

September 13, 2004

Dear [Hospital Administrator]:

I am writing in regards to a new provision of the 2003 Medicare Modernization Act (MMA) that we fear will have a serious and negative health impact on undocumented immigrants in the state.

You may be aware that a provision in this new federal law, referred to as “Section 1011,” makes \$250 million per year in federal funds available for four years to compensate health care providers for the cost of caring for undocumented immigrants. But because compensation depends on a patient’s undocumented status, providers wishing to obtain a share of this funding may be forced to perform invasive questioning to make a “citizenship determination” for each uninsured patient, a requirement that the ACLU – and the American Hospital Association – strongly opposes.

Currently, the EMTLA obligates providers to treat patients without asking about their non-medical personal histories before the onset of care. The Act has served as de facto protection for immigrants, who could be assured that they would not need to answer questions about their immigration status when visiting a hospital. Only those uninsured patients who voluntarily applied for Medicare or Medicaid after receiving care were asked to prove citizenship.

The new MMA program, however, will require providers to make a “citizenship determination” for each uninsured patient for the purposes of reimbursement. To assist providers, the Centers for Medicare and Medicaid Services (CMS) will soon be releasing an approved documentation method based on a policy statement that went to hearing last month. You can expect to receive the instructions within a few weeks.

Details pending, the ACLU believes the inquiry will likely place both providers and patients in deleterious positions. Under the draft guidelines prepared by CMS, providers would be charged with obtaining “acceptable evidence” of a patient’s illegal status, which could include an invalid drivers’ license or foreign passport. Such evidence is to be solicited even after a patient has repeatedly refused to answer questions about his or her legal status.

Patients, of course, will find the process even more traumatic. The pointed questions and demand for invalid documents will doubtless raise fears of legal consequences. The unfamiliar hospital environment, language barrier, and possible physical discomfort can only increase anxiety. Some immigrants should be expected to postpone or forgo medical care because of such fears, harming both themselves and general public health.

Also troubling is the Act’s lack of confidentiality provisions. Providers are instructed to share their citizenship determinations with physicians and ambulance companies who might also be eligible for reimbursement. In the case of an audit or integrity review, the

provider would need to disclose all records to CMS. There are no protections against other types of disclosure; clearly, an undocumented immigrant should have reservations about admitting his or her status to an interviewer with unlimited ability to share it.

Alternative approaches to providing this information – using statistical models, for example – have been suggested by concerned commentators as a way of fulfilling Section 1011 without invading the privacy of – and possibly scaring away – patients in need of hospital care. However, it is quite uncertain whether CMS will adopt this approach. The agency may be counting on the financial “carrot” that Section 1011 dangles before hospitals to obtain their cooperation in this troubling enterprise.

In sum, Section 1011 of the Medicare Modernization Act offers significant cause for concern. We want to urge you, as a provider, to carefully consider what participation in the program will entail, and to reject any funding that requires hospitals to keep documentation on the immigration status of patients. The CMS has released a provider enrollment form that you may be filling out in the near future. This form establishes your eligibility for the program, but does not commit you to participate. Please carefully evaluate the data collection policy that CMS will be releasing shortly. We don’t think that any person should face fears of exposure or persecution when seeking medical attention. We are hopeful that you will agree.

Once the new guidelines are released, we would be interested in learning whether your hospital plans on accepting any funds under the program. Thank you in advance for your attention to this urgent matter, and we look forward to hearing back from you about it.

Sincerely,

Steven Brown  
Executive Director

