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# EXECUTIVE ORDER 12866 SUBMISSION

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1. Agency/Subagency originating request

DHHS, HCFA, MB

2. Regulation Identifier Number (RIN)

0938-AH79

0938-B016

3. Title

Revision to the Definition of an Unemployed Parent - MB-106-FC

4. Stage of Development

- Prerule
- Proposed Rule
- Interim Final Rule
- Final Rule with comment period
- Final Rule - No material change
- Notice
- Other

Description of Other

5. Legal Deadline for this submission

a)  Yes

b)  Date

c)  Stat  Judicial

AS PROMISED,  
Please let me  
know as soon  
as you can if you  
have comments. Lamin.

6. Economically Significant

Yes

No

7. Agency Contact (person who can best answer questions regarding the content of this submission)

Judith Rhoades

*Judith Rhoades*

Phone (410) 786-4462

### Certification for Executive Order 12866 Submissions

The authorized regulatory contact and the program official certify that the agency has complied with the requirements of E.O. 12866 and any applicable policy directives.

Signature of Program Official

Date

for  
Director, MB

*William L. Kleinman*

5/19/97

Signature of Authorized Regulatory Contact

Date

Ken Choe OS/ES

*Ken Choe*

1/30/98

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

45 CFR Part 233

[HCFA-2106-FC]

RIN 0938-AH79

Medicaid Program; Revision to the Definition of  
an Unemployed Parent

**AGENCY:** Administration for Children and Families (ACF), and  
Health Care Financing Administration (HCFA), HHS.

**ACTION:** Final rule with comment period.

**SUMMARY:** The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) made changes in Federal law that affect the eligibility of Medicaid and Federal foster care recipients. Significantly, it eliminated the Aid to Families with Dependent Children (AFDC) program and replaced it with block grants for Temporary Assistance for Needy Families (TANF). While under the previous law receipt of AFDC qualified families for Medicaid, the new statute does not tie receipt of TANF to Medicaid. Instead, subject to some exceptions, Medicaid eligibility for families and children now depends upon whether a family would have qualified for AFDC under the rules in effect on July 16, 1996. Federal foster care eligibility depends on whether the child would have qualified for AFDC under the rules in effect on July 16, 1996.

We are amending the AFDC regulations pertaining to eligibility in cases where a parent is unemployed. This final rule with comment period makes a change to facilitate among the TANF, Medicaid and foster care programs coordination in cases where a State has expanded coverage under its TANF plan beyond the definition of unemployed parent contained in existing AFDC regulations.

This final rule with comment period revises the definition of unemployment of a principal wage earner for purposes of coverage of dependent children of unemployed parents. It also allows States to eliminate inequitable policies that are a disincentive to family unity.

**DATES:** *Effective Date:* These regulations are effective on **[the date of publication in the Federal Register]**.

*Comments:* Written comments will be considered if we receive them at the appropriate address, as provided below, no later than 5:00 p.m. on **[60 days after date of publication of these final rules with comment period in the Federal Register]**.

**ADDRESSES:** Mail written comments (one original and three copies) to the following address:

Health Care Financing Administration,

Department of Health and Human Services,

Attention: HCFA-2106-FC,

P.O. Box 7517,

Baltimore, MD 21207-0517.

If you prefer, you may deliver your written comments (one original and three copies) to one of the following addresses:

Room 309-G, Hubert H. Humphrey Building,  
200 Independence Avenue, SW,  
Washington, D.C., or

Room C5-09-27, Central Building,  
7500 Security Boulevard,  
Baltimore, Maryland.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HCFA-2106-FC. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 309-G of the Department's offices at 200 Independence Avenue, SW, Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (Phone: (202) 690-7890).

If you wish to submit written comments on the information collection requirements contained in this final rule with comment period, you may submit written comments to the following:

Laura Oliven, HCFA Desk Officer,  
Office of Information and Regulatory Affairs,  
Room 3001, New Executive Office Building,  
Washington, D.C. 20503; and

Health Care Financing Administration,  
Office of Information Services,  
Information Technology Investment Management Group,  
Division of HCFA Enterprise Standards,  
Room C2-26-17, 7500 Security Boulevard,  
Baltimore, MD 21244-1850.

