

Case Notes

Medicaid Citizenship Documentation Requirements Do Not Apply to Foster Children and Children Receiving Adoption Assistance, Congress Confirms—But Application to Other Medicaid Applicants and Recipients Not Yet Halted

Bell v. Leavitt, brought on behalf of nationwide classes of Medicaid applicants and recipients and filed on June 28, 2006, in the federal district court, challenges the Medicaid citizenship documentation requirements imposed by Section 6036 of the Deficit Reduction Act of 2005 and the implementing federal regulations. Plaintiffs are low-income persons, predominantly aged, blind, disabled, pregnant women, minor children and minor children's caretaker relatives, and minor children receiving foster care or adoption assistance. They are U.S. citizens who are applicants for or recipients of Medicaid and lack the documents now required to document U.S. citizenship.

In this case note, reflecting the situation as of late December 2006, I describe the federal law changes and the U.S. Department of Health and Human Services (HHS) regulatory actions that led to the *Bell v. Leavitt* lawsuit, the plaintiffs' claims, and the court's rulings. I also report on Congress' December 2006 "technical corrections," which affirmed Congress' intent to exempt several groups of Medicaid beneficiaries, including foster children and children receiving adoption assistance, from the new documentation requirements.

The Statutory and Regulatory Changes

Entitled "Improved Enforcement of Documentation Requirements," Section 6036 of the Deficit Reduction Act of 2005 amended the federal Medicaid statute to condition states' receiving federal matching funds for their Medicaid expenditures for an individual on the states' having obtained "satisfactory documentary evidence of citizenship" of that individual. The Act identifies specific documents (e.g., U.S. passports, certificates of naturalization, and birth certificates), which alone or in combination with other specific documents

are "satisfactory documentary evidence of citizenship." The Act includes "such other documents as the secretary may specify, by regulation" as documents which are "satisfactory documentary evidence of citizenship." The Act's documentation requirements apply to determinations of initial eligibility and to redeterminations of eligibility made on or after July 1, 2006. The Act left untouched the underlying law regarding Medicaid eligibility.

Before Section 6036 was enacted, Medicaid applicants had to declare under penalty of perjury whether they were citizens of the United States. That requirement had been in effect since enactment of the Immigration Reform and Control Act of 1986, and the case for changing the law was thin, non-existent in fact. In July 2005 the HHS Office of the Inspector General found no evidence of a problem with fraudulent declarations of citizenship in the Medicaid program.¹

But the likely harm from harsher documentation requirements was readily apparent. For example, even before Congress passed the Deficit Reduction Act, Connecticut's Medicaid director called the Section 6036 requirements "an enormous administrative burden" on the states, and Wisconsin's Medicaid director predicted that the requirements "would have a material and significant effect on enrollment."

After all, Medicaid serves people who are elderly or disabled, foster children, adopted children with special needs, parents and minor children, newborns—all of whom are low income and many of whom do not have at hand citizenship documents, such as passports or birth certificates.² Medicaid serves elderly people who are in nursing homes, perhaps are suffering from dementia, and have outlived or lost contact with family and friends; African Americans born at times and places where no birth records were kept for "colored" people; individuals and families who are homeless or disaster victims or domestic violence victims who left everything behind when they left their abusers' home; and foster children removed from their parents due to abuse or neglect.

Given that many citizens, people whom no one would ever doubt were U.S. citizens, would have great difficulty securing documents if the range of "satisfactory" documents was narrow, people hoped that Michael Leavitt, the secretary of health and human services, would adopt regulations specifying a broad range of "such other documents" that prove U.S. citizenship, as Section 6036 directed, so that any and all corroborating documents would be considered and, in the end,

¹Office of Inspector General, U.S. Department of Health and Human Services, OEI-02-03-00190, Self-Declaration of U.S. Citizenship for Medicaid, July 2005, at 27 (reporting on an investigation of state practices under the pre-Deficit Reduction Act policy allowing applicants to establish citizenship for purposes of Medicaid eligibility by making a written declaration under penalty of perjury that they are citizens of the United States).

