

THE DEFICIT REDUCTION ACT OF 2005 - REDUCING THE  
NUMBER OF RECIPIENTS AND APPLICANTS ELIGIBLE TO  
RECEIVE MEDICAID BENEFITS

*A statutory analysis of the citizenship documentation requirements and proposed  
amendments to ease the burden on individuals and states*

CHRISTAL CONTINI

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## I. INTRODUCTION

George “has had two strokes and cannot swallow or communicate verbally.”<sup>1</sup> Since he cannot care for himself, George resides in a nursing home and relies on Medicaid health coverage to pay for his nursing home care and other healthcare costs.<sup>2</sup> George “does not have any relatives to care for him,” and as a result fellow church member Art Huenkemeir is his Trustee and has his Power of Attorney.<sup>3</sup> George declared his citizenship “in writing, under penalty of perjury”<sup>4</sup> to fulfill the requirements to become eligible to receive Medicaid.<sup>5</sup> Congress, however, changed the Medicaid requirements by enacting the Deficit Reduction Act of 2005 (“Act”), which requires states to obtain documentary evidence of United States citizenship for certain Medicaid applicants and recipients as a condition for receiving federal funding.<sup>6</sup> This citizenship documentation requirement is “an administrative requirement if a state wants to get federal financial participation”; it is not an eligibility requirement, but has the effect of being one.<sup>7</sup>

George was born in the United States on July 31, 1926, but does not have a United States passport, birth certificate, government photo identification card, or any other document that would satisfy the citizenship documentation requirements.<sup>8</sup> His Trustee, Huenkemeier, examined all of George’s paperwork taken from his home when George moved into the nursing home, but he was unable to find any citizenship documentation.<sup>9</sup> Because of his health problems, George is incapable of assisting in any way to secure the documentation required by the Act.<sup>10</sup> Upon redetermination of George’s eligibility to receive Medicaid, George will be unable to provide

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<sup>1</sup>First Am. Compl. at 19, *Bell v. Leavitt*, No. 06 C 3520 (N.D. Ill. Sept. 14, 2006).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>42 U.S.C.A. § 1320b-7(d)(1)(A) (West 2006) (“The State shall require, as a condition of an individual’s eligibility for benefits . . . a declaration in writing, under penalty of perjury.”).

<sup>5</sup>First Am. Compl., *supra* note 1, at 1.

<sup>6</sup>42 U.S.C.A. § 1396b(x)(1)-(3) (West 2006); 42 C.F.R. § 435.1008 (West 2006) (“[Federal financial participation] will not be available to a State with respect to expenditures for medical assistance furnished to individuals unless the State has obtained satisfactory documentary evidence of citizenship or national status.”).

<sup>7</sup>Nat’l Health Law Program, *The DRA’s Medicaid Citizenship Documentation Requirements* 13 (May 18, 2006), available at <http://www.healthlaw.org/> [hereinafter *Requirements*] (follow “Medicaid” hyperlink; then follow “Deficit Reduction Act of 2005” hyperlink; then follow “The DRA’s Medicaid Citizenship Documentation Requirements” hyperlink).

<sup>8</sup>First Am. Compl., *supra* note 1, at 19.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

citizenship documentation verification,<sup>11</sup> and his benefits will likely be terminated by the state for fear it will lose federal financial participation.<sup>12</sup>

Medically impaired individuals such as George, as well as disaster victims, mentally handicapped persons, homeless persons, and foster children, will be adversely affected by the new citizenship documentation requirements imposed upon the states by the Act.<sup>13</sup> States will also be adversely affected by the increased administrative costs of implementing the Act's requirements.<sup>14</sup> This note asserts that aspects of the citizenship verification requirements treat citizen applicants worse than immigrant applicants, which violates the Due Process Clause of the Fifth Amendment.<sup>15</sup> Amendments should be made to the United States Code and the Code of Federal Regulations to ease the burden on individuals and states, while maintaining safeguards against giving benefits to fraudulent applicants and recipients.

Part II of this note explains the history and the new citizenship documentation requirements of the Deficit Reduction Act of 2005. Part III examines the adverse impact the Act will have on the states, while part IV examines the adverse impact the Act will have upon applicants and recipients. Part V asserts that aspects of the citizenship documentation requirements are unconstitutional and advocates for an amendment that will remedy the constitutional violation. Amendments to the Code of Federal Regulations to exempt children who receive foster care benefits are examined in part VI, and the abolishment of the documentation hierarchy, as well as the creation of a last resort option, is discussed in part VII. Finally, concluding remarks can be found in part VIII.

## II. THE HISTORY AND CITIZENSHIP REQUIREMENTS OF THE DEFICIT REDUCTION ACT OF 2005

Prior to implementation of the Act, the United States Code required an individual to declare citizenship "in writing, under penalty of perjury" in order to establish eligibility for Medicaid.<sup>16</sup> If there was a reason for a state to question the applicant's

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<sup>11</sup>See *supra* text accompanying note 9.

<sup>12</sup>See Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,217 (July 12, 2006) ("An applicant or recipient who fails to cooperate with the State in presenting documentary evidence of citizenship may be denied or terminated.").

<sup>13</sup>Requirements, *supra* note 7.

<sup>14</sup>LEIGHTON KU & MATT BROADDUS, CENTER ON BUDGET AND POLICY PRIORITIES, NEW REQUIREMENT FOR BIRTH CERTIFICATES OR PASSPORTS COULD THREATEN MEDICAID COVERAGE FOR VULNERABLE BENEFICIARIES: A STATE-BY-STATE ANALYSIS (2006) <http://www.cbpp.org/1-26-06health.pdf> [hereinafter STATE ANALYSIS].

<sup>15</sup>See *infra* Part IV.

<sup>16</sup>42 U.S.C.A. § 1320b-7(d)(1)(A) (West 2006). Specifically, the statute mandates that "State[s] shall require, as a condition of an individual's eligibility for benefits under a program listed in subsection (b) of this section, a declaration in writing, under penalty of perjury." *Id.* The programs in subsection (b) include: "(1) any State program funded under part A of subchapter IV of this chapter [named Temporary Assistance for Needy Families]; (2) the medicaid program . . . [;] (3) the unemployment compensation program . . . [;] (4) the food stamp program under the Food Stamp Act of 1977 . . . ; and any State program under a plan approved under subchapter I, X, XIV, or XVI of this chapter." *Id.* at (1)-(5).

written declaration of citizenship, most state policies would then require documentation of citizenship.<sup>17</sup> Two Republican representatives from Georgia, Charlie Norwood and Nathan Deal, noted that this declaration procedure exposes Medicaid to fraudulent enrollment of undocumented immigrants.<sup>18</sup> This vulnerability motivated the representatives to request that a citizenship documentation requirement be included in the Act.<sup>19</sup> Although an estimation of the amount of undocumented immigrants fraudulently enrolled in Medicaid has not been studied,<sup>20</sup> the Department of Health and Human Services (“Health and Human Services”) conducted a survey which found that “by their nature, self-declaration policies have inherent vulnerabilities in that they can allow applicants to provide false statements of citizenship. As such, it is vital to have protections in place to prevent such practices.”<sup>21</sup> This survey and the pressure from the two Republican

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<sup>17</sup>Nat'l Health Law Program, *The Deficit Reduction Act of 2005: Implications for Advocacy* 16 (April 21, 2006), available at <http://www.healthlaw.org/> [hereinafter *Advocacy*] (follow “Medicaid” hyperlink; then follow “Deficit Reduction Act of 2005” hyperlink; then follow “The Deficit Reduction Act of 2005: Implications for Advocacy” hyperlink); Department of Health and Human Servs. Office of Inspector Gen., *Self-Declaration of U.S. Citizenship for Medicaid* (July 2005), 5 <http://oig.hhs.gov/oei/reports/oei-02-03-00190.pdf> (stating that thirty-two states have prudent person policies, “which require evidence of citizenship if statements seem questionable to eligibility staff,” and twelve states have “unwritten, informal policies requiring documentation for questionable statements.”). Four states including Montana, New Hampshire, New York, and Texas did not allow self-declaration of citizenship and already required some type of documentation of citizenship. *Id.*

<sup>18</sup>*Requirements, supra* note 7, at 4. Two news releases quoted Charlie Norwood explaining his rationale for including the citizenship documentation provision in the Deficit Reduction Act of 2005. The first release quotes Norwood as stating:

If we really want to reform Medicaid, it's high time Congress went after the outright theft of benefits that is currently underway nationwide by illegal aliens . . . . Nobody knows for sure how much of our Medicaid dollars we're currently losing to illegal aliens, but by even the most conservative estimates, it has played a big role in causing our own citizens – low-income Americans, seniors and children, our most vulnerable health care population – to be kicked out of the system to compensate.

News Release, Rep. Charlie Norwood, *Norwood and Deal Open Fight to Preserve Medicaid for U.S. Citizens* (Oct. 27, 2005), available at [http://www.house.gov/list/press/ga10\\_norwood/MedicaidIllegals.html](http://www.house.gov/list/press/ga10_norwood/MedicaidIllegals.html).

The second release quotes Norwood as stating, “Illegal immigrants will still receive necessary healthcare at emergency rooms and clinics under indigent care programs, but their medical bills will no longer be deducted from state Medicaid funds to the detriment of legal low income residents.” News Release, Rep. Charlie Norwood, *Medicaid Recipients Must Prove U.S. Citizenship Before Receiving Benefits*, (Feb. 1, 2006) available at [http://www.house.gov/list/press/ga10\\_norwood/MedicaidIllegalsPasses.html](http://www.house.gov/list/press/ga10_norwood/MedicaidIllegalsPasses.html).

<sup>19</sup>*Id.*

<sup>20</sup>Department of Health and Human Services Office of Inspector General, *Self-Declaration of U.S. Citizenship for Medicaid* 5 (July 2005), <http://www.oig.hhs.gov/oei/reports/oei-02-03-00190.pdf> (“[T]his inspection does not examine the extent to which current Medicaid beneficiaries are ineligible on the basis of their citizenship.”).

<sup>21</sup>*Id.* at 18. The objective of the survey was “to determine the extent to which States allow self-declaration of U.S. citizenship for Medicaid and related programs and to identify potential

representatives foreshadowed an inevitable citizenship documentation requirement, which was made a part of the Act.<sup>22</sup>

vulnerabilities, if any, associated with quality control activities and evidence used to document citizenship.” *Id.* at 1.

<sup>22</sup>The citizenship documentation requirements of the Deficit Reduction Act of 2005 appears in Section 6036, which provides the following:

(a) In General.--Section 1903 of the Social Security Act (42 U.S.C. 1396b) is amended -- . . .

(2) by adding at the end the following new subsection:

(x)(1) For purposes of subsection (i)(23), the requirement of this subsection is, with respect to an individual declaring to be a citizen or national of the United States, that, subject to paragraph (2), there is presented satisfactory documentary evidence of citizenship or nationality (as defined in paragraph (3)) of the individual.

(2) The requirement of paragraph (1) shall not apply to an alien who is eligible for medical assistance under this title --

(A) and is entitled to or enrolled for benefits under any part of title XVIII;

(B) on the basis of receiving supplemental security income benefits under title XVI; or

(C) on such other basis as the Secretary may specify under which satisfactory documentary evidence of citizenship or nationality had been previously presented.

(3)(A) For purposes of this subsection, the term 'satisfactory documentary evidence of citizenship or nationality' means --

(i) any document described in subparagraph (B); or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

(B) The following are documents described in this subparagraph:

(i) A United States passport.

(ii) Form N-550 or N-570 (Certificate of Naturalization).

(iii) Form N-560 or N-561 (Certificate of United States Citizenship).

(iv) A valid State-issued driver's license or other identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act, but only if the State issuing the license or such document requires proof of United States citizenship before issuance of such license or document or obtains a social security number from the applicant and verifies before certification that such number is valid and assigned to the applicant who is a citizen.

