



Via Electronic Submission

February 21, 2013

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

RE: CMS-2334-P

NPRM: Medicaid, Children’s Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals, and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing.

Dear Madam/Sir:

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, labor unions, non-profit 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 submits the following comments in response to the NPRM with the goal of identifying and eliminating potential barriers for immigrant families that could arise if the proposed rule becomes final. We also provide comments where we believe the proposed rule will be particularly helpful in addressing the concerns of immigrant families when enrolling in Medicaid, CHIP or the Exchange.

Background

Disproportionate numbers of immigrants and their family members are uninsured, despite their high levels of participation in the nation’s workforce. Complicated eligibility rules for affordable coverage are different for citizens and non-citizens which results in only some members of an immigrant household being eligible for affordable coverage while others must remain uninsured despite meeting all other eligibility criteria. Moreover, eligible members of immigrant families consistently face barriers in the application, enrollment, appeal, and renewal processes for affordable health coverage which leaves them uninsured as well as among the “eligible, but not enrolled.”

ELIGIBILITY OF NON-CITIZENS

Definition of Citizenship, Non-citizen, and Qualified non-citizen – 42 CFR §435.4, §425.406; 45 CFR §155.20.

The NPRM provides that the term, *non-citizen*, has the same meaning as the term “alien,” as defined in 8 USC §1101(a)(3). It also provides that the term *qualified non-citizen* has the same meaning as the term “qualified alien” as defined at 8 USC §1641(b) and (c). And finally, the NPRM defines *citizenship* as including both citizens of the U.S. and non-citizen nationals of the U.S.

The term “alien,” dating from the nineteenth century and used throughout the Immigration and Nationality Act, 8 U.S.C., denigrates immigrants and has declined in usage. It is particularly inappropriate in a health and public benefits context, where to encourage the well-being of all, governments must strive to overcome barriers to immigrant participation and encourage their inclusion in services for which they are eligible. We support the change to “non-citizen” as well as the NPRM’s inclusion of “nationals” as part of the definition of “citizenship.” The latter may be helpful in ensuring rights when careless drafting confers eligibility on “citizens” but neglects to specifically include “nationals.”

- **We support the replacement of the term “alien” with the preferable term “non-citizen” which can now be used as a technical term of art in health care, increasing the effectiveness of outreach efforts to enroll immigrant families.**
- **We support including “nationals” within the term “citizenship.”**

Definition of Lawfully present – 42 CFR §435.4, 45 CFR §155.20

The definition of the term “lawfully present” can be a life-or-death matter, determining which immigrants will be eligible for coverage through the Exchanges, which children and pregnant women will be eligible for federal Medicaid and CHIP in about half the states, and which immigrants will be left with no option for affordable health coverage. Therefore, we support the most inclusive definition possible, and do not believe that administrative burden alone, such as ease of electronic verification through the SAVE system, should ever be dispositive in deciding whether a given immigration status is included in the definition. Moreover, an inclusive definition would better fulfill the ACA’s goal of expanding access to affordable health insurance, spreading the risk across a larger pool of covered individuals, and thereby decreasing the costs of health care for everyone and for the health care system in general.

The NPRM’s point of departure is the definition included in the July 1, 2010 State Health Officials letter regarding the state option to provide federal Medicaid and CHIP to lawfully residing children and pregnant women (CHIPRA option). Compared to the SHO, the NPRM has expanded the definition in modest ways, but also codifies a new restriction which is harsh and unjustifiable. HHS will apply the same definition of “lawfully present” to Medicaid, CHIP (for

states electing the CHIPRA option) and the Exchanges, which will help to streamline eligibility determinations for immigrants, as well as outreach and education to immigrant communities, and will make the program rules easier to learn and understand.

In general, we support the inclusion of the categories in the definition in the NPRM, with additional recommendations and comments on certain categories below.

We also recommend that, to avoid unnecessary burdens and increase administrative efficiency, the final rule should provide flexibility to states to include new lawfully present categories as they develop. Immigration law frequently changes, producing new statuses and document requirements.

- **We support the consistent application of the definition of “lawfully present” across programs (Medicaid, CHIP, and the Exchanges).**
- **We recommend that the regulation recognize that the list is not exhaustive.**

Nonimmigrant visa-holders – §435.4(2)

With regard to individuals with nonimmigrant visas, the NPRM includes all who are “in a valid nonimmigrant status, as defined by 8 USC 1101(a)(15) or otherwise under the immigration laws (as defined in 8 USC 1101(a)(17)).” This wording is inclusive of nonimmigrants such as individuals from the Compacts of Freely Associated States (also known as COFA migrants), and also converts the requirement in the SHO that agencies determine that the applicant has “not violated the terms of the visa,” to a requirement that the agency determine the visa to be “valid.” We support this change as eliminating a need for the agency to determine the terms of the visa and whether or not the terms have been violated. The change will assist states by easing administrative burden and will assist consumers by preventing enrollment delays.

- **We support the simplification in the definition of “nonimmigrants” considered to be lawfully present.**

Work-authorized immigrants – §§435.4(4)(ii), 435.4(4)(iii), 435.4(5)

The NPRM includes in the definition non-citizens who are “granted employment authorization under 8 CFR 274a.12(c).” This is a helpful way of capturing several of the currently eligible categories. However, the list of lawfully present categories fails to include the *individuals whose status makes them eligible to apply for work authorization*, but who have not sought such authorization due to cost or individual circumstances, including children and persons with disabilities who cannot work. The list of lawfully present individuals should include individuals whose immigration status makes them eligible for an Employment Authorization Document (EAD or “work permit”) *regardless of whether they have secured a work permit*. An immigrant’s lawful status does not depend on whether he or she has an EAD in-hand. Low-income families and individuals cannot easily afford the high fee to apply for and obtain a work permit, particularly if they do not otherwise need it. The time that it takes to obtain the document could also result in a delay in enrollment of vital health coverage.

RECOMMENDATION:

- Amend §435.4(4)(ii) as follows:

(ii) “Granted Temporary Protected Status (TPS) in accordance with 8 U.S.C. 1254a, and individuals with pending applications for TPS ~~who have been granted employment authorization;~~”

- Add the following category after §435.4(4)(iii):

(iii) Whose status makes them eligible to apply for work authorization under 8 CFR 274a.12;

- Amend §435.4(5) as follows:

(5) Is an individual with a pending application for asylum under 8 U.S.C. 1158, or for withholding of removal under 8 U.S.C. 1231, or the Convention Against Torture ~~who—~~
whose application has been accepted as complete;

~~(i) Has been granted employment authorization; or~~

~~(ii) Is under the age of 14 and has had an application pending for at least 180 days;~~

Immigrants granted a stay of removal – §435.4(4)(vii)

We are pleased that the proposed rule includes individuals granted an administrative stay of removal by DHS in the definition of "lawfully present." In response to the request for comments, we request that HHS also include individuals granted a stay of removal by an immigration judge, the Board of Immigration Appeals or by a federal court. There is no basis for distinguishing between these categories in terms of the form of relief they receive.

