

# NM center on law and poverty

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July 22, 2011

Centers for Medicare &  
Medicaid Services, Department of  
Health and Human Services, Attention:  
CMS-9993-IFC2, P.O. Box 8010,  
Baltimore, MD 21244-8010.

SUBMITTED ELECTRONICALLY

**RE: CMS-9993-IFC2**

To Whom It May Concern:

The New Mexico Center on Law and Poverty works to advance economic and social justice in New Mexico through education, advocacy and litigation. We improve living conditions, increase opportunity and protect the rights of people living in poverty. We have valued CMS's partnership in these efforts, particularly during the ongoing economic crisis.

We submit these comments with respect to the 10% threshold for translation and oral interpretation of private plan materials in the internal review and appeals contexts announced at 76 Fed. Reg. 37208 (June 24, 2011). We believe that the amended interim standards are seriously flawed and strongly urge CMS not to adopt them. Instead we urge the agency to adopt a threshold standard that requires translation when either a numerical or percentage threshold is met and mandates that oral interpretation be provided in this context for all languages in accordance with existing civil rights law.

The amended interim standards completely fail to recognize the needs of the approximately 12 million limited English proficient individuals in the United States that are estimated to be affected. Many of these individuals may receive marketing materials and calls in their primary languages, but will not be able to access plan review and appeals under the new rules. Even Spanish speakers will be left out in most of the country, as only 172 counties meet the 10% county population threshold for Spanish (out of 3,143 counties in the United States). Besides Spanish, the new proposed translation threshold is met by Navajo in 3 counties (1 county each in AZ, NM, UT), Tagalog in 2 counties (both in AK), and Chinese in one county (CA). Only 177 counties would require translated materials. Only one county in the entire nation would have translations in more than one language: the Aleutians West Census Area (population of 5,505 total persons) would have Spanish and Tagalog translations.

Translation of access plan review and appeals is a health disparities issue. If limited English proficient beneficiaries are not able to get all materials in a language they understand they will have a

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difficult time making good decisions about their health care. The result is less care and, likely, a worse health outcome that is directly linked to the fact that the individual does not speak English very well.

CMS should not adopt these regulations. The 10 percent threshold shuts out most LEP beneficiaries in most states from the right to receive documents that they can use and understand. A more appropriate standard would be "5% of the plan's population or 500 persons in plan's service area" for large group plans, and 25% of population for small plans. Oral interpretation should be provided in all languages at all times.

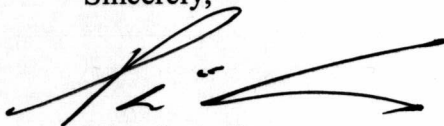
A 5 percent threshold is more responsive to Title VI requirements. Using 5 percent is consistent with Department of Justice and Health and Human Services Department guidance, both of which provide a safe harbor of 1,000 persons or 5 percent of population served or likely to be encountered, whichever is lower.<sup>1</sup>

An alternate numerical threshold is absolutely necessary. We believe the original DOJ/Department of Treasury/HHS interim final rule issued in July 2011 setting that threshold at 500 was appropriate.<sup>2</sup> Though changing the percentage threshold to 5 percent is a meaningful improvement, it is still an inadequate step without the inclusion of numerical minimums as well. A numerical threshold is necessary to ensure that significant concentrations of LEP beneficiaries living in large, ethnically diverse areas can receive materials. For example, in New Mexico's most populous county, Bernalillo, a numerical threshold of 500 would be met by Chinese, Vietnamese and Navajo speakers, as well as those who speak Spanish.<sup>3</sup> Under the proposed rule, none of these groups would receive language-appropriate materials.

Mandating that oral interpretation be provided in this context for all languages in accordance with existing civil rights law is critical. In New Mexico, at least 94 different languages are spoken. In Bernalillo County alone, 58 different languages are spoken. Because of the breadth of languages spoken in New Mexico and other states, it makes it more difficult for any one particular language to meet a percentage threshold due to dilution. All of those who primarily speak languages other than English should have interpreter services available when discussing critical matters like the details of their health insurance. Therefore we urge you to reject the proposed regulation in favor of adopting rules that better serve the needs of our non-English speaking communities.

Thank you for your consideration.

Sincerely,



Patricia Anders  
Staff Attorney

<sup>1</sup> The DOJ guidance is found at 65 Fed. Reg. 50123 (Aug. 16, 2000); the HHS guidance is at 68 Fed. Reg. 47311, 47319 (Aug. 8, 2003). Both can be accessed at [www.lep.gov](http://www.lep.gov).

<sup>2</sup> See 75 Fed. Reg. at 43337 (July 23, 2010).

<sup>3</sup> U.S. Census Bureau, ACS, B16001. Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over, 2005-2009.