



To: Office of Management and Budget

From: Asian & Pacific Islander American Health Forum (APIAHF), National Health Law Program (NHeLP) and Association of Asian Pacific Community Health Organizations (AAPCHO)

Re: Language Access Concerns with RIN 0945-AA11, Nondiscrimination in Health Programs or Activities Proposed Rule

Date: May 14, 2020

Background

Since the passage of the Affordable Care Act in 2010, Section 1557, known as the Health Care Rights Law, has offered critical protections in civil rights and health care for several protected groups. In promulgating the Final Rule in 2016, the U.S. Department of Health and Human Services Office for Civil Rights (HHS OCR) went through an extensive Request for Information, issued a Notice of Proposed Rulemaking, and later the Final Rule in 2016. Since then, covered entities have come into compliance with the many protections required by Section 1557, including protections for limited English proficient persons (LEP). On May 24, 2019, HHS OCR and the Centers for Medicare & Medicaid Services proposed substantial revisions to the Health Care Rights Law that would roll-back civil rights protections for transgender persons, abortion access, and language access.

As organizations that work to improve the health and wellbeing of LEP, minority and marginalized populations, the **Asian & Pacific Islander American Health Forum (APIAHF)**¹, **National Health Law Program (NHeLP)**² and **Association of Asian Pacific Community**

¹ APIAHF is the nation's leading health justice organization working to advance the health and well-being of over 23 million Asian Americans, Native Hawaiians and Pacific Islanders (AA and NHPI) across the U.S. and territories. APIAHF works to improve access to and the quality of care for communities who are predominantly immigrant and many of whom are limited English proficient (LEP). Over 60 percent of Asian Americans and Pacific Islanders are foreign-born and one third are LEP. For 32 years, APIAHF has advanced the health and well-being of these communities and other immigrant communities of color, working with over 100 community-based organizations across 34 states and the Pacific.

² The National Health Law Program (NHeLP), founded in 1969, protects and advances health rights of low-income and underserved individuals and families. NHeLP believes that health equity is achieved when a person's characteristics and circumstances – including race and ethnicity, sex, gender identity, sexual orientation, age, income, class, disability, health, immigration status, nationality, religious beliefs, language proficiency, or geographic location—do not predict their health outcomes. We also believe that these characteristics and circumstances should not limit people's experience in the world or in our organization.

Health Organizations (AAPCHO)³ have direct experience advocating for the rights of persons protected by Section 1557 and an understanding of why the protections are required. We are further deeply concerned about the impact of eliminating protections for LEP persons in light of the current COVID-19 national crisis. As such we strongly support the existing Health Care Rights Law and its 2016 implementing regulations. We oppose eliminating the protections for LEP persons in the May 24, 2019 Proposed Rule. While not the focus of this memo, we further oppose all other efforts to eliminate protections for protected classes covered by the Section 1557 regulation in the May 24, 2019 Proposed Rule.

I. Section 1557 Protections for Limited English Proficient Persons *Are* Justified by Need and Particularly Critical during the COVID-19 National Emergency

a. The Nondiscrimination Notice and Taglines in the 2016 Final Rule are Justified by Need

Federal agencies (including the U.S. Department of Justice, U.S. Department of Health and Human Services, U.S. Department of Homeland Security) and civil rights and health justice organizations such as APIAHF, AAPCHO and NHeLP have documented that LEP persons face significant barriers accessing and navigating public services, including public health efforts and healthcare generally. Over 25 million Americans are LEP, meaning they speak little to no English. An estimated 6.5 million LEP adults are uninsured. Over 6 million Asian Americans (AAs) and over 100,000 Native Hawaiians and Pacific Islanders (NHPIs) speak English less than very well.

Whether it is accessing public health information, enrolling in and understanding health insurance, and accessing quality care, LEP individuals face numerous challenges that can delay the critical information and care they need and deserve. APIAHF has found that during the past seven Open Enrollment Periods for the Health Insurance Marketplaces, for example, language presented a significant barrier for AAs and NHPIs and other LEP communities attempting to enroll in coverage and offers a precursor for the challenges that will only be compounded responding to COVID-19. For example, community-based partner *We Are Oceania* in Hawaii found that:

“After trying several times to enroll in Med-Quest [Hawaii Medicaid], we helped a couple who needed assistance in Chuukese. They never asked for interpreters because they were not aware they could ask for that service.”