Non-citizens who have been granted a stay of removal by an immigration judge (IJ), the Board of Immigration Appeals (BIA), or a federal court are permitted to remain in the United States for the period of time that the stay is in effect, and like those granted an administrative stay, should also be considered lawfully present. Generally stays are issued in conjunction with the agency's or court's consideration of an appeal, a motion to reopen or to reconsider a removal case. Although a stay may issue automatically in some cases -- e.g., in conjunction with a timely appeal to the Board of Immigration Appeals or with a motion to reopen based on an in absentia removal order based on lack of notice - that is not a legitimate reason to exclude these non-citizens from the "lawfully present" definition. Rather, the stay is automatic in these cases as a basic due process protection. The critical facts underlying the stay are that the individual cannot be removed and has been granted permission to remain because he or she may ultimately prevail in the appeal or motion to reopen.

Individuals granted a stay of removal by a court, the BIA or an IJ may be able to present an order or other document issued by an immigration judge, the Board of Immigration Appeals, or a court issuing or referencing a stay; or a notice of appeal or other document evidencing a pending

appeal to the Board of Immigration Appeals in a removal case, or a pending motion to reopen a removal order based on lack of notice. The fact of a pending appeal to the BIA may also be confirmed by the Executive Office of Immigration Review (EOIR) 800 number.

RECOMMENDATION:

Amend §435.4(4)(vii) as follows:

Granted an ~~administrative~~ stay of removal ~~under 8 CFR part 241~~ by the Department of Homeland Security, an immigration judge, the Board of Immigration Appeals or by a federal court.

Individuals lawfully present in American Samoa – §435.4(8)

Individuals who are lawfully present in American Samoa under the immigration laws of American Samoa were previously eligible for Medicaid and CHIP through the SHO, but lacked explicit inclusion in eligibility for the Exchange. The provision at 45 CFR §155.20, incorporating the same definition for the health insurance Exchanges as is found at 42 CFR §435.4 for Medicaid, ensures the eligibility of these individuals in the Exchange and across the insurance affordability programs.

We support the inclusion in the health insurance Exchanges, through 45 CFR §155.20, of individuals who are lawfully present in American Samoa under the immigration laws of American Samoa.

Residents of the Commonwealth of the Northern Mariana Islands (CNMI)

Until recently, the Commonwealth of the Northern Mariana Islands (CNMI) controlled its own immigration process and border. On November 28, 2011 under the Consolidated Natural Resources Act (CNRA) of 2008 (PL 110-229), local control ended and the CNMI federalized its immigration system and border. Prior to this law, the CNMI had the ability to determine who was lawfully present, putting it in a unique position to determine who would be eligible for federal programs consistent with existing statutes.

The proposed rule seeks to remove the category of “lawfully present individuals in CNMI” that was previously listed in the July 2010 SHO letter. Since the SHO letter was issued before November 28, 2011, this category was needed to clarify eligibility for this category of individuals. With the federalization of the immigration system in effect, we agree that lawfully present individuals in CNMI will be covered by other lawfully present categories at §435.4.

We support the proposal to remove the category of individuals who are lawfully present in the CNMI in the proposed rule, and agree that they will be covered by other lawfully present categories at §435.4.

Immigrant survivors of trafficking – §435.4(9)

We are pleased that the NPRM includes all survivors of trafficking under the Victims of Trafficking and Violence Protection Act (TVPA) of 2000. The Department of Homeland Security (DHS) has authority to grant survivors of trafficking continued presence in the U.S. for the purpose of aiding in the prosecution of traffickers. This category of non-citizens already was eligible for Medicaid and CHIP under separate statute, 22 U.S.C. §7105(b), and therefore did not appear in the SHO. The NPRM correctly lists them for purposes of consistent implementation of eligibility for all survivors of trafficking under the TVPA across Medicaid, CHIP, and the Exchanges.

We support the inclusion of all victims of trafficking in persons, in accordance with the TVPA, in the definition of individuals who are lawfully present for purposes of eligibility for Medicaid, CHIP, and the Exchanges.

Exclusion of Individuals granted deferred action through the Deferred Action for Childhood Arrivals (DACA) process - § 435.4(10)

The NPRM proposes to exclude individuals who are lawfully present in the U.S. and have been granted deferred action under the Deferred Action for Childhood Arrivals (DACA) from the list of immigration categories that are to be considered “lawfully present” for eligibility for Medicaid, CHIP, and the ACA. Prior definitions of lawfully present used for eligibility for the Pre-Existing Condition Insurance Plan (PCIP), Medicaid and CHIP did not include this exception.¹ Yet in August 2012, an interim rule and CMS guidance carved out an exception to the definition of lawfully present for individuals granted deferred action under DACA.² Despite a swell of opposition from a broad group of stakeholders to the August 30 interim rule through the public comment process on the August 2012 interim rule as well as other avenues such as a change.org petition, this NPRM maintains this exclusion of individuals with deferred action status under DACA from the newly created definition of “lawfully present” at 45 CFR § 435.4. Based on this exclusion, individuals who are granted deferred action by the U.S. Department of Homeland Security, who are granted work authorization, are considered lawfully present for all other purposes, and who are otherwise eligible, inexplicably continue to be denied eligibility under Medicaid, CHIP, and all the programs in the ACA, including full-price health insurance in the exchanges, as well as the premium tax credits and cost-sharing reductions.

For the reasons discussed below, we oppose the exception that was added to the definition of lawfully present for DACA grantees at both 45 CFR § 435.4 and 45 CFR § 152.2. The exception lacks legal or policy justification and undermines the primary goal of the Affordable Care Act (ACA) - to expand access to affordable health coverage to millions of currently uninsured

¹ See 75 Fed. Reg. 45033 (July 30, 2010); Centers for Medicare and Medicaid Services’ State Health Officials Letter #10-006 (July 1, 2010), available at <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf>

² See 45 CFR § 152.2(8); 77 Fed. Reg. 52616 (Aug. 30, 2012); Centers for Medicare and Medicaid Services State Health Officials’ Letter #12-002 (Aug. 28, 2012), available at <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SHO-12-002.pdf>.

individuals.³ We recommend deletion of subsection 45 CFR§435.4(10) as well as subsection 45 CFR§ 152.2(8).

The proposed rule makes arbitrary and capricious distinctions.

HHS has failed to provide a sufficient rationale for distinguishing between individuals granted deferred action through the DACA process and those granted deferred action through another exercise of discretion. Under the discretion of the Secretary of DHS, deferred action may be available to a range of individuals in the United States. Individuals granted deferred action have long been considered to be “lawfully present” by federal agencies as well as Congress.⁴ In fact, individuals granted deferred action based on grounds other than DACA remain eligible under the definition of “lawfully present” at § 435.4(4)(vi) (*see also* 45 CFR § 152.2(4)(vi)).

As recently as January 16, 2013, the press secretary for U.S. Citizenship and Immigration Services (USCIS) stated that “[t]he relief an individual receives through the Deferred Action for Childhood Arrivals process is the same for immigration purposes as that obtained by any other person who receives deferred action.”⁵ And on January 18, 2013, USCIS clarified that “[a]n individual who has received deferred action is authorized by the [DHS] to be present in the United States, and is therefore considered by DHS to be *lawfully present* during the period deferred action is in effect”⁶ (emphasis added).

