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December 22, 2014

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9944-P
P.O. Box 8016
Baltimore, MD 21244-8016

Submitted electronically to <http://www.regulations.gov>

**Re: Patient Protection and Affordable Care Act; HHS Notice of
Benefit and Payment Parameters for 2016 (CMS-9944-P)**

To Whom It May Concern:

The National Immigration Law Center (NILC) specializes in the intersection of health care and immigration laws and policies, offering technical assistance, training, and publications to government agencies, nonprofit organizations, and health care providers across the country. For over 30 years, NILC has worked to promote and ensure access to health services for low-income immigrants and their family members. NILC is submitting the following comments on the Proposed Rule on Benefit and Payment Parameters for 2016, published at 79 Fed. Reg. No. 228, 70674-70760 (November 26, 2014).

These comments are aimed at improving language access for limited English proficient (LEP) consumers. Our recommendations are informed by the experiences and feedback from our national and local partners working across the country to help LEP consumers enroll in coverage and utilize health care services. These comments focus on the sections of the proposed rule related to meaningful access with regard to language, specifically §155.205(c) and §156.250.

General Recommendations

We would like to reiterate the comments and recommendations made by the Asian & Pacific Islander American Health Forum (APIAHF), which would help provide meaningful access to care and coverage for LEP individuals across all HHS programs and activities including the Marketplace.

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We recommend that CMS implement the following general strategies:

1. Create a Language Access Coordinator within CMS who would be responsible for ensuring that LEP individuals and individuals with disabilities have access to CMS information and services and can enroll in coverage through the Marketplace. As a model to follow, the Federal Emergency Management Agency (FEMA) has a dedicated Limited English Proficient/Accessible Communications Needs Coordinator whose primary responsibility is to ensure that LEP individuals have meaningful access to information and services provided by FEMA.¹ The Department of Health and Human Services (HHS) should create a similar position within CMS whose primary responsibility is to ensure that LEP individuals and individuals with disabilities have meaningful access to information and services provided by CMS. CMS/CCIIO also had a designated Cultural and Linguistically Appropriate Services (CLAS) Specialist in 2010-2011 within the Office of Consumer Support whose responsibilities included coordinating the implementation of the CLAS Standards across CMS.
2. CMS should develop a specific Language Access Plan for the Marketplace. While CMS has drafted an overall Strategic Language Access Plan, a plan is needed with objectives, implementation strategies, and outcomes that are specific to Marketplace issues. For example, the language access plan should address oral interpreting services for consumers contacting the Federal Marketplace call center, written translations for Marketplace applications, notices, and educational materials and quality review measures to ensure the interpreting and translation services provided are accurate and of high quality. A Language Access Plan would help ensure meaningful access to LEP consumers, regardless of the specific language spoken.

Recommendations for Section 155.205(c) - Consumer Assistance Tools and Programs of an Exchange

We appreciate the proposal to require Exchanges, QHP issuers, and web-brokers to make telephone interpretation available in at least 150 languages. However, the guidance should not limit interpretive services to a minimum number of languages. The Department of Justice's LEP Guidance recommends that oral interpretation should be available in any language requested and at no cost to the requestor.² HHS' LEP Guidance, which describes requirements of entities covered by Title VI of the Civil Rights Act of 1964, also does not limit oral interpreting to any number of

¹ See U.S. Department of Homeland Security, Federal Emergency Management Agency, Draft Language Access Plan, September 2014, available at <http://www.dhs.gov/sites/default/files/publications/draft-fema-lep-plan.pdf>.

² See 67 Fed. Reg. 41461-41463 (Jun. 28, 2002).

languages. Exchanges, QHP issuers, and web-brokers can work with their vendor of choice to ensure access to languages encountered less frequently.

Suggested Revision: “For Exchanges, QHP issuers, and agents or brokers subject to §155.220(c)(3)(i) only, this standard includes telephone interpreter services in **any language requested by the consumer.**”

The standards described in 155.205(c) should do more to ensure meaningful access for LEP consumers.

The mere existence of telephone interpretation in multiple languages does not ensure meaningful access. During the first open enrollment period, our partner organizations reported that many LEP consumers received poor quality interpretation for certain languages and experienced long wait times to access an interpreter in their preferred languages through the Federal Marketplace Call Center, which was promoted as providing assistance in over 150 languages.³ Partners in states with state-based marketplaces reported similar problems with their state-based call centers.

In this proposed rule, CMS has requested specific comments on whether to consider and/or require more and specific language accessibility standards.⁴ We urge CMS to consider and quickly implement additional and more specific language accessibility standards. We propose the following recommendations to improve the overall customer experience for LEP consumers:

1. **Increase the number of bilingual call center staff.** As noted in the Department of Justice LEP Guidance, when certain languages are encountered often, hiring bilingual staff offers one of the best and most economical options. Marketplace Call Centers and Help Lines should hire and train bilingual staff in order to avoid using a third party telephone interpreter. Telephone interpreters often take longer to assist LEP applicant/enrollees when they are not trained and do not understand technical terminology and health care options.
2. **Include clear, in-language taglines on all important notices.** Taglines should reflect the urgency of the respective notice, and not merely state that language assistance is available. LEP consumers are often unaware that they needed to take immediate action if notices are provided in English only or

³ For more information on problems encountered with telephone interpretation during the first enrollment period, see “Improving the Road to ACA Coverage: Policy Recommendations for Enrollment Success,” July 2014, available at <http://www.apiahf.org/resources/resources-database/improving-road-aca-coverage-policy-recommendations-enrollment-success>.