History from recent disasters, including Hurricanes Katrina and Rita, demonstrate that under a national emergency, such as the current COVID-19 public health crisis, these barriers are

³ AAPCHO is a national association of 33 community-based health care organizations, 29 of which are Federally Qualified Health Centers (FQHCs), that primarily serve medically underserved Asian Americans, Native Hawaiians, and Pacific Islanders in the United States, U.S. territories, and Freely Associated States. AAPCHO members provide care to nearly three quarters of a million patients annually, 72 percent of whom are racial or ethnic minorities and 46 percent of whom are Limited English Proficient. AAPCHO member health centers provide services in over 50 different languages and dialects in order to care for the primarily low-income AA and NHPI communities they serve.

significantly magnified with sometimes fatal consequences. Both the National Response Framework and National Disaster Recovery Framework identify the importance of including individuals with limited English proficiency in disaster response. The Recovery Framework notes that “Care must be taken to assure that actions, both intentional and unintentional, do not exclude groups of people based on race, color, ethnicity, national origin (including limited English proficiency), religion, sex, sexual orientation, gender identity, age, or disability.” In 2015, the U.S. Department of Justice issued joint guidance with Homeland Security (DHS), Housing and Urban Development (HUD), Health and Human Services (HHS) and Transportation (DOT) stating:

“Hurricane Katrina and subsequent emergencies and disasters highlight a recurring lesson: we need to take proactive measures to ensure that all members of our communities are appropriately incorporated into emergency management activities.”

Numerous news outlets have reported cases in which LEP persons with COVID-19 or suspected cases have been denied standard of care and potential civil rights violations due to their inability to access language services, as required by federal law.⁴

“There are certain communities that are going to be left out, simply because they have a language barrier. I’m being bombarded with requests to translate.” – Melissa Laelan, Marshallese advocate in Arkansas⁵

APIAHF has received several stories from community-based partners that highlight the lack of meaningful access for LEP persons in the current COVID-19 response. Further, data reported by the Health Resources and Services Administration found that COVID-19 resulted in the temporary closure of one in six health centers nationally and 14% of health workers being unable to work.⁶ Consistent with this data, AAPCHO member clinics have reported up to 40% staff reductions due to lost revenues and declines in patient visits due to COVID-19.⁷ One AAPCHO member reported having a physician use two cell phones on speakerphone in order to connect a patient with an interpreter because they could not provide one on-site.

These barriers that are being heightened as a result of COVID-19 remain despite existing federal protections for persons with limited English proficiency, including Title VI of the Civil Rights Act of 1964, Section 1557 of the Affordable Care Act and Executive Order 13166, issued in 2000. The Stafford Act requires that FEMA, “identify in coordination with State and local governments, population groups with limited English proficiency and take into account such groups in planning for an emergency or major disaster.” More recently, the U.S. Commission on

⁴ See *Hospitals Have Left Many COVID-19 Patients Who Don’t Speak English Alone, Confused and Without Proper Care*, ProPublica, March 31, 2020, available at: <https://www.propublica.org/article/hospitals-have-left-many-covid19-patients-who-dont-speak-english-alone-confused-and-without-proper-care>.

⁵ *Race to Translate COVID-19 Info as Some US Communities Left Out*, AlJazeera, March 31, 2020, available at: <https://www.aljazeera.com/news/2020/03/race-translate-covid-19-info-communities-left-200331144408436.html>.

⁶ *Key Updates from the Health Center COVID-19 Survey Week 3*, George Washington University School of Public Health, April 17, 2020, available at: <https://publichealth.gwu.edu/sites/default/files/HRSA%20COVID-19%20Week%203%20Updates%20GG-RCHN%20Collaborative%204-27-20.pdf>.

⁷ Analysis by AAPCHO of internal member data.

Civil Rights found that “the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans.”⁸

Given these long-standing systemic challenges, many of which were considered in the administrative record informing the Section 1557 Final Rule and current Federal response to the COVID-19 national emergency, **the Proposed Rule runs counter to these existing obligations and fails to consider the human and economic harm to LEP individuals and the organizations that serve them.**

b. Removing Language Protections during COVID-19 Has Significant Economic Implications

Removing the requirement for covered entities to post a notice of nondiscrimination and taglines during the COVID-19 economic retraction and potential recession that has already had profound economic implications raises serious economic and human costs and undermines the federal response.