(v) Such other document as the Secretary may specify, by regulation, that provides proof of United States citizenship or nationality and that provides a reliable means of documentation of personal identity.

(C) The following are documents described in this subparagraph:

(i) A certificate of birth in the United States.

(ii) Form FS-545 or Form DS-1350 (Certification of Birth Abroad).

(iii) Form I-97 (United States Citizen Identification Card).

(iv) Form FS-240 (Report of Birth Abroad of a Citizen of the United States).

(v) Such other document (not described in subparagraph (B)(iv)) as the Secretary may specify that provides proof of United States citizenship or nationality.

(D) The following are documents described in this subparagraph:

(i) Any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act.

(ii) Any other documentation of personal identity of such other type as the Secretary finds, by regulation, provides a reliable means of identification.

(E) A reference in this paragraph to a form includes a reference to any successor form.'

(b) Effective Date. --The amendments made by subsection (a) shall apply to determinations of initial eligibility for medical assistance made on or after July 1,

On February 8, 2006, President Bush signed the Act into law,<sup>23</sup> effectively amending the Public Health and Welfare section of the United States Code that deals with Medicaid benefits (“Medicaid statute”).<sup>24</sup> The Congressional Budget Office estimates that the Act will “reduce direct spending by about \$39 billion over the 2006 to 2010 period.”<sup>25</sup> A Medicaid advocacy group argues that the most significant aspect of the Act “is that a large portion of the reductions in spending are attributable to provisions that make people ineligible for Medicaid or limit the benefits that are available to them through the program.”<sup>26</sup> This note will discuss only the effects of the citizenship documentation requirements; any other provisions are outside the scope of this note.

One way the Act proposes to reduce the deficit is by refusing to provide federal financial participation to a state unless it obtains documentary citizenship evidence for individuals who declare themselves to be citizens.<sup>27</sup> The citizenship documentation requirement is an administrative requirement that a state must fulfill

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2006, and to redeterminations of eligibility made on or after such date in the case of individuals for whom the requirement of section 1903(z) of the Social Security Act, as added by such amendments, was not previously met.

(c) Implementation Requirement.--As soon as practicable after the date of enactment of this Act, the Secretary of Health and Human Services shall establish an outreach program that is designed to educate individuals who are likely to be affected by the requirements of subsections (i)(23) and (x) of section 1903 of the Social Security Act (as added by subsection (a)) about such requirements and how they may be satisfied.

Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6036, 120 Stat 4 (2006).

<sup>23</sup>PRESIDENT SIGNS S.1932, DEFICIT REDUCTION ACT OF 2005, 42 WEEKLY COMP. PRES. DOC. 213 (Feb. 8, 2006), 2006 WLNR 5411190. At the signing of the Act, President George Bush addressed the Act’s goals with regard to Medicaid:

In the long run, the biggest challenge to our budget is mandatory spending - - or entitlement programs like Medicare and Medicaid and Social Security . . . . The Deficit Reduction Act is estimated to slow the pace of spending growth in both Medicare and Medicaid . . . . These programs are providing vital services to millions of Americans in need - - yet the costs of Medicare and Medicaid are straining budgets at both the state and federal level . . . . The bill I sign today restrains spending for entitlement programs, while ensuring that Americans who rely on Medicare and Medicaid continue to get the care they need.

*Id.*

<sup>24</sup>*See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6036, 120 Stat 4 (2006).

<sup>25</sup>CONGRESSIONAL BUDGET OFFICE, S. 1932 THE DEFICIT REDUCTION ACT OF 2005 1 (Jan. 27, 2006), available at <http://www.cbo.gov/ftpdocs/70xx/doc7028/s1932conf.pdf> (“Enacting S. 1932 would reduce direct spending by about . . . \$99 billion over the 2006-2015 period.”). Health advocates assert that the Congressional Budget Office’s figures on the Act’s savings reflect that “[seventy-five] percent of the savings are due to provisions that make it more difficult for individuals to qualify for long term care, allow states to impose heightened cost sharing, permit states to restrict benefit packages, and require recipients to prove their citizenship using specified documentation.” *Advocacy, supra* note 17, at 1.

<sup>26</sup>*Id.*

<sup>27</sup>42 U.S.C.A. § 1396b(x)(1) (West 2006); 42 C.F.R. § 435.1008 (“[Federal financial participation] will not be available to a State with respect to expenditures for medical assistance furnished to individuals unless the State has obtained satisfactory documentary evidence of citizenship or national status.”).

in order to receive the federal government's half of Medicaid.<sup>28</sup> Because the state does not want to lose federal funding, it requires the individual to supply the citizenship documentation to satisfy the state's obligation.<sup>29</sup> Failure to supply the documentation will force the state to deny or terminate the individual's Medicaid benefits.<sup>30</sup> This administrative requirement imposed upon the states is shifted onto the individual. The state does not want to lose federal funding; therefore, it requires the individual to supply the citizenship documentation to satisfy the state's obligation. Failure to supply the documentation will force the state to deny or terminate the individual's Medicaid benefits. In effect, the Act's citizenship documentation requirement is not just a state administrative requirement but an eligibility requirement imposed upon individual applicants/recipients as a condition to receive Medicaid.<sup>31</sup>

#### A. *The Hierarchy of Citizenship Documentation Accepted*

In order to fulfill the documentation requirements, a state must obtain proof of both citizenship and identity for all Medicaid applicants<sup>32</sup> and current Medicaid recipients "at the time of first redetermination of eligibility that occurs on or after July 1, 2006."<sup>33</sup> Centers for Medicare and Medicaid Services ("Medicare and Medicaid Services")<sup>34</sup> have made it clear that they will audit the states to ensure that the most reliable evidence is being used to satisfy the Act's requirements.<sup>35</sup>

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<sup>28</sup>§ 1396b(x)(1). "Medicaid . . . [is] a cooperative venture jointly funded by the Federal and State governments (including the District of Columbia and the Territories) to assist States in furnishing medical assistance to eligible needy persons." Centers for Medicare & Medicaid Services, [http://www.cms.hhs.gov/MedicaidGenInfo/03\\_TechnicalSummary.asp](http://www.cms.hhs.gov/MedicaidGenInfo/03_TechnicalSummary.asp) (last visited April 7, 2007).

<sup>29</sup>See 42 C.F.R. § 435.1008 (West 2006) ("[Federal financial participation] will not be available to a State with respect to expenditures for medical assistance furnished to individuals unless the State has obtained satisfactory documentary evidence of citizenship.").

<sup>30</sup>See Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. at 39,217 ("An applicant or recipient who fails to cooperate with the State in presenting documentary evidence of citizenship may be denied or terminated.").

<sup>31</sup>*Requirements*, *supra* note 7, at 13.

<sup>32</sup>Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. at 39,218 (codified at 42 C.F.R. § 436.407).

<sup>33</sup>*Id.* at 39,217 (This information only appears in the Federal Register.).

<sup>34</sup>The Centers for Medicare and Medicaid Services is a federal agency within the Department of Health and Human Services that is "responsible for administering the Medicare, Medicaid, SCHIP (State Children's Health Insurance), HIPAA (Health Insurance Portability and Accountability Act, CLIA (Clinical Laboratory Improvement Amendments), and several other health related programs." Centers for Medicare & Medicaid Services, <http://questions.cms.hhs.gov> (follow "What is CMS" hyperlink) (last visited April 6, 2007).

<sup>35</sup>*Id.* (stating "[w]e will review implementation of [the citizenship documentation requirements] . . . to determine whether claims for FFP ["federal financial participation"] for services provided to citizens should be deferred or disallowed. Additionally, we will monitor the extent to which the State is using primary evidence to establish both citizenship and identity and will require corrective action to ensure the most reliable evidence is routinely being obtained."). See also 42 C.F.R. § 436.407(h)(i)(2) (West 2006) (stating "[s]tates must

The Code of Federal Regulations authorizes a hierarchy of documentation that must be used to establish citizenship.<sup>36</sup> The hierarchy is set up into four separate tiers: primary evidence, secondary evidence, third level evidence, and fourth level evidence.<sup>37</sup> The Code of Federal Regulations also specifies that the states must first require citizens to submit primary documents from the first tier and then can move to each subsequent tier when the immediately preceding tier has been exhausted.<sup>38</sup> Thus, an applicant/recipient must first try to submit primary evidence, but if primary evidence is unavailable, the Act requires the applicant/recipient to provide secondary evidence.<sup>39</sup> The third tier can be used only when “primary evidence cannot be obtained within the State’s reasonable opportunity period, secondary evidence does not exist or cannot be obtained, and the applicant or recipient alleges being born in the [United States].”<sup>40</sup> The fourth tier “should only be used in the rarest of circumstances...[,] only when ordinary primary evidence is not available, both secondary and third level evidence do not exist or cannot be obtained within the State’s reasonable opportunity period, and the applicant alleges a [United States] place of birth.”<sup>41</sup>

The following documents are considered primary evidence that satisfies the first tier, and any one is sufficient to prove both citizenship and identity: a United States Passport, a Certificate of Naturalization, a Certificate of United States Citizenship, a valid state-issued driver’s license (“but only if the State issuing the license requires proof of [United States] citizenship before issuance of such license”), and other documentation specified by the Secretary of Health and Human Services (“Secretary”).<sup>42</sup> The second through fourth tiers require two documents: one document to prove citizenship and a separate document to prove identity.<sup>43</sup>

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maintain copies of citizenship and identification documents in the case record or electronic data base and make these copies available for compliance audits.”).

<sup>36</sup>See § 436.407(a)-(d).

<sup>37</sup>See *id.*

<sup>38</sup>Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. at 39,215 (codified at 42 C.F.R. § 436.407(b)-(d)).

<sup>39</sup>*Id.* at 39,218 (codified at 42 C.F.R. § 436.407(b)); see also 42 U.S.C.A. §§ 1396(b)(x)(3)(C)-(D)(ii) (West 2006).

<sup>40</sup>§ 436.407(c).

<sup>41</sup>§ 436.407(d).

<sup>42</sup>§ 436.407(a).

(a) Primary evidence of citizenship and identity. The following evidence must be accepted as satisfactory documentary evidence of both identity and citizenship:

(1) A U.S. passport. The Department of State issues this. A U.S. passport does not have to be currently valid to be accepted as evidence of U.S. citizenship, as long as it was originally issued without limitation . . . Exception: Do not accept any passport as evidence of U.S. citizenship when it was issued with a limitation. However, such a passport may be used as proof of identity.

(2) A Certificate of Naturalization (DHS Forms N-550 or N-570.) Department of Homeland Security issues for naturalization.

The second through fourth tiers require the same documents to establish identity, which include a driver’s license with a photograph, school identification card, or a U.S. military card.<sup>44</sup> The second through fourth tiers, however, require different documents to establish citizenship.<sup>45</sup> For example, an individual may satisfy the second tier proof of citizenship requirement by providing a government issued document, such as a birth certificate, a report of birth abroad of a United States citizen, or an American Indian Card.<sup>46</sup> An individual may satisfy the third tier by

(3) A Certificate of U.S. Citizenship (DHS Forms N-560 or N-561.) Department of Homeland Security issues certificates of citizenship to individuals who derive citizenship through a parent.

(4) A valid State-issued driver’s license, but only if the State issuing the license requires proof of U.S. citizenship before issuance of such license or obtains a social security number from the applicant and verifies before certification that such number is valid and assigned to the applicant who is a citizen. (This provision is not effective until such time as a State makes providing evidence of citizenship a condition of issuing a driver’s license and evidence that the license holder is a citizen is included on the license or in a system of records available to the Medicaid agency. States must ensure that the process complies with this statutory provision in section 6036 of the Deficit Reduction Act of 2005. CMS will monitor compliance of States implementing this provision.

