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The Repeal of PPACA's Maintenance of Eligibility
Requirement: An Unhealthy Outcome

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I. INTRODUCTION

Throughout the current economic recession, incomes have declined, unemployment has increased, and, as a result, many individuals have lost their employer-sponsored health coverage.¹ This has led to increased enrollment and spending for government-funded health programs.² In 2008, the number of uninsured children in the United States was at the lowest level since 1987.³ State revenues have since declined, however, making it difficult for states to afford the increase in spending this has produced.⁴ Adding to states' responsibilities, the Patient Protection and Affordable Care Act (PPACA) was passed on March 23, 2010, which requires, inter alia, that states maintain eligibility and enrollment standards known as maintenance of eligibility provisions (MOE) in order to continue to receive federal Medicaid funds.⁵

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1. KAISER COMM'N ON MEDICAID AND THE UNINSURED, STATE FISCAL CONDITIONS AND MEDICAID, 1 (October 2010), available at <http://www.kff.org/medicaid/upload/7580-07.pdf>.

2. *Id.*

3. KATHLEEN SEBELIUS, HEALTH & HUMAN SERVICES, CHILDREN'S HEALTH INSURANCE PROGRAM REAUTHORIZATION ACT: ONE YEAR LATER CONNECTING KIDS TO COVERAGE 7 (2011), http://www.insurekidsnow.gov/chip/chipra_anniversary_report.pdf.

4. KAISER COMM'N ON MEDICAID AND THE UNINSURED, *supra* note 1, at 1.

5. *Id.*

Under the PPACA, “states cannot impose eligibility and enrollment policies that are more restrictive than those in place at the time the [law] was enacted.”⁶ In this era of cuts to Medicaid and Children’s Health Insurance Program (CHIP) eligibility, the MOE has been a leading factor in keeping children enrolled throughout the recession.⁷ In fact, according to the Congressional Budget Office (CBO), by 2019, sixteen million additional individuals will be insured under Medicaid and CHIP then would have been without the requirements.⁸ However, some governors assert, among other critiques, that the MOE puts an unreasonable strain on already tight state budgets, leading them to cut other essential public welfare programs.⁹ This article weighs arguments from both the critics and supporters of the PPACA’s MOE requirements and analyzes the potential impact of its repeal.

II. A BRIEF INTRODUCTION TO CHILDREN’S HEALTH INSURANCE PROGRAM

Written by the late Senator Edward Kennedy, CHIP was created with the intention that tobacco products would be taxed to help finance health care coverage for children.¹⁰ Today, CHIP provides low-cost health insurance coverage to children whose families earn too much to qualify for Medicaid coverage yet cannot afford to purchase private health insurance.¹¹ Since CHIP was first implemented, over five million uninsured children have

6. KAISER COMM’N ON MEDICAID AND THE UNINSURED, UNDERSTANDING THE MEDICAID AND CHIP MAINTENANCE OF ELIGIBILITY REQUIREMENTS 1 (2011), <http://www.kff.org/healthreform/upload/8061.pdf>.

7. *See id.* and accompanying text (noting that MOE maintains CHIP coverage).

8. Dennis M. Barry, Charles A. Luband & Holley Thames Lutz, *The Impact of Healthcare Reform Legislation on Medicare, Medicaid and CHIP*, 2d HEALTH L. PRAC. GUIDE, Ch. 3 (2010).

9. *US Federal Government’s One-Size-Fit-All Medicaid Program Does Not Work for. . .*, BIGGOVCARE.COM (Jan. 8, 2011), <http://biggovcare.com/government-health-news/us-federal-governments-one-size-fit-all-medicaid-program-does-not-work-for>.

10. Susan Milligan, *Clinton Role in Health Program Disputed*, BOSTON GLOBE, Mar. 14, 2008, http://www.boston.com/news/nation/articles/2008/03/14/clinton_role_in_health_program_disputed/?page=full.