In the past month, 30 million Americans have filed for unemployment.⁹ The massive increase in unemployment affects individuals’ access to employer-based health insurance and eligibility for Medicaid and the Health Insurance Marketplaces. Analysis from the Kaiser Family Foundation estimates that most of these individuals may become eligible for subsidized coverage under the Marketplace or Medicaid.¹⁰ Removing notice and tagline requirements during this time of economic uncertainty and significant increase in public support programs could result in LEP individuals not understanding their rights and failing to respond to legal notices regarding their rights.

II. OCR’s Proposed Rule Fails to Consider that Section 1557 Language Access Requirements are Built on Federal Civil Rights Protections and Guidance that have Existed for Decades in which Many Covered Entities were Already in Compliance

The protections for LEP persons in the final Section 1557 regulation build on existing federal civil rights protections and guidance that have been in place for decades, including Title VI of the Civil Rights Act of 1964, Executive Order 13166 and HHS 2003 LEP Guidance to ensure meaningful access for LEP persons. HHS OCR has itself noted that these protections are “consistent with longstanding principles under civil rights laws.” As such, OCR’s claims of economic costs must be evaluated in the context in which considerable numbers of covered entities are already in compliance with many of the requirements of Section 1557.

⁸ *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement*, U.S. Commission on Civil Rights, November 2019 Statutory Report. Available at: <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf>.

⁹ *Job Losses Deepen in Pandemic with U.S. Tally Topping 30 Million*, Bloomberg, April 30, 2020, available at: <https://www.bloomberg.com/news/articles/2020-04-30/another-3-8-million-in-u-s-filed-for-jobless-benefits-last-week>.

¹⁰ *Changes in Income and Health Coverage Eligibility after Job Loss Due to COVID-19*, Kaiser Family Foundation, April 14, 2020, available at: <https://www.kff.org/health-reform/issue-brief/changes-in-income-and-health-coverage-eligibility-after-job-loss-due-to-covid-19/>.

The notice provisions under §92.8 require that each covered entity “take initial and continuing steps to notify beneficiaries, enrollees, applicants, or members of the public of individuals’ rights under Section 1557 and this part and of covered entities’ nondiscrimination obligations with respect to their health programs and activities.” Further, HHS OCR noted that “we modeled this section generally after the notice requirements found in regulations implementing Title VI, Title IX, Section 504, and the Age Act, which require covered entities to have a notice in place.” As part of this notice requirement, covered entities must post in-language taglines in the top 15 languages spoken in the state in significant publications or significant communications targeted to beneficiaries, enrollees, applicants or members of the public.

When HHS OCR issued the Final Rule requiring such taglines, it considered comments from several commenters, including those that proposed eliminating the tagline requirement. HHS responded to those comments noting that “[w]e decline to eliminate the tagline requirement because such an approach would not provide adequate notice of language assistance services.” **Further HHS OCR considered arguments that the notice and tagline requirements were “onerous” and found that the “burdens were outweighed by the benefits that § 92.8(f)(1)(iii) will generate for individuals with limited English proficient by making them aware, in their own languages, of the availability of language assistance services.”**

As such, taglines are a necessary and well-established method of ensuring that LEP individuals are aware of their legal right to language services, particularly in the absence of fully translated materials and notices in their languages.

III. OCR has Failed to Document or Quantify the Harm and Resulting Economic Impact of Removing Critical Language Access Protections

a. Eliminating the Nondiscrimination Notice Imposes Economic Harm on LEP Persons and the Organizations that Serve Them

The Section 1557 Final Rule requires that all covered entities post a “notice of nondiscrimination” on their websites and in conspicuous locations and in “significant publications and communications.” The notice broadly describes who is protected by Section 1557 (all protected classes) and informs the public of their rights. **The notice requirement is consistent with the long history of civil rights regulations requiring posting of notice of rights, including implementing regulations of Title VI, Section 504, Title IX and the Age Act which all require that recipients of federal financial assistance notify recipients that they do not discriminate.**

The 2016 Final Rule created a new obligation to post a 1557 notice of nondiscrimination given the new application of 1557 to health care and sex discrimination. In an effort to harmonize existing notice requirements, OCR developed a sample notice that meets the other statutory requirements under Title VI, Section 504, Title IX and the Age Act, thereby lessening the burden on covered entities subject to multiple civil rights laws. At the same time, OCR retained flexibility in allowing covered entities to adopt their own notice, at their preference.