²See 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, Feb. 17, 2006, available at www.cbpp.org.

no U.S. citizen would be barred from the Medicaid program due to inability to produce a specific document.

That did not happen. Instead Leavitt delayed issuing regulations and did not issue any guidance to the state Medicaid agencies until just three weeks before Section 6036 was to take effect. Then on June 9, 2006, Leavitt's director of the Centers for Medicare and Medicaid Services issued to all state Medicaid directors a letter telling them that regulations would be published later and instructing them on how to implement the citizenship and identity documentation requirements, effective July 1, 2006. Although Section 6036 made documentation a federal reimbursement issue, not an eligibility issue, the letter instructed the state Medicaid programs to implement the citizenship documentation requirements as if they were Medicaid eligibility requirements.³ The letter set out a complicated and narrow hierarchy of acceptable documents, and applied the documentation requirements to Medicaid applicants and recipients to whom Section 6036, by its own terms, does not apply.

The Lawsuit

On June 28, 2006, Ruby Bell and eight other named plaintiffs from across the country, some by their guardians, parents, or trustees, filed suit challenging the citizenship documentation law and Leavitt's June 9 instruction to the state Medicaid directors.⁴ The case was assigned to U.S. District Court Judge Ronald A. Guzman. The named plaintiffs were all U.S. citizens who were applicants for or recipients of Medicaid; they were elderly or disabled persons or minor children, all of whom lacked the documents that Leavitt was now requiring to document their U.S. citizenship. Plaintiff Bell, for instance, was born in Arkansas in 1911, three years before the Arkansas county where she was born began keeping birth certificates, and she knew of no living witnesses to attest to her birth. Plaintiff Robert Patterson thinks he was born in Jackson, Mississippi, in 1932 or 1934, but was raised in several foster homes, and knows no one who knows the circumstances of his birth.

In their original complaint, the plaintiffs claimed that the letter to the state Medicaid directors violated the Administrative Procedure Act, Section 6036, other sections of the Medicaid Act (42 U.S.C. § 1396(a)(10)(A)(1)), and the due process clause of the Fifth Amendment and, in the alternative, if Leavitt's interpretation of Section 6036 in the June 9 letter was correct, then Section 6036 violated the Fifth Amendment's due process clause. They also claimed that Leavitt failed to meet a requirement of Section 6036 and the Administrative Procedure Act to issue regulations and establish an outreach program before sending out his June 9 implementation instructions.⁵

The June 28 complaint was filed on behalf of nine named plaintiffs and on behalf of three nationwide classes—Class A of persons who, before July 1, 2006, had been determined eligible for Medicaid; Class B of persons who, on or after July 1, 2006, are applicants or recipients of Medicaid; and Class C of persons who are not required to file separate applications for Medicaid because they are eligible for Supplemental Security Income (SSI) or foster care or adoption assistance under Title IV-E of the Social Security Act. Plaintiffs also sought class certification and moved for preliminary injunctive relief.

However, late in the day on July 6, the day before the preliminary relief hearing, Leavitt issued interim final rules.⁶ These interim regulations, unlike the June 9 letter, did exempt some of the groups to whom Section 6036 did not apply and some groups specifically exempted by Section 6036 from the documentation requirements, primarily SSI and Medicare recipients. These exemptions saved approximately seven million Medicaid recipients from possible loss of benefits.⁷

Faced with the defendant's substantially changed implementation scheme, which still left some fifty million Medicaid applicants and recipients at risk, the plaintiffs amended their suit. The amended complaint, filed on behalf of fifteen named plaintiffs claimed jurisdiction under 28 U.S.C. Sections 1331 and 1361 and the Administrative Procedure Act.⁸ It pled three classes—Class A, all persons determined

³Section 6036 of the Deficit Reduction Act left in place the Medicaid statute's explicit provision that all otherwise eligible U.S. citizens who declare under penalty of perjury that they are citizens are eligible for Medicaid health coverage. 42 U.S.C. §§ 1320b-7(b)(2), (d)(1)(A). The Medicaid Act also provides: "The Secretary ... shall not approve any [state] plan which imposes, as a condition of eligibility for medical assistance under the plan ... and citizenship requirement which excludes any citizen of the United States." 42 U.S.C. § 1396a(b)(3).

