August 13, 2019

Mr. Roger Severino
Director, Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Ave. SW, Washington, DC 20201

Re: Nondiscrimination in Health and Health Education Programs and Activities (Section 1557 NPRM), RIN 0945-AA11

Dear Mr. Severino:

The Association of Asian Pacific Community Health Organizations (AAPCHO) writes to comment on the proposed rulemaking on Section 1557 of the Patient Protection and Affordable Care Act (ACA) ("Health Care Rights Law" or "Section 1557"). On behalf of the community health centers and the Asian American, Native Hawaiian and Pacific Island (AANHPI) communities AAPCHO represents, we strongly oppose this proposed rule. Rolling back Section 1557 eliminates critical protections--and will put needed health care out of reach for our communities.

AAPCHO represents 34 community-based health organizations, 29 of which are Federally Qualified Health Centers (FQHCs). AAPCHO members serve more than 630,000 patients annually. Our members are dedicated to promoting the health status of medically underserved AANHPIs in the United States, the U.S. territories, and the Freely Associated States. The primarily low-income AANHPI patients and communities our members serve rely on a number of supports to maintain their health and well-being and to live as critical members of our communities and economies.

AAPCHO's member centers are leaders in providing linguistically and culturally appropriate care that is imperative to AANHPI communities. Asian American and Pacific Islanders are the fastest growing communities in the United States[1] and similarly represent incredible diversity. AANHPIs trace their heritage to nearly 100 different ethnic groups and speak more than 250 different languages. Seventy-two percent of AAPCHO patients are racial or ethnic minorities and nearly half of all our members' patients are limited English proficient (LEP), meaning that English is not their primary language and they have a limited ability to read, write, speak or understand English.[2] Our member health centers provide services in up to 15 different languages and dialects, including Cantonese, Hawaiian, Ilocano, Korean, Mandarin, Samoan, Tagalog, and Vietnamese.[3]

[1] Asian American Center for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States: 2011*, Executive Summary (2011), https://www.advancingjustice-la.org/sites/default/files/ENTERED_Community_of_Contrasts_2011.pdf
[2] Asian & Pacific Islander American Health Forum Analysis of 2017 American Community Survey Data.
[3] AAPCHO Member Health Centers Chartbook, March 2019

The work of AAPCHO's member health centers focuses on low-income and medically-underserved AANHPI populations. Our members have seen first-hand the importance of providing in-language support in both health literacy *and* health insurance literacy. Language has long presented a significant barrier for AANHPIs attempting to enroll in health insurance. Once enrolled, many LEP individuals face ongoing difficulties understanding their benefits and coverage--in large part due to the fact materials are often not in-language.

To combat these challenges, AAPCHO members were--and are--leaders in outreach and enrollment for health insurance in the marketplaces and Medicaid. In partnership with Action for Health Justice, we developed a glossary of health insurance enrollment terms in English and 12 AAPI languages; this glossary included approximately 100 of the most frequently used (and often confused) terms encountered by in-person assisters and navigators.[4] These efforts have been assisted and made possible by protections and requirements provided under Section 1557.

AAPCHO strongly supports Section 1557 regulations because they represent a substantial advancement in health care justice: it prohibits discrimination on the basis of race, color, national origin, sex, age, and disability; and it provides critical protections for individuals with limited English proficiency (LEP). As a result of Section 1557, a wide range of individuals were able to access health care without discrimination, importantly including people who are LEP, LGBTQ+ persons, people with disabilities and chronic conditions, and people needing reproductive health services. This proposed rule seeks to eliminate and limit these protections and attacks the civil rights of each of these groups.

AAPCHO's comments focus on the proposed rule's language access provisions to ensure that people who are LEP have meaningful access to health care. We oppose eliminating the language access protections as proposed. Every day, our member health centers see the challenges that LEP individuals face in accessing health care and using their insurance. Our patients who lack of English literacy or have different cultural experiences with health insurance often face challenges in understanding their options or their rights as patients or their rights and responsibilities under their plans. Taglines, language assistance services, and legal notices are critical in educating and informing patients about how to use health care, and the services available to them.

Without enforcement of language assistance services, legal notices, and taglines to inform persons of their rights, discrete communities with large numbers of LEP individuals, including many AANHPIs, will be systematically excluded from opportunities to achieve better health and have their civil rights violated.