**FOR FURTHER INFORMATION CONTACT:**

Judith Rhoades, (410) 786-4462 (Medicaid)  
Daniel Lewis, (202) 205-8618 (title IV-E foster care)

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193 (commonly referred to as welfare reform), enacted on August 22, 1996, replaced the Federal/State program of Aid to Families With Dependent Children (AFDC) with a new program of block grants to States for Temporary Assistance for Needy Families (TANF). This change has substantial implications for Medicaid and title IV-E foster care eligibility. Prior to the enactment of Public Law 104-193, under section 1902(a)(10)(A)(i)(I) of the Social Security Act (the Act), individuals who received AFDC cash assistance or were deemed to have received AFDC were automatically eligible for Medicaid. Section 114 of Public Law 104-193 amended the Act by redesignating section 1931 as section 1932 and inserting a new section 1931 which establishes a new Medicaid

eligibility group for low-income families that is related to eligibility requirements of the AFDC program in effect on July 16, 1996. Section 108(d) of Public Law 104-193 amended title IV-E of the Act to provide for Federal foster care eligibility of children who would have been eligible for AFDC under the June 1, 1995 requirements. Section 5513(b) of the Balanced Budget Act of 1997 (Public Law 105-33) amended sections 472 and 473 of the Act to replace the reference to the June 1, 1995 AFDC requirements date (regarding title IV-E foster care eligibility), with a reference to July 16, 1996 AFDC requirements. This technical change makes the July 16, 1996 date consistent with the Medicaid AFDC eligibility provisions. In other words, the financial eligibility standards and deprivation requirements of the States' pre-welfare reform AFDC programs will be used to determine Medicaid and title IV-E foster care eligibility. One requirement in both programs is that a child in a family must be deprived of parental support or care by reason of the death, absence, incapacity, or unemployment of a parent (the pre-welfare reform AFDC deprivation provision).

Under the AFDC program, States were required (until October 1998) to provide cash assistance to families in which the principal wage earner was unemployed. Unemployment of the principal wage earner constituted a type of dependency relationship under the AFDC program. Section

407(a) of the Act authorized the Secretary to prescribe standards for determining unemployment for purposes of this requirement. It did not specifically define unemployment. In accordance with this provision, the Secretary established an hour standard for determining unemployment, with an exception for certain intermittent work, under current regulations at 45 CFR 233.101(a)(1). Specifically, § 233.101(a)(1) provides that the definition of unemployed must include any such parent who is employed less than 100 hours a month; or exceeds that standard for a particular month, if the work is intermittent and the excess is of a temporary nature as evidenced by the fact that the parent was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month. These pre-welfare reform regulations apply for purposes of determining whether a family would have qualified for AFDC under the statute in effect on July 16, 1996, which is part of the test for Medicaid eligibility.

Under TANF, States will no longer be mandated to provide cash assistance to intact families on the basis of unemployment but may choose to do so. If a State chooses to ensure Medicaid eligibility for cash assistance recipients under TANF, it must align the eligibility requirements of the new Medicaid eligibility group with its requirements under TANF. In consultation with States, we have learned that many States believe the definition of unemployment

established under § 233.101(a)(1) for the AFDC program is inequitable and excessively restrictive. They do not intend to continue using the definition under their TANF programs. Some States believe that this definition is anti-family and disadvantages intact families. Under the AFDC program, employment in excess of 100 hours per month was immaterial for single-parent families. Some States believe if they were to import the 100-hour rule into their TANF programs, families in which a principal wage earner is employed over 100 hours per month, but whose income is below the cash assistance standard, may actually break up in order to be eligible for cash assistance.

States have indicated they would like to align eligibility of TANF, foster care, and Medicaid programs for programmatic reasons (such as facilitating Medicaid eligibility) and administrative simplicity. However, the existing definition of unemployment in § 233.101(a)(1) will stand in the way of this alignment if a State chooses to apply a more liberal definition of employment under its TANF program.

We agree with States that the existing definition of unemployment is too restrictive. It imposes an impediment to administrative simplification particularly for those States that believe that the policy is inequitable and discourages family unity. For these reasons, we are revising the definition of unemployment to allow States the

opportunity to adopt more flexible definitions of unemployment. This revision will allow States to align their TANF, foster care, and Medicaid programs and thereby allow administrative simplification. It will also allow States to eliminate policies they believe to be inequitable and a disincentive to family unity. We expect that some States will choose to consider the principal wage earner to be unemployed if the family income is below the applicable cash assistance standard. Under welfare reform demonstration projects, 30 States have statewide title IV-A waivers that allow them to treat single-parent and two-parent recipient families the same. In these States, eligibility for cash assistance is not terminated solely on the basis of hours worked. It is expected that these States will use section 1931(d) authority to continue this policy under their TANF programs for purposes of Medicaid eligibility. However, it is expected that additional States may wish to adopt a similar policy under their TANF programs for purposes of Medicaid eligibility. (Six States have related title IV-A waivers in limited areas of the State. The section 1931(d) authority cannot be used to continue these waivers on a statewide basis under TANF.)