⁴Plaintiffs are represented by attorneys from the Sargent Shriver National Center on Poverty Law, Health and Disability Advocates, the National Health Law Program, the National Senior Citizens Law Center, and the law firm of Goldberg Kohn Bell Black Rosenbloom and Moritz.

⁵Because, as explained below, the plaintiffs have filed an amended complaint and a corrected amended complaint, I do not discuss in this case note the original complaint in detail.

⁶The secretary of health and human services issued the interim final rules on July 6, 2006, on the eve of the scheduled hearing on the motion for a temporary restraining order and preliminary injunction. They were published in the *Federal Register* on July 12, 2006. See 71 Fed. Reg. 39214 (July 12, 2006). Six hundred forty-five individuals, government agencies, medical providers, and social service groups submitted comments on the regulation during the thirty-day comment period. Most comments opposed the narrow range of acceptable documents; they pointed out the need for original documents or certified copies and described the harm the documentation requirements were doing to ill people and to the medical providers and safety net systems that serve them. The comments from the state Medicaid Directors described the tremendous and unnecessary administrative burden that the documentation requirements were imposing on already financially strapped state governments. As of late December 2006, the defendant had not issued final regulations.

⁷However, among other failures, the defendant specifically declined to use his statutorily given authority to exempt current Medicaid recipients from the documentation requirements. While recognizing that the "statute ... gives us authority to exempt ... individuals who declare themselves to be citizens ... from the documentation requirements if satisfactory documentary evidence of citizenship ... has been previously presented," Michael Leavitt declared that we "are not currently exercising this authority." 71 Fed. Reg. 39216 (July 12, 2006). Inexplicably, because the Deficit Reduction Act imposed no such requirement, the regulations also specify that "all documents must be either originals or copies certified by the issuing agency. Copies or notarized copies may not be accepted." 42 C.F.R. § 435.407(h)(1).

⁸Plaintiffs filed their amended complaint on July 21, 2005, and a corrected amended complaint (inserting some language inadvertently omitted from the July 21 amended complaint) on August 11, 2006. All references to the "amended complaint" are to the August 11 version.

eligible for Medicaid before July 1, 2006; Class B, all persons who, on or after July 1, 2006, apply for or receive Medicaid; and Class C, all persons who receive Medicaid and are not required to make a declaration of citizenship in connection with a Medicaid application because they acquire Medicaid eligibility because they are eligible for foster care or adoption assistance under Title IV-E of the Social Security Act or another Social Security Act program.

Plaintiffs summarized the basis for the lawsuit in the second paragraph of the amended complaint as follows:

Under Section 6036, as implemented by the defendant, Medicaid recipients who have already established their citizenship under current law will have that determination undone and will be forced to prove their citizenship again under the new law, despite the fact that there had been no indication that their circumstances have changed, or that the original determination of citizenship in their cases was mistaken or obtained by misrepresentation. Further, both Medicaid recipients and applicants will be terminated from or denied health coverage or have that coverage delayed or threatened if they cannot produce the specialized proof required by defendant's implementation of the new law, even though they can prove that they are citizens through other forms of proof. In addition, the defendant is applying Section 6036 to threaten, terminate or deny Medicaid health coverage of plaintiffs to whom Section 6036 by its terms does not apply. Plaintiffs, who are otherwise eligible for Medicaid, are thus threatened with denial of access to medication and doctors, inability to secure preventive and well-child services, and many other crucial health care services.