Under the May 2019 Proposed Rule, OCR proposes to completely repeal the requirement to post notice, without evaluating the human and economic costs of doing so and without proposing any alternative method in which notice is to be provided. While OCR reiterates the important obligations it is under with respect to Title VI numerous times in the Proposed Rule and desire to harmonize 1557 to it, repealing the nondiscrimination notice runs entirely counter to HHS LEP Guidance. HHS has previously stated that “awareness of rights or services is an important part of ‘meaningful access.’ Lack of awareness that a particular program, right or service exists may effectively deny LEP individuals meaningful access.”¹¹

Contrary to OCR’s assertions, the Section 1557 nondiscrimination notice is not redundant of existing civil rights notices under other statutes. Rather, the notice recognizes the fact that individuals may face *multiple forms of discrimination* and in fact eliminates duplication by consolidating the underlying statutes’ notice requirements into one.¹²

OCR has provided no explanation for how individuals will know of their rights and how elimination of notices will not deny LEP individuals, LGBTQ+ persons, women and persons with disabilities meaningful access. Without the notice, members of the public will have limited means of knowing they have the right to file a complaint and how to file such a complaint. Such concerns are particularly relevant during the COVID-19 national emergency.

APIAHF has received numerous stories from community-based organizations working to meet the needs of LEP individuals and communities demonstrating not only the lack of knowledge about their civil rights protections, including those guaranteed by Section 1557, but about their rights to Federally-supported health care programs and activities in general. APIAHF partners, who generally work with immigrant communities, have shared that notices play an important role in helping establish an understanding among their clients about the U.S. civil rights regime.

Mr. Tran has lived in Biloxi, MS with his wife and three children for the past 15 years, working as a deckhand on a shrimping boat. His wife works part time at a local seafood processing center. Neither qualified for employer-sponsored coverage and they were not able to afford coverage on the open market based on their low income. During the past open enrollment period, Mr. Tran came to Boat People SOS Gulf Coast (BPSOS), a community-based organization employing navigators to get people enrolled in coverage. At the time, Mr. Tran had been uninsured for about 6 years. With the help of BPSOS’ bilingual navigators, Mr. Tran learned he could enroll in coverage and his children qualified for CHIP. Because he is limited English proficient and speaks Vietnamese, Mr. Tran was completely unaware of his health care rights and options prior to getting help from BPSOS navigators and outreach staff. Now Mr. Tran is able to visit a doctor and have a plan he can afford.¹³

¹¹ 2003 HHS LEP Guidance 68 FR 47311.

¹² To reduce the burden on covered entities, OCR developed a model nondiscrimination notice that treats compliance with § 92.8 as satisfying the notice requirements under the regulations implementing Title VI, Section 504, Title IX, and the Age Act.

¹³ Story as collected by BPSOS, a partner of the Asian & Pacific Islander American Health Forum.

b. Eliminating the Tagline Requirement Imposes Economic Harm on LEP Persons and the Organizations that Serve Them

Currently, covered entities, such as health insurance plans, must also include in-language taglines in the top 15 languages spoken by individuals with LEP in the state or relevant states the entity operates.

The inclusion of taglines is well-supported by long-standing federal and state regulations, guidance and practice.¹⁴ In addition, a number of states have independent tagline requirements to support language access, including California, Colorado, District of Columbia, Maryland, Nebraska and Washington.¹⁵ The use of taglines is a cost-effective approach to ensuring that covered entities are not overly burdened while maintaining access for LEP individuals.

Thus, taglines are already a compromise to balance costs and benefits on covered entities and to LEP individuals, a point OCR has not considered in the Proposed Rule's economic impact analysis.

In the absence of fully translated documents, taglines are an efficient and cost-effective way “to ensure that individuals are aware of their protections under the law, and are grounded in OCR’s experience that failures of communication based on the absence of auxiliary aids and services and language assistance services raise particularly significant compliance concerns under Section 1557, as well as Section 504 and Title VI.”¹⁶

For example, as provided by APIAHF’s partner in Hawaii:

We Are Oceania (WAO), established in 2015 and located in Honolulu, Hawaii is a community-based organization that serves more than 6000 people per year, or an average of 240 per month. Five out of their seven staff serve on the healthcare team. In addition to English, their bilingual staff speak 3 dialects of Chuukese, Marshallese, Pohnpeian, and Kosraean. WAO established a partnership with an FQHC so that their Certified Application Counselors can do ACA enrollments as well as health literacy training on site, co-locating health education with health care access. Part of WAO’s work is to conduct community outreach around open enrollment dates, eligibility, etc., both in and around Honolulu, but also on Maui, Hawaii and the Big Island.

