



June 23, 2023

Chiquita Brooks-Lasure
Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244-1850

Submitted via regulations.gov

Re: End SIJS Backlog Coalition’s Comment on the Centers for Medicare & Medicaid Services Proposed Rule “Clarifying Eligibility for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, and for Some Medicaid and Children’s Health Insurance Programs,” CMS Docket No. CMS-9894-P

Dear Administrator Brooks-Lasure:

The [End SIJS Backlog Coalition](#) respectfully submits this comment¹ on the Centers for Medicare & Medicaid Services’ (“CMS”) proposal (“the Proposed Rule”) to expand healthcare access for Deferred Action for Childhood Arrivals (“DACA”) recipients and other immigrant youth, including those granted Special Immigrant Juvenile Status (“SIJS”).² The End SIJS Backlog Coalition (“the Coalition”), a project of the National Immigration Project, is a national group of over 136 child welfare and legal services organizations and impacted youth working together to educate Congress, relevant administrative agencies, and the public about the harmful impacts of visa caps on vulnerable immigrant children, and to advocate for an end to the green card visa backlog for SIJS youth.

SIJS is a humanitarian status that provides protections and a pathway to lawful permanent residence and eventual U.S. citizenship to immigrant children up to the age of 21 who have been abused, abandoned, or neglected by their parent(s), and where a state juvenile court has

¹ The Coalition wishes to thank Viviana Gonzalez, 2023 summer law clerk at the National Immigration Project and UCLA law student, for her work on this comment.

² Clarifying Eligibility for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, and for Some Medicaid and Children’s Health Insurance Programs, 88 Fed. Reg. 25313 (proposed Apr. 26, 2023) [hereinafter Proposed Rule], <https://www.federalregister.gov/documents/2023/04/26/2023-08635/clarifying-eligibility-for-a-qualified-health-plan-through-an-exchange-advance-payments-of-the>.

determined that it is not in their best interest to be returned to their country of origin. Starting in 2016, SIJS youth from certain countries were unable to immediately apply for green cards because annual visa caps were reached—and what is known as the SIJS visa backlog began.³ SIJS youth are subject to annual visa caps because, by statute, their visas derive from a numerically-restricted employment-based visa category.⁴ As of February 28, 2023, there were over 80,000 youth with approved SIJS petitions trapped in the SIJS backlog.⁵ The Coalition believes that ending the backlog would restore the purpose of the SIJS statute, which is realizing permanent legal protection in the United States for immigrant children who have survived abuse, abandonment, and neglect. As we work toward a legislative solution, we also advocate with administrative agencies to mitigate the worst harms of the backlog.

The Coalition strongly supports CMS’s effort to expand immigrant youth’s access to federal healthcare programs. We fully support the Proposed Rule’s expansion of access to federal health coverage for DACA recipients, who have been unfairly excluded from eligibility for federal healthcare programs and left without access to affordable healthcare for far too long. Additionally, the Coalition has a specific interest in the Proposed Rule because it would impact healthcare coverage for SIJS youth—whom we advocate for and alongside. We appreciate that the Proposed Rule would close the eligibility gap that has prevented SIJS youth in the visa backlog from seeking health coverage through the ACA Marketplace, the Basic Health Program (“BHP”) and Medicaid and CHIP under Section 214 of CHIPRA.

Our comment below focuses on the Proposed Rule’s provisions governing federal healthcare program eligibility for individuals with pending and approved SIJS petitions, specifically proposed 42 CFR § 435.4(13) and proposed 45 CFR § 155.20(13). We write to (1) highlight how these proposed changes to eligibility for federal healthcare programs will promote greater healthcare access for SIJS youth, and 2) emphasize the importance of maintaining the language proposed at 42 CFR § 435.4(13) and 45 CFR § 155.20(13) that specifically ties eligibility to the pendency or approval of an individual’s SIJS petition.

I. The Coalition Applauds the Proposed Rule’s Expansion of the Definition of “Lawfully Present” for the Purposes of Healthcare Access Eligibility (Proposed 42 CFR § 435.4 and 45 CFR § 155.20); It Will Provide Greater Access to Care for SIJS Youth and Thereby Improve Their Health and Well-Being.

