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February 18, 2013

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

Re: Proposed Rule: Medicaid, Children's Health Insurance Programs, and Exchanges; Proposed Rules for Extending Medicaid to Age 26 for Eligible Former Foster Children (Fed. Reg. Vol. 78, No. 14, 1/22/13)

Dear Ms. deLone and Ms. Kaminsky:

The Children's Advocacy Institute (CAI), located at the University of San Diego School of Law, seeks to improve the health, safety, and well-being of children and youth. CAI advocates in legislatures to make laws, in the courts to interpret laws, before administrative agencies to implement laws, and before the public to educate and build support for laws to improve the status of children and youth across the nation. CAI educates policymakers about children's needs for economic security, adequate nutrition, health care, education, quality child care, and protection from abuse, neglect, and injury.

One of the issues on which CAI has focused a great deal of research and advocacy over the past several years is the improvement of outcomes for youth who age out of the foster care system. In the past several years, CAI has released three reports that address the issues faced by older youth in foster care and youth who age out of the foster care system: *Expanding Transitional Services for Emancipated Foster Youth* (2007), *Proposition 63: Is the Mental Health Services Act Reaching California's Transition Age Foster Youth* (2010), and *The Fleecing of Foster Children – How We Confiscate Their Assets and Undermine Their Financial Security* (2011) (available online at www.caichildlaw.org/special-reports.htm). In addition to these reports, CAI has engaged in advocacy around California's AB 12, which implemented the Federal Fostering Connections to Success Act in California and extended foster care assistance to age 21. CAI has a Youth Advisory Board that is comprised of young adults who have a history of foster care, and homelessness, in some cases. Finally, CAI works closely with dependency attorneys and the courts in San Diego County to instruct law students how to represent children and youth in dependency (foster care) proceedings. Through this work, CAI has participated in many cases and heard from several youth who are either currently in the foster care system, or have had a history of foster care.

CAI supports many of the proposed elements of the proposed regulatory provisions implementing the Affordable Care Act's extension of Medicaid eligibility to former foster care children up to age 26. However, we do object to specific aspects of the proposal, and we respectfully request your consideration of our concerns.

The Children’s Advocacy Institute strongly supports a number of important provisions in the Department’s proposed regulations that will help former foster youth retain Medicaid to age 26.

CAI commends CMS for its clarification in the statutory language with respect to eligibility for Medicaid for former foster youth; specifically that Title IV-E and non-Title IV-E former foster care youth can be eligible for Medicaid to age 26, and that once eligible, if in a state that provides Medicaid coverage to them, they may apply and be determined eligible at any time between attaining age 18 and losing eligibility at age 26. Thus, all youth who turned 18 in foster care between 2007 and 2013, as well as youth turning 18 in foster care in 2014 and beyond, should be eligible for Medicaid up to age 26. We recognize that these youth are eligible for Medicaid because of their status as former foster care youth and that other rules that sometimes apply to Medicaid, such as income, resource and asset tests and premiums and co-pays, will not apply. We are pleased that the new eligibility category of former foster youth will be eligible for full Medicaid benefits and not the Alternative Benefit Plan. Additionally, CAI commends CMS for clarifying that the ability of former foster youth to enroll in Medicaid is not contingent upon a state accepting new Medicaid funds. Finally, we thank CMS for making it clear that when a former foster youth approaches age 26 and the potential loss of Medicaid, he or she shall be terminated from Medicaid only if the individual is not eligible under any other adult Medicaid eligibility group.

The Children’s Advocacy Institute objects to the interpretation of the Affordable Care Act as only mandating Medicaid coverage for former foster youth until age 26 from the same state in which each youth was in foster care at age 18 and enrolled in Medicaid. In order for the regulations to further the intent of the Act, this provision must be revised to ensure that mandatory Medicaid coverage be provided to all former foster youth up to age 26, regardless of where these youth choose to reside after aging out of foster care.