11. Texas Department of Insurance, *Texas Health Options – Health Insurance Information for a Parent or Guardian*, (Jan. 16, 2012, 2:46 PM) <http://www.Texashealthoptions.com/cp/children.html>.

been covered by the program.¹²

The program was reauthorized on February 4, 2009, when President Barack Obama signed into law the Children's Health Insurance Program Reauthorization Act (CHIPRA).¹³ The reauthorization provided additional funding to renew CHIP and to help make CHIP and Medicaid coverage available to more children.¹⁴ In 2009 alone, nearly 2.6 million previously-uninsured children received insurance coverage through CHIP.¹⁵ States have accomplished this by creating online registration processes along with other streamlined enrollment procedures.¹⁶ The spike in CHIP enrollment illustrates the success of CHIPRA, for a key goal of the Act was to make it easier for low-income families to enroll in the program.¹⁷

III. AFFORDABLE CARE ACT AND CHIP MAINTENANCE OF ENROLLMENT

The PPACA was designed to address states' attempts to cut Medicaid costs by tightening eligibility requirements and reducing services.¹⁸ Since insurance companies do not always provide coverage when patients are in need, a major goal of the PPACA was, "to put American consumers back in charge of their health coverage. . ."¹⁹ The PPACA improves the health care system by expanding coverage to include more children.²⁰ For instance,

12. *National Chip Policy*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Aug. 4, 2011, 7:06 AM) <https://www.cms.gov/nationalchippolicy/>.

13. SEBELIUS, *supra* note 3, at 4.

14. *Id.*

¹⁵ *Id.* at 1.

16. KAISER COMM'N ON MEDICAID AND THE UNINSURED, ONLINE APPLICATIONS FOR MEDICAID AND/OR CHIP: AN OVERVIEW OF CURRENT CAPABILITIES AND OPPORTUNITIES FOR IMPROVEMENT, 1 (June 2011), available at <http://www.cbpp.org/files/6-27-11health.pdf>.

17. See SEBELIUS, *supra* note 3, at 4 (stating that one of CHIP's goals is to incentivize enrollment for children).

18. CTR. FOR CHILDREN & FAMILIES, HOLDING THE LINE ON MEDICAID AND CHIP: KEY QUESTIONS AND ANSWERS ABOUT HEALTH CARE REFORM'S MAINTENANCE-OF-EFFORT REQUIREMENTS 1 (2010), available at <http://ccf.georgetown.edu/index/holding-the-line-on-medicaid-and-chip>.

19. *Fact Sheet The Affordable Care Act's New Patient's Bill of Rights*, HEALTHREFORM.GOV (June 22, 2010), http://www.healthreform.gov/newsroom/newpatients_bill_of_rights.html.

20. Farra Bracht, *The Patient Protection and Affordable Care Act: An Overview of Its Potential Impact on State Health Program*, Legislative Analyst's Office, May 13, 2010, http://www.lao.ca.gov/reports/2010/hlth/fed_healthcare/fed_healthcare_051310.aspx.

job-based and new individual health plans are no longer allowed to deny coverage for children based on a pre-existing disability or condition.²¹

Moreover, the PPACA helps reduce variations in eligibility between states.²² Even though it is not a requirement for states to participate in Medicaid, all fifty do.²³ However, state involvement varies greatly.²⁴ In 2014, when the Medicaid expansion takes full effect, the extreme variations that are present between states will be eliminated to a great extent because of the uniformity inherent in the PPACA's requirements, including state benefit exchanges.²⁵

The PPACA requires states to offer an American Health Benefit Exchange through which individuals can purchase coverage, with reduced payments for individuals and families with income between 133% and 400% of the federal poverty level.²⁶ Until these state exchanges become fully operational, the PPACA requires states to maintain existing income eligibility levels.²⁷ The CHIP MOE, for example, requires maintenance of CHIP "eligibility standards, methodologies and procedures" as a condition of continued Medicaid funding, with certain exceptions.²⁸ The MOE requirement for adults is expected to last through January 1, 2014 and is extend through September 30, 2019 for children.²⁹

There is an exception for states that are experiencing a current or

21. *Families with Children and the Affordable Care Act*, HEALTHCARE.GOV, <http://www.healthcare.gov/news/factsheets/2011/08/families.html> (last visited Sept. 25, 2011).