It is therefore unreasonable and unfair to distinguish between individuals granted deferred action through the DACA process and individuals granted deferred action for other reasons. Since this population was granted a form of relief already considered by HHS and other agencies to be “lawfully present,” the decision to exclude these particular individuals from eligibility is arbitrary and capricious.⁷

³ For full comments opposing the DACA restriction, please see National Immigration Law Center, “CMS-9995-IFC2 – Comments on CMS’ Interim Final Rule Changes to Definition of ‘Lawfully Present’ in the Pre-Existing Condition Insurance Plan Program of the Affordable Care Act of 2010” October 29, 2012, *available at* <http://nilc.org/facts-health.html>.

⁴ *See, e.g.*, Social Security Administration regulations at 8 C.F.R. §1.3. The Real ID Act similarly defines “approved deferred action status” as one form of “lawful status.” [Pub.L. 109-13](#), § 202(c)(2)(B)(viii)(May 11, 2005), codified at 49 U.S.C. § 30301 note.

⁵ Craig LeMoult, NPR All Things Considered, “Some States Put Brakes On Driver’s Licenses For Illegal Immigrants,” *available at* <http://www.npr.org/2013/01/16/169526603/some-states-put-brakes-on-drivers-licenses-for-illegal-immigrants>.

⁶ United States Citizenship and Immigration Services, “Frequently Asked Questions About Deferred Action for Childhood Arrivals,” *available at* [http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD;);

USCIS also goes on to clarify that deferred action under the DACA process is identical to deferred action granted under other processes (A7: “Deferred action for childhood arrivals is one form of deferred action. The relief an individual receives pursuant to the deferred action for childhood arrivals process is identical for immigration purposes to the relief obtained by any person who receives deferred action as an act of prosecutorial discretion.”).

⁷ For the reasons expressed in the National Immigration Law Center’s comments on the interim final rule, CMS-9995-IFC2, *supra* n.1, we believe that the interim final rule was promulgated improperly under the Administrative Procedure Act, 5 U.S.C. § 551; *see also* American Civil Liberties Union, “Comments on the Centers for Medicare & Medicaid Services’ (CMS) Interim Final Rule Changes to the Definition of ‘Lawfully Present’ in the Pre-Existing Condition Insurance Plan Program of the Patient Protection and Affordable Care Act of 2010,” (Oct. 29, 2012),

The proposed rule leads to higher health care costs, increased administrative burden, and unintended consequences.

Excluding individuals granted deferred action under the DACA process from Medicaid, CHIP, and the health insurance exchanges does not eliminate their need for health care; it only shifts the costs of their care to health care providers and local and state governments. Including DACA recipients, however, would mean allowing a population of generally younger, healthier individuals to pay their fair share for health insurance in the exchanges; spread the risk across a larger pool of covered individuals; and thereby lower the cost of health care for everyone. The negative consequences of excluding this relatively healthy population from accessing health care through the exchanges supports the conclusion that HHS's purported reason for the exclusion is irrational.

In addition, instead of creating a more streamlined eligibility and enrollment system under the ACA, the NPRM will introduce additional complexity in eligibility rules and confusion for state agencies, eligibility workers, patient navigators, consumer assistance programs, certified application counselors, health care providers, and other entities that will assist individuals applying for health insurance. The exception will exacerbate the confusion as states reach out to immigrant communities to encourage them to enroll. States will now have to train patient navigators, consumer assistance programs, eligibility workers, and certified application counselors about the distinction between those granted deferred action under the DACA process and those granted deferred action on other grounds.

The proposed rule sends mixed messages to lawfully present immigrants.

The proposed rule also contradicts the purposes and goals of the DACA program. One of the motivating factors for the DACA program is to integrate individuals who meet certain requirements into the fabric of their communities, despite their previously undocumented status. As the President stated in his remarks at the Rose Garden on June 15, 2012, when he announced the new DACA policy, “[t]hese are young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper.”⁸ The President and DHS singled out this group of immigrant children and youth as a particularly compelling group of individuals who do not fit under the administration’s enforcement priority goals and should therefore be granted immigration relief. As the Secretary of DHS stated, “many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.”⁹

available at http://www.aclu.org/files/assets/aclu_daca-aca_comments_final.pdf; Mexican American Legal Defense and Educational Fund, “Comments on the Determination to Exclude Holders of Deferred Action through the Deferred Action for Childhood Arrivals Process from Eligibility for the Pre-Existing Condition Insurance Plan Program, the Affordable Insurance Exchanges, Premium Tax Credits, and Cost-Sharing Reductions under the Patient Protection and Affordable Care Act,” (Oct. 29, 2012).

⁸ “Remarks by the President on Immigration,” President Barack Obama, June 15, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

⁹ “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” Memorandum from Secretary of Homeland Security, Janet Napolitano, June 15, 2012, available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

The DACA program ensures that eligible individuals can live in the United States without fear of deportation, and that they are able to work with authorization so that they might provide for themselves and their families. In order to ensure that they are healthy and productive at work, these individuals need access to affordable health insurance. Despite the President and DHS's recognition of these individuals' circumstances, the proposed rule undermines their ability to participate and contribute fully to the economy and to their communities.

RECOMMENDATION:

For the reasons discussed above, we recommend deletion of subsection 10 of 42 CFR§435.4:

~~(10) Exception. An individual with deferred action under the Department of Homeland Security's deferred action for childhood arrivals process, as described in the Secretary of Homeland Security's June 15, 2012 memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (9) of this definition.~~

In order to ensure consistency, we also recommend deletion of subsection 8 of 42 CFR§152.2:

~~(8) Exception. An individual with deferred action under the Department of Homeland Security's deferred action for childhood arrivals process, as described in the Secretary of Homeland Security's June 15, 2012, memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition.~~

OTHER ELIGIBILITY AND ENROLLMENT ISSUES FOR NON-CITIZENS

Declaration of non-citizen eligibility by "someone acting responsibly" – §435.406(a)(3), §457.320(d)

We SUPPORT the provision at §435.406(a)(3) and §457.320(d) that the declaration of citizenship or immigration status may be made by an adult member of the individual's household or an authorized representative, or someone acting responsibly for an applicant who is a child or is incapacitated may declare the applicant's immigration status, as crucial for ensuring immigrant families can easily apply and enroll in affordable coverage.

Immigrant families often do not resemble the traditional two-parent household with children; due to cultural or other reasons, other family members may be acting as caretakers for eligible members. This provision will help to ensure eligible members of immigrant families can easily enroll.

State option to provide Medicaid and CHIP to lawfully residing non-citizen children or pregnant women - §435.406(b), §457.320(c)

We strongly SUPPORT ensuring that Section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) is implemented through regulation in this NPRM. In particular, we SUPPORT the requirement that states electing this option must provide the same covered benefits to eligible non-citizens as provided to citizens. §435.406(c)

Types of acceptable documentary evidence of citizenship - §435.407

We SUPPORT this provision as it would significantly streamline the procedures for the use of documents to prove citizenship. Along with improvements in §435.406 and §435.956, this provision would lessen the burden of the citizenship verification process for states and consumers for the reasons discussed below.