We greatly appreciate CMS’s proposal to update the eligibility regulations that currently exclude youth with approved SIJS petitions from important federal healthcare programs. To be eligible for health coverage through the ACA marketplace, BHP, or Medicaid and CHIP benefits under Section 214 of CHIPRA, an individual must meet the criteria of being “lawfully present.”⁶ Under current regulations, only youth with *pending* SIJS petitions—but not those with *approved* SIJS petitions—are considered “lawfully present” and, therefore, eligible only through their status as

³ End SIJS Backlog Coalition & The Door, *‘Any Day They Could Deport Me’: Over 44,000 Immigrant Children Trapped in the SIJS Backlog*, at 11-15 (Nov. 2021), <https://www.sijbacklog.com/any-day-they-could-deport-me>.

⁴ *Id.* at 11.

⁵ U.S. CITIZENSHIP AND IMMIGR. SERV., FOIA PRODUCTION (May 2023) (on file with authors) (data provided accounts for youth with approved SIJS petitions waiting for an available visa through February 28, 2023).

⁶ Lawfully Present, 45 C.F.R. § 152.2 (2022); *see* Proposed Rule, *supra* note 1, at 25313-14, 25319.

an SIJS petitioner for these federal healthcare programs.⁷ Thus, under the existing rule, SIJS youth with approved SIJS petitions who cannot yet apply for an adjustment of status because of the visa backlog are ineligible for health coverage through these federal programs.⁸

When CMS drafted the current regulations in 2010 that recognize eligibility for federal healthcare programs only for youth with pending, rather than approved SIJS petitions, youth with approved SIJS petitions were able to immediately apply for adjustment of status and thus were eligible for federal healthcare programs based on the pending adjustment application.⁹ At the time, CMS’s regulations aligned with congressional intent to provide permanent protection for these vulnerable children—SIJS youth were eligible for federal health coverage from the moment they filed their SIJS petition through being able to apply for adjustment of status.

However, when the SIJS visa backlog began in 2016, it created a serious gap in coverage for SIJS youth under the current CMS regulations. Because of the SIJS visa backlog, youth with approved SIJS petitions face long wait times before they have an available visa and can apply to adjust their status.¹⁰ For this reason, an SIJS youth may be eligible for federal health coverage upon filing a SIJS petition and then become ineligible when their SIJS petition is approved, because they cannot immediately apply to adjust their status.

This eligibility gap under current CMS regulations has left thousands of SIJS youth without meaningful or consistent access to federal healthcare programs while they wait years for a visa.¹¹ The Proposed Rule would fix this exclusion by defining youth with both pending *and* approved SIJS petitions as lawfully present, thereby guaranteeing SIJS youth in the backlog access to health coverage through the ACA Marketplace, BHP and Medicaid and CHIP under the CHIPRA 214 option.¹²

The Proposed Rule will promote health equity by increasing SIJS youth’s access to affordable, quality healthcare responsive to their unique needs. In a 2021 report authored by our Coalition and featuring the stories of directly impacted SIJS youth, we highlighted some of the obstacles SIJS youth in the backlog face concerning health coverage and access.¹³

⁷ Lawfully Present, 45 C.F.R. § 152.2; Proposed Rule, *supra* note 1, at 25319.

⁸ Lawfully Present, 45 C.F.R. § 152.2; Proposed Rule, *supra* note 1, at 25319. Since May 2022, many SIJS youth have become eligible for these federal healthcare programs through a separate part of the definition, as deferred action recipients. U.S. Citizenship and Immigration Services, Policy Alert - Special Immigrant Juvenile Classification and Deferred Action (Mar. 7, 2022), available at <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf>. However, eligibility is still not automatically provided through the SIJS petition approval.

⁹ See Centers for Medicaid and Medicare Services, Letter to State Health Officials, Re: Medicaid and CHIP Coverage of “Lawfully Residing” Children and Pregnant Women (July 1, 2010), available at <https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf>.

¹⁰ See End SIJS Backlog Coalition & The Door, *supra* note 2.