⁴ See 79 Fed. Reg. 70705 (Nov. 26, 2014).

the in-language taglines are too generic. For example, in the summer of 2014, HHS/CMS sent important notices regarding citizenship/immigration status inconsistencies only in English and Spanish, and included the same simple in-language taglines that are used on HealthCare.gov. The taglines did not inform consumers that they were at risk of losing their coverage if they failed to respond to the notice. The notices could have easily included one additional in-language sentence to the tagline, such as: “If you do not respond to this notice, you could lose your health care coverage.” These taglines should also be included in clear, large font at the beginning of notices so consumers are more likely to see them. Additionally, if a consumer indicated a preferred language on their application, translated notices should be sent to those consumers in that preferred language.

- 3. Develop easy to understand translated materials and translate notices in additional languages.** CMS should provide translated Marketplace notices and should require QHP issuers to provide translated versions of all notices in any language that makes up 5% or 500 individuals of the issuers’ qualified QHP population, whichever is less. The HHS Office of Civil Rights (OCR) sets a standard in its Title VI LEP Guidance for written materials at “5 percent or 1,000 individuals, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered.” We suggest combining the 5% threshold from HHS with a lower number that is used by the Department of Labor in regulations governing large health plans—500 or 1,000. Since CMS as an entity is larger than any large insurance plan, we believe that it should be held to the same standards as these plans, particularly since work undertaken by CMS to translate documents provides significant benefits to hundreds of thousands of Marketplace consumers who will use the translated documents.

We strongly recommend that CMS adopt policy, through regulations and guidance, setting forth that failure to translate documents when languages meet this percentage or numeric threshold is evidence of non-compliance with Title VI and Section 1557 of the ACA. A combined percentage and numeric threshold is already employed in other federal agencies through policy guidance. Utilizing a 5% or 500 person threshold will better ensure that the intent and statutory requirements to provide linguistically appropriate services will be met.

Additionally, all Marketplace and QHP educational and enrollment-related forms and materials should be translated into at least fifteen languages. CMS has already recognized the importance of translating documents into multiple languages with its commitment to translating beneficiary-related Medicare forms into fifteen languages.

- 4. Conduct consumer testing and quality review of materials and services.** CMS should conduct annual quality reviews of interpreting services and

translated materials. A system for quality control is necessary to ensure that good quality interpretation services are being provided. Some examples of quality control that should be implemented include incorporating third party reviewers or community feedback into the review of translated materials and assessing wait times, by language, for Marketplace call center interpreting services.

In the proposed rule, CMS has also requested specific comments on whether consumer assistance personnel should be required to meet the standard proposed in 155.205(c). Ideally, Navigators should have bi- or multi-lingual staff to provide in-person language assistance in their designated service areas. We assume that these Navigators were awarded grants on the basis of being trusted messengers about health care and information in their communities, which means they should have the capacity to provide assistance in multiple languages to the communities they are serving. If they do not have language capacity, Navigators should be required to refer consumers to other entities with language assistance capability and partner with them to provide in-language assistance. Examples include community-based organizations or community health centers that have the capacity to provide language assistance. Based on our experiences from the first Open Enrollment Period, there is a high demand among LEP individuals for in-person, in-language assistance to help them enroll in coverage.

If a Navigator organization does not have in-person interpreting services available, and is not able to partner with community-based organizations or other local partners to provide in-person interpretation services, then a referral to a competent telephonic interpretation line should be used. Based on experiences of our partner organizations from the first Open Enrollment period, we know that most LEP consumers will not enroll unless they have in-person, in-language assistance from a trusted source of information. While Navigators may legally fulfill their meaningful access requirements by referring LEP consumers to a telephonic interpretive service or the Federal Marketplace call center, we know this will most likely result in the consumer's failure to enroll in coverage.

Recommendations for Section 156.250 - Health Plan Applications and Notices

We support the proposals to improve the readability and clarity of the referenced standards. We also support the proposal requiring QHPs to provide all information that is critical for obtaining health insurance coverage or access to health care services through the QHP, including documents required by State or Federal law, and applications, forms, and notices, to qualified individuals, applicants, qualified employers, qualified employees, and enrollees in accordance with the standards described in § 155.205(c). In providing information, QHPs should adhere to the standards and recommendation we have proposed above for § 155.205(c). We strongly believe the term "critical" should be further defined in regulation text.

*National Immigration Law Center
Comments CMS-9944-P, December 22, 2014*

Thank you for the opportunity to provide feedback on this proposed rule. Please direct any questions about our comments to Angel Padilla at padilla@nilc.org.

Sincerely,

/s/

Angel Padilla
Health Policy Analyst
National Immigration Law Center