Section 1931(b) of the Act, as added by Public Law 104-193, provides that an individual must be treated as receiving aid or assistance under a State plan approved under title IV only if the individual meets the income and

resources standards and methodologies and the eligibility requirements of the State's title IV-A plan under section 406(a) through (c) and section 407(a) of the Act as in effect as of July 16, 1996. Section 407(a) defined "dependent child" to include a needy child "who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of the parent who is the principal wage earner." The regulations promulgated under the section 407(a) authority generally imposed a 100-hour test to determine unemployment of the principal wage earner (45 CFR 233.101(a)(1)). Nevertheless, we believe that the reference in section 1931(b) to the requirements of section 407(a) as in effect on July 16, 1996 does not freeze those regulations in place. Rather, it refers to the statutory test for unemployment, which is itself subject to regulation by the Secretary. In view of the new flexibility contained in the TANF statute and the desirability of coordinating Medicaid and foster care rules with expanded TANF criteria, we believe that section 1102 of the Act affords the Secretary with the authority to provide States with the discretion to liberalize their definitions of unemployment for purposes of Medicaid eligibility. Therefore, we are revising the regulations at 45 CFR 233.101(a)(1) to permit States to include families with

unemployed parents who would not have met the 100-hour rule contained in the existing regulation.

## II. Provisions of the Final Rule with Comment Period

We are revising § 233.101(a)(1) to specify that a State's definition of unemployed, for purposes of Medicaid and title IV-E eligibility, must have a reasonable standard and, at a minimum, include any such parent who is employed less than 100 hours a month, or meets the exception for certain intermittent work specified in existing regulations.

Under the revised definition, States will not be allowed to define unemployment in any way that is more restrictive than the existing definition. This is because the intent of the welfare reform legislation was to protect Medicaid eligibility for any individuals who would have been eligible under the AFDC rules previously in effect. Furthermore, the revised regulation does not require States to adopt a broader definition of unemployment, since there is no indication that the Congress intended to mandate expanded eligibility beyond the statutory baseline.

In addition, States will be required to develop a reasonable standard as part of the definition of unemployment. That standard may be based on hours of work and/or dollar amounts and may include family size and/or time elements.

### III. Regulatory Impact Statement

HCFA has examined the impact of this final rule with comment period as required by Executive Order 12866 and the Regulatory Flexibility Act (RFA) (Public Law 96-354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulations are necessary, to select regulatory approaches that maximize net benefits (including potential economic environments, public health and safety, other advantages, distributive impacts, and equity). We believe that this final rule with comment period is consistent with the regulatory philosophy and principles identified in the Executive Order. The RFA requires agencies to analyze options for regulatory relief for small businesses. For purposes of a RFA, individuals and States are not considered to be small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis for any final rule that may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. With the exception of hospitals located in certain rural counties adjacent to urban areas, for purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

This final rule with comment period makes a change necessary to facilitate the coordination of Medicaid with TANF in cases where a State has expanded coverage under its TANF plan beyond the definition of unemployed parent that was contained in existing AFDC regulations. The rule revises the definition of unemployment of a principal wage earner for purpose of unifying families.

We estimate that this rule meets the threshold under Executive Order 12866 of an effect on the economy of \$100 million or more and thus requires a regulatory impact analysis as a major rule. Therefore, we have developed the following analysis in combination with the remainder of this preamble.

Although this rule is considered a major rule, we believe that the legislative intent of the Congress in passing the PRWORA was to encourage needy families to withdraw from welfare dependency over time, and at the same time provide them with temporary assistance. Therefore, we believe it is necessary to revise the definition of an unemployed parent to achieve these goals.

The table below shows estimates of Federal and State shares of Medicaid program costs that may be incurred as a result of this regulation. These estimates are based on an initial simulation study conducted in 1996 by the Urban Institute to determine the impact of repealing the 100-hour rule in those States that did not have IV-A waivers at that

time. This simulation produced an estimated increase of 1.275 million individuals who would meet AFDC eligibility requirements as a result of repeal of the 100-hour rule. Of these 1.275 million individuals, the Urban Institute estimated that .546 million -- mostly adults -- would gain Medicaid eligibility specifically because of the change; the balance would have been eligible for Medicaid already, under other Medicaid eligibility provisions. Of all the adults gaining AFDC eligibility as a result of the change, the Urban Institute estimated that 83 percent would also gain Medicaid eligibility as a result (that is, would not otherwise have been eligible for Medicaid).

Our estimate starts from the Urban Institute numbers of potential new Medicaid eligibles, and updates them using a corrected list of States that currently have statewide or substate IV-A waivers. (These States are: Alabama\*, Arizona, California, Connecticut, Florida\*, Georgia, Hawaii, Iowa, Indiana, Kansas, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Montana, Missouri, North Carolina, North Dakota\*, Nebraska, New Mexico, Ohio, Oklahoma\*, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin. [Asterisks indicate States with partial waivers.]) We assumed no Medicaid effect in those States in which the 100-hour rule is already waived, and we assumed further that

these waivers would remain in effect throughout the estimate period.