The amended complaint sets out five discrete claims for relief:

1. The regulations deny members of Class A the finality of administrative determinations that they are citizens in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (D), and the due process clause of the Fifth Amendment, or, in the alternative, if the regulations' interpretation of Section 6036 is their only permissible interpretation, then Section 6036 violates the Fifth Amendment's due process clause.
2. By giving federal reimbursement to states for medical assistance to noncitizen Medicaid applicants during the "reasonable opportunity" period for supplying documentation but threatening to deny federal reimbursement to states that provide medical assistance to citizen applicants during the "reasonable opportunity" period, the defendant deprives Class B of the equal protection of the law guaranteed to it by the due process clause of the Fifth Amendment.
3. In violation of Section 6036, other Medicaid Act eligibility provisions, and the Administrative Procedure Act, the defendant converted Section 6036 into an eligibility requirement for Medicaid by requiring the states to obtain documentation of citizenship before giving medical assistance to the plaintiff applicant class.
4. By applying the Deficit Reduction Act's citizenship documentation requirements to Class C whose Medicaid eligibility is derived from its foster care and adoption assistance eligibility of Title IV-E of the Social Security Act or eligibility for other programs (listed in 42 U.S.C. § 1396a(a)(10)(A)(i)(I) and (II)), the defendant is violating the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(A)(i), Section 6036, and the Administrative Procedure Act.
5. By implementing Section 6036 without first establishing an outreach and education program, the defendant violated Section 6036(c) and the Administrative Procedure Act.

Requesting interim relief, plaintiffs filed amended motions for class certification and for a temporary restraining order and preliminary injunction.⁹ Plaintiffs sought an order directing the defendant to instruct the states not to implement the interim regulations and stating that their federal reimbursement would not be denied for serving Medicaid recipients regardless of the final outcome on the merits.

The Court's Rulings and "Technical Corrections" on the Deficit Reduction Act

Judge Guzman issued his decision on September 14. He dismissed all the claims of proposed Classes A and B on subject-matter jurisdiction (standing) grounds and therefore denied certification for those classes.

Judge Guzman specifically dismissed all the claims brought by those plaintiffs who were Medicare or SSI recipients as moot because, under the July 6, 2006, interim final rules, they were not subject to the new citizenship documentation requirements. (The amended complaint had retained the SSI and Medicare recipient plaintiffs because language in the July 12 *Federal Register* publication of the interim regulations suggested that the defendant might subject them to the requirements in the final regulations.) He also dismissed the rest of the plaintiffs' non IV-E related claims because he concluded that they could not satisfy the redressability and traceability components of standing. He reached that conclusion by reading the plaintiffs' pleadings as attacking the interim regulations, not the statute, and finding that barring enforcement of the regulations "would not invalidate the citizenship documentation in the statute or spare them [the plaintiffs] the burden, or additional burden of complying with it."

Plaintiffs responded to Judge Guzman's September 14 decision by filing a motion for reconsideration of the court's dismissal of the Class A claims and the resulting striking of the motions for class certification and emergency relief with respect to Class A. The motion and supporting memorandum set out the ways in which their earlier pleadings had, in fact, made a claim against Section 6036 itself—that it violates the due process clause of the Constitution because it denies their right to repose with respect to the prior final determinations that that they are citizens. They argue that this constitutional violation is traceable to Section 6036 and that an order enjoining the statute insofar as it applies the documentation requirement to Class A without a triggering factual indication that the original finding that they are citizens is incorrect,

⁹The Illinois attorney general filed an amicus curiae memorandum on behalf of four Illinois state human service departments and the State of Maryland in support of the plaintiffs' motion for a preliminary injunction on August 11, 2006.

fraudulent, or outdated would redress the injury. Thus the standing elements that Judge Guzman found missing when he read the pleadings as attacking only the interim regulations—traceability and redressability—are satisfied. As of late December 2006, the motion for reconsideration is pending.

