



**Michelle Lujan Grisham, Governor**  
Kari Armijo, Acting Secretary  
Lorelei Kellogg, Acting Medicaid Director

September 12, 2023

RE: Tribal Notification to Request Advice and Comments Letter 23-21: Proposed amendments to 8.291.400 NMAC-Affordable Care, Eligibility Requirements, 8.200.400 NMAC-General Recipient Rules-General Medicaid Eligibility, 8.200.410 NMAC-General Recipient Rules-General Recipient Requirements.

Dear Tribal Leadership, Indian Health Service, Tribal Health Providers, and Other Interested Parties:

Seeking advice and comments from New Mexico's Indian Nations, Tribes, Pueblos and their health care providers is an important component of the government-to-government relationship with the State of New Mexico. In accordance with the New Mexico Human Services Department's (HSD's) Tribal Notification to Request Advice and Comments process, this letter is to inform you that HSD, through the Medical Assistance Division (MAD), is accepting written comments until **5:00 p.m., Mountain Time (MT) on September 29, 2023**, regarding proposed amendments to the following New Mexico Administrative Code (NMAC) rule *8.291.400 NMAC-Affordable Care, Eligibility Requirements, 8.200.400 NMAC-General Recipient Rules-General Medicaid Eligibility, and 8.200.410 NMAC-General Recipient Rules-General Recipient Requirements*.

Section 9-8-6 NMSA 1978, authorizes the Department Secretary to promulgate rules and regulations that may be necessary to carry out the duties of the Department and its divisions.

Notice Date: September 12, 2023

Public Hearing: October 13, 2023

Adoption Date: Proposed as January 1, 2024

Technical Citations: 42 CFR 435.926 and 42 CFR 435.406

## **Background**

### Continuous Medicaid eligibility for children under age six

The Department currently provides 12 months of continuous enrollment for children from birth until turning age 19. The Department's Turquoise Care (TC) 1115 Waiver renewal request proposes to provide continuous Medicaid enrollment for children for up to six years from the time of application approval or recent renewal until turning age six. Continuous Medicaid enrollment for young children will yield improvements in access to essential care while reducing unnecessary costs associated with enrollment lapses. Objectives, as outlined in the TC 1115 Waiver request for continuous Medicaid enrollment, are to minimize coverage gaps to help maintain consistent access to care, including early childhood screenings, primary and preventive services, and treatment, decreasing the need for higher-

cost services associated with delaying care, easing the stress and burden on families and caregivers as they navigate Medicaid coverage, and reducing the Department's administrative costs associated with application reprocessing. The Department is proposing through these rules to implement continuous Medicaid enrollment for children from birth up to age six.

#### Deferred Action for Childhood Arrivals (DACA)

The federal Health and Human Services (HHS) Department recently issued proposed rules that modify the definition of "lawfully present" to remove an exception that excludes DACA recipients from the definition of "lawfully present" used to determine eligibility to enroll in Medicaid under the Children's Health Insurance Program Reauthorization Act of 2009 referred to as the CHIPRA 214 option.

The HHS proposed rule changes interpretation of "lawfully present" to treat DACA recipients the same as other deferred action recipients. DACA recipients would be considered "lawfully present" to the same extent as other deferred action recipients for purposes of the CHIPRA 214 option and can be determined eligible for Medicaid. Including DACA recipients in the definition of "lawfully present" is expected to lower the number of people who are uninsured and make affordable health care available to more people. The Department is proposing through these rules to implement the HHS required changes for CHIPRA 214 states that allow DACA recipients who reside in New Mexico to enroll in Medicaid if meeting financial and non-financial eligibility requirements.

The HHS proposed rules make additional changes to the definition of "lawfully present" that have been incorporated into the proposed rules.

#### **The Department is proposing to amend the rule as follows:**

##### **8.291.400 NMAC**

Section 11 is modified to include continuous eligibility for up to six years for children from birth until turning age six. A child enrolled for less than 12 months before turning age six is eligible for 12 months of continuous eligibility. The continuous eligibility period begins on the effective date of the individual's eligibility or most recent redetermination or renewal of eligibility.

##### **8.200.400 NMAC**

Section 12 is modified to include continuous eligibility for up to six years for children from birth until turning age six. A child enrolled for less than 12 months before turning age six is eligible for 12 months of continuous eligibility. The continuous eligibility period begins on the effective date of the individual's eligibility or most recent redetermination or renewal of eligibility.