Moreover, while AAPCHO is specifically commenting on the proposed rule's language access provisions, we fully oppose all efforts to eliminate or rollback the additional protections in

[4] Action for Health Justice (AHJ) consists of four national organizations (Asian & Pacific Islander American Health Forum, Association of Asian Pacific Community Health Organizations, Asian Americans Advancing Justice | AAJC, and Asian Americans Advancing Justice | Los Angeles), and more than 70 Asian American, Native Hawaiian and Pacific Islander national and local community-based organizations and Federally Qualified Health Centers dedicated to educating, empowering and enrolling Asian Americans, Native Hawaiians and Pacific Islanders in health coverage.

Section 1557 as they apply to other protected classes, including LGBTQ+ persons, women, and people with disabilities.

Our specific comments are as follows:

I. Proposed Subpart A General Provisions

AAPCHO opposes the proposed changes in § 92.1 - 92.3 that would narrow the scope of application of Section 1557. The proposed changes run counter to the statutory text and intent of Section 1557 and would severely limit its application. Section 1557 applies to any health program or activity, any part of which is receiving federal financial assistance or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the ACA. In addition, given that the majority of individuals access health care through insurance plans, the provision of health insurance is a "health program or activity" and thus Section 1557 applies to it.

Proposed § 92.5 Enforcement

We oppose the proposed changes to § 92.301 as newly designated § 92.5. OCR incorrectly limits the remedies available under Section 1557, in part by referencing the regulations implementing the cited statutes. One of the goals of Section 1557 was to build and expand on prior civil rights laws such that individuals seeking to enforce their rights would have access to the full range of available civil rights remedies and not be limited to only the remedies provided to a particular protected group under prior civil rights laws. This is why Section 1557 expressly provides individuals access to any and all of the "enforcement mechanisms provided for and available under" the cited civil rights statutes, regardless of the type of discrimination.

II. Proposed Subpart B Specific Applications to Health Programs or Activities

Proposed § 92.101 Meaningful Access for Individuals with Limited English Proficiency

a) *Obligations*
We oppose the proposed § 92.101, which changes the emphasis from "each individual with limited English proficiency" to the covered entity's program or activities. The language in Section 1557 of the ACA is clear that "*an individual shall not*" be subject to discrimination. Section 1557 regulations must maintain the provisions of the statute and the protections offered in regulation must be on each *individual* and not programs. The proposed change is contrary to Congressional intent and we therefore oppose it.

b) *Specific applications*
AAPCHO strongly supports the Title VI and 2003 HHS LEP Guidance and have provided significant input on how to interpret the 4-factor test to ensure its application results in meaningful access for LEP persons. We oppose, however, the codification of the 4-factor test in the Section 1557 regulation because:

- It is already the interpretation of OCR that the 2-factor test in the 2016 Final Rule is consistent with Title VI, the only statute in Section 1557 that prohibits national

origin discrimination against LEP individuals.[5] The protections in Section 1557 and its regulations cannot be anything less than those already guaranteed by Title VI. This interpretation negates the claims made by OCR in the current NPRM that it seeks to align Section 1557 with Title VI, as they are already in alignment.

- In providing the 2-factor test based upon, informed by, and consistent with Title VI, OCR was providing a method of articulating how it would engage in its enforcement review in the health activities and programs context, a specific application of Title VI and newly created by Section 1557. The 2-factor test incorporates the principles in the HHS LEP Guidance and allows OCR to better explain how the factors will be considered in the specific 1557 health activities and programs context giving substantial weight to the nature and importance of the particular communication at issue.

III. Opposition to Current 1557 Provisions Proposed for Repeal or Reconsideration

AAPCHO strongly supports 1557's protections for LEP populations, including the nondiscrimination notice, taglines, and language access plan language in the 2016 Final Rule. These provisions ensured that LEP individuals were able to understand their rights and understood how to access the in-language materials needed to make informed choices about their health care. These materials were not overly burdensome, nor did they create inconsistent requirements for covered entities. Instead, they put important information into the hands of individuals who needed it.

a) *Proposed Repeal of Nondiscrimination Notice*
AAPCHO strongly opposes the repeal of the requirement that covered entities provide a notice of nondiscrimination that informs the public of their legal rights. Without the notice, individuals will be unaware of their rights, and importantly, unaware that language services and auxiliary aids and services are available. Without the notice, these individuals will not know how to request services, what to do if they face discrimination, that they have the right to file a complaint, and how to file such a complaint. This nondiscrimination notice is not redundant and consolidates the statutes' notice requirements into one piece.

b) *Proposed Repeal of In-Language Taglines*
AAPCHO strongly oppose the repeal of the "taglines" for LEP populations. The requirement for covered entities to provide in-language taglines on the availability of language assistance has put needed in-language assistance in front of the LEP individuals who need it. What is more, taglines are an efficient method for the covered entities to provide this information in the absence of fully translated documents. The

