

September 21, 2010

The Honorable Kathleen Sebelius
Department of Health and Human Services
Attn: OCIIO-9993-IFC
7500 Security Boulevard
Baltimore, Maryland 21244

Re: Interim Final Rules Code OCIIO-9993-IFC
Comments regarding: Proposed changes to 45 CFR Section 147 – Health
Insurance Reform Requirements for the Group and Individual Health Insurance
Market

Dear Secretary Sebelius:

The National Senior Citizens Law Center advocates nationwide to promote the independence and well being of older Americans with limited income and resources as well as younger persons with disabilities.

We thank you for the opportunity to comment on the interim final rules for group health plans and health insurance issuers relating to internal claims and appeals and external review processes under the Patient Protection and Affordable Care Act that were published in the Federal Register on July 23, 2010. 75 Fed. Reg. 43330 (July 23, 2010).

Our comments address proposed changes to 45 C.F.R. Part 147.

Section 147.136(e)

Notices related to appeal rights are among the most critical notices that a plan sends to members. Failure to understand such notices can have a direct impact on a member's access to medically necessary services. For these reasons, the regulations governing the provision of culturally and linguistically appropriate notices are of high importance for plan members.

Use of Literacy as LEP Criteria:

We have concerns, however, about using a definition of “plan participants being literate only in the same non-English language.” DOJ guidance re limited English proficient persons defines an LEP individual as one who self-identifies as not speaking English

“very well”, which is a category of information collected by the Bureau of the Census. We urge that the regulations incorporate this definition, rather than the current definition based on literacy in a language.

We have reviewed the sub-regulatory guidance issued for individual plans and note that it incorporates the concept of not speaking English “very well”.

www.hhs.gov/ocio/regulations/consumerappeals/guidance_for_individual_market.pdf.

We appreciate that the guidance makes reference to the Census categories and terminology. The guidance for group plans is not yet available but we hope and expect that it will, as well, focus on individuals who self-identify as not speaking English “very well.” Despite the existing and expected guidance (and the fact that the “literacy” references track existing Department of Labor regulations), we remain concerned that there is a significant gap between the meaning of “being literate in only” one language and the guidance about speaking English not “very well.”

Regulatory language has legal import. Regulations should say clearly what they mean and should not rely on sub-regulatory guidance to bend their meaning. Regulations and sub-regulatory guidance need to be consistent for transparency and as a protection against legal challenge. Here, although the sub-regulatory guidance is appropriate, the regulatory language is not.

In addition, as stated in the notice, plans have language access obligations under Title VI. Use of Title VI terminology and criteria when discussing the language access obligations of plans under these regulations would be less confusing and make it easier for plans to develop data to understand and meet their obligations both under these regulations and under Title VI.

Further, though we do not yet know what the guidance for group plans will be, we have particular concerns about any reference to “literacy” when individual members are asked about their language ability and preference. While there is extensive experience with polling of individuals over whether they “speak” English “very well,” we worry that if asked whether they are “literate” in English, many poor English speakers might out of embarrassment, pride or misunderstanding, state that they are “literate” even though their ability to navigate written English is limited.

Call centers: Both individual and group plans

We believe that the regulations are inadequate with respect to the language access requirements for plan call centers. For individuals who speak a language that does not meet the thresholds set by the regulations, call centers are the only safety net. Call center interpreters should be available to all LEP members.

Imposing this obligation on plans is reasonable. Most plans already contract with language line contractors to provide interpreter services. Those contractors have the capability to provide interpreters in all languages. Moreover, Medicare contractors are

required to provide such language line assistance. Group and individual plans should have the same requirements under these regulations.

Percentage and Numerical Thresholds:

Group plans: We appreciate that the proposed regulations set numerical as well as percentage thresholds for “large” plans in the group market. Numerical thresholds are critical to protect individuals in plans with large memberships. We support the 500 enrollees numerical threshold. We recommend, however, that the percentage threshold be lowered to 5% to be consistent with “safe harbor” thresholds developed by the Department of Health and Human Services and the Department of Treasury.

The regulations are silent on the obligation of plans to collect data to determine the number of members needing translated documents. We urge that the regulations require that plans upon enrollment ask each enrollee whether the enrollee speaks English “very well” and ask the enrollee’s preferred language for communications. Provisions should also be made to allow members to update their preferences at any time.

Individual plans: We believe that a threshold by county is appropriate for individual plans. The threshold should, however, be lowered to 5%. In addition a numerical threshold should be added. Using a percentage threshold without including a numerical threshold as well disadvantages LEP members who reside in large counties. For example, although there may be tens of thousands of Vietnamese speakers in Los Angeles County, translations will not be required because Vietnamese does not meet the 10 percent threshold. In a thinly populated rural county, a much smaller Vietnamese population would be entitled to translations.

We also ask that, if the service area of a plan extends beyond one county, and if the plan is required to translate documents into a particular non-English language because that language meets the thresholds in one county set in the regulations, then the plan should be required to offer the translated materials to its members in all counties served. For example, if a plan serves San Francisco County, Alameda County and Marin County and must translate documents into Chinese because the number of Chinese speakers exceeds the threshold for San Francisco County, then the plan should be required to make the translated documents available to all members who speak Chinese in all covered counties.

Taglines

Regardless of whether the thresholds for translation are met, taglines should be included on all English documents. The current language requires plans to only include taglines of languages which meet the thresholds. This requirement should be broadened. We recommend that, as a supplement to requiring translation of notices into threshold languages, plans be required to include a “tagline” in 15 languages – at the top of the notice or as an insert in the same mailing – that informs recipients that the notice is

important and to call an insurer's customer service center to obtain assistance in understanding it.

Thank you for the opportunity to comment on these proposals. If any questions arise from these comments, please contact Georgia Burke gburke@nsclc.org.

Sincerely,



Georgia Burke
Directing Attorney