*Id.* See also 42 U.S.C.A. § 1396b(x)(3)(B)(i)-(v) (West 2006).

<sup>43</sup>§ 436.407(b)-(d).

<sup>44</sup>§ 436.407(e).

(e) Evidence of identity. The following documents may be accepted as proof of identity and must accompany a document establishing citizenship from the groups of documentary evidence of citizenship in the groups in paragraphs (b) through (d) of this section [(b) lists secondary evidence; (c) lists third level evidence; and (d) lists fourth level evidence].

(1) A driver’s license issued by a State or Territory either with a photograph of the individual or other identifying information such as name, age, sex, race, height, weight, or eye color.

(2) School identification card with a photograph of the individual.

(3) U.S. military card or draft record.

(4) Identification card issued by the Federal, State, or local government with the same information included on driver’s licenses.

(5) Military dependent’s identification card.

(6) Native American Tribal document.

(7) U.S. Coast Guard Merchant Mariner Card.

(8) Identity documents described in 8 C.F.R. 274a.2(b)(1)(v)(B)(1).

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(9) Certificate of Degree of Indian Blood, or other U.S. American Indian/Alaska Native Tribal document with a photograph or other personal identifying information relating to the individual.

*Id.*

<sup>45</sup>See § 436.407(b)-(d).

<sup>46</sup>§ 436.407(b).

Secondary evidence of citizenship

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providing a document that shows a United States place of birth, such as a hospital record on letterhead or an insurance record.<sup>47</sup> The fourth tier may be satisfied by providing a federal or state census record showing United States citizenship, institutional papers from a nursing facility that shows a United States birth, or a written affidavit.<sup>48</sup> The aforementioned documents are subject to the strict

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(1) A U.S. public birth certificate showing birth in one of the 50 States, the District of Columbia, Puerto Rico (if born on or after January 13, 1941, Guam (on or after April 10, 1899), the Virgin Islands of the U.S. (on or after January 17, 1917), American Samoa, Swain's Island, or the Northern Mariana Islands (after November 4, 1986 (NMI local time)). A State at its option, may use a cross match with a State vital statistics agency to document a birth record . . . .

. . . .

(2) A Certificate of Report of Birth (DS-1350). The Department of State issues a DS-1350 to U.S. citizens in the U.S. who were born outside the U.S. and acquired U.S. citizenship at birth, based on the information shown on the FS-240 . . . .

(3) A Report of Birth Abroad of a U.S. Citizen (Form FS-240). The Department of State consular office prepares and issues this. A Consular Report of Birth can be prepared only at an American consular office overseas while the child is under the age of 18. Children born outside the U.S. to U.S. military personnel usually have one of these.

(4) A Certification of birth issued by the Department of the State (Form FS-545 or DS-1350). Before November 1, 1990, Department of State consulates also issued Form FS-545 along with the prior version of the FS-240. In 1990, U.S. consulates ceased to issue Form FS-545. Treat an FS-545 the same as the DS-1350.

(5) A U.S. Citizen I.D. card . . . .

(6) A Northern Mariana Identification Card (I-873). (Issued by the DHS to a collectively naturalized citizen of the United States who was born in the Northern Mariana Islands before November 4, 1986.) . . . .

(7) An American Indian Card (I-872) issued by the Department of Homeland Security with the classification code 'KIC.' . . . .

(8) A final adoption decree showing the child's name and U.S. place of birth . . . . The adoption agency must state in the certification that the source of the place of birth information is an original birth certificate.

(9) Evidence of U.S. Civil Service employment before June 1, 1976 . . . .

(10) U.S. Military Record showing a U.S. place of birth . . . .

*Id.*

<sup>47</sup>§ 436.407(c).

(c) Third level evidence of citizenship . . . .

(1) Extract of a hospital record on hospital letterhead established at the time of the person's birth that was created 5 years before the initial application date and that indicates a U.S. place of birth. (For children under 16 the document must have been created near the time of birth or 5 years before the date of application.) . . . .

(2) Life, health, or other insurance record showing a U.S. place of birth that was created at least 5 years before the initial application date that indicates a U.S. place of birth.

*Id.*

<sup>48</sup>§ 436.407(d).

Fourth level evidence of citizenship . . . .

(1) Federal or State census record showing U.S. citizenship or a U.S. place of birth . . . .

requirement that states can only accept original documents or copied documents certified by the issuing agency.<sup>49</sup>

The most notable provision of the fourth level option is that applicants/recipients can use affidavits to meet the citizenship requirement<sup>50</sup> but are still required to submit a separate document to prove identity.<sup>51</sup> The statute, however, emphatically states “[a]ffidavits should ONLY be used in rare circumstances.”<sup>52</sup> Two individuals must write separate affidavits that describe their personal knowledge of the events establishing the applicant’s/recipient’s claim of citizenship,<sup>53</sup> and if possible, the affidavit must include their knowledge as to why the applicant/recipient is unable to submit citizenship documentation.<sup>54</sup> In addition to providing written affidavits, the two individuals must also be able to establish their own citizenship<sup>55</sup> and sign the affidavits under penalty of perjury.<sup>56</sup> The state must also obtain an affidavit signed

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(2) One of the following documents that show a U.S. place of birth and was created at least 5 years before the application for Medicaid. This document must be one of the following and show a U.S. place of birth:

(i) Seneca Indian tribal census.

(ii) Bureau of Indian Affairs tribal census records of the Navajo Indians.

(iii) U.S. State Vital Statistics official notification of birth registration.

(iv) An amended U.S. public birth record that is amended more than 5 years after the person's birth

(v) Statement signed by the physician or midwife who was in attendance at the time of birth.

(3) Institutional admission papers from a nursing facility, skilled care facility or other institution . . .

(4) Medical (clinic, doctor, or hospital) record created at least 5 years before the initial application date that indicates a U.S. place of birth. (For children under 16 the document must have been created near the time of birth or 5 years before the date of application.) . . .

(5) Written affidavit. Affidavits should ONLY be used in rare circumstances.

*Id.*

<sup>49</sup>42 C.F.R. § 436.407(i)(1). “States may permit applicants and recipients to submit such documentary evidence without appearing in person at a Medicaid office. States may accept original documents in person, by mail, or by a guardian or authorized representative.” *Id.* at (i)(3). “Presentation of documentary evidence of citizenship is a one time activity; once a person’s citizenship is documented and recorded in a State database, subsequent changes in eligibility should not require repeating the documentation of citizenship unless later evidence raises a question of the person’s citizenship.” *Id.* at (i)(5).

<sup>50</sup>§ 436.407(d)(5).

<sup>51</sup>§ 436.407(d).

<sup>52</sup>*Id.*

<sup>53</sup>According to the statute, “the two affidavits could be combined into a joint affidavit.” § 436.407(d)(5)(i) However, “[a]t least one of the individuals making the affidavit cannot be related to the applicant or recipient. Neither of the two individuals can be the applicant or the recipient.” § 436.407(d)(5)(ii).

<sup>54</sup>§ 436.407(d)(5)(iv).

<sup>55</sup>§ 436.407(d)(5)(iii).

<sup>56</sup>§ 436.407(d)(5)(vi).

under penalty of perjury from the applicant/recipient or guardian, explaining why citizenship evidence does not exist or cannot be obtained.<sup>57</sup>

The overall structure of the documentation hierarchy provides many options for compliance and these options are summarized as follows:<sup>58</sup> submitting primary evidence is the simplest option available in the four level hierarchy structure inasmuch that an individual needs only one document to meet the Act's documentation requirement.<sup>59</sup> The second through fourth tiers can only be used when the immediately preceding level cannot be met.<sup>60</sup> Tiers two through four also require the submission of two documents: one to prove identity and the other to prove citizenship.<sup>61</sup> Medicaid and Medicare Services will audit the states to ensure that the most reliable evidence is being used to satisfy the Act's requirements.<sup>62</sup>

### *B. Exemptions and Extra Documentation Options*

Medicare and Medicaid Services clarified ambiguous language in the Act by correcting a scrivener's error made by Congress.<sup>63</sup> The original language of the Act provides an exemption from the citizenship documentation requirements for an alien who receives Medicaid as a result of receiving Medicare or Supplemental Security Income ("SSI").<sup>64</sup> The Federal Register directs that the use of the word alien was accidental and that the exemption applies to citizens and nationals, not aliens.<sup>65</sup> Therefore, states will not be refused federal financial participation if they fail to document the citizenship of individuals who receive Medicaid as a result of receiving SSI or Medicare.<sup>66</sup> Individuals who qualify for this exemption receive a benefit from this provision because they do not have to provide physical documentation to the states in order to obtain Medicaid. States that do not automatically provide Medicaid to SSI recipients may bypass the hierarchy structure and establish an individual's citizenship by cross referencing the State Data

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<sup>57</sup>§ 436.407 (d)(5)(v).

<sup>58</sup>See § 436.407(a)-(d).

<sup>59</sup>See § 436.407(a).

<sup>60</sup>§ 436.407(b)-(d).

<sup>61</sup>*Id.*

<sup>62</sup>Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,217 (July 12, 2006) (codified at 42 C.F.R. 436.407(h)(2)) ("we will monitor the extent to which the State is using primary evidence to establish both citizenship and identity and will require corrective action to ensure the most reliable evidence is routinely being obtained.").

<sup>63</sup>*Id.* at 39,215.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.* at 39,216 (codified at 42 C.F.R. § 435.1008). 42 U.S.C.A. § 1396b(x)(2) provides an exemption from the citizenship documentation requirements for an *alien* who is eligible for Medicare or SSI. The Federal Register, however, directed that this was a "scrivener's error" on the part of Congress, which they have the authority to correct. The correction is that the exemption applies to citizens and nationals, not aliens. *Id.* at 39, 215 (The explanation of the scrivener's error only appears in the Federal Register.).

Exchange, a database kept by the Social Security Administration that contains identity information.<sup>67</sup>

The Federal Register also articulates a shortcut that allows states to establish proof of citizenship for individuals through matches with state vital statistics agencies in place of the individual providing a physical birth certificate.<sup>68</sup> This shortcut is discretionary and only available to states that implement the program.<sup>69</sup> The states that implement the program are also limited to verifying the birth certificates of only those born within its own state. Therefore, citizens who moved from their state of birth and request Medicaid in another state will still have to provide a physical birth certificate.<sup>70</sup>

The exemption of SSI and Medicare recipients from providing citizenship documentation and the authorized shortcut available through cross-referencing the state vital statistic agencies ease the burden on both states and individuals.<sup>71</sup> States do not risk losing federal funding by failing to obtain physical documentation of citizenship, and individuals do not have the burden of locating physical documentation or face denial of Medicaid benefits. The exemption and shortcut are helpful, but they will not assist all citizen applicants/recipients to provide the necessary citizenship documentation. As discussed in Parts V. and VI.A., this note advocates an additional exemption and a last resort option for those citizens who cannot satisfy the documentation requirement.

### III. THE ADVERSE IMPACT OF THE ACT ON STATES

The Act's citizenship documentation requirements will adversely affect the states by generating significant administrative burdens, which will increase operating costs for state Medicaid offices.<sup>72</sup> According to an analysis from the Center on Budget and Policy Priorities ("Center"), approximately fifty-one million current Medicaid beneficiaries will be subject to the citizenship documentation requirement.<sup>73</sup> This

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<sup>67</sup>*Id.* (This information only appears in the Federal Register.).

<sup>68</sup>*Id.* (codified at 42 C.F.R. § 436.407(b)(1)).