22. JULIETTE FORSTENZER ESPINOSA, RESEARCH INSIGHTS: REIMAGING FEDERAL AND STATE ROLES FOR HEALTH REFORM UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, ACADEMY HEALTH 2 (Feb. 3, 2010).

23. *Id.*

24. *Id.* at 2.

25. *Id.* at 4.

26. *America's Agenda Recommendations in the Patient Protection and Affordable Care Act: Building Blocks for a Cost-Effective, High Quality Health System*, AMERICA'S AGENDA, <http://www.americasagenda.org/Campaigns/Federal-Campaigns/Proposals-in-the-PPACA.aspx> (last visited Sept. 29, 2011).

27. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *supra* note 6, at 5.

28. CTR. FOR MEDICARE & MEDICAID SERVS., THE AFFORDABLE CARE ACT MAINTENANCE OF EFFORT (MOE)-QUESTIONS & ANSWERS, (2011), *available at* <http://www.cms.gov/smdl/downloads/SMD11001.pdf>.

29. CTR. FOR CHILDREN & FAMILIES, *supra* note 18, at 2.

projected budget deficit.³⁰ If the state can verify the deficit they may qualify for an exemption for non-pregnant,³¹ non-disabled adults above 133% of the federal poverty line (FPL) through 2014.³² However, if non-exempt states do not comply with either the Medicaid or CHIP MOE requirements, their federal Medicaid funds will be at risk; the state could lose all Medicaid funding.³³ Given such a high penalty, states are encouraged to come into compliance with the PPACA's MOE requirement in order to maintain state funding.

IV. CRITICS OF MOE

There has been widespread criticism concerning the MOE requirements, especially among politicians.³⁴ In a letter to Congress, nine Republican governors, past and present, call the maintenance requirements "unconscionable" because, as they put it, they force states to cut critical programs, "in order to fund a 'one-size-fits-all' approach to Medicaid."³⁵ With the economy in recession, unemployment rising, and the number of eligible Medicaid recipients increasing, coupled with the fact that the average allocation to Medicaid is twenty percent of an entire state's budget, it is no surprise that the budget deficits are at the forefront of the political scene.³⁶ Texas Governor Rick Perry agrees, stating that it "imposes unnecessary financial burdens on already strapped state budgets. . ."³⁷ Critics highlight this concern, noting that the new law fails to address how states are supposed to manage these new, increased costs for either existing

30. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *supra* note 1, at 5.

31. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *supra* note 6, at 1.

32. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *supra* note 1, at 5.

33. *See id.* and accompanying text (noting that states may lose all Medicaid funds).

34. *Id.*

35. Jocelyn Guyer, *States Should Seek a Balanced Approach to Maintaining Medicaid* (Jan. 7, 2011, 6:06 PM), <http://theccfblog.org/2011/01/states-should-seek-a-balanced-approach-to-maintaining-medicaid.html>.

36. FORSTENZER ESPINOSA, *supra* note 22, at 3.

37. *US Federal Government's One-Sized-Fit-All Medicaid Program Does Not Work for. . .*, *supra* note 9.

or newly eligible Medicaid recipients.³⁸

The PPACA's MOE requirement has faced backlash concerning the requirement's interference with states' control.³⁹ Absent federal involvement, Medicaid and CHIP implementation varies greatly among the states.⁴⁰ However, passage of the PPACA and implementation of its requirements, including the MOE, limit states' flexibility in creating new policy or procedure around Medicaid or CHIP.⁴¹

In addition to budget and constitutional violation concerns, critics claim that the requirement also interferes with states' ability to reduce fraud and waste, including improper payments within the federal health care programs.⁴² Whatever their reasons, critics of the MOE provision have a common goal: to see the MOE requirement repealed.⁴³ According to the Kaiser Commission, a repeal of the requirements would allow states to roll back eligibility standards and impose more restrictive enrollment procedures.⁴⁴ Then, many states could tighten enrollment procedures, "resulting in reductions in caseload in a less visible way than cutting eligibility levels."⁴⁵

V. SUPPORTERS OF MOE

Despite critic pushback, supporters contend that the MOE requirements have been extremely beneficial throughout this economic recession.⁴⁶ In her January 2011 article, Jocelyn Guyer, executive director at Georgetown's Center for Children and Families, emphasized that the requirements have been extremely effective in stabilizing coverage for children in families

38. ESPINOSA, *supra* note 22, at 2–3.

39. *Id.* at 1

40. *Id.* at 2.

