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Via UPS Next Day Air, Fax (Without Enclosures), and Electronic Submission

Office for Civil Rights
U.S. Department of Health and Human Services
150 S. Independence Mall West
Suite 372, Public Ledger Building
Philadelphia, PA 19106-9111

Re: Formal Complaint Under Section 1557 of the Affordable Care Act, 42 U.S.C.A. § 18116, Regarding Lack of Meaningful Language Access for Enrollees in the Federally Funded Marketplaces

To Whom It May Concern:

Our firm is Co-counsel with the National Immigration Law Center (“NILC”) and we represent the Southeast Asian Mutual Assistance Associations Coalition (“SEAMAAC”), the Complainant in this matter.

Brief Summary

SEAMAAC is a non-profit organization based in Philadelphia, Pennsylvania which was founded in 1984 by refugees from Southeast Asia to “to support immigrants, refugees, and their families as they seek access to opportunities, which would advance the condition of their lives in the United States.” SEAMAAC supports immigrant and refugee families to improve the quality of their lives through access to health care, social services, community building, advocacy, and building bridges to health care and social service providers. SEAMAAC has assisted immigrant and refugee families to apply for health insurance and public benefits programs since our founding. SEAMAAC serves a diverse set of residents of Pennsylvania, the majority of whom speak neither English nor Spanish. Those individuals are affected by HHS/CMS’s policies, described herein.

SEAMAAC makes this complaint against the United States Department of Health and Human Services (“HHS”) and its agency, the Centers for Medicare and Medicaid Services (“CMS”), pursuant to the Nondiscrimination provision of the Affordable Care Act (“ACA”), Section 1557. 42 U.S.C. § 18116. Specifically, this complaint concerns HHS’s and CMS’s failure to provide meaningful access to the federally funded marketplaces to individuals who do not speak English

or Spanish. The ACA's Nondiscrimination provision prohibits, among other forms of discrimination, HHS and CMS from discriminating on any basis outlined in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. As explained below, HHS's and CMS's actions violate Title VI's guarantees of meaningful access to federally funded services for individuals who do not speak English.

The Complaint is made on the basis that HHS/CMS failed to provide adequate language access to non-Spanish-speaking Limited English Proficient ("LEP") persons who have applied for and were enrolled in a qualified health plan ("QHP") through the federally funded marketplaces set up by the ACA, but who will be terminated from their QHP on September 30, 2014 due to HHS/CMS's inability to verify the applicants' citizenship and immigration status (the "Terminated Applicants"). HHS/CMS provided notice of application "inconsistencies," and the impending QHP terminations, in English and Spanish only, notwithstanding the fact that many LEP Terminated Applicants identified themselves to HHS/CMS as non-English and non-Spanish speakers.

The failure to provide notice of the inconsistencies and the terminations in the LEP Terminated Applicants' primary language violates HHS/CMS's obligations under the Anti-Discrimination Provisions of the ACA because it violates Title VI as applied with respect to required language access to federally funded programs. OCR has enforcement authority with respect to HHS/CMS, 45 C.F.R. § 80.2; 80.3.

As a result, based on the information presented below, Complainant requests that the Office for Civil Rights for the United States Department of Health and Human Services ("OCR") immediately investigate these claims. Complainant also requests that OCR require remedial and affirmative actions to protect the rights of the LEP Terminated Applicants to re-apply for or remain on their QHPs, and to ensure that individuals and families are not deterred from applying for QHPs on behalf of eligible persons because of agency policies and practices that fail to ensure meaningful language access and violate federal law. In addition to changes in policies and procedures, Complainant requests that OCR require the agencies to conduct effective outreach aimed at rectifying the harm caused by these violations.

Background

The ACA created a Health Insurance Marketplace, sometimes known as the health insurance "exchange," in order for uninsured people to obtain affordable health coverage, either through a private insurer under a QHP, or through the ACA's expansion of Medicaid or the Children's Health Insurance Program. 42 U.S.C. § 18001 et seq. See also <https://www.healthcare.gov/get-covered-a-1-page-guide-to-the-health-insurance-marketplace/>. Further, for low-income individuals, the ACA created a "premium assistance credit" in which the Federal Government would pay either applicants or their insurance company a tax credit in order to lower the total cost of the applicants' health insurance. 26 U.S.C. § 36B.

The ability to use the exchanges to select a QHP, or to receive the premium assistance credit depends on various eligibility requirements, including requiring the applicant be a U.S. citizen, national or “lawfully present” in the United States. See 26 C.F.R § 1.36B-2(b)(4). “Lawfully present” is defined in 45 C.F.R. § 152.2 and contains seven categories of noncitizens who are considered eligible.