<sup>69</sup>*See* Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. at 39,216 ("States may also, at their option, use matches with State vital statistics agencies in place of a birth certificate to establish citizenship."); Rong-Gong Lin II, *Tighter Medicaid Rules Put on Hold [sic] A Federal Law Requires States to Now Verify Applicants' Citizenship. But California and Others Are Taking It Slow*, L.A. TIMES, Nov. 17, 2006. States, such as California and Oklahoma, are currently trying to set up capabilities for their state to verify birth certificates through their respective state's vital statistic agency. *Id.*

<sup>70</sup>*See* Elizabeth Simpson, *Medicaid Trips Up Some Families*, VA. PILOT AND LEDGER STAR, Dec. 6, 2006 (suggesting that the state of Virginia should set up a fund to help those who were born outside of Virginia to pay for birth certificates).

<sup>71</sup>Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. at 39,216 (codified at 42 C.F.R. 435.1008).

<sup>72</sup>LEIGHTON KU, DONNA COHEN ROSS AND MATT BROADDUS, CENTER ON BUDGET AND POLICY PRIORITIES, SURVEY INDICATES THE DEFICIT REDUCTION ACT JEOPARDIZES MEDICAID COVERAGE FOR 3 TO 5 MILLION U.S. CITIZENS 5 (2006), <http://www.cbpp.org/2-17-06health.pdf> [hereinafter SURVEY] ("The Medicaid director for Connecticut has observed that requiring documentation 'would be an enormous administrative burden.'").

<sup>73</sup>STATE ANALYSIS, *supra* note 14, at 4.

means that between July 1, 2006, the date that the Act went into effect, and July 1, 2007, the states are required to redetermine the eligibility of approximately fifty-one million Medicaid beneficiaries.<sup>74</sup> In addition to evaluating citizenship documentation for the large number of current beneficiaries, states will have to determine the eligibility of new Medicaid applicants.<sup>75</sup>

The Center reports that new administrative duties will include “notify[ing] applicants of the new requirements, check[ing] their documents, keep[ing] records that the documents were submitted, [and] delay[ing] enrollment if people cannot locate the documents.”<sup>76</sup> The option that individuals may send original documentation through the mail will also complicate matters because it forces states to take responsibility for original documentation submitted by individuals.<sup>77</sup> The Center compiled a list of states that have analyzed the effects of the Act on their administrative budgets.<sup>78</sup> For example, “Illinois is projecting \$16 million to \$19 million in increased staffing costs in the first year of implementation . . . [and t]he Arizona legislature has allocated \$10 million to implement the citizenship documentation requirement. This included the costs associated with staffing, training and payments for obtaining birth records.”<sup>79</sup>

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[The Center on Budget and Policy Priorities] used data from Census Bureau’s March 2003, 2004, and 2005 Current Population Surveys to compute the percentage of Medicaid beneficiaries in each state who are native or naturalized citizens and those who are non citizen beneficiaries. [They] applied these percentages to administrative data (from HHS’ Medicaid Statistical Information System) on the number of people enrolled in Medicaid in each state at any point during fiscal year 2003.

*Id.*

<sup>74</sup>*See* Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. at 39,215 (“[T]he State must obtain evidence of citizenship and identity at the time of application or at the time of the first redetermination occurring on or after July 1, 2006.”).

<sup>75</sup>*See id.*

<sup>76</sup>SURVEY, *supra* note 72, at 5. Martha Roherty, director of the National Association of State Medicaid Directors, stated that “[The Act] is an administrative nightmare for the states.” Lin II, *supra* note 69.

<sup>77</sup>Nat’l Health Law Program, *Final NheLP Comments on HHS Interim Rule on Citizenship Documentation* 8-9 (Aug. 9, 2006), available at <http://www.healthlaw.org/> [hereinafter *Comments*] (follow “Medicaid” hyperlink; then follow “Deficit Reduction Act of 2005” hyperlink; then follow “Final NheLP Comments on HHS Interim Rule on Citizenship Documentation” hyperlink). Additionally, “[r]equiring people to appear in person to protect their documents will have an especially burdensome impact on the working poor, many of whom cannot take time off from work without jeopardizing their jobs.” *Id.* at 9.

<sup>78</sup>DONNA COHEN ROSS, CTR. ON BUDGET & POLICY PRIORITIES, NEW MEDICAID CITIZENSHIP DOCUMENTATION REQUIREMENT IS TAKING A TOLL: STATES REPORT ENROLLMENT IS DOWN AND ADMINISTRATIVE COSTS ARE UP 7 (2007), <http://www.cbpp.org/2-2-07health.pdf>.

<sup>79</sup>*Id.* Colorado’s budget request was for an additional \$2.8 million for county administration costs. *Id.* Washington “estimates that the costs will be \$2.7 million in [2007] and \$450,000 in each of the succeeding two years.” *Id.* “Wisconsin is expecting increased costs of \$1.8 million to cover the increased workload associated with administering the requirement in [2007] and \$600,000 to \$700,000 per year for the two years after that.” *Id.* Minnesota is estimating that it will spend \$1.3 million in [2007] for new staff, birth record fees, and other administrative expenses.” *Id.*

As a result of the aforementioned increase of administrative duties and the significant number of Medicaid recipients and applicants that must be evaluated, many states have failed to meet the deadline for compliance with the Act. For example, California still has not implemented the Act and is still evaluating eligibility officials' concerns.<sup>80</sup> The L.A. Times reported that "Stan Rosenstein, deputy director of medical care services in the California Department of Health Services[, stated that 'the Act is] . . . so complicated, we want to make sure we do it right so we minimize the negative impact' on eligible beneficiaries."<sup>81</sup> It was also reported that "[o]ther states, like Vermont, are phasing in the rules over several months, while in the state of Washington, officials are allowing people applying for Medicaid to begin receiving benefits while the applicant or state searches for documentation."<sup>82</sup>

The citizenship documentation requirement is mandatory in order for a state to receive federal financial participation.<sup>83</sup> According to Jeff Nelligan, a spokesman for Medicare and Medicaid Services, the federal government will check a state's compliance by subjecting them to federal audits. The L.A. Times reported his comment, "if a state is found to have made payments to an ineligible recipient, . . . the federal agency would recover its share of the funds."<sup>84</sup> As of November 2006, as many as twenty states were not in compliance with the Act's requirements,<sup>85</sup> and according to the law, the federal government will penalize the state by reclaiming its share of the Medicaid funds expended on benefits for an undocumented recipient.<sup>86</sup> States not in compliance with the Act are also not receiving sympathy from Representative Charlie Norwood, who advocated for the inclusion of the citizenship documentation requirement and co-authored the Act.<sup>87</sup> The L.A. Times reported that Norwood's spokesman stated, "some states may have faced hardships in

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<sup>80</sup>Simpson, *supra* note 70.

<sup>81</sup>Lin II, *supra* note 69. Rosenstein supported the state's lack of compliance by stating that "we are moving as expeditiously as we can to reasonably and responsibly implement the program." *Id.* Rosenstein also stated that "the state is still reviewing concerns raised by county officials and healthcare providers – as required by law – before issuing regulations to counties so they can begin enforcement." *Id.*

<sup>82</sup>*Id.* See *supra* Part IV.A. (States should give Medicaid benefits to applicants while they are obtaining the documentation.) Doug Porter, the Medicaid director for Washington supported Washington's partial compliance with the Act by stating, "[Allowing individuals to receive benefits while the state searches for documentation] is not exactly what the feds told us to do but it's what we thought we need to do, particularly for the kids . . . We're confident that we can extend benefits to folks . . . and comply with the spirit of the law." *Id.*

<sup>83</sup>42 U.S.C. §1396(b)(i)(22) (West 2006); 42 C.F.R. § 435.1008 (West 2006) ("FFP will not be available to a State with respect to expenditures for medical assistance furnished to individuals unless the State has obtained satisfactory documentary evidence of citizenship or national status.").

<sup>84</sup>Lin II, *supra* note 69.

<sup>85</sup>*Id.*

<sup>86</sup>42 U.S.C. §1396(b)(i)(22); § 435.1008.

<sup>87</sup>Lin II, *supra* note 69.

implementing [the Act] but . . . have had plenty of time to comply. ‘So far, all of the objections we have heard seem rather contrived.’”<sup>88</sup>

The federal government is apparently not sympathetic to a state’s noncompliance with the Act and has not offered financial or logistical support to states attempting to implement the Act.<sup>89</sup> The federal government has forced the states into a very difficult position because a state faces losing money whether or not it implements the Act. If a state chooses to comply with the Act, it will be solely responsible for paying the additional administrative costs associated with implementing the Act. The state will lose twice if it fails in its implementation and, as a result, loses federal funding for undocumented recipients. On the other hand, if a state chooses not to comply with the Act, it will only lose the federal funding. It is not surprising that close to half of the states had not fully implemented the Act by the start date.<sup>90</sup>

The slow implementation of the Act will defeat the federal government’s goals to quickly combat fraud in the Medicaid system and concurrently save the nation money. The federal government must make its own citizens a priority and offer the states financial and logistical support to implement the Act so that the states may quickly and efficiently police the Medicaid system for fraud.

#### IV. THE ADVERSE IMPACT OF THE ACT ON INDIVIDUALS

The Act’s citizenship documentation requirements will not only burden the states; many applicants/recipients who are citizens will be adversely affected by the requirements despite the recent exemption of SSI and Medicaid recipients<sup>91</sup> and the shortcut provided through state vital statistic agencies.<sup>92</sup> The Center conducted a survey revealing that eight percent of “[United States]-born adults age [eighteen] or older who have incomes below \$25,000 report that they do not have a [United States] passport or [United States] birth certificate in their possession.”<sup>93</sup> Although eight percent may seem low, this translates into an estimated “1.7 million [United States]-born adults who are covered by Medicaid . . . los[ing] their health insurance . . . or [experiencing] delays in obtaining coverage as they attempt to secure these documents.”<sup>94</sup>

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<sup>88</sup>*Id.*

<sup>89</sup>*Comments, supra* note 77, at 6.

<sup>90</sup>*See* Lin II, *supra* note 69.

<sup>91</sup>Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg., 39,214, 39,216 (July 12, 2006) (codified at 42 C.F.R. 435.1008) (exempting states from documenting citizens who receive Medicaid as a result of receiving Medicare or SSI).

<sup>92</sup>*See* § 42 C.F.R. 436.407(b)(1) (“A State, at its option, may use a cross match with a State vital statistic agency to document a birth record.”).

<sup>93</sup>SURVEY, *supra* note 72, at 1. The reported data was taken via a telephone survey of 2,026 adults. *Id.* The survey “reveal[ed] that the new requirement could have large consequences on the health insurance coverage of millions of low-income U.S. citizens.” *Id.*

<sup>94</sup>*Id.* Normal delays in obtaining documentation will be further complicated by the increased number of requests the state vital statistic agencies will have to handle. The Center on Budget and Policy Priorities reports that “Garland Land, executive director of the National Association for Public Health Statistics and Information systems, has observed that, ‘We expect the legislation will increase the volume of birth certificate requests by as much as 25

The Center's statistics, however, are conservative because various groups who will be affected by the Act's requirements were not represented in the survey.<sup>95</sup> These groups include "nursing-home residents, Katrina survivors living in temporary facilities, and homeless people"<sup>96</sup>; these groups are particularly at risk of not having the necessary documentation requirements.<sup>97</sup> For example, victims of Hurricane Katrina and Rita, who lost everything, may not be able to obtain replacement documentation from county, parish, and state record offices that also suffered losses.<sup>98</sup> Those who have mental diseases, who are incapacitated due to illness, or who are in nursing home facilities are likely not able to assist in securing the documentation.<sup>99</sup> The aforementioned groups were not given an exemption.