41. *Id.*

42. SARAH LUECK, CTR. ON BUDGET & POL'Y PRIORITIES, MAINTENANCE-OF-EFFORT REQUIREMENT DOES NOT STOP STATES FROM FIGHTING FRAUD 1 (June 6, 2011), *available at* <http://www.cbpp.org/files/6-6-11health.pdf>.

43. Guyer, *supra* note 35.

44. KAISER COMM'N ON MEDICAID AND THE UNINSURED, *supra* note 6, at 2.

45. *Id.*

46. Guyer, *supra* note 35.

without job-related insurance.⁴⁷ For example, in June of 2010, Arizona planned to completely eliminate its CHIP program.⁴⁸ This would have left approximately 47,000 children without insurance.⁴⁹ Because of the MOE requirements, however, enrollment in CHIP for underprivileged children has to date remained consistent.⁵⁰

The increased standardization between states' eligibility for Medicaid and CHIP has also been a point supporters emphasize.⁵¹ Additionally, experts speaking at a panel discussion on the health care reform in February 2010, explained that "increases in state spending" under PPACA will be "small compared to increases in coverage and federal revenues and relative to what states would have spent if reform had not been enacted."⁵² While this may not eliminate all of the critics' apprehensions, it should ease the common concern regarding already-stretched state budgets.⁵³

Despite the belief of some that the MOE standards impede states' efforts to reduce fraud, waste and abuse, supporters claim that is far from the truth.⁵⁴ As stated in recent testimony, "the MOE does *not* affect any of the tools and initiatives that states. . . [or the federal government] . . . use to combat fraud and abuse. . ."⁵⁵ They argue that, "[i]n fact, anti-fraud activities have increased since the MOE was enacted as part of the Affordable Care Act."⁵⁶ In particular, additional tools to assist these problem areas have been provided by the PPACA to the Centers for

47. *Id.*

48. *Id.*

49. *Id.*

50. JUDITH SOLOMON, CTR. ON BUDGET & POL'Y PRIORITIES, REPEALING HEALTH REFORM'S MAINTENANCE OF EFFORT PROVISION COULD CAUSE MILLIONS OF CHILDREN, PARENTS, SENIORS, AND PEOPLE WITH DISABILITIES TO LOSE COVERAGE 3 (February 24, 2011), available at <http://www.cbpp.org/files/2-10-11health.pdf>.

51. ESPINOSA, *supra* note 22, at 2.

52. *Id.* at 3.

53. Kathryn Nix, *Wyden-Brown Won't Give States the Flexibility they need to Reform Health Care* (Feb. 14, 2011), THE FOUNDARY, <http://blog.heritage.org/2011/02/14/wyden-brown-won%e2%80%99t-give-states-the-flexibility-they-need-to-reform-health-care/>.

54. LUECK, *supra* note 42, at 1.

55. *Id.*

56. *Id.* at 2.

Medicare and Medicaid Services (CMS).⁵⁷ For instance, the PPACA includes heightened requirements for screening payments for providers and suppliers, along with oversight controls such as payment caps.⁵⁸ Kimberly Brandt, Director of Program Integrity Group, explained that these additional requirements will allow states to focus their resources on addressing the areas of greatest concern, not vice versa.⁵⁹ Moreover, it is not the actions of underprivileged patients, but the health care provider's actions that lead to fraud and abuse in Medicaid.⁶⁰ Additionally, the MOE does not affect efforts to identify and remedy Medicaid payment errors that do not involve fraud or abuse.⁶¹

Policy-makers expect that, when fully implemented, ninety-five percent of Americans will be covered, primary care services will have expanded, and cost-cutting programs and procedures will have been created.⁶² Predictions aside, supporters disapprove of a repeal because it would make it more difficult for eligible individuals to obtain and maintain health coverage.⁶³