To determine an applicant’s eligibility to receive a QHP or the premium assistance credit in the Marketplace, an applicant must provide a social security number (“SSN”) or other information deemed acceptable by the Department of Homeland Security. 42 U.S.C. § 18081(b). That information is then transferred from the Secretary of HHS to the Secretary of Homeland Security and the Commissioner of Social Security for verification. 42 U.S.C. § 18081(c); 45 C.F.R § 155.315. If this information is provided and verified, the eligibility requirements for the Marketplace and subsidy are satisfied. 42 U.S.C. § 18081(e)(2).

In cases of “inconsistencies” regarding the documentation of an individuals’ citizenship or lawful presence, the inconsistencies are to be resolved in the same manner as directed by 42 U.S.C. § 1396(ee). 42 U.S.C. § 18081(e)(3). In general, this means:

- A reasonable effort must be made by HHS/CMS to identify and address the causes of such inconsistency, including through typographical or other clerical errors; and
- HHS/CMS must contact the individual to confirm the accuracy of the name or SSN submitted or declaration of citizenship or nationality.

When the inconsistency is not resolved, the individual is to be notified and provided 90 days to present satisfactory documentary evidence of citizenship or nationality or to resolve the inconsistency with the Commissioner of Social Security. Thirty days following that period, the individual is disenrolled from their QHP if no such documentary evidence is presented or if such inconsistency is not resolved.¹

As documented in the attached Declarations provided by certified Affordable Care Act “assisters,” a significant number of applicants who sought health coverage through the ACA do not speak English as their primary language, have a limited ability to read, write, speak, or understand English, and therefore are considered limited English proficient. See **Exhibits 1-3**.

¹ In addition, the ACA incorporated the procedures used for non-citizens in the Medicaid program (1137(d) of the SSA), which provides that coverage not be delayed, denied reduced or terminated during the reasonable opportunity period, assuring that individuals who submit the requested documents maintain coverage pending verification of their status. Notwithstanding their own failure to process applicants supplemental documents and, DHS/CMS has insisted on maintaining its arbitrary termination deadline, violating the applicants due process rights.

Many of these LEP individuals also do not speak Spanish. See Declaration of Priscilla Huang (“Huang Decl.”), ¶ 5, attached as **Ex. 1**.

SEAMAAC started working on ACA marketplace health insurance enrollment in 2013. During the first health care open enrollment period from October 1, 2013, through March 31, 2014, SEAMAAC helped approximately 450 heads of household navigate through the enrollment process. About 150 of the applicants were able to enroll in health care coverage through the federal health care marketplace successfully.

SEAMAAC recognized that the LEP communities it served would face tremendous barriers to understanding the ACA and enrolling in health insurance. English is not the primary language of the majority of SEAMAAC’s clients, and they need interpreters in order to understand the health care application process. SEAMAAC has staff members who provide in-language outreach, education, and enrollment assistance in Vietnamese, Mandarin, Nepali, Laotian, Thai, Hmong, Burmese, Chin, and Karen. It also relies on telephonic interpretation or trained Certified Application Counselor (“CAC”) volunteers to provide this assistance in Indonesian, Khmer, and other languages that come to our office.

As a general matter, in addition to general problems with the application process, assisters found it especially difficult to assist LEP individuals to apply for health care coverage in the marketplaces in languages other than English. The Marketplace did not allow assisters to serve as interpreters for their clients with the federal call center representatives until January 2014. See Declaration of Luvia Quiñones (“Quiñones Decl.”) ¶ 6, attached as **Ex. 2**. This caused delays in the ability to help clients because approved interpreters were not always available, especially before January 2014. For example, one assister reported always encountering problems locating interpreters who could translate in certain Asian and Pacific Islander languages, while another assister reported particular trouble assisting clients who spoke Chinese. Quiñones Decl. ¶ 6.

As applicants went through the application process, many received notices of “inconsistencies” requesting additional documentation when there were problems verifying the applicants’ immigration or citizenship status. Some agencies reported their clients receiving inconsistency notices in English and Spanish, while some reported their clients receiving notices only in English. No notices were sent in languages other than English or Spanish. See Declaration of Amy Jones (“Jones Decl.”), ¶ 12, attached as **Ex. 3**; see also Huang Decl. ¶ 6. Some agencies were forced to create flyers notifying non-Spanish speaking LEP applicants of potential problems with applications. Jones Decl., ¶ 12; Huang Decl., ¶ 11.²

Since August 12, 2014, approximately 25 consumers have contacted SEAMAAC about receiving an inconsistency notice based on inability to verify their immigration or citizenship status. The inconsistency notices sent by the federal government are only being sent out in English and

² To date, the federal government has not released information on the preferred language of enrollees in the FFM.