##### **8.200.410 NMAC**

Section 11 Subpart B(1)(m) pertaining to COFA migrants has been moved to a newly created lawfully present section.

Section 11 Subpart B(3) pertaining to children under age 21 and pregnant individuals has been deleted and moved to a newly created lawfully present Subsection C.

A new Section 11 Subpart C has been created for lawfully present individuals. New Mexico covers

lawfully present individuals who are lawfully residing in the United States. An individual is lawfully residing in the United States if they are lawfully present and otherwise meet the eligibility requirements in the state plan. Lawfully present includes the following three groups of individuals for Medicaid coverage: children under age 21 and pregnant individuals, COFA migrants, and DACA individuals.

Additional changes were made to lawfully present children under age 21 and pregnant individuals to correspond with the HHS proposed rules. The following changes were made:

- 1) Subsection 11 Subpart C(1)(d)(ii) was revised to change “currently under” to granted”.
- 2) Subsection 11 Subpart C(1)(d)(iv) was revised to add under family unity individuals who are granted benefits under section 1504 of the Legal Immigration and Family Equity (LIFE) Act Amendments of 2000.
- 3) Subsection 11 Subpart C(1)(d)(vi) was revised to remove the exception for DACA individuals.
- 4) Subsection 11 Subpart C(1)(d)(vii) was revised to add pending visa petitions rather than only approved visa petitions.
- 5) Subsection 11 Subpart C(1)(e) was revised to remove the 180-day application pending period for an applicant under age 14.
- 6) Subsection 11 Subpart C(1)(f) was removed as duplicative language to (e). Subsequent lettering was updated due to this removal.
- 7) Subsection 11 Subpart C(1)(f), formerly (g), was revised to include approved applications for special immigrant juvenile status.
- 8) Subsection 11 Subpart C(1)(h) was removed because it references individuals lawfully present in American Samoa and is not relevant to residing in New Mexico.
- 9) The term “non-citizen” is being updated per the HHS proposed rules to remove the hyphen and use the term “noncitizen” to align with terminology used by the Department of Homeland Security. This term has been updated throughout these rules.

Amendments were made throughout the rule to align with formatting requirements.

### **Estimated Total Financial Impact**

The estimated total financial impact of implementing continuous eligibility for children under six years of age is estimated to be \$5,883,000 (\$1,587,822 of the total is state general funds with the balance being federal funds) for the remainder of state fiscal year 2023 (January through June 30, 2023). For state fiscal year 2024 the total is estimated to be \$11,766,000 (\$3,175,644 of the total is state general funds with the balance being federal funds).

The estimated total financial impact for covering DACA recipients is estimated to be \$11,196,720 (\$1,119,672 of the total is state general funds with the balance being federal funds) for the remainder of state fiscal year 2023 (January through June 30, 2023). For state fiscal year 2024 the total is estimated to be \$22,393,440 (\$2,239,344 of the total is state general funds with the balance being federal funds).

### **Tribal Impact**

The tribal impact is positive for providing continuous Medicaid eligibility up to six years for children from birth until turning age six. Currently continuous eligibility for children is limited to 12-months.

This change allows for a longer continuous eligibility period for younger children which means greater continuity of care and fewer Medicaid renewals.

The inclusion of DACA recipients as “lawfully present” and able to be eligible for Medicaid has no tribal impact.

### **Tribal Advice and Comments**

Tribes and tribal healthcare providers may view the proposed NMAC rule on the HSD webpage at: <https://www.hsd.state.nm.us/providers/written-tribal-consultations/>. ***Notification letter 23-21.***

A written copy of these documents may be requested by contacting the HSD Medical Assistance Division (HSD/MAD) in Santa Fe at (505) 827-1337.

### **Important Dates**

A public hearing to receive testimony on this proposed rule will be held at the Administrative Services Division (ASD), 1474 Rodeo Rd, Santa Fe, NM 87505 and via conference call on October 13, 2023 at 8:30am. **Conference phone number: 1-800-747-5150. Access Code: 2284263.**

**Written advice and comments must be received no later than 5:00 p.m. MT on October 13, 2023.** Please send your advice, comments or questions to the MAD Native American Liaison, Theresa Belanger, at (505) 670-8067 or by email to [theresa.belanger@state.nm.us](mailto:theresa.belanger@state.nm.us).

All comments and responses will be compiled and made available after December 1, 2023.

Sincerely,



Lorelei Kellogg, Acting Medicaid Director  
Medical Assistance Division