The vast majority of applicants will be able to verify their citizenship through the use of electronic data sources. However, for those individuals who will have to provide documentary evidence, we strongly support allowing them to provide copies of documents unless the documentation is questionable or inconsistent with other information. Currently states have to have processes that allow applicants to make in-person visits to the agency offices so that a staff person can view original documents. They have to have procedures to securely return original vital documents such as passports that are mailed with applications. These processes are burdensome for states. States had to train frontline staff to view and process documents that come in and they have to deal with an increased volume of people coming in to state offices, which contributes to long lines and crowded waiting rooms. Consumers are also burdened by having to visit agencies during office hours that often conflict with work schedules or by having to mail in their vital documents that would be difficult and costly to replace if they were to be lost in the process. These burdensome processes will no longer be necessary now that applicants will be able to mail, fax and scan copies of their documents to prove their citizenship status.

The proposed provision also streamlines the acceptance of affidavits for citizenship. The proposed change says that an affidavit can be used when the consumer does not have one of the other documents that can be used to prove citizenship. It also only requires one affidavit; while the existing regulation requires two affidavits and includes a restriction that only allows one of the affidavits to be completed by a relative of the applicant. Moreover, states no longer must obtain a separate affidavit from the applicant/beneficiary or other knowledgeable individual such as a guardian or representative explaining why documentary evidence does not exist or cannot be obtained. We strongly support these changes. Given the primary reliance on electronic verification, we do not anticipate that the affidavits will be needed by many individuals but it is important that the rules and process for the collection of affidavits for those who do need them be streamlined.

The proposed provision also changes the identity affidavit requirements. Currently there is an age restriction on the use of the affidavit for identity. Allowing the affidavit to be used for adults

will be very important to help ensure that the application process does not become overly burdensome for the millions of adults that will become newly eligible for coverage in 2014. Many adults do not have documents such as drivers licenses or passports that will satisfy the identify verification requirement, the affidavit will allow those individuals satisfy this requirement without unneeded extra steps. This proposed change along with increased emphasis on states using electronic verification from data available through other government agencies such as public assistance programs, law enforcement, IRS and others will help to ensure that the verification of identity does not slow down the rapid eligibility determinations expected to occur in 2014 and beyond. We also strongly SUPPORT lifting the restriction on using affidavits for both citizenship and identify. While we don't believe many individuals will require both affidavits, the affidavits may be the only way some vulnerable individuals such as homeless persons can verify their citizenship and identity.

Assistance with application and renewal - §435.908

Due to confidentiality and privacy concerns of immigrant families, we SUPPORT the following two requirements:

- 1) That Certified Application Assisters must be “trained in and subject to regulations relating to the safeguarding and confidentiality of information” at §435.908(c)(1)(iii)
- 2) That the state must create procedures that require:
 - a) Individuals to provide authorization to application assisters to receive confidential information about the individual. §435.908(c) (3)(ii)(B)
 - b) That the agency does not disclose confidential applicant or beneficiary information to an application assister unless the applicant or beneficiary has authorized the application assister to receive such information. §435.908(c) (3)(ii)(C)

These protections will help allow immigrant families to feel assured that their personal information will not be shared without their clear and explicit permission and that they will know where and for what purpose their information is being shared. In addition, these protections will help prevent individuals from fraudulently acting as application assisters, especially those who specifically target immigrant communities.

We SUPPORT that these Medicaid confidentiality requirements apply to certified application assisters enrolling individuals in CHIP (at 45 CFR§457.340(a)) as well as in the Exchange (at 45 CFR§155.225(a)).

We also RECOMMEND the final rule require the state to certify application assisters through a process that includes training in how to provide culturally and linguistically appropriate services, especially to vulnerable low-income immigrant families.

Use of Social Security Number - §435.910(g)

The NPRM requires that “the agency must verify the SSN furnished by an applicant or beneficiary with SSA to ensure the SSN was issued to that individual, and to determine whether any other SSNs were issued to that individual.”

We have the following concerns with this imposing this requirement as currently written:

- 1) The purpose of this verification is unclear as currently described.
- 2) There is no procedure instructing how the agency must conduct this verification of SSN.
- 3) There is no procedure instructing the agency what procedures it must follow in the event that another SSN is found to have been issued to the individual.
- 4) There is no requirement that the agency must provide clear notice to the applicant or beneficiary if there is a problem during this verification.
- 5) There is no requirement that the applicant or beneficiary be given a reasonable opportunity period to correct a non-verification of his/her SSN.
- 6) There is no requirement that the state must provide clear instructions as well as assistance to the applicant or beneficiary as to how to correct his or her SSA records in the event of non-verification.

RECOMMENDATION:

We recommend deletion of Section 435.910(g) and that future rulemaking fully address the requirements for verification of SSN, in particular what protections and procedures the state is required to provide an applicant or beneficiary in the event of a problem with his or her SSN verification.

Determination of Eligibility - §435.911

We SUPPORT the requirement that the Medicaid agency must “promptly and without undue delay consistent with the timeliness standards established under §435.912, furnish Medicaid to each individual whose household income is at or below the applicable modified adjusted gross income standard.”

This reaffirms Section 1137(d) of the Social Security Act, a long-standing requirement of the Medicaid program. However, in practice, there have been reports that despite an applicant providing all relevant eligibility documentation, including immigration status, there is an extended delay or no action taken by the Medicaid agency on non-citizens’ applications without notice. This results in eligible individuals in immigrant families unnecessarily remaining uninsured or unable to seek required medical assistance at the time needed.

To help ensure eligibility procedures comply with this provision or are updated in order to comply with this provision, we recommend that HHS issue sub-regulatory guidance to state Medicaid agencies affirming this long-standing requirement and clarifying the agencies' notice and timeliness obligations to non-citizen applicants.

Authorized Representatives - §435.923(d)(2)

We SUPPORT the requirement that an authorized representative “must agree to maintain, or be legally bound to maintain, the confidentiality of any information regarding the applicant or beneficiary provided by the agency.”

Reassurances that information provided to the Medicaid agency must comply with existing confidentiality rules and that this requirement also applies to those acting as certified application assistors or Authorized Representatives helps to reduce the fears and concerns immigrant families have when applying for Medicaid, even for citizen family members, that their information will be shared for immigration enforcement purposes. These fears and concerns about the confidentiality of their information deters immigrant families from seeking benefits even if they are aware there are eligible members in the family.

Documentary evidence of immigration status – § 435.956(a)(1)

Under §435.956(a)(1), the state must verify citizenship and immigration status electronically per and if unable to do electronically, the state may require documentary evidence in accordance with §435.952(c)(2)(ii).

