



Administrator
Washington, DC 20201

JAN - 7 2013

Ms. Mary Mayhew
Commissioner
Department of Health and Human Services
11 State House Station
221 State Street
Augusta, ME 04333-0011

Dear Ms. Mayhew:

I am responding to your request for approval of the State of Maine's Medicaid state plan amendment (SPA) #12-010, received by the Centers for Medicare & Medicaid Services (CMS) on August 1, 2012. The state subsequently split the SPA into two separate SPAs, #12-010 and #12-010A.

Today, under separate cover, we are approving #12-010A, which makes changes to eligibility for parents, caretaker relatives, and individuals who are eligible for Medicaid based on their eligibility for Medicare, whose income is above 133 percent of the federal poverty line (FPL).

In SPA #12-010, Maine proposes changes to eligibility for parents, caretaker relatives and children whose income is at or below 133 percent of the FPL. The proposal would make eligibility standards, methods, and procedures more restrictive than those in effect on March 23, 2010. For the reasons set forth below, I am unable to approve SPA #12-010 because it does not comply with the requirements of sections 1902(a)(74) and 1902(gg) of the Social Security Act (Act).

Medicaid Maintenance of Effort Requirements

Under sections 1902(a)(74) and 1902(gg) of the Act, added to the Social Security Act by the Affordable Care Act, state plans must maintain Medicaid eligibility standards, methodologies, and procedures that are no more restrictive than those in effect on March 23, 2010, (the date of enactment of the Affordable Care Act) for a limited period of time. We refer to those provisions as maintenance of effort (MOE) requirements. For adults, under 1902(gg)(1), MOE provisions apply until a health insurance Exchange is operational on January 1, 2014. To the extent that the state certifies that it has an actual or projected budget deficit, under 1902(gg)(3), there is a limited exception under which MOE provisions do not apply to non-pregnant, non-disabled adults in optional populations who have income above 133 percent of the FPL for the applicable family size.

The Affordable Care Act MOE provisions relating to adults are aimed at maintaining stability during the period between enactment of the Affordable Care Act and 2014, when the Exchanges will become operational.

Discussion

As discussed above, it is not consistent with the MOE requirements in sections 1902(a)(74) and 1902(gg) of the Act for Maine to have eligibility standards, methods, or procedures under its State plan that are more restrictive for children until September 30, 2019, and for adults until a health insurance Exchange is operational in the state (on January 1, 2014), except, based on the state's budget deficit certification, for non-pregnant, non-disabled adults whose income exceeds 133 percent of the FPL. Based on Maine's certification of a projected budget deficit, on February 10, 2012, CMS notified the state that Maine qualified for the exception to the MOE provisions pursuant to section 1902(gg)(3) of the Act for the period from July 1, 2012, through June 30, 2013. This exception applies to non-pregnant, non-disabled adults whose income exceeds 133 percent of the FPL. This provision of law allows us to approve SPA #12-010A.

The provisions of SPA 12-010 would violate the permissible limitations by reducing eligibility for children and for parents and caretaker relatives who have income below 133 percent of the FPL. As a result, we cannot approve proposed SPA 12-010 as consistent with the requirements of sections 1902(a)(74) and 1902(gg) of the Act.

Specifically, the areas of MOE violation are as follows:

1. Parents and Caretaker Relatives: Maine proposed to reduce income eligibility levels for parents and caretaker relatives, eligible under sections 1902(a)(10)(A)(i)(I) and 1931 of the Act, from 150 to 100 percent of the FPL. Since 2005, the Maine plan has covered parents and caregiver relatives with income up to 150 percent of the FPL. The proposed amendment thus would impose more restrictive eligibility standards on adults between 100 and 133 percent of the FPL, which is not consistent with the MOE requirements.
2. Children Ages 19 and 20: Maine proposed to reduce the age limit for eligibility under its state plan for individuals who meet the income and resource requirements of the AFDC state plan but would not have received AFDC benefits because of age. This proposed change would eliminate eligibility for such individuals who are ages 19 and 20. Since 1991, the Maine plan has covered 19 and 20 year olds who meet the income and resource requirements of the AFDC state plan.¹ Because the individuals were previously covered by the state based on their status as children, reduction of eligibility for these individuals is not permitted under the budget deficit certification exception, which is available only for non-pregnant, non-disabled adults. Even if these individuals were treated as adults, the budget deficit certification exception would not apply because the income level of

¹ The state would make an exception to this reduction of eligibility for 19 and 20 year olds who are independent foster care adolescents.