Those citizens in need of Medicaid who may have difficulty locating the original documentation or otherwise demonstrating citizenship will likely experience delays in obtaining coverage or be denied coverage altogether.<sup>100</sup> Current recipients of Medicaid who are citizens will remain eligible until after a reasonable opportunity period has passed.<sup>101</sup> The recipient will be found ineligible as required by statute if

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percent to 50 percent. Many vital records jurisdictions may find it very difficult to manage this large of an increase of requests in such a short time period. This could result in significant delays in processing birth certificate applications." STATE ANALYSIS, *supra* note 14, at 7. In addition to administrative delays, states such as California require a notarized application because of homeland security concerns. *Id.*

<sup>95</sup>SURVEY, *supra* note 72, at 2 (stating "[t]hese results are conservative. Many of those who would be most likely to experience difficulty in securing these documents – such as nursing-home residents, Katrina survivors living in temporary facilities, and homeless people – were not represented in the survey. Had the survey included such people, the percentage of people likely to be harmed by the requirement would almost certainly have been found to be higher.").

<sup>96</sup>*Id.*

<sup>97</sup>*See Requirements, supra* note 7, at 14.

<sup>98</sup>*Id.* J. Ruth Kennedy the Deputy Medicaid Director of Louisiana Department of Health and Hospitals commented on the impact the citizenship documentation requirements are having on Louisiana: "[t]hese numbers [regarding the Medicaid enrollment decline of children] are not driven primarily by the loss of population from New Orleans and other parishes affected by Hurricane Katrina . . . We are quite confident that the overwhelming majority of these children are citizens – born right here in Louisiana – and not ineligible alien children." ROSS, *supra* note 78, at 2.

<sup>99</sup>*See Requirements, supra* note 7, at 14. *See also supra* notes 1-12 and accompanying text. Also, many hospitals, especially in the South during the twentieth century prohibited admission of African Americans; therefore, many women gave birth outside of a hospital, and their children never obtained birth certificates.<sup>99</sup> *Requirements, supra* note 7, at 14.

<sup>100</sup>*See* Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,217 (July 12, 2006) ("An applicant or recipient who fails to cooperate with the State in presenting documentary evidence of citizenship may be denied or terminated."); *supra* notes 69, 71 and accompanying text.

<sup>101</sup>*Id.* ("A determination terminating eligibility may be made after the recipient has been given a reasonable opportunity to present evidence of citizenship or the State determines the individual has not made a good faith effort to present satisfactory documentary evidence of citizenship.").

they do not submit the information within the state's reasonable opportunity period.<sup>102</sup> The reasonable opportunity period is set by each individual state, and the time ranges from forty-five days to ninety days.<sup>103</sup> On the other hand, new Medicaid applicants will be put at the greatest disadvantage because they cannot obtain Medicaid benefits at all until they have met the requirements of the Act.<sup>104</sup> The adverse effects of the Act on Medicaid recipients and applicants are problematic because those who need immediate medical coverage will either be denied Medicaid benefits entirely or will experience significant delays in coverage.<sup>105</sup>

Several states already have recorded data that demonstrates significant decreases in Medicaid enrollment since implementation of the Act. Wisconsin reported that in a seven month period "19,413 Medicaid-eligible individuals were either denied Medicaid or lost coverage as a result of the documentation requirement."<sup>106</sup> Individuals and Medicaid office workers in Kansas are trying to comply with the citizenship documentation requirements; however, this process of complying has caused 16,000 individuals to be left without health insurance due to an accumulation of pending applications that are awaiting eligibility determinations.<sup>107</sup> Perhaps the most disheartening result is that Virginia has noticed the Act's effect, particularly on children. "[T]he number of Virginia children covered by Medicaid dropped by about 12,000 between June and the end of October after steady increases during the past few years."<sup>108</sup> Within a period of two months, "Louisiana experienced a net loss of more than 7,500 children in its Medicaid program despite a vigorous back-to-school outreach effort and a significant increase in applicants during the month of September."<sup>109</sup>

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<sup>102</sup>*Id.* at 39,216 ("Individuals who are Medicaid recipients will remain eligible until determined ineligible by Federal regulations at § 435.930.").

<sup>103</sup>42 C.F.R. § 435.911 (West 2006).

(a) The agency must establish time standards for determining eligibility and inform the applicant of what they are. These standards may not exceed--

(1) Ninety days for applicants who apply for Medicaid on the basis of disability; and  
(2) Forty-five days for all other applicants.

(b) The Time standards must cover the period from the date of application to the date the agency mails notice of its decision to the applicant.

*Id.*

<sup>104</sup>Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. at 39,216.

<sup>105</sup>*See supra* notes 69, 71 and accompanying text.

<sup>106</sup>ROSS, *supra* note 78, at 2. "Obtaining proof of identity, rather than proof of citizenship, was the major problem for people in Wisconsin who were otherwise eligible during this period . . . This indicates that most of those who were denied were, in fact, U.S. citizens." *Id.*

<sup>107</sup>*Id.*

<sup>108</sup>Simpson, *supra* note 70 ("The number rebounded by about 1,000 in November."). The *LA Times* reported that "Linda Nablow, director of the division of maternal and child health for the Medicaid program in Virginia[, stated that] 'I believe the great majority, almost every single one of [the 12,000 children], are in fact a U.S. citizen . . . It's just causing an enormous barrier.'" Lin II, *supra* note 69.

<sup>109</sup>ROSS, *supra* note 78, at 5.

V. THE ACT VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION BECAUSE IT TREATS CITIZEN APPLICANTS WORSE THAN QUALIFIED IMMIGRANT APPLICANTS

In addition to the aforementioned adverse effects of the Act on citizens and states, the Act fails to treat citizen and immigrant applicants equally.<sup>110</sup> The unequal treatment of citizen and qualified immigrant applicants is caused by the disparate application of the reasonable opportunity period to Medicaid applicants based on differing citizenship statuses.<sup>111</sup> A new applicant who is a qualified immigrant and is only lacking proof of immigration status will receive Medicaid during a reasonable opportunity period to obtain the required immigration evidence.<sup>112</sup> The citizen applicant, on the other hand, does not have the benefit of a reasonable opportunity period and, therefore, will not receive Medicaid until the documentation requirements are met.<sup>113</sup> The disadvantageous treatment of citizen applicants compared to immigrant applicants violates the Fifth Amendment of the Constitution and contradicts congressional intent in passing the Act.

The only information available that demonstrates congressional intent for including the citizenship documentation requirement in the Act is news releases from Congressman Charlie Norwood, who pushed for inclusion of the requirement.<sup>114</sup> In one news release, Congressman Norwood stated, “It is absolutely intolerable that we have allowed some of the poorest Georgians to lose access to health care due to fraud by illegal aliens.”<sup>115</sup> If Congress’s intent was really to combat fraud in order to help its own low income citizens to obtain healthcare, as purported by Congressman Norwood, then it should not place a strict requirement on its own citizens to provide documentation before they can receive Medicaid, while it allows only immigrants to receive Medicaid benefits during the reasonable time period they have to obtain documentation. The better treatment of immigrants and lack of consideration for citizens is contrary to congressional intent in passing the Act<sup>116</sup> and is

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<sup>110</sup>*Comments, supra* note 77, at 4 (stating “citizen applicants are indeed irrationally treated worse than qualified alien applicants . . . [, and] the equal protection component of the Fifth Amendment of the U.S. Constitution does not allow it.”).

<sup>111</sup>*See infra* notes 111-112 and accompanying text.

<sup>112</sup>42 U.S.C.A. § 1320b-7(d)(4)(A)(ii) (West 2006). (“[T]he State-- may not delay, deny, reduce or terminate the individual’s eligibility for benefits under the program on the basis of the individual’s immigration status until such a reasonable opportunity has been provided.”).

<sup>113</sup>Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,216 (July 12, 2006) (“applicants for Medicaid (who are not currently receiving Medicaid), should not be made eligible until they have presented the required evidence.”).

<sup>114</sup>*See supra* notes 18-19 and accompanying text.

<sup>115</sup>News Release, Rep. Charlie Norwood, *Medicaid Recipients Must Prove U.S. Citizenship Before Receiving Benefits*, (Feb. 1, 2006) available at [http://www.house.gov/list/press/ga10\\_norwood/MedicaidIllegalsPasses.html](http://www.house.gov/list/press/ga10_norwood/MedicaidIllegalsPasses.html).

<sup>116</sup>*See id.*

unconstitutional.<sup>117</sup> The unfavorable treatment of citizens should be resolved by amending the Medicaid statute to put citizens and immigrants on equal footing.<sup>118</sup>

*A. The Medicaid Statute Should Be Amended to Remedy the Unequal Treatment of Citizen and Immigrant Applicants*

Congress can remedy the constitutional violation by adding an amendment with language that mirrors the language of the Medicaid statute as it applies to qualified immigrants.<sup>119</sup> Currently, one of the basic eligibility requirements to receive Medicaid is that applicants “declare in writing under penalty of perjury” that they are either a citizen, national, or individual in a satisfactory immigration status.<sup>120</sup> The applicants who declare a satisfactory immigration status have to satisfy an additional eligibility requirement and provide documentation to verify their status.<sup>121</sup> As a result of the administrative requirement imposed on the states by the Act, applicants who declare that they are citizens have to provide documentation to verify their citizenship status.<sup>122</sup>

The Medicaid Statute, however, protects immigrants from a state prematurely denying benefits by providing that a state may not “delay, deny, reduce, or terminate the individual’s eligibility for benefits under the program on the basis of the individual’s immigration status until such a reasonable opportunity period has been provided.”<sup>123</sup> Now that the Act technically places similar burdens on citizens to document their status as it does on immigrants,<sup>124</sup> the same protection given to immigrants should be given to citizens. Congress should pass an amendment within the same section of the Medicaid statute whereby the above language applicable to

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<sup>117</sup>See *Comments, supra* note 77, at 4 (stating “citizen applicants are indeed irrationally treated worse than qualified alien applicants . . . [and] the equal protection component of the Fifth Amendment of the U.S. Constitution does not allow it.”).

<sup>118</sup>See *infra* Part IV.A.

<sup>119</sup>The author created this statutory strategy in order to remedy the constitutional violation and preserve continuity in the Medicaid statute. The language that this note wants to apply to citizens can be found in § 1320b-7(d)(4)(A)(i)(ii), which states:

(A) the State—

(i) shall provide a reasonable opportunity to submit to the State evidence indicating a 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 the individual’s immigration status until such a reasonable opportunity has been provided.

*Id.*

<sup>120</sup>42 U.S.C.A. § 1320b-7(d)(1)(A)(West 2006).

<sup>121</sup>§ 1320b-7(d)(2)(A) (“If such an individual is not a citizen or national of the United States, there must be presented either--alien registration documentation or other proof of immigration registration from the Immigration and Naturalization Service that contains the individual’s alien admission number or alien file number . . .”).

<sup>122</sup>See 42 U.S.C.A. § 1396(b)(x)(1) (West 2006).

<sup>123</sup>§ 1320b-7(d)(4)(A)(ii).

<sup>124</sup>See *Comments, supra* note 77, at 4 (making a comparison between the documentation that used to be required only from aliens and is now required from citizens).

immigrants should be applied to citizens.<sup>125</sup> The language could simply be copied to read: a state may not “delay, deny, reduce, or terminate the individual’s eligibility for benefits under the program on the basis of the individual’s [citizenship status] until such a reasonable opportunity period has been provided.”<sup>126</sup> Such an amendment would secure the equal treatment of citizens by giving them Medicaid benefits during the same reasonable opportunity period to search for documentation that is given to immigrants.

*B. Congress Should Apply the Reasonable Opportunity Language to Citizen Applicants in a Manner Consistent With the Current Statutory Framework*

The language of the Act itself does not specifically deny citizen applicants Medicaid during a reasonable opportunity period to search for documentation.<sup>127</sup> The Code of Federal Regulations issued by Medicare and Medicaid Services denied the reasonable opportunity period to citizen applicants.<sup>128</sup> The fact that the Code of Federal Regulations and not the Act itself denies the reasonable opportunity period is important because Congress can remedy the unequal treatment of citizens and immigrants by simply passing an additional amendment to the Medicaid statute,<sup>129</sup> which will override the administrative rules articulated in the Code of Federal Regulations.<sup>130</sup> The Act does not need to be entirely repealed and rewritten by Congress in order to give citizens equal treatment under the Medicaid statute.

