



American Cancer Society ☿ Children's Defense Fund/New York ☿ Community Service Society of New York
Institute for Puerto Rican and Hispanic Elderly ☿ Make The Road New York ☿ Medicare Rights Center
Metro New York Health Care for All Campaign ☿ New Yorkers for Accessible Health Coverage ☿
New York Immigration Coalition ☿ Public Policy and Education Fund of New York/Citizen Action of New York
Raising Women's Voices ☿ Schuyler Center for Analysis and Advocacy

VIA ELECTRONIC SUBMISSION

October 26, 2012

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9995-IFC2
P.O. Box 8016
Baltimore, MD 21244-8016

RE: **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

Dear Sir/Madam:

Health Care For All New York (HCFANY) is a statewide coalition of over 130 organizations that seek to achieve affordable, quality health care for all New Yorkers. We are writing to express our opposition to the proposed change in the definition of "lawfully present."

We oppose the exclusion of individuals granted deferred action by the U.S. Department of Homeland Security under the Deferred Action for Childhood Arrivals (DACA) policy from the U.S. Department of Health and Human Services' list of immigration categories considered "lawfully present" for purposes of health coverage eligibility. Specifically, we oppose the change in the definition of "lawfully present" in the Pre-Existing Condition Insurance Plan program as well as the use of this definition in other provisions of the Affordable Care Act of 2010 (ACA) (77 Fed. Reg. 52614, Aug. 30, 2012). The rule change lacks legal or policy justification and undermines the goals of the ACA.

New York is a state with a large immigrant population that has long recognized the importance of providing access to quality, affordable health care for immigrants as a key tenet of its public health system. In 2010, New York's population was 19.3 million, 15% (or 2,886,000) of which was uninsured. New York State's residents include 4.3 million immigrants (22.3% of the population), about 2.2 million of whom are naturalized citizens,¹ about 1.4 million of whom

¹ "New York Fact Sheet: Social and Demographic Characteristics." Migration Policy Institute, 2010. Available at: <http://www.migrationinformation.org/DataHub/state.cfm?ID=NY#3>



are lawfully residing, and about 625,000 of whom are undocumented.² Up to 72,000 young New Yorkers may be granted deferred action status under the June 2012 directive described below.³

If the August 2012 Interim Final Rule's definition of "lawfully present" goes into effect, most other states will be able to exercise discretion in whether or not to cover DACA beneficiaries through state-funded health programs. However, New York State Law will most likely require the state to cover DACA beneficiaries. The settlement in the 2001 *Aliessa v. Novello* held that New York State's obligation under the State Constitution's mandate that "the aid, care and support of the needy are public concerns and shall be provided by the state," and the constitutional guarantee of equal protection, required the provision of state-funded medical assistance to lawful residents left out in the cold under federal welfare reform's exclusion of large numbers of documented immigrants from Medicaid.⁴ Following this precedent, New York will have to cover the costs of providing health care to DACA beneficiaries excluded from federal programs. Given the challenging fiscal climate and shortfalls in state budgets across the nation, this exclusion will place an unnecessary burden on states such as New York that extend benefits to DACA grantees. Meanwhile, those states that opt *not* to cover DACA beneficiaries excluded from federal programs will create unintended consequences that will adversely affect the health conditions in their state and across the nation.

In addition to being arbitrary from the point of view of immigration law and sending mixed messages to immigrant communities, whose participation is key to the success of the ACA's insurance exchanges, we offer the following rationales for our opposition to the Interim Final Rule:

1) The Interim Final Rule Leads to Higher Premiums

Denying coverage to individuals granted deferred action under DACA excludes individuals who are healthier and younger than the general population from the newly created health insurance risk pools in the exchanges. In order to prevent adverse selection, where only those who need health insurance purchase insurance, the ACA creates incentives and opportunities for more people to enter the insurance pool so that insurers can spread the risk and reduce the health insurance premiums for everyone. By increasing the number of young and healthy individuals who enter the insurance pool, insurers are able to reduce the health insurance premiums for all.

² <http://www.pewhispanic.org/2011/02/01/authorized-immigrant-population-national-and-state-trends-2010/>

³ "Relief from Deportation: Demographic Profile of the DREAMers Potentially Eligible under the Deferred Action Policy," Migration Policy Institute, Aug. 2012, available at http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf

⁴ *Aliessa v. Novello*, 96 N.Y.2d 418, 754 N.E.2d 1085, 730 N.Y.S.2d 1 (2001).



However, the Interim Final Rule excludes young, healthy individuals of working age from the new health insurance pool in the exchanges. Preventing them from buying health insurance with or without tax credits will keep this healthy population out of the insurance pool and thereby increase the likelihood of adverse selection, which ultimately will keep health insurance premium costs high for everyone in the pool.

Including individuals granted deferred action under the DACA process in the definition of “lawfully present” under the ACA would benefit all of us. These young, healthy individuals would be able to buy health insurance under the new health insurance exchanges, would be able to pay their fair share of their health care costs, and would be able to see a doctor on a regular basis instead of remaining uninsured.

2) The Interim Final Rule leads to higher health care costs and unintended consequences

Excluding individuals granted deferred action under the DACA process from the PCIP program, the health insurance exchanges, and the health insurance premium tax credits, does not eliminate their need for health care. Individuals granted deferred action under DACA who are of school- and working-age will still need access to affordable health care. Yet, due to the Interim Final Rule, they will remain without a regular source of care and instead will need to rely on community health centers, hospital emergency rooms, and other safety net providers. As a result, health care costs for these individuals, as well as costs to the overall health care system, will remain high and could lead to poor health outcomes and increased health disparities. Excluding individuals granted deferred action under DACA from affordable health care options under the ACA will shift the costs of their care to health care providers and local and state governments.

Instead of creating a more streamlined eligibility and enrollment system under the ACA, the Interim Final Rule will introduce additional complexity in eligibility rules and confusion for state agencies, eligibility workers, and patient navigators. 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, and eligibility workers about the distinction between those granted deferred action under the DACA process and those granted deferred action on other grounds.

3.) The Interim Final Rule Shifts the Cost Burden to the States

Under existing state law, New York will most likely be required to pick up the tab for DACA beneficiaries excluded from federal coverage under the Interim Final Rule using state



dollars. States like New York will thus assume unexpected and unfair financial responsibilities for ACA implementation. A final consequence of the exclusion of DACA beneficiaries for states like New York will thus also be to inflict unfair financial pressures on state budgets.

In sum, excluding DACA grantees from the ACA's full promise is not in keeping with the goals of DACA or the ACA. In addition to the moral imperative to offer DACA beneficiaries access to coverage, we oppose Interim Final Rule's exclusion on the grounds that it burdens state economies, threatens to adversely impact health insurance premiums, and erodes public health.

Thank you for considering our comments. If you have any questions, please contact Jackie Vimo at (212) 627-2227x248 or jvimo@thenyic.org.

Sincerely,

Jackie Vimo
Director of Advocacy
New York Immigration Coalition