Spanish. Based on SEAMAAC's experience assisting individuals in enrolling in the ACA, SEAMAAC believes many of the 12,600 Pennsylvania consumers who received an inconsistency notice received it in a language they cannot read. SEAMAAC is concerned that those individuals have no way to understand that they are at risk of being terminated from health care coverage and that they may be required to repay any tax subsidies they received. For the majority of SEAMAAC's low-income clients, losing their health insurance or having to re-pay the tax subsidies would be especially burdensome. To make matters worse, many clients submitted the requested immigration or citizenship documents, but for some reason, these documents were not processed.

On September 15, 2014, HHS/CMS announced that 115,000 individuals would be terminated from the federal marketplace for failing to resolve these inconsistencies. See **Exhibit 4**.

These termination notices were sent in only English or Spanish. See **Exhibit 5**. As a result, many non-Spanish speaking LEP Terminated Applicants have no reason to be aware of the inconsistencies with their application, or their impending termination from the federal marketplace. Consequently, potentially thousands, if not tens of thousands of people, will lose their QHP, and access to critical health coverage, without having any idea why.

The Anti-Discrimination Provision of the ACA Prohibits Discrimination on the Basis of National Origin

Section 1557 of the ACA makes it illegal for the federally funded marketplace to discriminate on a basis protected under Title VI of the Civil Rights Act of 1964. In turn, Section 601 of Title VI of the Civil Rights Act provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. Section 602 directs and authorizes federal agencies that are “empowered to extend Federal financial assistance to any program or activity . . . to effectuate the provisions of [section 601] . . . by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. § 2000d-1.

Moreover, Executive Order 13166 (EO 13166), signed August 11, 2000, requires federal agencies to meet the same standards as federal financial assistance recipients in providing meaningful access for LEP individuals to federally conducted programs. Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency” ([PDF](#)). To assist Federal agencies in carrying out these responsibilities, the U.S. Department of Justice has issued a Policy Guidance Document, “Enforcement of Title VI of the Civil Rights Act of 1964 - National Origin Discrimination Against Persons With Limited English Proficiency” ([2002 LEP Guidance](#)). This LEP Guidance sets forth the compliance standards that recipients of Federal financial assistance must follow to ensure that their programs and activities normally provided in English are accessible to LEP persons, and thus do not discriminate on the basis of national origin in violation of Title VI's prohibition against national origin discrimination

Section 1557 of the Patient Protection and Affordable Care Act (codified at 42 U.S.C. § 18116) explicitly extends these prohibitions to HHS and CMS, providing that an individual shall not be excluded from participation in the marketplaces, be denied the benefits of, or be subjected to discrimination on the grounds prohibited under Title VI. This anti-discrimination prohibition 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 Affordable Care Act or its amendments. *Id.*

HHS/CMS administer the ACA and the federal marketplace, and therefore these anti-discrimination statutes apply to notice of benefit changes, application inconsistencies, and termination of enrollment in QHPs.

**Language Based Discrimination Constitutes a Form of National-
Origin Discrimination Under Title VI and therefore under Section
1557 of the ACA**

Language-based discrimination unquestionably constitutes a form of national-origin discrimination under Title VI. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116–17 (9th Cir. 2009) (citing *Lau v. Nichols*, 414 U.S. 563, 568 (1974) abrogated on other grounds by *Sandoval*, 532 U.S. 275 (2001)) (“discrimination against LEP individuals was discrimination based on national origin in violation of Title VI”). Since *Lau*, other courts have found that the failure by a recipient of federal funding to provide meaningful access to LEP persons constitutes national origin discrimination.³

The Department of Justice has interpreted Title VI’s prohibition against national origin discrimination as requiring that federal funding recipients ensure LEP individuals have

³ See *Sandoval v. Hagan*, 197 F.3d 484, 510-11 (11th Cir. 1999) (holding that English-only policy for driver’s license applications constituted national origin discrimination under Title VI), *rev’d on other grounds*, 532 U.S. 275 (2001); *J.D.H. v. Las Vegas Metropolitan Police Dep’t*, No. 13-01300, 2014 WL 3809131, at *5 (D. Nev. Aug. 1, 2014) (holding that allegations of failure by police department to provide bilingual services could constitute a violation of Title VI); *Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 978 (N.D. Cal. 2013) (holding that allegations of housing authority’s failure to provide language assistance services could constitute a violation of Title VI); *United States v. Maricopa Cnty*, 915 F. Supp. 2d 1073, 1081 (D. Ariz. 2012) (holding that allegations of failure to provide inadequate language assistance to its LEP jail population denying them meaningful access to programs could constitute a Title VI violation); *Almendares v. Palmer*, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003) (holding that allegations of failure to ensure bilingual services in a food stamp program could constitute a violation of Title VI); *Aghazadeh v. Maine Med.Ctr.*, No. 98-421, 1999 WL 33117182, at *7 (D. Me. June 8, 1999) (denying motion to dismiss where LEP patients alleged that a failure to provide interpreters violated Title VI).