Fortunately, the NPRM makes it clear that when documentary evidence for citizenship status is required, the state must accept a photocopy, facsimile, scanned or other copy of a document. See §435.407(f). However, there is no similar requirement in the NPRM for a state to accept non-original documentary evidence of immigration status. The final rule should include a similar provision to explicitly require a state to accept non-original documentation for demonstrating satisfactory immigration status. This is consistent with section 1137(d) of the Social Security Act and with current practice by most Medicaid agencies. Most importantly, ensuring non-original documentary evidence of immigration status must be accepted will prevent erroneous denials and delays. Without such clear guidance in the final rule, eligible non-citizens applying for Medicaid and the Exchange will unfairly and disproportionately face delays and denials.

RECOMMENDATION:

- 1) Add a new section entitled “Types of acceptable documentary evidence of immigration status” to the final rule that is similar to § 435.407 Types of acceptable documentary evidence of citizenship. The new section for documentary evidence of immigration status would include the same requirement under §435.407(f).

- 2) Amend § 435.956(g)(1) instructing the state to accept a photocopy, facsimile, scanned or other copy of a document for documentary evidence of immigration status.

Use of information and requests of additional information from individuals – Special Circumstances Exception - §435.952(c)(3)

The NPRM requires states to permit self-attestation for all eligibility criteria when documentation does not exist, such as for homelessness, domestic violence, or natural disaster, with the exception of citizenship and immigration status. For these eligibility criteria, the rule requires documentation, with the rationale that documentation is specifically required under title XIX. This proposal is likely to create severe consequences to individuals needing access to health care in an emergency. Immigrants caught in a natural disaster such as a devastating hurricane, or those who quickly flee home because of domestic violence, may present themselves for health coverage and care without documentation of their immigration status. They should be permitted to attest to their status and obtain benefits until such time as the status can be verified.

The requirement of immigration status documentation in special circumstances is harsh and is inconsistent with other elements of the ACA regulatory scheme. The ACA's policy of administrative streamlining permits an applicant to declare immigration status by entering an identifying number into a web portal, so the requirement of documentation in special circumstances is unduly burdensome. Even when an applicant in special circumstances cannot provide an identifying immigration status number, the rules should allow attestation in an emergency, and prohibit delaying or denying benefits pending later verification of income and other eligibility criteria.

We suggest that to promote program integrity, HHS require states to establish oversight mechanism such as spot-check verification of eligibility, as permitted at §155.320(d) where attestations of eligibility for and enrollment in employer-sponsored insurance are allowed. At a minimum, the special circumstance of major disaster should be designated by HHS rules as an event triggering an automatic waiver of other statutory verification requirements, as is provided for by the Stafford Act of 1988 as implemented through widespread federal and state disaster assistance and emergency preparedness plans.

RECOMMENDATION:

Amend §435.952(c)(3) to delete the exception that requires states to collect documentary evidence of eligible immigration status under special circumstances such as natural disaster, domestic violence, and homelessness.

Verification of other non-financial information - §435.956

In general, we SUPPORT the clear explanation of the verification process that the state must comply with in order to verify citizenship and immigration status that is outlined in this provision. As discussed in more detail below, we SUPPORT the specific reference to the requirement that the state must comply with section 1137(d) of the Social Security Act. We also SUPPORT the requirements that:

- a) a state must provide an applicant or beneficiary a reasonable opportunity period to provide proof of immigration status if electronic verification is unsuccessful through the “electronic service” (§435.956(a)(2)(i)) and;
- b) a state may not “delay, deny, reduce or terminate benefits” for an individual who is otherwise eligible for Medicaid during the reasonable opportunity period.” (§435.956(a)(3)).

Below are recommendations on specific verification requirements included in this provision:

A. Use of federal data services hub for verification of other non-financial information – §435.956(a)(1)

This provision provides that states must verify immigration status through the electronic federal data services hub if available, and that if the federal electronic service is not available, states may verify directly with the U.S. Department of Homeland Security (DHS) in accordance with §1137d of the Act. Prior to the ACA, most Medicaid agencies had Memorandums of Understanding with DHS to verify immigration status of applicants and beneficiaries and verified immigration status directly with DHS through the Systematic Alien Verification for Entitlements (SAVE) Program. Yet as part of implementation of the ACA, HHS will now provide states access to a federal electronic data services hub - a single electronic verification point for federal data in order to reduce each state’s administrative burden and costs of seeking information individually from DHS, the Social Security Administration (SSA), and the Internal Revenue Service (IRS).

Although this provision instructs states to verify immigration status directly with DHS when the electronic data services hub is unavailable, it would be helpful to allow states to verify immigration status with DHS in other circumstances. Because the electronic data services hub is in its inception, it is likely there will be unexpected delays, transmission errors, incorrect or incomplete data transfers as well as interruption of service of the data services hub especially during the first year of implementation. As a result, we are concerned that in circumstances other than when the hub is “unavailable,” a state may either delay or wrongly deny eligibility due to the inability to verify immigration status through the electronic hub.

We RECOMMEND that this provision in the final rule is amended to be more specific as to what “when the electronic hub is unavailable” encompasses. We also RECOMMEND that the provision clearly requires states to verify immigration status directly with DHS, as they previously had done, whenever there may be delays, interruption of service, or problems of reliability with the electronic data services hub in addition to when the electronic service is simply not available. This will help ensure non-citizens are not disparately impacted by potential problems with the federal data services hub because verification of immigration status relies

more heavily on access to a federal database to confirm eligibility (as compared to citizenship or income criteria). We also RECOMMEND that the final rule requires states to have a formal agreement with DHS that provides the applicant with the due process and privacy protections as set forth in §1137d of the Act.

B. Promptness in providing reasonable opportunity period - §435.956(a)(2)(i), §155.315(f)

In response to HHS’ request for comments in the preamble at p. 4616 on how much time must elapse before the reasonable opportunity period is triggered, we RECOMMEND that the reasonable opportunity period must begin if a state fails to determine eligibility “promptly and without undue delay” rather than after a specific number of days. As eligibility determinations are moving towards real-time verification and the goal of the Affordable Care Act is to enroll every individual who is eligible for coverage, individuals are likely to be notified immediately that additional information is needed to complete their application or renewal. There is no valid reason to unnecessarily allow a state to wait an arbitrary number of days before notifying the applicant of the need for additional information and to start the clock for the individual’s reasonable opportunity period.

We also strongly recommend that the trigger for the reasonable opportunity period is the same for Medicaid and the Exchange. As currently proposed, the Exchange’s reasonable opportunity period would begin after two days while currently under Medicaid, the trigger is based on the standard of “promptly and without undue delay.” In order to avoid confusion and simplify enrollment procedures across programs so that it is seamless for the consumer, enrollment rules such as triggers for the reasonable opportunity period as well as other similar due process protections should be consistent between Medicaid and the Exchange.

We SUPPORT finalizing the proposal at §435.956(a)(2) that the reasonable opportunity period is triggered if verification of citizenship or immigration status cannot be concluded “promptly.”

RECOMMENDATION:

Amend §155.315(f) to require the Exchange to provide the reasonable opportunity period if verification of citizenship or immigration status cannot be concluded “promptly.”