¹¹ *Id.* at 12-13.

¹² Proposed 42 C.F.R. § 435.4(13); Proposed 45 C.F.R. § 155.2(13) (stating that “lawfully present” includes a noncitizen who “[h]as a pending or approved petition for Special Immigrant Juvenile classification as described in 8 U.S.C. 1101(a)(27)(J)”).

¹³ See *generally* End SIJS Backlog Coalition & The Door, *supra* note 2.

One such challenge has been a lack of work authorization, which severely limits the ability of young people in the SIJS backlog to secure employer-based health insurance.¹⁴ Compounded with the barrier many SIJS youth have faced in accessing federal healthcare programs, SIJS youth have often been left without any viable health coverage options. Last year, after our report was published, the Biden administration enacted a discretionary deferred action program that makes many youth with approved SIJS petitions eventually eligible for work authorization.¹⁵ However, SIJS youth still face difficulties securing work, as there are often lengthy delays between petition approvals and having the work permit in hand.¹⁶ Moreover, SIJS youth are not guaranteed deferred action, and those that do not receive this discretionary protection are ineligible for healthcare coverage under the current rule.

Meanwhile, many SIJS youth are in dire need of quality, affordable healthcare. Noncitizen children are more likely to lack health coverage than U.S. citizen children, and uninsured children are more likely to lack a reliable source of care, to delay care, or to have unmet medical needs than insured children.¹⁷ One unmet health need among SIJS youth that our report highlighted was a lack of mental health care, as SIJS youth often experience adverse mental health outcomes—like Post-traumatic Stress Disorder, anxiety, depression, and even suicidal ideation—as a result of the trauma they have experienced.¹⁸ And as the recent COVID-19 pandemic has demonstrated, health coverage can make all the difference in whether someone can obtain the treatment they need to survive.¹⁹ By expanding SIJS youth’s access to affordable healthcare through Medicaid, CHIP, BHPs and the ACA Marketplace, CMS’s proposal will allow SIJS youth to seek the healthcare services they need to survive and thrive.

II. The Coalition Emphasizes the Importance of the Proposed Rule’s Tying Eligibility for Federal Healthcare Programs Directly to the Pendency or Approval of a SIJS Petition; Defining Eligibility Based on the SIJS Petition Furthers Congressional Intent to Provide Permanent Legal Protection for SIJS Youth.

Recently, the Biden administration acted to support youth in the SIJS visa backlog by

¹⁴ *Id.* at 18-19.

¹⁵ See U.S. Department of Homeland Security, *USCIS to Offer Deferred Action for Special Immigrant Juveniles* (Mar. 7, 2022),

<https://www.uscis.gov/newsroom/alerts/uscis-to-offer-deferred-action-for-special-immigrant-juveniles>.

¹⁶ See U.S. Citizenship and Immigration Services, *Fiscal Year 2022 Progress Report*, 5-6 (Dec. 2022), https://www.uscis.gov/sites/default/files/document/reports/OPA_ProgressReport.pdf.

¹⁷ Kaiser Family Foundation, *Health Coverage and Care of Immigrants* (Mar. 30, 2023),

<https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-and-care-of-immigrants/#:~:text=State%20Funded%20Coverage%20for%20Immigrants&text=As%20of%20December%202022%2C%20eight,children%2C%20regardless%20of%20immigration%20status>; Rachel Garfield et al., *The Uninsured and the ACA: A Primer - Key Facts about Health Insurance and the Uninsured Amidst Changes to the Affordable Care Act*, Kaiser Family Foundation (Jan. 25, 2019),

<https://www.kff.org/report-section/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act-how-does-lack-of-insurance-affect-access-to-care/>.

¹⁸ End SIJS Backlog Coalition & The Door, *supra* note 2, at 24-25.

