental health and substance use disorders than young adults in the general population (Keller et al.2010; Pecora et al.2003; Vaughn, Ollie, McMillen, Scott, Munson, 2007)."

Strengthening this Medicaid coverage is important because we are concerned that this is not always a well-served population. In 1999 Congress enacted the Foster Care Independence Act (PL 106-169), which allowed states to extend Medicaid coverage to the age of 21, after a young person left foster care. This state option, also referred to as the Chafee option, has been used by approximately 21 states according to some surveys. This is not an encouraging development, although some observers will counter that states have not taken this optional coverage but have provided other avenues to health care and Medicaid.

We are concerned that under this rule, allowing some states an option on extending Medicaid to individuals formerly in foster care raises the possibility of creating greater complexity and confusion for this group of young people. Varying Medicaid coverage between states could create greater confusion not just to the young person potentially eligible but the resource and information workers available including case workers, social workers or other health care eligibility resource

people. Recently one of our Coalition members had a discussion with a state child welfare official who incorrectly assumed that because their state was not expanding Medicaid coverage to 133 percent of poverty under the ACA that meant there was to be no expansion of Medicaid services even for these former foster youth.

Understanding and addressing this potential patchwork and confusion of coverage is important because a young person leaving foster care may not have the familial supports that so many similarly aged young people have.

Continued access to health care is vital to these young people once they have left the child welfare system due to sometimes challenging health related outcomes. According to the National Campaign to Prevent Teen and Unplanned Pregnancy:

> "By age 19, nearly half (48%) of teen girls in foster care have been pregnant and teen girls in foster care are 2.5 times more likely to become pregnant by the age of 19 than their peers not in foster care. By age 21, nearly half of young men in foster care reported getting a girl pregnant compared to 19 percent of their peers. Youth who have been in foster care are also more likely to have sex at a young age and to experience forced sex, an unintended or non-marital birth, and a sexually transmitted infection (STI)."

In regard to access to mental health services the Children's Bureau tells us,

> "...Studies have demonstrated that rates of mental illness are high among children who have experienced maltreatment and have been in foster care. Posttraumatic Stress Disorder (PTSD), Attention Deficit/Hyperactivity Disorder (ADHD), Major Depressive Disorder (MDD), and Conduct Disorder (CD)/Oppositional Defiant Disorder (ODD) are the most common mental health diagnoses among this population. As McMillan, et al. (2005) demonstrated, many children meet diagnostic criteria for these disorders before entering foster care that predicates mental health problems. By the time they are teenagers, 63% of children in foster care have at least one mental health diagnosis; 23% have three or more diagnoses (White, Havalchack, Jackson, O'Brien, & Pecora, 2007)"

We feel that the state option/ability to not extend Medicaid coverage if that young person was in foster care in a different state could reduce health care access due to the nature of child welfare placements. Young people in foster care may be mobile due to heritage and placements. For example, in an area such as the Washington, D.C. region, the placement of a foster child out of his or her birth state can occur by a move of a few miles or even blocks, due to the availability of relatives or other foster care placements. This may mean that that once that young person reaches adulthood and exits care, he or she may be best served by returning to his or her home state or place of birth due to past relationships and family connections. This is not limited to just one area but can be found across the country where a young person may have been placed across state boarders.

Leaving this as an option may in fact restrict the rights of individuals to travel freely among the states if they move to a state that does not take up the option, or if no state takes up the option. This would raise potential constitutional issues. Cf. Duffy v. Meconi, 508 F Supp. 2d 399 (D. Del. 2007)

(holding Medicaid residency regulations violated beneficiary's constitutional right to travel). Furthermore, foster children who are placed out-of-state would be unfairly disqualified from this group unless the state takes up the proposed option.

Creating more seamless coverage through this "Medicaid—former foster youth" category became more important last summer with the Supreme Court ruling, *National Federation of Independent Business v. Sebelius* which gave states the option on whether or not to extend Medicaid coverage to all people at 133 percent of poverty starting in 2014. Such an expansion of Medicaid may offer an additional option for youth formerly in foster care but it is also possible we will have a patchwork of state eligibility through this Medicaid expansion and a young person exiting care could find herself/himself in a state that neither extends Medicaid to 133 percent of poverty and does not cover former foster youth moving from another state.

We also urge HHS to take steps to streamline this eligibility and category of care by making sure state Medicaid systems and the new insurance exchanges include this information for any youth formerly in foster care since they may not learn about their coverage until the first time they seek medical services or attempt to apply for health insurance through the state exchanges.

We hope you will take these circumstances into consideration and revise and strengthen this part of the rule.

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February 20, 2013