C. Providing benefits during reasonable opportunity period - §§435.956(a)(2)(ii), 435.1008(c)

The NPRM strengthens the language of the rule requiring provision of benefits during a reasonable opportunity period, making that consistent with §1137d of the Act, which mandates that the agency “may not delay, deny, reduce or terminate benefits . . . during the reasonable opportunity period...” In addition, the NPRM adds §435.1008(c), making FFP available to the State for this purpose. We support the incorporation into 42 CFR of these statutory rights that have long been critical to meeting the health care needs of non-citizens, who sometimes encounter delays in verification due to inaccurate databases, changes in status, and lost documents.

- We SUPPORT revised language of §435.956(a)(2)(ii) that is now consistent with longstanding statutory rights.
- We SUPPORT §435.1008(c) providing FFP for this purpose.

D. Re-verification of immigration status at renewal – 435.956(a)(3)

We SUPPORT the requirement that the Medicaid agency “may not re-verify or require an individual to re-verify citizenship at renewal.” §435.956(a)(3).

However, we suggest one amendment to this provision. We RECOMMEND ADDING the requirement that a state may not re-verify immigration status at renewal as well. Like citizenship, immigration status for most lawfully present immigrants does not change from year to year; nor does a non-citizen have to renew his or her status every year with the Department of Homeland Security nor does she lose her status from year to year. Furthermore, a beneficiary whose immigration status changes is already obligated to report that change in status to the Medicaid agency under existing change reporting requirements that apply to every beneficiary.

Allowing the Medicaid agency to re-verify immigration status of a non-citizen beneficiary at renewal will likely cause unnecessary delay or wrongful denial of benefits and likely gaps in coverage. This disparate impact on non-citizens at the time of renewal could also deter other immigrant families from applying as they see families like themselves having challenges in keeping their Medicaid coverage when those families are clearly eligible.

RECOMMENDATION:

Amend §435.956(a)(3) to add “or immigration status”

(3) The agency must maintain a record of having verified citizenship or immigration status for each individual, in a case record or electronic database. The agency may not re-verify or require an individual to re-verify citizenship *or immigration status* at a renewal of eligibility or subsequent application following a break in coverage.

E. Retention policy for immigration and citizenship records - §435.956(a)(3)

In response to HHS’ request for comments in the preamble regarding how long states should be required to maintain data so that citizenship status does not have to be re-verified, the use of electronic verification should allow states to easily and cost-effectively retain citizenship status data indefinitely (while still permitting archival of older records). For individuals who are not able to have their status verified through electronic means, we RECOMMEND that states be required to retain documentation of citizenship or immigration status for a period no less than ten years.

Finally, in response to HHS’ request for comment in the preamble (at page 4616 of the NPRM) on the length of time that application records of an immigrant who has Temporary Protected

Status (TPS) or another temporary status shall be retained by a state, we recommend that the final rule does not create a special retention period for an agency for non-citizens with TPS or other temporary statuses. First, it is misconception that individuals in these “temporary” statuses are residing in the U.S. for a short period of time. For example, many individuals with TPS status have resided in the U.S. for more than ten years and their status is automatically extended by DHS. In addition, other non-immigrant visas such as H1-B visas, allow an individual to work in the U.S. for as long as the employer is willing to sponsor the employee. Second, making unnecessary distinctions and different rules for different immigration statuses will create additional administrative burden and costs especially in the first step of identifying which of the many immigration status would fall under such a special rule. It is actually unclear why HHS would consider creating a special retention period for certain immigrants as there is no rational basis for doing so except for common misconceptions of how immigration law operates for non-citizen applicants and beneficiaries. As discussed already, applicants and beneficiaries have an existing duty to report significant changes which would include a change in immigration status,

We SUPPORT consistency in retention policies between citizenship and immigration status records, which should be indefinitely, and regardless of the seemingly temporal terms of an individual’s immigration status.

F. Assistance with obtaining an SSN - §435.956(g)(1)(i)

We strongly SUPPORT reaffirming the existing Medicaid requirement that a state must “assist the individual in obtaining an SSN, in accordance with §435.910” during the reasonable opportunity period. In particular we SUPPORT ensuring the state provide this assistance if the SSN is “relevant to the verification of the individual’s status.”

However, there may be Medicaid eligible individuals who are lawfully present but are not eligible for an SSN. If these individuals have other documentation of their lawful status, the state should be required to accept this documentation to verify immigration status. The state should then assist the individual to obtain a non-work SSN for the purposes of applying for benefits as is already required by 45 CFR§435.910 and not “delay, deny reduce or terminate” an individual who is lawfully present and is awaiting a non-work SSN from SSA.

However, immigrant applicants to Medicaid have reported difficulties and delays in obtaining a non-work SSN and that neither the Medicaid agency nor SSA can provide clear guidance on the process to apply and obtain a non-work SSN. Their Medicaid application is either denied because they had no way to obtain the non-work SSN or that they received their non-work SSN too late and have to now re-apply. As a result, we recommend that this provision in the final rule remind states that per 45 CFR § 435.910(h)((1)(i) and 435.910(h)(1)(ii) (as amended by the March 23, 2012 Final Rule), a state can issue a Medicaid identification number in lieu of a non-work SSN for otherwise eligible individuals and that doing so may help avoid unnecessary delays in providing coverage in these special circumstances.

G. Consistency of reasonable opportunity period across programs - §435.956(g)(2)(i)

The NPRM provides a 90-day period for resolving inconsistencies in verification of either citizenship or immigration status. Similar to our reasons above for consistency in retention policies between citizenship and immigration records, consistency in the length of time of the reasonable opportunity period will be simpler for states to administer, resulting in greater fairness for immigrant applicants.

We support the consistent timeframe of 90 days for resolving inconsistencies in verifying both citizenship and immigration status.

Children covered under presumptive eligibility - § 435.1102(d)(1)

We commend HHS for recognizing that, even when there is a shift towards a streamlined application process to provide real-time eligibility determinations, presumptive eligibility (PE) will continue to play an important role in ensuring Medicaid applicants receive immediate health care coverage.

However, we are concerned this section allows a State agency, for purposes of making a PE determination, to require attestation (by the applicant or another person with reasonable knowledge) that the individual is (1) a citizen or national of the United States or in satisfactory immigration status; or (2) a resident of the state. HHS is seeking comment on whether this should be a state option or a requirement. We believe it should be neither.

Neither the statute nor previous CMS guidance on presumptive eligibility include an attestation of immigration status. Sections 1920(b)(1)(A) and 1920A(b)(2)(A) provide that the qualified provider or entity determines eligibility for the pregnant woman or child on the “basis of preliminary information, that the family income of the (woman or child) does not exceed the applicable income level of eligibility under the State plan.” Furthermore, § 2001(a)(4) of the ACA, adding new § 1920(e), extends PE to other groups “in the same manner as the State provides for such a period under this section or section 1920A.”

Any requirement that a PE application include an attestation of immigration status will only serve to deter potentially eligible individuals from successfully applying. Further, the purpose of PE is to get individuals into care quickly while further determinations are made. Given the complexity of determining immigration status, neither the “qualified entity” staff nor the applicant is necessarily knowledgeable about the immigration eligibility rules, and we are concerned that a qualified entity may wrongly turn eligible applicants from PE or deter them from applying. Immigration status is appropriately addressed when an individual submits a complete application.