[5] See 45 CFR part 92 "...the proposed rule adopted recipients' existing obligations under Title VI to take reasonable steps to provide meaningful access to individuals with limited English proficiency and codified the standards consistent with long-standing principles from the HHS LEP Guidance regarding the provision of oral interpretation and written translation services."

inclusion of taglines is well-supported by long-standing federal and state regulations, guidance and practice.[6]

c) *Proposed Repeal of Video Interpretation Standards*
AAPCHO opposes the elimination of the requirements for the use of video remote interpreting services for spoken language interpretation. Further, even with the higher cost in equipment and training, Video Remote Interpreting has saved costs from in-person interpreting as there are no minimums, travel time, or cancellation risks, though we believe in-person interpreting is still best for the patient. Maintaining the current standard allows providers to determine which technology is appropriate and when an entity uses video, that it is high quality and without lagging.

d) *Language Access Plans*
AAPCHO opposes repealing the language around language access plans. Language access plans are recognized as a way for a health plan to ensure it is compliant with requirements; and OCR has required language access plans from plans as a key provisions for more than two decades. Repealing the voluntary language removes a tool that supports plans' compliance efforts. They may, as a result, fail to fully plan on how to best meet the needs of LEP patients and customers.

IV. The Regulatory Impact Analysis is Flawed and Ignores Costs to LEP Individuals

a) *The Regulatory Impact Analysis (RIA) is Insufficient and Fails to Justify the Proposals*
In its regulatory impact analysis, OCR did not consider alternatives to a complete repeal of notices and taglines that could have appropriately balanced the need to inform individuals of their rights. Instead, OCR justifies its actions by saying that it has received little evidence that more beneficiaries are seeking language assistance and uses this claim as a justification to remove the notice and taglines. This claim, which relies on reports from health plans alone, is insufficient to justify their repeal.

The regulation has been in effect for three years in which OCR, by its own admission, has had limited resources to conduct public outreach. Second, the protections guaranteed by Section 1557 are both continuing, and many are new, warranting a public effort to conduct outreach. Third, the notices and taglines were selected as a compromise position, to avoid requiring covered entities to translate large numbers of documents. Fourth, LEP persons are uniquely at risk of facing barriers to knowing and asserting their rights. Lack of uptake of services raises questions about the extent to which the public knows its rights and what covered entities are doing to communicate those rights, as opposed to justifying elimination of notices and taglines.

b) *Language Access Requirements in the 2016 Final Rule Are Justified by Need*
OCR has provided no tangible analysis of the costs and burdens of repealing the notice and tagline requirement. Instead, OCR provides only acknowledgment that repeal "may

[6] See Title VI Coordination Regulations, 29 C.F.R. § 42.405(d)(1); Marketplace and QHP issuer requirements, 45 C.F.R. § 155.205(c)(2)(iii); Medicaid Managed care plans, 42 C.F.R. § 438.10(d)(3); DOL WIOA Nondiscrimination requirements, 29 C.F.R. § 38.9(g)(3); USDA SNAP Bilingual Requirements, 7 C.F.R. § 272.4(b); and the 2003 HHS LEP Guidance.

impose costs, such as decreasing access to, and utilization of, health care for non-English speakers by reducing their awareness of available translation services." OCR perfunctorily labels the impact as "negligible" while providing no evidentiary basis.

However, we understand that the costs of repealing the language access requirements are not only reduced awareness of language services by LEP persons, but also reduced awareness by the general public about their rights as protected by 1557, especially regarding the notices which include information about the broader nondiscrimination requirements of Section 1557. OCR's only acknowledgement of this impact is one statement about the "unknown number of persons are likely not aware of their right to file complaints."

Discrimination on the basis of national origin, which encompasses discrimination on the basis of language, creates unequal access to health care. Language access in health care is just as critical now as when the Civil Rights Act was originally passed in 1964. Over twenty-five million individuals in the United States are LEP.[7] An estimated 19 million LEP adults are insured. Language assistance is necessary for LEP persons to access federally funded programs and activities in the healthcare system. Without meaningful access, the estimated 25 million individuals who are LEP would be excluded from programs and services they are legally entitled to, including the more than 300,000 LEP patients served by AAPCHO member health centers across 15 states and territories.

On behalf of AAPCHO's members and patients, we oppose the proposed rule and encourage HHS to withdraw it in its entirety.

Sincerely,

Adam P. Carbullido
Director of Policy and Advocacy

[7] Asian & Pacific Islander American Health Forum Analysis of 2017 American Community Survey Data.