VI. IMPACT OF REPEAL

Currently, H.R. 1683, the State Flexibility Act, is under consideration by Congress.⁶⁴ The bill, if passed, would repeal the MOE requirements in the PPACA, and according to the CBO, would reduce federal deficits by an estimated \$2.1 billion over the next nine years.⁶⁵ "In 2016, CBO estimates that half of the states would end their CHIP programs. . . ." and enrollment in

57. Kimberly Brandt, Dir., Program Integrity Grp., Reducing Fraud, Waste and Abuse in Medicare, Testimony Before the Committee on Ways and Means (April 19, 2011), <http://www.hhs.gov/asl/testify/2010/06/t20100615a.html>.

58. *Id.*

59. *Id.*

60. Lueck, *supra* note 42, at 1.

61. *Id.*

62. ESPINOSA, *supra* note 22, at 5.

63. SOLOMON, *supra* note 50, at 5.

64. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *supra* note 6, at 2.

65. *Id.*

employer-based coverage would increase.⁶⁶ Moreover, compared to CHIP, enrollees would be required to pay a larger share of the cost for insurance through the exchanges.⁶⁷

However, the true impact of legislation would be that many low-income children would lose their Medicaid coverage and have no source of insurance.⁶⁸ Currently, MOE provisions ensure eligibility standards and their application and renewal procedures do not get altered.⁶⁹ However, if the MOE requirements were to be repealed, states would be able to tighten their enrollment procedures by requiring extra paperwork and adopting other procedural barriers.⁷⁰ Unfortunately, this would cause many families to lose insurance coverage.⁷¹ For example, in 2003, Washington state began requiring families to reapply every six months (rather than once every year) to maintain their children's Medicaid eligibility.⁷² The state also began requiring families to provide pay stubs to verify family income, instead of using state earnings databases.⁷³ According to the Center on Budget and Policy Priorities, consequently, over the following two years, over 30,000 of Washington's children lost coverage.⁷⁴ Then in January 2005 when "the state restored its previous 12-month eligibility period[,] 30,000 children gained coverage by the end of the year."⁷⁵ Likewise, roughly 1.4 million adults and children lost coverage in the current recession because thirty-four states cut back Medicaid and CHIP eligibility in the early 2000s.⁷⁶

Finally, "if states curtail [CHIP] eligibility now, they will [likely] have to increase their Medicaid budgets by much greater amounts when the

66. *Id.*

67. *Id.*

68. LUECK, *supra* note 42, at 1.

69. SOLOMON, *supra* note 50, at 6.

70. *Id.* at 5–6.

71. LUECK, *supra* note 42, at 1, 3.

72. SOLOMON, *supra* note 50, at 6.

73. *Id.*

74. *Id.*

75. *Id.*

Medicaid expansion takes effect in 2014, because they will have to add back the beneficiaries they dropped. . . .⁷⁷ States would then be responsible for an average of forty-three percent of those costs.⁷⁸ This evidence illustrates the devastating effect an MOE repeal could have on the state budget, in addition to low-income families and their children.

VII. CONCLUSION

With a repeal of PPACA's MOE provisions and in an effort to reduce state spending, states could scale back Medicaid and CHIP eligibility or tighten enrollment procedures.⁷⁹ While this might put less pressure on state budgets, as found by the Kaiser Foundation on Medicaid and the Uninsured, "it would also result in a loss of federal matching funds and more uninsured [children] prior to the implementation of the coverage expansions under [the PPACA] in 2014."⁸⁰ CBO estimates that those who lose CHIP or Medicare eligibility based on the H.R. 1683 would not lose coverage because they would enroll in employment-sponsored health care.⁸¹ However, these estimates seem to forget our current economic climate and its effect on health care coverage. Until we can be confident that few will lose coverage and that money will in fact be saved, repealing an effective health insurance system would be irresponsible, if not completely devastating on the health and safety of our nation's children.

76. *Id.* at 8.

77. *Id.* at 9.

78. *Id.*

79. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *supra* note 6, at 2.

80. *Id.*

81. *Id.*