RECOMMENDATION:

Strike § 435.1102(d)(1).

EXCHANGE

Consumer assistance tools and programs of an Exchange - §155.205(d)

It is more likely immigrant and LEP individuals will seek as well as need consumer assistance to enroll in Medicaid or the Exchange. We strongly SUPPORT the requirement that assisters must be trained in QHP options, insurance affordability programs, eligibility, and benefits rules and regulations. In particular, assisters must be trained on the complex and different immigrant eligibility rules in each program if they are to accurately screen and assist the entire household for coverage options. One of the first barriers to enrollment eligible individuals in immigrant families face is they are immediately told they are not eligible because of they are not citizens or they are incorrectly screened for a health program because of lack of knowledge of the immigrant eligibility rules. Training of assisters should also be culturally-sensitive and linguistically-appropriate to address the needs of limited-English proficient consumers and to help overcome the specific concerns or barriers that prevent immigrant families from enrolling. Thus, in order to ensure that immigrant families are not turned away before they even start the application process, anyone responsible for screening and determining eligibility must demonstrate accurate knowledge of the immigrant eligibility rules between programs and as a requirement for certification.

We also SUPPORT the provision, §155.205(d)(2), requiring the Exchange to refer potential applicants to consumer assistance programs in the state when available and appropriate. If there are options in the state for immigrant families to receive assistance from trusted community-based organizations, the Exchange should have close referral relationships with these CBOs, understanding that such CBOs often lack capacity to provide additional services without compensation. The Exchange must not consider the CBO to be “available and appropriate” unless the CBO has indicated willingness and capacity to provide such assistance to consumers.

RECOMMENDATION:

Amend §155.205(d)(1) to require that any individual providing a consumer assistance function under this section be trained in provision of culturally-sensitive and linguistically-appropriate services, prior to providing such assistance.

Eligibility standards for exemptions from the shared responsibility payment - §155.305

In the Preamble p. 4636, HHS announces that eligibility standards for exemptions under §5000A of the IRC will be discussed in future regulations.

We RECOMMEND that future rulemaking clarify that the Exchange will not be responsible for issuing certificates of exemption from the shared responsibility payment for exempt non-citizens, consistent with 26 CFR §1.5000A-3(k), which provides that such claims will be available exclusively from the Internal Revenue Service through the tax-filing process.

Requirement for Exchange to properly determine eligibility for non-citizens with incomes below 100% FPL – 45 § CFR 155.345(f)

Due to existing eligibility criteria, non-citizens whose household income is below 133% FPL and are ineligible for Medicaid due to their immigration status are eligible and may enroll in the Exchange as well as the advance premium tax credit and cost-sharing reductions. Because the income levels established in the ACA for premium tax credits begin at 100% FPL, Congress enacted a special rule that permits non-citizens ineligible for Medicaid due to immigration status and whose income is below 100% FPL to be eligible for advance premium tax credits and cost-sharing reductions and that the credits be calculated based on actual household income.

We SUPPORT the requirement that the Exchange must develop enrollment procedures that easily allow eligible non-citizens with incomes below 133% FPL to enroll in a QHP and they are accurately determined for premium tax credits and cost--sharing reductions, including those whose income falls below 100% FPL. In particular, we SUPPORT that the Exchange must not request any eligibility information that may have been already provided to another agency and that clear notice is provided to these individuals.

Special enrollment periods - 45 CFR §155.420(d)(3)

We SUPPORT the requirement that the Exchange must allow a qualified individual to enroll or change from QHP to another if the “qualified individual who was previously not a citizen, national, or lawfully present individual gains such status” and that change in immigration status is listed among the triggering events for a special enrollment period.

Because an individual may become newly lawfully present under immigration law as determined by the U.S. Department of Homeland Security or court order at any time during the year, it is important that such an individual, if otherwise eligible for the Exchange and applicable tax credits, be able to apply and enroll for affordable health care at the time he or she becomes newly eligible rather than requiring that he or she remain uninsured and wait until the open enrollment period.

Employer appeals process – §155.555(h)

We strongly SUPPORT the requirement that neither “the Exchange nor the appeals entity may make available to an employer any tax return information of an employee as prohibited by §6103 of the Code.” It is important that the existing IRS confidentiality protections for a taxpayer are not eroded in any way as a result of implementation of the ACA. These confidentiality protections encourage individuals in the U.S., regardless of immigration status, to fulfill their tax obligations.

Employer appeals process – §155.555(g)(2)(iii)

We oppose the requirement that the appeals entity must provide the employer an opportunity to review “other data used to make the determination described in §155.305(f) or (g), to the extent allowable by law, except the information described in paragraph (h) [referring to Section 6103 of the IRS Code] of this section.”

As currently written, “other data used to make the determination” is overly broad and vague. It is unclear if the employer has a right to review eligibility information only for their employee or the employee’s entire household. It is also unclear what other information other than the employee’s income and the other specified data listed in §155.555(g) would be relevant to an employer for an appeal in the Exchange. Finally, the qualifier “to the extent allowable by law” is ineffective because the data to be shared is not specified and thus it is unknown which specific laws apply and what protections may or may not exist under the current applicable law.

RECOMMENDATION:

Delete §155.555(g)(2)(iii)

~~(iii) Other data used to make the determination described in § 155.305(f) or (g), to the extent allowable by law, except the information described in paragraph (h) of this section.~~

LANGUAGE ACCESS BARRIERS

We greatly appreciate the recognition and inclusion of Title VI and non-discrimination protections in all aspects of the eligibility and enrollment process throughout the NPRM. We strongly SUPPORT that these protections are mandated on the states in the final rule as these are federal protections that must be enforced by federal agencies. These protections must also be mandated to ensure consistency between the states so that an individual’s civil rights does not vary based on geography. Moreover, based on evidence of health disparities and low enrollment rates of certain populations, HHS and the states must improve the existing enrollment and renewal processes to address barriers faced by LEP individuals, racial and ethnic minorities, women, LGBT individuals, as well as persons with disabilities.

Below we provide comments and recommendations that support and further strengthen language access and non-discrimination protection. As many immigrant families have members who are LEP and their immigration status make them and their citizen family members vulnerable to discrimination, these protections are critical to ensure all eligible individuals in immigrant families are able to enroll and stay in affordable health coverage options provided by the ACA.

A. LEP access to the hearing system - § 431.205(e)

The NPRM requires that the hearing system be accessible to LEP individuals. We appreciate this rule, and believe it could be improved and strengthened with specific implementation instructions to states, either in this regulation or in sub-regulatory guidance. To protect LEP and other vulnerable appellants, final rules or guidance should further specify that the hearing system must not discriminate against any individual on the basis of race, color, national origin, language, or any other prohibited ground.

We support §431.205(e) requiring accessibility of the hearing system to LEP persons.

Recommendation: Amend the rule with specific standards for accessibility, and with prohibitions against discrimination based on race, color or national origin.