Careful reading of the Act and surrounding sections of the Medicaid statute reveals that the proposed amendment and its suggested placement<sup>131</sup> will fit into the current statutory framework of the Medicaid statute. Language that was part of the Medicaid statute prior to the inclusion of the citizenship documentation requirement

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<sup>125</sup>It is imperative that the language regarding citizenship should be included in the same section, § 1320b-7(d)(4)(A)(ii), for reasons that will be discussed in Part IV.B.

<sup>126</sup>See § 1320b-7(d)(4)(A)(ii). The author has inserted the words “citizenship status” into the language of the cited statute (applicable only to immigrants) to illustrate the ease of providing for a statutory provision that would allow a reasonable opportunity period for citizens to receive Medicaid benefits while obtaining the required documentation.

<sup>127</sup>See Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6036, 120 Stat 4 (2006).

<sup>128</sup>Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,216 (July 12, 2006) (stating “applicants for Medicaid (who are currently not receiving Medicaid), should not be made eligible until they have presented the required evidence.”).

<sup>129</sup>See *supra* Part IV.A. and accompanying notes discussing the proposed amendment.

<sup>130</sup>An agency, such as Medicare and Medicaid Services, derives its authority to promulgate rules from legislation passed by Congress. One way that Congress can effectively overrule an agency’s action is by passing an amendment that is signed by the president. See Boris Bershteyn, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 YALE L.J. 359, 371-72 (2004).

<sup>131</sup>See *supra* Part IV.A. and accompanying notes. The proposed amendment should apply the same language to citizens that is in the Medicaid statute referencing immigrants and should place the new language into the same section. The language from the statute that should be copied is as follows: “The State may not delay, deny, reduce, or terminate the individual’s eligibility for benefits under the program on the basis of the individual’s immigration status until such a reasonable opportunity has been provided.” § 1320b-7(d)(4)(A)(ii).

and that is still a part of the statute today suggests that the reasonable opportunity period should already apply to citizens;<sup>132</sup> this conclusion is based on a reference to both immigrants and citizens.<sup>133</sup> The language states that the federal government may not punish the state if it later finds out that the state gave Medicaid benefits to immigrants and citizens because it was required to allow a reasonable opportunity to obtain documentation pursuant to the section that applies to only immigrants (and that this note suggests should be applied to citizens).<sup>134</sup> This means that states will not be punished by the federal government for providing Medicaid during the reasonable opportunity period if the state later discovers that the citizens and immigrants do not qualify. The reference to citizens in the statute demonstrates that at one time Congress understood the limitations of the state's ability to police the system and that immigrants and citizens should be given the benefit of the doubt and receive healthcare while they search for documentation.

Congress should return to its previous belief that citizens and immigrants should be treated equally and follow the statutory framework that was already included in the Medicaid statute by passing an amendment that gives Medicaid benefits to citizens during the reasonable opportunity period to search for documentation.<sup>135</sup> By following this note's suggestion and referencing citizens in the same section as immigrants, Congress will also give force to the provision that states will not be punished for providing Medicaid to immigrants and citizens during the reasonable opportunity period if it is discovered that the applicant does not in fact qualify.<sup>136</sup> Giving force to this provision is important in order to completely rectify the unequal treatment of citizens and immigrants. Permitting states to provide benefits during a reasonable opportunity period and not refraining from punishment if the state discovers that the applicant does not qualify will yield the same unequal treatment that is already occurring. States will be unlikely to give Medicaid benefits during the reasonable opportunity period to citizens for fear of making a mistake and subsequently losing federal funding. On the other hand, states will continue to give

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<sup>132</sup>See 42 U.S.C. § 1320b-7(e)(2); *infra* text accompanying notes 107-108.

<sup>133</sup>See § 1320b-7(e)(2).

(e) Erroneous State citizenship or immigration status determinations; penalties not required.

Each Federal agency responsible for administration of [Medicaid] . . . shall not take any compliance, disallowance, penalty or other regulatory action against a State with respect to any error in the State's determination to make an individual eligible for benefits based on citizenship or immigration status - -

. . . .

(2) because the State, under subsection (d)(4)(A)(ii) of this section, was required to provide a reasonable opportunity to submit documentation.

*Id.*

<sup>134</sup>§ 1320b-7(e)(2). Subsection (d)(4)(A)(ii) refers to the language that this note wants to apply to citizens. According to the statute, "[t]he State may not delay, deny, reduce, or terminate the individual's eligibility for benefits under the program on the basis of the individual's immigration status until such a reasonable opportunity has been provided." § 1320b-7(d)(4)(A)(ii).

<sup>135</sup>See *supra* text accompanying notes 105-108.

<sup>136</sup>See § 1320b-7(e)(2); *supra* text accompanying notes 105-108.

benefits to immigrants because the current provision promises to not punish the states for a discovery that the immigrant does not qualify.

The federal government should deny federal funding only if the reasonable opportunity period passes and the state does not have sufficient documentation of citizenship in the file. The federal government will still have the ability to enforce the Act's requirement that the states obtain documents from citizen applicants/recipients because only the criteria that trigger the denial of Medicaid benefits will be changed. This result will safeguard Medicaid from fraudulent activity, while also providing citizens with access to Medicaid benefits during their pursuit of proper documentation.

The unequal treatment of citizens can be resolved by affording citizens a reasonable opportunity period to obtain documentation and requiring the federal government to refrain from punishing states for providing benefits during this period. This note does not advocate the complete abolition of the citizenship documentation requirement because fraudulent activity is a reality and needs to be controlled.<sup>137</sup> The goal of the documentation requirement to combat fraudulent activity can still be reached while preserving the citizens' abilities to receive Medicaid benefits. Congress should refer to its own language in the Medicaid statute in order to remember that providing healthcare to needy citizens is the most important goal of Medicaid.<sup>138</sup>

VI. THE CODE OF FEDERAL REGULATIONS SHOULD BE AMENDED TO EXEMPT STATES FROM DOCUMENTING FOSTER CHILDREN BECAUSE NOT DOING SO IS AGAINST CONGRESSIONAL INTENT AND IS BAD PUBLIC POLICY

In addition to amending the Medicaid Statute to give benefits during a reasonable time period to citizens who would otherwise qualify, Congress should make other changes that will further protect citizens' abilities to receive Medicaid benefits. Perhaps the most notable change that has the support of advocates, such as the National Health Law Program,<sup>139</sup> is to exclude the state from the requirement of documenting children who receive foster care benefits under Title IV-E of the Social Security Act.<sup>140</sup> Subjecting foster children to the citizenship documentation requirement is contrary to the intent of Congress and is bad public policy.<sup>141</sup>

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<sup>137</sup>See Department of Health and Human Services Office of Inspector General, *Self-Declaration of U.S. Citizenship for Medicaid* (July 2005), 18 <http://oig.hhs.gov/oei/reports/ei-02-03-00190.pdf> (stating that “[b]y their nature, self-declaration policies have inherent vulnerabilities in that they can allow applicants to provide false statements of citizenship. As such, it is vital to have protections in place to prevent such practices.”).

<sup>138</sup>See § 1320b-7(e)(2) (West 2006) (providing that the federal government will not punish the state if it is later found that it gave benefits to citizens and immigrants during the reasonable opportunity period).

<sup>139</sup>“The National Health Law Program is a national public interest law firm that seeks to improve health care for America’s working and unemployed poor, minorities, the elderly and people with disabilities.” National Health Law Program, *About NHeLP*, available at <http://www.healthlaw.org/about.cfm>.

<sup>140</sup>*Comments, supra* note 77, at 2-3.

<sup>141</sup>*Id.*

Congress directed that the documentation requirements should apply only to those who declare themselves citizens for the objective of receiving Medicaid and other specific programs.<sup>142</sup> According to the language of the statute, Title IV-E foster care benefits is not a program listed in the statute that must comply with the citizenship documentation requirements.<sup>143</sup> Those children who receive Medicaid benefits receive them by virtue of qualifying for foster care benefits, not because they independently have met the Medicaid requirements.<sup>144</sup> This situation is similar to that of SSI and Medicare recipients who receive Medicaid by virtue of qualifying for SSI or Medicare. The states are exempted from obtaining documentation from those who receive Medicaid as a result of receiving SSI or Medicare.<sup>145</sup> Recipients of foster care benefits should be treated similarly.<sup>146</sup> The Code of Federal Regulations should be revised to exempt states from obtaining documentation from children who receive Medicaid by virtue of qualifying for Title IV-E foster care benefits.<sup>147</sup>

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<sup>142</sup>*Id.* See § 1396b(i)(22) (“with respect to amounts expended for medical assistance for an individual who declares under section 1320b-7(d)(1)(A) of this title to be a citizen or national of the United States for purposes of establishing eligibility for benefits under this subchapter, unless the requirement of subsection (x) [to document citizenship] is met.”). The benefits referred to in this statute include: “(1) any State program funded under part A of subchapter IV of this chapter [named Temporary Assistance for Needy Families]; (2) the medicaid program . . . ; (3) the unemployment compensation program . . . ; the food stamp program . . . ; any State program under [an approved plan].” § 1320b-7(b)(1)-(5).

<sup>143</sup>*See id.* (Foster care benefits are not listed as a program that should declare citizenship status).

<sup>144</sup>*Comments, supra* note 77, at 2 (“For example, if a state had an asset limit for foster care services that was higher than its asset limit for Medicaid, foster care children not meeting the lower Medicaid asset limit would nonetheless still receive Medicaid.”). *Id.* For all children receiving federal foster care maintenance payments, states are required to verify citizenship or immigration status. Department of Health and Human Services Office of Inspector General, *Self-Declaration of U.S. Citizenship for Medicaid* (July 2005), 16 <http://oig.hhs.gov/oei/reports/oei-02-03-00190.pdf>. This verification process, however, is not the same as the requirements imposed by the Act.

<sup>145</sup>42 C.F.R. § 435.1008 (West 2006) (“FFP will not be available to a State with respect to expenditures for medical assistance furnished to individuals unless the State has obtained satisfactory documentary evidence of citizenship or national status . . . . This requirement does not apply with respect to individuals declaring themselves to be citizens or nationals who are eligible for medical assistance and who are either entitled to benefits or enrolled in any parts of the Medicare program under title XVIII of the Social Security Act, or on the basis of receiving supplemental security income benefits under title XVI of the Act.”).

<sup>146</sup>*Comments, supra* note 77, at 2 (stating “[i]t is our understanding that children are in fact required to demonstrate their U.S. citizenship or nationality in the process of qualifying for Title IV-E benefits. In this regard, therefore, they are indistinguishable from SSI beneficiaries and it makes no sense to treat them differently.”).

<sup>147</sup>*Comments, supra* note 77, at 3 (Medicare and Medicaid Services can exempt the states from documenting foster care children by amending 42 C.F.R. § 435.1008 to also exempt children receiving foster care benefits under Title IV-E of the Social Security Act.).