Regarding the Title IV-E recipients, Judge Guzman concluded that, on behalf of Class C, plaintiff A.L. had standing because if her claim that the Deficit Reduction Act's documentation requirements do not apply to Title IV-E recipients is correct, then the interim regulations do harm her by making her prove her citizenship. That is an injury traceable to the regulations and one that can be redressed by an injunction against the defendant. Judge Guzman then certified a nationwide class, defined as

[a]ll persons who are receiving or will receive health coverage under the Medicaid Program, 42 USC Section 1396 *et seq.*, and who are not required to make a declaration of citizenship under 42 USC Section 1320b-7 in connection with an application for Medicaid because they acquire their eligibility for Medicaid coverage as a result of the determination of their eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act.

Judge Guzman also concluded that plaintiff A.L. was likely to succeed on the merits of her claim regarding the regulations' conflict with the Medicaid statute but that she had not yet shown irreparable harm because she had not shown that she is in danger of losing her Medicaid benefits. He referred the Class C request for a preliminary injunction to a magistrate. In briefing their motion before the magistrate, the plaintiffs documented the administrative rules and policies adopted in dozens of states applying the citizenship documentation requirements to Class C members. Nevertheless on December 8, 2006, the magistrate recommended denying preliminary relief to Class C because they had not yet demonstrated imminent or actual harm.

As of late December, however, newly enacted law apparently will moot Class C's claim for relief. Congress undid the HHS' misreading of Section 6036's Medicaid citizenship documentation requirements for foster children and children receiving adoption assistance by passing H.R. 6111 on December 9. President Bush signed the bill into law on December 20. Congress' action—"technical corrections on the [Deficit Reduction Act]," contained in Section 405 of H.R. 6111—confirms that Congress always intended to exempt these children from the citizenship documentation requirements included in the Act and that the *Bell* plaintiffs were right about the law. The effective date of the technical corrections is July 1, 2006.

Attorneys for the *Bell* plaintiffs and HHS are discussing how HHS can best and most quickly advise the states to exempt foster care and adoption assistance children from HHS' citizenship documentation requirements and to use their authority to set their own procedures for verifying the citizenship status of such children. Assuming the Class C legal claim is resolved favorably, the *Bell* lawsuit will continue on the remaining issues, including that the new citizenship documentation requirements do not apply to Medicaid recipients

and that the agency's narrow list of acceptable documents is illegal. The next steps will depend on Judge Guzman's ruling on the pending motion for reconsideration.

The original and amended complaints presented claims on behalf of all Medicaid applicants and recipients (Class B), challenging the defendant's narrow limits on the acceptable types of proof of citizenship, his exclusion of other types of reliable proof, and his unreasonable time limits for submitting documents as violations of the Administrative Procedure Act and the due process clause of the Fifth Amendment. In retrospect, given standing issues and the necessary involvement of state Medicaid agencies in implementing the handling of documentation issues, the *Bell* plaintiffs' attorneys think these issues may be better addressed in state-by-state suits, challenging the adequacy and fairness of the documentation requirements, notices, and hearing procedures, against the state Medicaid agencies and perhaps against Leavitt.

Advocates are encouraged to contact the *Bell* plaintiffs' attorneys with information about how the citizenship documentation requirements are being implemented in their states. Such information may be useful in the *Bell* case itself or in state-by-state litigation on which the *Bell* attorneys could assist.

[Editor's Note: Case documents in *Bell v. Leavitt*, Clearinghouse No. 56,034, are available in our Poverty Law Library at www.povertylaw.org.]

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Inability to Purchase Food or Prepare Meals Does Not Prevent a Person Under 60 with Disabilities from Qualifying as a Separate Food Stamp Household

Catherine Carter needed to establish herself as a separate food stamp household from her mother so that she could obtain enough food assistance to keep from spending on food the money that she needed for house payments, utilities, and other necessities. The county food stamp office denied her application initially and affirmed that denial after consulting the state Food Stamp Division, which in turn consulted the federal Food and Nutrition Service of the U.S. Department of Agriculture (USDA).

In *Carter v. Walley* Carter challenged the denial in federal court. Before the court made any ruling on the merits, the Food and Nutrition Service decided to "clarify" its policy and to allow Ms. Carter and others similarly situated across the country to qualify as separate food stamp households.