Then, for the remaining States, we projected population growth and Medicaid per capita costs over the 5-year estimate period. We also assumed that only adults would be affected by any broadening of the definition of unemployment, since children would most likely be covered already through other eligibility mechanisms. This methodology produced an estimate of Medicaid costs for implementation of this expansion of coverage.

Because this regulation provides States with an option, it is difficult to predict State behavior. On the one hand, it could be assumed that if a State had wanted to use an unemployment standard different from the 100-hour rule, it would have done so already, through the waiver mechanism; by that logic, the additional cost of this regulation would be minimal. On the other hand, the new TANF program, with its new eligibility requirements and its disconnection from Medicaid eligibility, provides new incentives that may not have been present before, and, conceivably all States may wish to immediately avail themselves of the option to change the 100-hour rule. This latter scenario would produce maximum costs. Given these uncertainties, we made a midpoint estimate of the cost impact of this regulatory change. That is, we assumed that expenditures in States that do not currently have waivers would increase so that

the cost of this change would be half the estimated maximum possible amount. Accordingly, we expect this final rule to result in the following costs:

	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002
Federal	\$115	\$110	\$115	\$120	\$125
State	\$85	\$80	\$85	\$90	\$95

(\$ in millions, rounded to the nearest \$5 million)

A separate but similar analysis was conducted for the title IV-E foster care and adoption assistance programs. Because more than 90 percent of children who are eligible for foster care and adoption assistance would qualify for these programs according to other rules unaffected by this revision, we determined that this revision would have no cost impact on foster care or adoption assistance.

These final regulations affect only States and individuals, which are not defined as small entities. We have determined and certify that this final rule with comment period will not have a significant economic impact on small entities under the threshold criteria of the RFA. However, we have provided an analysis of the impact on States and individuals under E.O. 12866. Further, we certify that this final rule with comment period does not have a significant impact on the operations of a substantial number of small rural hospitals.

The only alternative to implementing this provision is not to publish this regulation. However, not publishing

this provision would impose additional barriers to family unity and administrative simplification of State Medicaid programs.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

This final rule has been classified as a major rule subject to Congressional review. The effective date is **[INSERT DATE of publication]**. If, however, at the conclusion of the congressional review process the effective date has been changed, HCFA will publish a document in the Federal Register to establish the actual effective date or to issue a notice of termination of the final rule action.

#### IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, agencies are required to provide 60-day notice in the Federal Register and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- Whether the information collection is necessary and useful to carry out the proper functions of the agency;

- The accuracy of the agency's estimate of the information collection burden;
- The quality, utility, and clarity of the information to be collected; and
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Section 233.101 of this final rule with comment period contains requirements that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995. The rule requires States to amend their State plans to specify a reasonable standard for measuring unemployment. Public reporting burden for this collection of information is estimated to be 1 hour per State. A notice will be published in the Federal Register when approval is obtained. Organizations and individuals desiring to submit comments on the information collection and recordkeeping requirements should direct them to the OMB official and HCFA/OFHR whose names appear in the "ADDRESSES" section of this preamble.

#### V. Waiver of Proposed Rule and 30-Day Delay in the Effective Date

We ordinarily publish a notice of proposed rulemaking in the Federal Register for a substantive rule to provide a period of public comment. However, we may waive that procedure if we find good cause that notice and comment are

impractical, unnecessary, or contrary to the public interest. In addition we also normally provide a delay of 30 days in the effective date. However, if adherence to this procedure would be impractical, unnecessary, or contrary to public interest, we may waive the delay in the effective date.

We are adopting this regulation as a final rule with comment period without publication of a notice of proposed rulemaking because we believe it would be impractical and contrary to public interest to delay allowing States flexibility in implementing the welfare reform legislation. The effective date for the TANF program depends on the date the State submits a State TANF plan to the Secretary. However, the limit on State funding under title IV-A is effective on October 1, 1996. We believe that it is imperative to allow States as much flexibility as possible, and as soon as possible, to align the eligibility requirements of the Medicaid program with the TANF program to aid administrative simplification and eliminate any disincentive to family unity on the part of recipients. The sooner States have the flexibility to align these programs, the more likely it is that additional individuals will receive needed medical and remedial care. Also, providing States with flexibility at the earliest possible time will minimize unnecessary systems changes they would otherwise incur in making the transition to the post-AFDC

environment. Therefore, we find good cause to waive proposed rulemaking and issue these regulations as final.

For reasons discussed above, we also find good cause to waive the usual 30-day delay in the effective date so that the revisions to the definition may take effect upon publication of this final rule with comment period.

Although we are publishing this as a final rule, we are providing a 60-day period for public comment.

#### VI. Response to Comments

Because of the large number of items of correspondence we normally receive on Federal Register documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the "DATES" section of this preamble, and, if we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

#### List of Subjects in 45 CFR Part 233

Aliens, Grant Programs-Social Programs, Public Assistance Programs, Reporting and recordkeeping requirements.