Failure to exclude the state from documenting children who receive foster care benefits would also be contrary to public policy.<sup>148</sup> The NHELP advocacy group noted:

Knowledge that Medicaid will be available to meet the medical needs of the children they are agreeing to care for is undoubtedly a major factor in a would-be foster parent's decision regarding participation in that program. Constructing gratuitous barriers to children receiving IV-E coverage when the [Act] does not require that result is terrible public policy. It will certainly deprive already imperiled children of necessary medical care, and will predictably reduce the number of families willing to participate in the foster care system at all.<sup>149</sup>

Even if Congress intended the documentation requirements to apply to Title IV-E foster children, Medicare and Medicaid Services has the statutory authority to exclude other groups from the requirements and should exclude these foster children for the public policy reasons stated above.<sup>150</sup>

#### VII. THE HIERARCHY IS PROBLEMATIC BECAUSE IT FAILS TO CREATE A LAST RESORT OPTION AND IS UNNECESSARILY COMPLICATED

One of the problems with the hierarchy structure is that even if a reasonable opportunity period to obtain documentation is given to citizen applicants and the state is granted an exclusion from documenting foster care children, it is inevitable that some citizens will still not be able to comply with the Act and will be denied Medicaid benefits.<sup>151</sup> Health advocates criticize the documentation hierarchy as “faulty in its failure to provide a true method of last resort for people who, for [various] reasons . . . simply cannot provide any of the listed documents.”<sup>152</sup> They also note that “there will be innumerable situations in which a person is unable to produce any of the documents listed in the [hierarchy], not because (s)he has failed to cooperate but merely because (s)he has failed to succeed.”<sup>153</sup> These reasons include loss of documentation due to natural disasters, lack of mental capacity to

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<sup>148</sup>*Id.*

<sup>149</sup>*Id.* at 2-3. The health advocacy group also stated that, as a result of fewer families participating in the foster care system, “many children whose very lives are at risk will not only lose the opportunity for a healthy childhood, but also the chance at a safe one.” *Id.* at 3. One of the burdens on foster parents is that they may find it difficult to obtain duplicate birth certificates and may have to incur an application fee of five dollars to twenty-three dollars to obtain one. STATE ANALYSIS, *supra* note 14, at 7.

<sup>150</sup>*Id.* See § 1320b-7(x)(2)(D) (The citizenship documentation requirement shall not apply “on such other basis as the Secretary may specify.”).

<sup>151</sup>See *Requirements*, *supra* note 7, at 14 (listing victims of hurricane Katrina and Rita, people with mental illnesses, and African Americans from the South as examples of those groups who may not be able to obtain the citizenship documentation).

<sup>152</sup>*Comments*, *supra* note 77, at 8.

<sup>153</sup>*Id.*

assist in the procurement of documentation, inability to pay for documentation, and inability to locate the documentation.<sup>154</sup>

A second problem with the hierarchy is that it is unnecessarily complicated.<sup>155</sup> The current four level hierarchy will cause state Medicaid offices and Medicaid applicants/recipients to unnecessarily spend time searching for evidence in the higher tier when evidence in a lower tier may be readily available.<sup>156</sup> The complexities of the hierarchy structure are further complicated by the fact that all of the documentation described by the Act to determine eligibility is subject to the strict requirement that a state should accept only originals and copies certified by the issuing agency; copies and even notarized copies are not acceptable.<sup>157</sup> States have cited the complicated nature of the Act as part of the reason they are falling behind in its implementation.<sup>158</sup> One individual also complained that complying with the Act “felt like the run around.”<sup>159</sup>

Before the complex hierarchy structure was enacted, the Medicaid enrollment process was already considered too complicated by applicants.<sup>160</sup> For example, a 1998-1999 study by the Kaiser Commission on Medicaid and the Uninsured revealed that “[a]mong parents who tried to enroll their child but did not complete the entire process . . . , a prevailing theme emerges: the Medicaid enrollment process is too

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<sup>154</sup>See *supra* Part III and accompanying notes.

<sup>155</sup>*Comments, supra* note 77.

<sup>156</sup>*Id.* at 7.

<sup>157</sup>42 C.F.R. § 436.407(h)(1) (West 2006). Although an individual may send the documents by mail or authorized representative, it is likely that the individual will personally appear because most people will not want to send original documentation through the mail or trust it to another person. *Comments, supra* note 77, at 8-9. This not only burdens the individual to apply for Medicaid in person, but also the state, which will be forced to take responsibility for original documentation. *Id.* Health advocates stated that,

CMS offers no explanation for this extraordinary concept [requiring originals or certified copies], and none is readily apparent. Certainly [the Act] does not impose such an onerous and expensive requirement. Requiring originals or certified copies will certainly increase the cost of acquiring any necessary evidence, and it will almost certainly require people who already have the documents such as birth certificates to acquire new copies that comply with this gratuitously burdensome provision. In addition, . . . [this requirement] will effectively reinstate the requirement that people apply for Medicaid in person . . . . Requiring people to appear in person to protect their documents will have an especially burdensome impact on the working poor, many of whom cannot take time off from work without jeopardizing their jobs.

*Id.*

<sup>158</sup>See Lin II, *supra* note 69. The deputy director of medical care services in the California Department of Health Services stated, “[The Act] is so complicated, we want to make sure we do it right so we minimize the negative impact on eligible beneficiaries.” *Id.* The spokeswoman from the Oklahoma Health Care Authority stated, “We’re just trying to make it as easy as possible and make the transition smooth, . . . We think if we acted immediately that probably would have caused more harm than good.” *Id.*

<sup>159</sup>Simpson, *supra* note 70.

<sup>160</sup>See *infra* notes 159-161 and accompanying text.

difficult and complicated.”<sup>161</sup> The reasons cited for not completing the process include “[d]ifficulty of getting all the required papers (72%); [o]verall hassle of the enrollment process (66%); and [b]elief that the process was complicated and confusing (62%).”<sup>162</sup> Medicare and Medicaid Services, one of the government agencies responsible for issuing regulations to implement the Act, summed up the problem the best: “If the application process is simple and easy to complete, a family is more likely to complete it. By the same token, if the process is complicated, because other programs are involved, a family may be deterred and not complete the process.”<sup>163</sup> It is reasonable to assume that the hierarchy will only increase the complex nature of the Medicaid process and the number of families not seeking coverage.<sup>164</sup>

Both problems, the lack of a last resort option and the complex nature of the hierarchy system, contribute to the two negative consequences of the Act listed by the Center on Budget and Policy Priorities. First, if medical care is delayed while families try to comply with the Act, such delay could result in more expensive care once the person meets the new Medicaid documentation requirements.<sup>165</sup> Second, “to the extent that the new requirements increase the number of uninsured people or increases the length of time that people remain uninsured, there would be increases in the costs of uncompensated health care borne by state and local hospitals and clinics that provide health care to the uninsured.”<sup>166</sup>

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<sup>161</sup>MICHAEL PERRY ET AL., Kaiser Commission on Medicaid and the Uninsured, *Medicaid and Children Overcoming Barriers to Enrollment Findings from a National Survey* 9 (2000), available at <http://www.kff.org/medicaid/upload/Medicaid-and-Children-Overcoming-Barriers-to-Enrollment-Report.pdf>.

<sup>162</sup>*Id.* (Thirteen percent of all respondents tried to enroll their child in Medicaid but did not complete the process). Twelve percent of the respondents never tried to enroll their children in Medicaid. Some of the reasons listed for not trying to obtain Medicaid include lack of knowledge, quality of care concerns, and the enrollment “hassle factor.” *Id.* “The study was comprised of two components: a nationwide telephone survey and a series of focus groups . . . . Specifically, [the study] polled 836 parents with children enrolled in Medicaid and 419 parents with children who are currently uninsured.” *Id.* at 27.

<sup>163</sup>CENTERS FOR MEDICARE AND MEDICAID SERVS., *Continuing the Progress: Enrolling and Retaining Low-Income Families and Children in Health Care Coverage* 3 (2001), available at [http://www.childrenspartnership.org/AM/Template.cfm?Section=Medicaid\\_SchIP&ContentID=6495&TEMPLATE=/CM/ContentDisplay.cfm](http://www.childrenspartnership.org/AM/Template.cfm?Section=Medicaid_SchIP&ContentID=6495&TEMPLATE=/CM/ContentDisplay.cfm). (stating that in some states the application process for Medicaid is complicated by the fact that the state uses the Medicaid application to also “determine eligibility for other benefit programs such as cash assistance, child care and Food Stamps.”).

<sup>164</sup>*See* Simpson, *supra* note 70 (“Some health advocates are concerned that the delays could lead some parents to stop seeking care.”); Lin II, *supra* note 69 (“Some fear that the new requirement will discourage low-income Americans from obtaining health services, and lead to more serious illnesses.”). The hierarchy is not only complex, but it is also a policy that is unfamiliar to both individuals and Medicaid officers due in part that no other government program contains such a policy. *See Comments, supra* note 77, at 7.

<sup>165</sup>STATE ANALYSIS, *supra* note 14, at 7.

<sup>166</sup>*Id.* *See also* Lin II, *supra* note 69 (“Some fear that the new requirement will discourage low-income Americans from obtaining health services, and lead to more serious illnesses.”). Simpson, *supra* note 70 (“[Some health advocates] worry that others are taking their children

The negative consequences of the Act can be lessened by revising the Code of Federal Regulations. Revising the affidavit option and expanding the responsibilities of the states can remedy the first problem, the lack of a last resort option.<sup>167</sup> The second problem, the complicated nature of the hierarchy system, can be remedied by condensing the four-tier system into a two-tier system.<sup>168</sup>

*A. The Code of Federal Regulations Should Be Amended To Require States To Assist All Applicants Obtain Citizenship Documentation and To Provide a Last Resort Option for Establishing Citizenship*

Although there is not a specific last resort option available, two provisions currently in the Code of Federal Regulations allow some relief for those who do not have traditional documentation of citizenship. The affidavit option available in tier four could help some applicants/recipients, but only those who have access to two citizen witnesses.<sup>169</sup> There also is a requirement that states must assist “special populations” who due to “incapacity of mind or body” cannot provide documentary evidence of citizenship.<sup>170</sup> This provision is vague because it does not specify whether the states should only provide support in locating the documents or whether the states should also provide financial support to help citizens pay for the documents.<sup>171</sup> The fourth tier affidavit option and the “special populations” provision are helpful, but an applicant/recipient who does not fit neatly within the

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to overburdened hospital emergency rooms when they should be going to pediatricians’ offices or clinics for routine treatments.”).

<sup>167</sup>See *infra* Part VI.A.

<sup>168</sup>See *infra* Part VI.B.

<sup>169</sup>See 42 C.F.R. § 436.407(d)(5)(iii) (West 2006) (“In order for the affidavit to be acceptable the persons making them must be able to provide proof of their own citizenship and identity.”). Advocates have criticized the affidavit approach to be “so cumbersome as to be of little value.” One of the main problems cited is that the affidavit requires the two witnesses to “document their status as if they themselves were applying for Medicaid.” Advocates believe that requiring the two witnesses to prove their citizenship “will prevent some citizens, especially children from getting benefits to which they are entitled. If, for example, undocumented women gives [sic] birth at home in this country, it is likely that no one attending that birth, much less two people, will be a citizen. Yet the non citizens in attendance would be the only people in a position to truthfully attest to the child’s birth in the United States.”

<sup>170</sup>§ 435.407(h) (“Special populations needing assistance. States must assist individuals to secure satisfactory documentary evidence of citizenship when because of incapacity of mind or body the individual would be unable to comply with the requirement to present satisfactory documentary evidence of citizenship in a timely manner and the individual lacks a representative to assist him or her.”). The way this statute is written suggests that an incapacitated individual will only get the state’s help if they do not have a representative to assist them. See *Comments, supra* note 77, at 7. This provision places too much responsibility on the part of the representative and puts a Medicaid applicant with a representative at a disadvantage. All incapacitated individuals should get the help of the state if it is needed, regardless if they have a representative.

