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June 10, 2004

Mark McClellan, M.D., Ph.D
Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Mail Stop C5-11-24
Baltimore, MD 21244

Re: Federal Reimbursement of Emergency Health Services Provided to Undocumented Immigrants

Dear Dr. McClellan:

On behalf of the undersigned organizations, the National Immigration Law Center (NILC) welcomes the opportunity to provide input on the implementation of Section 1011 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 ("Section 1011"), regarding federal reimbursement of emergency health care services provided to undocumented immigrants. NILC is a nonprofit legal services organization that works on behalf of low-income immigrants and their families, with a special focus on access to health care services and public benefits. Our comments relate to the process used to determine the amount of unreimbursed emergency services provided to undocumented persons.

A fundamental premise underlying our comments is that individual and public health are harmed when immigrant families are deterred from seeking needed health care because of questions about their immigration status.

Some commentators have recommended that the Department of Health and Human Services ("HHS") develop a process based on reimbursement of individual or aggregated claims. Under such an approach, individual patients would be asked to declare their immigration status, or providers would make assumptions about immigration status based on an individual's possession or nonpossession of certain documents, such as possession of a foreign voting card or the lack of a Social Security Number. The undersigned organizations urge HHS to reject any approach based on identification of individual patients' immigration status, whether direct or indirect, and instead to adopt a "proxy" methodology that uses data to approximate providers' costs of care to undocumented persons. Such a methodology might look at the ratio of emergency Medicaid to full-scope Medicaid patients served by a provider and apply that ratio to the providers' overall uncompensated care costs.

Asking individuals to declare or somehow prove their "undocumented" status will cause them to avoid seeking needed health care for themselves and their family members, with severe consequences for individual and public health. Our organizations often hear reports of immigrant families who avoid needed health care because of fears that family members will be reported to the Department of Homeland Security. For example, a Migrant

Education Teacher from Galt, California told the California Immigrant Welfare Collaborative:

> A family that was undocumented did not want to apply for emergency [Medicaid] for their children because they were afraid of being reported…their son became very ill and almost died because his appendix burst.

Any process that requires providers to ask patients to declare or provide evidence of their immigration status will exacerbate that deterrent effect.

HHS has recognized that public health is harmed when immigrants avoid seeking needed health care. As reported by the Department of Justice in the preamble to its proposed public charge regulations, "Federal and State benefit granting agencies" had reported that immigrants' concerns about using health services were creating "significant negative public health consequences across the country." The preamble states:

> This situation is becoming particularly acute with respect to the provision of emergency and other medical assistance, children's immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants' fears of obtaining these necessary medical and other benefits are not only causing them considerable harm, but are also jeopardizing the general public. 64 Fed. Reg. 28676 (May 26, 1999).

Moreover, any action that deters immigrants' from using health care inevitably harms citizens, especially children. According to the Urban Institute, 85% of immigrant households include at least one U.S. citizen, typically a child. (Michael Fix, Wendy Zimmermann and Jeffrey S. Passel, *Integration of Immigrant Families In the United States*, Urban Institute, (July 2001). If immigrant parents are afraid to interact with health care providers, their citizen children will also be denied health care.

A reimbursement process based on either individual or aggregated claims would impose onerous new responsibilities on heavily burdened health care providers, and is likely to delay access to emergency services for all consumers. Such a process also would create a risk of discriminatory treatment of persons whose accent, surname, race or presumed national origin lead providers to assume that they may be undocumented.

A process based on individual identification is unlikely to be accurate – it is not unusual for immigrants to be confused about their immigration status. In addition, undocumented persons, by definition, cannot present papers that demonstrate their status. The suggested alternatives, such as lack of a social security number or a foreign driver's license, do not necessarily indicate undocumented status.

Finally, we urge HHS to develop written regulations to implement Section 1011, and to receive formal feedback on the regulations in proposed form by submitting them to the notice-and-comment process provided in the Administrative Procedure Act, 5 USC §553. The Agency's rules implementing Section 1011 will necessarily be substantive, carrying the force and effect of law. As such, the rules are subject to the notice and comment requirements of 5 USC 553(b)(3). American Mining Congress v. Mine Safety & Health Administration, 995 F.2d 1106 (DC Cir 1993).

The funds provided by Section 1011 will assist hospitals in providing critical emergency health care services to people who need them. If the provision is implemented in a manner that discourages people with urgent health care needs from seeking services, its purpose will be frustrated.

Thank you for the opportunity to submit comments. Please contact Gabrielle Lessard at (213) 639-3900 x 114 if we can provide any additional information.

Respectfully submitted,

Asian & Pacific Islander Institute on Domestic Violence (San Francisco, CA)
Asian Pacific American Legal Center (Los Angeles, CA)
Asian/Pacific Islander Domestic Violence Resource Project (Washington, DC)
Association of Maternal and Child Health Programs (Washington, DC)
Broward Immigration Coalition (Ft. Lauderdale, Florida)
California Primary Care Association (Sacramento, CA)
Certified Languages International (Portland, OR)
Cross-Cultural Communications (Ellicott City, MD)
Family Violence Prevention Fund (Washington, DC)
Iowa Coalition Against Domestic Violence (Des Moines, IA)
Lawyers' Committee for Civil Rights (San Francisco, CA)
Massachusetts Immigrant and Refugee Advocacy Coalition (Boston, MA)
Mexican American Legal Defense and Educational Fund (Washington, DC)
Migrant Legal Action Program (Washington, DC)
Migration Policy and Resource Center (Los Angeles, CA)
National Council of La Raza (Washington, DC)
National Employment Law Project (New York, NY)
National Health Law Program (Los Angeles, CA)
National Immigration Forum (Washington, DC)
National Immigration Law Center (Los Angeles, CA)
Office of Hispanic Ministry, Diocese of Grand Rapids (Grand Rapids, MI)
Public Justice Center (Baltimore, MD)
Services, Immigrant Rights and Education Network (San Jose, CA)
Tennessee Justice Center (Nashville, TN)

Cc: James Bossenmeyer, Program Manager, Center for Medicare Management