B. LEP access to hearing notices - §431.206(b) and (e)

The NPRM requires that hearing notices be in writing and be accessible to LEP individuals. We support this proposal and ask that it be strengthened with specific mandated translation standards, either in regulation or guidance. Further, since some agencies may not have comprehensive language data on all individuals, if HHS requires taglines in at least 15 languages on all notices, then many LEP individuals will be informed that the notice is important and how to access the information by requesting a written translation or receiving oral communication assistance. Taglines are cost-efficient for states.

We support the requirements at §431.206(b) and (e) that hearing and appeals notices be in writing and be accessible to individuals who are LEP.

Recommendation: Amend §431.206(e) by adding the following specific requirements: for any individual the agency knows or should reasonably know is LEP, information must be provided in that individual's language; and for all notices, the agency must provide taglines in at least 15 languages informing individuals of the availability of written translations or oral assistance to understand the information provided and a toll-free telephone number to request assistance.

C. Availability of program information - 435.905(b)(1) and (3)

The NPRM requires program information to be available to LEP persons at no cost to the individual, to include oral interpretation, written translations, and taglines in non-English languages, and requires the state to inform individuals of the availability of services and how to access services. We appreciate this vital provision and support its effective implementation to ensure that all LEP individuals can fully access the benefits of health reform. A minimum standard for taglines in 15 languages would provide essential implementation guidance to states. Given that bilingual (and bicultural) staff is the most effective manner of providing language services, we believe the rule should be strengthened with the addition of competent bilingual staff in the list of language services. Because states must have flexibility to accommodate differences in populations and languages spoken, it is important to encourage the use of staff who can provide services directly to an LEP individual in his/her language, in addition to interpreting.

We support §435.905(b)(1) and (3) requiring that program information be provided at no cost to LEP persons, that language services include interpretation, translations and taglines, and that individuals be informed of the availability of language services.

Recommendation: Amend §435.905(b)(1) by adding, after the word “including”: “competent bilingual staff who provide services directly in a non-English language”; and after the words “taglines in”, add the words: “at least 15”.

D. Accessibility of CHIP enrollment assistance and information - §457.110(a)

The NPRM requires the state to make information and enrollment assistance available and accessible to LEP applicants, enrollees, and families of potential applicants, a requirement we support and appreciate. The rule is strengthened by cross-reference to §435.905(b), which provides a list of three specific language services: interpretation, translation, and taglines.

We support §457.110(a), requiring that CHIP program information and enrollment assistance be accessible to persons who are LEP.

E. Accessibility of eligibility determination notice to LEP persons - §§435.917(a)(2), 457.340(e)

The NPRM requires eligibility determination notices to be accessible to individuals who are limited English proficient. This rule is vital for protecting civil rights. The notice and any actions taken pursuant to the notice should be valid only when the state provides the notice in an accessible manner that is in an LEP individual's preferred written language. HHS should ensure that for any individual the agency knows or should reasonably know is LEP, the agency should provide the notice in that individual's language.

We support §§435.917(a)(2) and 457.340(e) requiring an eligibility determination notice to be accessible to LEP persons.

F. LEP access to notice of reasonable opportunity period - §435.956(g)

In providing an applicant with a reasonable opportunity to resolve an inconsistency in verification of citizenship or immigration status, the NPRM provides that the agency must provide notice of this opportunity accessibly to LEP persons. This is a critical rule for protecting the civil rights of all persons whom the agency knows or should reasonably know are LEP.

We RECOMMEND that the final rule regarding §435.956(g) require access of LEP persons to a notice of reasonable opportunity to resolve an inconsistency in verification of citizenship or satisfactory immigration status.

G. LEP access to the appeals process generally - §155.505(f)

The preamble at 4649 requests comment on §155.505(f) of the proposed Exchange regulation that the appeals processes must be accessible to appellants who are limited-English proficient or who are living with disabilities. We strongly support these requirements as all individuals must be able to actively defend their rights and participate in the appeals process in a meaningful manner. The agency has a duty to provide LEP persons with meaningful access to the appeals process pursuant to Title VI of the Civil Rights Act of 1964 and ACA §1557. The legal duty, and the inclusive goals of health reform, dictates that HHS adopts in regulations specific detailed requirements to provide effective communication with LEP individuals.

The NPRM applies to appeals processes in the Exchange, the same requirement for accessibility of LEP individuals as is provided for Exchange programs and consumer assistance tools at §155.227, which also lists three specific language services: oral interpretation, written translation, and taglines. We appreciate this provision, which should be required of the Exchange for any individual the Exchange knows or should reasonably know is LEP. The description of taglines should be strengthened with a specific requirement that they be provided in at least 15 languages.

We support §155.505(f), applying the LEP accessibility requirements of §155.205(c) to Exchange appeals processes.

Recommendation: Amend §155.505(f) to require specific language services including oral interpreting during any hearings and written translations of any documents that will be utilized during the hearing or appeals processes, and taglines in at least 15 languages.

H. Opportunity to file an appeal request in a non-English language - §155.520(a)

LEP individuals may need to file appeals in non-English languages, necessitating a requirement of Exchanges that they accept requests for appeals in languages other than English. Without such a requirement, Exchanges may create a barrier to filing an appeal that would result in discrimination against LEP applicants and enrollees.

Recommendation: Amend § 155.520(a) to delete “and” after subsection (iii), add “and” at the end of subsection (iv) and add new subsection (a)(i)(v): “In a non-English language from an LEP individual.”

I. LEP rights in a dismissal - §155.530

When an LEP individual files an appeal, it is essential to ensure that any withdrawal or failure to appeal is not due to a language barrier. Thus before allowing a withdrawal or failure to appeal, we believe the appeals entity should confirm that information was provided in a language the individual understands. If the individual (or a household contact) has indicated a preferred non-English language, the regulations should prohibit the appeals entity from allowing a withdrawal or dismissal based on a failure to appear without documenting in the individual’s record the appropriate language services that were provided.

Recommendation: Amend §155.530(a) by adding a proviso that, for an individual who has indicated a preferred non-English language, the agency must first document in the individual’s record what appropriate language services were provided.

J. LEP access to informal resolution processes - §155.535(a)

We recommend that the rules governing informal resolution and hearing also specifically include requirements for LEP accessibility. To comply with due process requirements, all individuals must have the ability to participate in the informal resolution process established by an Exchange. This may require the appeals entity to provide competent interpreters and translated materials.

Recommendation: Amend §155.535(a) by adding a new subsection (5) at the end, requiring the informal resolution process to comply with the accessibility requirements of §155.205(c).

Recommendation: Amend §155.535(d) to add a new provision (6) at the end, requiring the Exchange to provide LEP individuals with appropriate language services including competent interpretation and translated materials at no cost.

Thank you for the opportunity to provide these comments. If you have any questions, you may contact Sonal Ambegaokar at ambegaokar@nilc.org or at (213) 639-3900 ext. 114.

Sincerely,

A handwritten signature in cursive script that reads "Sonal Ambegaokar".

Ms. Sonal Ambegaokar
Health Policy Attorney
National Immigration Law Center