<sup>171</sup>See *Comments, supra* note 77, at 7 (stating the Act “neither provides sufficient guidance regarding a state’s responsibilities nor casts a net wide enough to capture all those who will need assistance.”).

scope of the rules will be denied Medicaid benefits. A more reasonable approach would be to modify the “special population” provision and the affidavit provision to allow a structured last resort option that can still insulate Medicaid from fraudulent activity.<sup>172</sup>

First, the “special populations” provision should be rewritten to require states to assist not only those plagued by incapacity of mind or body but to assist all applicants/recipients who were unable to obtain the documentation on their own after a good faith effort.<sup>173</sup> The provision should also specifically identify the states’ duties with regard to assisting citizens to meet the documentation requirements. The provision should require the states to offer financial support by paying for citizenship documentation for those citizens who cannot afford the fees themselves, and it should require the states to assist the applicants/recipients to locate the required information.<sup>174</sup> This will give all citizens the best opportunity and an equal opportunity to meet the citizenship documentation requirements and receive healthcare.

If the documentation is still not located with the help of the state, the individual should be given the opportunity to provide a written affidavit that is different from the one described in the fourth tier. The fourth tier affidavit should be modified to allow a last resort option for all citizens, not just those citizens who know two witnesses who can prove their own citizenship.<sup>175</sup> Once an applicant/recipient has exhausted all resources in a good faith effort to find documentation and after the state has intervened on the applicant’s/recipient’s behalf, a last resort option should require that both the applicant/recipient and the state caseworker submit affidavits signed under penalty of perjury. The applicant/recipient should submit an affidavit that describes the reasons they are unable to obtain the documentation and all of the steps they have taken to procure the documentation.<sup>176</sup> The state caseworker should

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<sup>172</sup>The new last resort option was created by the author in order to provide a solution to the lack of such an option in the current Medicaid statute. This new last resort option incorporates parts of the existing statutory framework in order to demonstrate that Congress can fix the problem by simply modifying the already established statutory framework.

<sup>173</sup>*See Comments, supra* note 77, at 7 (“Medicare and Medicaid Services should expand the list of reasons why a person may require special assistance to include, for example, people with limited English proficiency (LEP), and everyone who is homeless or who has been displaced by a natural disaster, such as a hurricane or a fire.”)

<sup>174</sup>*See Requirements, supra* note 7, at 13 (“Advocates should . . . encourage their state agencies to pay for the documents that recipients may need to document their citizenship.”). Part VII of this note advocates that the federal government and the state government should share the responsibility of paying for the fees associated with acquiring certain documentation and locating documentation.

<sup>175</sup>*See Comments, supra* note 77, at 8 (health advocates criticize the Act for not providing a last resort option, and they criticize the affidavit option in tier four as being “so cumbersome as to be of little value.”).

<sup>176</sup>*See id.* at 8 (The Act should “allow a person who cannot acquire any of the listed documents to explain why the documents cannot be acquired, and to allow a state to provide Medicaid to that person if it finds the explanation to be credible. If the person is incapacitated to such a degree that (s)he cannot provide an explanation, the person’s guardian or representative should be able to provide it instead.”).

also submit an affidavit that describes their efforts to obtain citizenship documentation and list the evidence, if any, that demonstrates the individual's citizenship.

After the completion of the proposed procedure, the state should ultimately decide whether the reasons stated in the affidavit for not obtaining the documentation and the surrounding evidence compiled by the state and/or individual yield a reasonable conclusion that the applicant/recipient is a citizen of the United States. An affirmative answer after such a thorough investigation by the state should allow the state to administer Medicaid benefits without the threat of losing federal funding.<sup>177</sup> Such an investigation and reasonable decision by the state should convince the federal government that the individual is not fraudulently entering the Medicaid system. Conversely, the state could deny Medicaid benefits when it determines that the affidavits and evidence do not yield a reasonable conclusion that the applicant/recipient is a citizen. The information from those citizens who use the affidavit option could be double checked and kept in a state database for routine re-evaluations to discover misrepresentation and fraud.

In summary, the Code of Federal Regulations should be revised to require the states to help all applicants/recipients obtain citizenship documentation in order to qualify to receive Medicaid. The states should intervene when the individual has made a good faith effort to obtain documentation and is still unable to comply with the Act's requirement. The Code of Federal Regulations should also specifically require the states to assist individuals by offering financial support and support in locating documentation. Finally, the fourth tier affidavit option should be revised to give a last resort option to applicants/recipients who were unable to obtain documentation after a good faith effort and after the state intervened. This can be accomplished by requiring both the applicant/recipient and the state caseworker to submit affidavits under penalty of perjury. The state should ultimately decide if it is reasonable to determine that the applicant is a citizen and should not be denied federal funding for such a determination after the rigorous attempt to locate documents.

*B. The Hierarchy Structure Should Be Simplified To Alleviate the Unnecessary Burdens Imposed on Individuals and States*

Simplifying the unnecessarily complicated structure of the hierarchy system can also reduce the negative impact of the Act. The hierarchy should be condensed into two tiers in order to simplify the application process<sup>178</sup> so that a larger number of eligible recipients will not be deterred from seeking Medicaid and so that applicants/recipients and Medicaid offices will not have to waste time searching for a document in the highest tier possible when another document in a lower tier will suffice.<sup>179</sup> Implementation of the two-tier approach will only require a revision of

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<sup>177</sup>*Id.*

<sup>178</sup>The two-tier approach was created by the author and is based on the statutory language of the original Act that only provided for two tiers. The additional third and fourth tiers were added by the Code of Federal Regulations. See 42 C.F.R. § 436.407(c)-(d) (West 2006).

<sup>179</sup>See *Comments, supra* note 77, at 7 (advocating for complete abolition of the hierarchy because it "will at a minimum cause both state Medicaid agencies and would-be Medicaid beneficiaries to waste time unnecessarily seeking evidence of higher priority when perfectly

the Code of Federal Regulations; therefore, a congressional amendment to the Medicaid statute is not necessary.

Currently, the states and individuals are subject to providing documentation within the framework of a four-tier hierarchy. Congress enacted the first two tiers of the current hierarchy<sup>180</sup> and acknowledged the first tier's reliability and insulation from fraud by directing that any document listed proves both citizenship and identity.<sup>181</sup> Congress also indicated that any document listed in the second tier was less reliable to establish both citizenship and identity by specifying that only certain documents were reliable to prove citizenship, while other documents were only reliable to prove identity; Congress required a document from each category.<sup>182</sup> Congress did not create a hierarchy by requiring that an applicant obtain primary evidence from a first tier before attempting to obtain secondary evidence from a second tier.<sup>183</sup> The language of the statute specified that an individual could meet the documentation requirements by submitting primary or secondary evidence of citizenship.<sup>184</sup> It was the Code of Federal Regulations that set up the hierarchy by imposing the strict requirement that the preceding tier must be exhausted before an individual may satisfy the documentation requirements using the following tiers.<sup>185</sup>

Tiers three and four were issued in the Code of Federal Regulations pursuant to a grant of authority from Congress.<sup>186</sup> This authorization appeared in the Act as part of the provision describing the second tier and stated that the Secretary could specify other documents sufficient to prove citizenship.<sup>187</sup> Congress did not indicate that the additional documents should appear in a different tier.<sup>188</sup> The placement of the authorization in the second tier and the lack of congressional direction requiring the creation of third and fourth level tiers demonstrate that the additional documentation specified by the Secretary as appropriate to prove citizenship should be listed in the second tier.

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adequate evidence is readily available.”); Simpson, *supra* note 70 (“Some health advocates are concerned that the delays could lead some parents to stop seeking care.”); Lin II, *supra* note 69 (“Some fear that the new requirement will discourage low-income Americans from obtaining health services, and lead to more serious illnesses.”).

<sup>180</sup>See 42 U.S.C.A. § 1396b(x)(3)(A)-(D) (West 2006).

<sup>181</sup>See § 1396b(x)(3)(B).

<sup>182</sup>See § 1396b(x)(3)(C)-(D).

<sup>183</sup>See § 1396b(x)(3)(A)(i)-(ii) (The language of the statute enacted by Congress does not indicate a hierarchy, which is evidenced by the use of the word “or.”).

<sup>184</sup>See 42 U.S.C.A. § 1396b(x)(3)(A)-(D).

<sup>185</sup>See § 436.407(b)-(d); *see also supra* text accompanying notes 27-30.

<sup>186</sup>See § 1396b(x)(3)(C)(v).

<sup>187</sup>See *id.* (satisfactory documentary evidence includes “[s]uch other document as the Secretary may specify that provides proof of United States citizenship or nationality.”).

<sup>188</sup>See § 1396b(x)(3)(A)(i)-(ii). The absence of a hierarchy authorized by Congress is demonstrated by the use of the word “or” to indicate that a citizen may use evidence from the first tier or evidence from the second tier. Congress did not indicate that an applicant/recipient should try to provide evidence from the first tier before providing evidence from the second tier.

Further support for creating an expanded second tier is that the continuity of the regulations will not be completely disturbed in the merge because tiers two through four require the same documents to prove identity.<sup>189</sup> Therefore, combining tiers three and four with tier two will not in any manner change the identity requirements of the current regulations.<sup>190</sup> It is also frivolous to have a hierarchy when ultimately any tier can prove citizenship. Health advocates recognize that “whether or not a person is a citizen . . . of the United States is a yes or no question. One does not become a better citizen or a more worthy citizen by providing ‘better’ documentation of his or her citizenship.”<sup>191</sup>

Combining the documents from the third and fourth tiers into the second tier creating an expanded second option and eliminating the hierarchy will put the Code of Federal Regulations in line with Congress’s language in the Act.<sup>192</sup> An individual should be given the choice between providing evidence from the first option using primary evidence or from the second option using an expanded list of secondary evidence. These changes will ease the adverse impact of the Act on individuals and states. The two-tier approach will not deter as many eligible applicants from seeking Medicaid, and it will improve the overall efficiency in locating the documents because applicants/recipients and Medicaid offices will no longer have to waste time searching for a document in the highest tier possible when another document in a lower tier will suffice.

#### VIII. CONCLUSION

The Act’s citizenship documentation requirement adversely affects citizens, such as hurricane Katrina victims, homeless people, poor people, foster children, mentally handicapped people, and persons with illnesses, because they will be denied Medicaid for their likely inability to produce citizenship documentation.<sup>193</sup> States also are negatively affected because of the increased administrative and financial burdens imposed by the Act.<sup>194</sup> The burden on both citizens and states can be lessened while still maintaining safeguards against fraudulent behavior.<sup>195</sup>

Congress can accomplish the above task by maintaining the citizenship documentation requirements; however, it should be required to treat citizens equally to immigrants and allow individuals who would otherwise qualify for Medicaid to receive benefits during a reasonable opportunity period to obtain citizenship

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<sup>189</sup>See § 436.407(b)-(e). Tiers two through four require identity documents from subsection (e). *Id.*

<sup>190</sup>If the Secretary truly questioned the reliability of the citizenship documents in tiers three and four, the Secretary would have required more reliable identity documents instead of allowing the same identity documents as required in tier two.

<sup>191</sup>*Comments, supra* note 77, at 7.

<sup>192</sup>*Id.*

<sup>193</sup>See *supra* Part IV.

<sup>194</sup>See *supra* Part III.

<sup>195</sup>See *supra* Parts IV-VII.

documentation.<sup>196</sup> The documentation hierarchy should also be abolished and condensed into a more simple two tier evidentiary system.<sup>197</sup>

Furthermore, states should be exempted from requesting documentation from foster children who receive Title IV-E foster care benefits,<sup>198</sup> and a last resort option, including a modified affidavit approach, should be added to assist disaster victims, homeless people, and other individuals who with the help of the state still cannot obtain the documentation requirements.<sup>199</sup> Finally, the federal government should extend financial and logistical assistance to the states for the implementation of the Act.<sup>200</sup> These changes will promote equality among citizens and immigrants in the Medicaid system and provide necessary medical assistance to those who need it without unduly delaying a citizen's receipt of Medicaid benefits.

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<sup>196</sup>*See supra* Part V.

<sup>197</sup>*See supra* Part VII.

<sup>198</sup>*See supra* Part VI.

<sup>199</sup>*See supra* Part VII.

<sup>200</sup>*See supra* Part III.