meaningful access to the recipient's programs. See Dep't of Justice ("DOJ") Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002). The DOJ implementing regulations specify that federally-funded recipients must provide foreign language assistance:

[w]here a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program . . . needs service or information in a language other than English in order effectively to be informed of or to participate in the program This requirement applies with regard to written material of the type which is ordinarily distributed to the public.

28 C.F.R. § 42.405(d)(1) (1976). Federal agencies, including HHS and CMS, are well aware of their numerous obligations to implement Title VI regulations that follow the DOJ regulations, and have consistently construed Title VI's prohibition on both intentional and disparate-impact discrimination to require that recipients of federal financial assistance provide meaningful access for LEP persons.⁴ Similarly, Section 1557 provides clear notice to HHS and CMS of their obligations to ensure meaningful language access to services provided under the ACA.

Title VI protects against policies that intentionally discriminate based on language access as well as against those that have a disproportionate impact for this reason, although claims of disparate impact cannot be brought by private plaintiffs in court. *Sandoval*, 197 F.3d at 510-11. Here, CMS/HHS' practices give rise both to claims of disparate impact and intentional discrimination based on language.

Under Title VI claims of intentional discrimination can include claims based on facially neutral laws or practices.⁵ In order to prove intentional discrimination by a facially neutral policy, a "plaintiff must show that the rule was promulgated or reaffirmed because of, not merely in spite of, its adverse impact on persons in the plaintiff's class." *Horner v. Kentucky High School*

⁴ See Dep't of Health and Human Services Notices, 35 Fed. Reg. 11595 (1970); 45 Fed. Reg. 82972 (1980); 65 Fed. Reg. 52762 (2000); 68 Fed. Reg. 47311 (2003) (HHS LEP Guidance); Strategic Language Access Plan to Improve Access to CMS Federally Conducted Activities by Persons with Limited English Proficiency (Feb. 28, 2014). Available at <http://www.cms.gov/About-CMS/Agency-Information/OEOCRInfo/Downloads/CMS-LAP-Updated-2014-508.pdf> (last accessed September 23, 2014.)

⁵ See *Almendares v. Palmer*, 284 F. Supp. 2d 799, 805 (N.D. Ohio 2003); *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) ("As we made clear in *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.").

Athletic Ass'n, 43 F.3d 265, 276 (6th Cir. 1994). An “important starting point,” however, for assessing discriminatory purpose is the “impact of the official action.” *Arlington Heights*, 429 U.S. at 266. Under *Arlington Heights*, determining whether invidious discriminatory purpose is at play requires looking at circumstantial and direct evidence of intent. The impact of the official action—whether it “bears more heavily on one race than another,”—provides the starting point. *Id.*; see also *Reno v. Bossier Parish School Bd.* 520 U.S. 471, 487 (1997) (“[T]he impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.”).

In *Almendares, v. Palmer*, 284 F. Supp. 2d at 807-08, the court found that LEP Spanish-speaking food stamp recipients sufficiently stated an intentional discrimination claim by alleging that the officials administering the food stamps program purposefully discriminated against them by distributing materials only in English, knowing that non-English speakers could not understand the materials. The court found that even when a policy is facially neutral, that policy can constitute evidence of intentional discrimination when established through evidence of “disparate impact, history of the state action, and foreseeability and knowledge of the discriminatory onus placed upon the complainants.” *Id.* at 806 (quoting *S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot.*, 254 F. Supp. 2d 486, 497 (D.N.J. 2003)); see also *Columbus Bd. Of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979) (holding that actions which have a foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose).

Like in *Almendares*, the failure by HHS and CMS to provide non-Spanish speaking LEP individuals meaningful access to a program or services violates Title VI’s protections, and therefore, Section 1557 of the ACA. As HHS itself recognizes, “in many cases, LEP individuals form a substantial portion of those encountered in federally assisted programs.” DHHS LEP Guidance at 47313.