¹⁹ Noah Weiland and Sarah Kliff, *For the Uninsured, COVID Care has Entered a New Stage of Crisis*, *New York Times* (Dec. 6, 2022), <https://www.nytimes.com/2022/12/06/us/politics/covid-testing-treatment-uninsured.html>; see Rachel Garfield, *supra* note 16 (finding that one in five (20%) uninsured adults said that they went without needed care in the 2021 because of cost compared to 3% of adults with private coverage and 8% of adults with public coverage in an analysis of the Kaiser Family Foundation’s 2017 National Health Interview Survey).

automatically considering youth with approved SIJS petitions for deferred action—which creates a separate basis for federal healthcare program eligibility under the regulations.²⁰ However, and as CMS acknowledges, relying on a discretionary and time-limited grant of deferred action for access to these important health programs would be an inefficient and incomplete solution for SIJS youth.²¹

While many SIJS youth have a way to secure federal health coverage at this moment in time, deferred action alone cannot provide SIJS youth the permanent protection that Congress intended. Some SIJS youth face significant delays between petition approval and the grant of deferred action, just as delays are common with other immigration processes. Additionally, deferred action is a discretionary process and not all SIJS youth with approved petitions will be granted deferred action. Deferred action is also a time-limited protection set to expire after four years, and USCIS has yet to clarify a renewal process.²² Even if a renewal process is provided at the end of the deferred action period, more gaps in federal health coverage eligibility could emerge as SIJS youth navigate the renewal process. Finally, like any other administrative policy, deferred action may be subject to change based on future administrative policies.

The Proposed Rule will prevent future gaps in federal health coverage eligibility for SIJS youth by specifically defining eligibility based on the SIJS petition’s pendency or approval, rather than forcing youth with approved SIJS petitions to rely on a separate discretionary agency policy to determine their healthcare access. Defining eligibility for federal healthcare programs by the SIJS petition will allow SIJS youth to access federal healthcare programs without delay, as opposed to requiring SIJS youth to overcome the additional bureaucratic barrier of awaiting USCIS’s discretionary and non-reviewable deferred action adjudication. Moreover, tying eligibility for federal healthcare programs to a youth’s SIJS petition is consistent with CMS’s longstanding recognition that SIJS petitioners warrant eligibility for federal healthcare programs, as youth with pending SIJS petitions have been eligible for federal health coverage for many years now.²³ For these reasons, we believe that proposed 42 CFR § 435.4(13) and 45 CFR § 155.20(13) further congressional intent to provide permanent legal protection and stability for SIJS youth.²⁴

III. The Coalition Recommends an Alternative Proposed Effective Date to Better Fulfill CMS’s Purpose of Increasing Access to Healthcare for Immigrant Youth

Access to healthcare is critical to the health and well-being of immigrant youth, and many of the young people who would benefit from this Proposed Rule have been forced to wait for such care

²⁰ See U.S. Department of Homeland Security, *supra* note 14.

²¹ Proposed Rule, *supra* note 1, at 25319.

²² U.S. Citizenship and Immigration Services, Policy Alert - Special Immigrant Juvenile Classification and Deferred Action (Mar. 7, 2022), available at <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf>.

²³ Centers for Medicaid and Medicare Services, *supra* note 8.

²⁴ The Coalition disagrees with CMS’s characterization that SIJS does not confer legal status. Proposed Rule, *supra* note 1, at 25319 n.35. Congress used the term “Special Immigrant Juvenile Status” in the statute, and the text and legislative history of the SIJS provision Congress created shows an intent to permit SIJS youth to safely remain in the United States until they can adjust their status to legal permanent residents. Congress acted to provide this particularly vulnerable group—who are often victims of physical, sexual, and emotional abuse—long-term stability and security through SIJS.

for too long already. Delays of weeks, months, or even years in accessing healthcare deprive children of access to preventive services and increase the risk that medical conditions may be overlooked or deteriorate without timely attention. DACA recipients and youth with approved SIJS petitions have been forced to wait far too long for access to these federal healthcare programs, and CMS should work as expediently as possible to support the health and well-being of these populations. Therefore we support the implementation of the rule's changes through a special enrollment period once the rule is finalized before November 1, 2023, and then again for general open enrollment on November 1, 2023.

We appreciate the opportunity to comment on this important rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Rachel Davidson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Rachel Leya Davidson
Director, [End SIJS Backlog Coalition](#)
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