these individuals (based on the AFDC state plan standards) is below 133 percent of the FPL.²

We do not agree with your claim that *National Federation of Independent Businesses v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2556 (2012) (*NFIB*), requires that SPA 12-010 be approved despite these violations of the MOE requirements. In *NFIB*, the Supreme Court did not strike down any part of the Affordable Care Act. The Court limited federal enforcement remedies with respect to states that elect not to proceed with the Medicaid adult eligibility expansion and thus have state plans that are out of compliance with the provisions of section 1902(a) of the Act. The Court did not strike down any provision of the law, nor did it authorize approval of state plan provisions that do not comply with other provisions of the law, including the MOE requirements. Accordingly, we do not agree with your assertion that the Court's reasoning in *NFIB* implies that the MOE provision in section 1902(gg) of the Act is unconstitutional or that it would be unconstitutional for the Secretary to disapprove the proposed state plan amendments due to their inconsistency with section 1902(a)(74) of the Act.

In *NFIB*, the Court likened the Medicaid adult eligibility expansion to an entirely new program because it will expand Medicaid coverage to all low-income adults, where Medicaid has previously covered only "the disabled, the blind, the elderly and needy families with dependent children." *NFIB*, 132 S. Ct. at 2605-06. The Court concluded that this shift is "a shift in kind, not merely in degree," and distinguished it from earlier eligibility expansions under the Medicaid program, which had "merely altered and not expanded the boundaries of these categories." *Id.* In concluding that the Secretary could not, constitutionally, withhold all funding for a state's existing Medicaid program if the state refused to implement the Medicaid adult eligibility expansion, the Court reasoned that, "while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in *a new health care program.*" *Id.* at 2606 (emphasis added). The Court concluded that Congress could not make existing Medicaid funding contingent upon a state's agreement to implement this new health care program. *Id.* at 2605-07.

The MOE provisions are not part of the Medicaid adult eligibility expansion. To the contrary, the MOE provisions require the state to continue providing medical assistance to populations that were previously covered by the state's Medicaid program. The populations that Maine has proposed to eliminate from the state Medicaid program are "needy families with dependent children," populations that have long been covered by the state's Medicaid program. Medicaid coverage for parents and caretaker relatives was first authorized under the original enactment of the Medicaid statute in 1965, and Maine has covered them at the current income level since 2005. Similarly, Medicaid coverage for 19 and 20 year old children was first authorized in the original enactment of the Medicaid statute in 1965, and Maine has covered them at the current income level since 1991. Thus, as relevant here, because the MOE provisions require the state plan to continue coverage of needy families with dependent children that the state has covered for many years rather than implement a new program, the analysis in *NFIB* makes it clear that the MOE provisions are well within Congress's authority.

² For example, the amount for a family of three with an adult in the home is approximately 28% percent of the FPL.

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You also assert that the MOE requirements retroactively penalize the state for having maintained its eligibility levels during the period financial incentives for doing so were available under the American Recovery and Reinvestment Act of 2009 (ARRA), without continuing the incentives that were present under ARRA. However, as discussed above, Maine's coverage of the groups of individuals it now proposes to drop from Medicaid began long before ARRA.

To the extent that Maine now faces economic pressures, Maine still has substantial flexibility to achieve budgetary objectives consistent with the MOE requirements. The state retains flexibility to adjust benefit levels or provider payment rates and to increase the effectiveness and efficiency of service delivery consistent with many of the new opportunities afforded states under the Affordable Care Act as well as existing flexibilities in the Medicaid program.

For these reasons, and after consulting with the Secretary as required by federal regulations at 42 CFR 430.15(c), I am unable to approve this SPA. If you are dissatisfied with this determination, you may petition for reconsideration within 60 days of receipt of this letter in accordance with the procedures set forth at 42 CFR 430.18. Your request for reconsideration may be sent to Ms. Cynthia Hentz, Centers for Medicare & Medicaid Services, Center for Medicaid, CHIP and Survey & Certification, 7500 Security Boulevard, Mail Stop S2-26-12, Baltimore, MD 21244-1850.

If you have any questions or otherwise wish to discuss this determination, please contact Mr. Richard McGreal, Associate Regional Administrator, JFK Federal Building, Government Center, Room 2275, Boston, MA 02203.

Sincerely,

A handwritten signature in black ink, appearing to read "Marilyn Tavenner", written over a large, faint circular stamp or watermark.

Marilyn Tavenner
Acting Administrator

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cc:

Regional Administrator, Boston RO
Associate Regional Administrator, Boston RO