According to a recent report by HHS’s Office of the Assistant Secretary for Planning and Evaluation (“ASPE”), over 8 million people have selected a plan through the federally-facilitated marketplace through the opening enrollment period.⁶ While enrollment data by language preference is not included, the available data sheds light on the potential LEP population. Of the over 1.9 million eligible uninsured Asian Americans, Native Hawaiians, and Pacific Islanders, “[ab]out 13 percent speak Chinese, 8 percent Korean, 8 percent Vietnamese, 3 percent Tagalog, and 14 percent other languages, and 31 percent live in a household without an English-speaking adult present.”⁷ Thus, significant numbers of non-Spanish-speaking LEP individuals are

⁶ ASPE Issue Brief, Health Insurance Marketplace: Summary of Enrollment Report for the Initial Annual Open Enrollment Period (“ASPE Issue Brief”), May 1, 2014, at 13.

⁷ ASPE/Office of Minority Health Research Brief, Eligible Uninsured Asian Americans, Native Hawaiians, and Pacific Islanders: 8 in 10 Could Receive Health Insurance Marketplace Tax Credits, Medicaid or CHIP, March 18, 2014, at 3. Further, approximately 10.7 percent of the total enrollees in the federally-funded marketplace who reported race/ethnicity are Latinos, and

impacted by HHS/CMS's decision to only provide vital notices of inconsistencies and QHP terminations in English and Spanish. This fact was readily foreseeable to HHS/CMS.

Further, despite knowing that a significant number of individuals eligible for and participating in the ACA marketplace were non-Spanish-speaking and LEP, HHS/CMS still elected to send termination notices only in English and Spanish by regular mail and email. The mailed Spanish and English notices of termination included only the following tagline in 15 languages:

Getting Help in a Language Other than English

If you, or someone you're helping, has questions about the Health Insurance Marketplace, you have the right to get help and information in your language at no cost. To talk to an interpreter, call 1-800-318-2596.

Here's a listing of the available languages and the same message provided above in those languages[.]

The taglines provided in these terminations in other languages were clearly insufficient to inform consumers that they were at risk of losing health care coverage because it failed to give non-Spanish-speaking LEP individuals crucial information about the contents of the notice and more importantly, that they had to take immediate action to preserve their benefits, much less which actions they actually needed to take. The taglines also failed to provide notice of the consequences of failing to act by the deadline—consequences which include not only termination of an individual's enrollment in their health care plan, but also the potential repayment of advance premium tax credits and the penalty for failing to have health insurance coverage as required by the ACA. To make matters worse, the taglines instructed consumers to call the marketplace call center phone number, which is answered in English and offers only Spanish as an alternative option. *See* Huang Decl., ¶ 9.

More importantly, HHS and CMS knew these deficient notices would and did impact non-Spanish-speaking LEP individuals disproportionately.⁸ Advocates repeatedly raised concerns about language access to HHS and CMS officials, and in particular of the disparate impact that the deficient notices would have on non-Spanish, non-English speakers. *See* Huang Decl. ¶¶ 6, 12-16; Huang Decl. ¶¶ 1-3; *see also* Letter to Secretary Burwell from the National Immigration Law Center (July 31, 2014), attached as **Exhibit 6**.

approximately 7.9 percent of the total enrollees who reported race/ethnicity are Asians. ASPE Issue Brief, at 29.

⁸ The taglines were in fifteen languages: Arabic, Chinese, French, French Creole, German, Gujarati, Hindi, Korean, Polish, Portuguese, Russian, Spanish, Tagalog, Urdu, and Vietnamese.

Thus, at a minimum, HHS and CMS created a disparate impact on non-Spanish-speaking LEP individuals by failing to provide meaningful language access to the federally-funded marketplace, and the evidence also suggests that this amounted to intentional discrimination against these individuals.

Conclusion

Based on this information, Complainant requests that OCR immediately investigate this claim and require remedial and affirmative actions so that the rights of the Terminated Applicants to re-apply for and continue to receive health insurance benefits are protected. Complainant also requests that individuals and families are not deterred from applying for benefits on behalf of eligible persons because of agency policies and practices that violate federal law. In addition to changes in policies and procedures, Complainant requests that OCR require the agencies to conduct an effective outreach campaign aimed at rectifying the harm caused by these violations.

Thank you for the opportunity to bring these issues to your attention. While we regret the necessity of such a complaint, we are hopeful it is a step towards fulfilling the promise of the ACA by ensuring that millions of uninsured people across the country, including those who are low-income and/or LEP receive the opportunity and benefits health insurance provides. Please let me know if we can provide you any further information.

We would appreciate being kept informed of the results of OCR's investigation into this matter.

Sincerely yours,

HOLLAND & KNIGHT LLP



Robert Barton

Enclosures

cc: George E. Schulz, Jr.
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