Within proposed § 435.150(b), CMS proposes that a state agency must provide Medicaid to individuals who:

- (1) Are under age 26;
- (2) Are not eligible and enrolled for mandatory coverage under §§ 435.110 through 435.118 or §§ 435.120 through 435.145 of this part; and
- (3) Were in foster care under the responsibility of the State or Tribe and enrolled in Medicaid under the State’s Medicaid State plan or 1115 demonstration (or at State option were in foster care and Medicaid in any State) upon attaining:
 - (i) Age 18; or
 - (ii) Such higher age at which the State’s or Tribe’s foster care assistance ends under title IV–E of the Act.

CAI objects to this interpretation for five reasons. First, the intent of this legislative language was to ensure that a child who has been in foster care is extended the same protections that a young person of the same age would have by being able to access health insurance coverage under his/her parents’ plan up until age 26. Youth of the same age with parents benefit from the ACA provision allowing them to remain on their parents’ insurance until they are 26 — and there is no residency requirement imposed on these youth. To impose such a restrictive limitation on former foster youth without clear Congressional intent to do so would result in denying them the equal opportunity that their peers have to move out of state to attend college, work, etc. and would be grossly inequitable to former foster youth, who already face a myriad of additional challenges.

Second, other children age 18 or older who had been in foster care to age 21, adopted or placed with relative guardians as they leave foster care, continue, at least until the age of 21, to be able to receive Medicaid regardless of the state in which they reside. It would be inconsistent not to apply the same to former foster youth who are eligible for Medicaid. They must be able to retain access to Medicaid regardless of the state in which they reside.

Third, placing a residency requirement on former foster youth by allowing states the option to provide Medicaid to former foster youth who were not in care in the state in which they are residing will have a greater impact on this very mobile population of youth. Foster youth are more mobile than their peers; between the two populations, former foster youth — who already lack the familial “home” and “safety net” provided by parents — often have far fewer ties to keep them in their home state than do their peers. Many foster youth move to other states to go to college, to live with siblings or other extended family members, or to find work. Further, in metropolitan areas where state borders are close, such as those that are found in New York and the Metropolitan Washington area, these youth may move across state borders several times between the ages of 18 and 26.

Fourth, former foster youth face many unique barriers to care with which their peers do not have to contend. Foster youth often have limited educational and employment opportunities, further limiting their ability to access health care through other means. Additionally, foster youth experience health and mental health issues at rates that exceed those of their peers — and these issues are often significant. Thus, it is vital that this population maintain access to health care even as they move from one state to another.

Finally, HHS cites language in its commentary to the proposed regulation (on pg. 4604) requiring that an individual be in foster care under the responsibility of “the state” and be enrolled in Medicaid under “the state plan” or an 1115 demonstration as the reason for its decision that the Medicaid mandate only applies to children who remain in the same state after they leave foster care, rather than in a state. The language HHS cites, however, is subject to a different interpretation. “Under the responsibility of the state” is a familiar term of art that refers to children who are in the care and custody of a state. Given this interpretation, the rule should allow former foster youth to be eligible for Medicare to the age of 26, regardless of the state in which they reside.

The Children’s Advocacy Institute recommends that CMS take steps to ensure that all eligible former foster youth are notified about their eligibility and that enrollment and re-enrollment in Medicaid be automatic.

Former foster youth face unique barriers to health care, they move often, and they often have significant health care needs. This population should be presumptively eligible for Medicaid. Further, enrollment in Medicaid and renewal should be passive wherever possible. CAI is pleased that the ACA and proposed regulations make clear that if a state has elected to provide presumptive eligibility for children or pregnant women that the state may also elect to provide presumptive eligibility for former foster care youth. (pg. 4611, §435.1103, pg. 4697) CAI recommends that former foster care youth should be allowed, on their own to be a presumptive eligibility group, or that CMS take steps to minimize the red tape that often results in former foster youth losing their Medicaid coverage.

Youth in foster care are the children of the state; as such, they are our children. We need to ensure that they have access to the health care they need, regardless of the state in which they choose to reside following foster care. Further, we need to ensure that former foster youth are aware of their eligibility and are able to enroll and remain enrolled in Medicaid as seamlessly as possible.

Thank you,

Melanie Delgado
Staff Attorney
Children's Advocacy Institute