More than 90% of WAO’s clients speak languages other than English, from Micronesia, or Asian countries. More than 50% of their clients speak and read limited to no English. The majority of WAO’s clients don’t realize before going through the ACA enrollment process that they are legally entitled to an interpreter. Through the ACA enrollment process, WAO spends considerable staff time informing clients of their right to an interpreter. Clients see this message from WAO staff echoed in taglines on their ACA

¹⁴ 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.

¹⁵ Youdelman, Mara, *Summary of State Law Requirements Addressing Language Needs in Health Care*, National Health Law Program, April 2019, <https://9kqpw4dcaw91s37kozms5jx17-wpengine.netdna-ssl.com/wp-content/uploads/2019/04/Language-Access-NHeLP-50StateSurvey.pdf>.

¹⁶ *Id.*

enrollment paperwork, in their local hospitals and FQHC, and then, finally, often by the provider themselves.

Especially for those who have more recently moved to Hawaii and may be getting health insurance for the first time, it is important to have their right to meaningful language access reiterated at multiple points of connection to the health care system. If clients were not able to be reminded in their language that they have rights to an interpreter, it would put significant strain on We Are Oceania staff. In particular, we estimate that our number of walk-in clients requesting assistance would become burdensome. If clients are reminded that they have the right to interpretation, they are more easily able to advocate for language access themselves in the hospital or doctor's office setting.”¹⁷

APIAHF partners with community-based organizations that already struggle to fully serve their LEP clients protected by Section 1557. For example, HOPE Clinic, an AAPCHO member community health center in Houston, Texas, serves thousands of LEP patients in 34 languages every year. HOPE is one of the few providers in the area with doctors that speak languages like Vietnamese, Burmese, Teochew, Persian, Arabic, Turkish, French and many other languages and dialects spoken in Africa. HOPE provides more than medical care, as many clients need help understanding insurance and other documents in English. HOPE staffers take time out of their day to walk through these complex documents.

If this rule is finalized, organizations like HOPE will face increased burdens due to fewer clients being aware of their language access rights and the likelihood that more people will turn to them for help in their language, rather than the covered entities. For example, for written materials, HOPE and clinics similar to HOPE provide language services in a number of languages that both include and exceed the top 15 languages spoken in the state that are covered by the current Section 1557 regulation for notices and taglines. However, these entities must still ensure meaningful access regardless of whether LEP individuals receive notice of their right to language services or not and provide oral language services in all languages to anyone who needs it.

Few of these organizations are funded or receive reimbursement for language services they provide. Only 15 states, for example, use the Medicaid option to reimburse for interpretation. If fewer patients are aware of their rights, or if health insurance and other companies simply stop offering language access services, community-based organizations will have to find a way to serve these patients or turn them away. As described throughout this letter, LEP communities already face barriers to knowing and exercising their rights to federally supported health care programs and activities. For example, HOPE provided the following client story:

“We are proud to make our patients feel more comfortable when they come here. Being part of the Arabic community, a Syrian family contacted us through their son, seeking for health insurance for himself and his parents. We scheduled the appointment for him first, and he got enrolled in marketplace, and another appointment for the parents, both who got approved for ACA, The mother has been diagnosed with breast cancer and needs to start the treatment journey. The family still scheduling appointments for medical services with the clinic as well

¹⁷ Story provided by We Are Oceania (WAO), a partner of the Asian & Pacific Islander American Health Forum.

as, helping them to do their health assessment and the rewards with their insurance provider to get the points and rewards.”¹⁸

A community-based organization, Monsoon, in Iowa shared:

“Monsoon’s approach is to train clients to simply ask for an interpreter because urging them to “demand” their rights would not only be a difficult act for them as many Asians believe in respect for authority or have themselves faced oppressions from authority. Even if there are clients who are willing to act independently and raise issues of language access rights, they would still need an advocate to assist them as a “witness” to any interactions to ensure fair treatment. It is, therefore, incumbent on official systems with power to train their employees to support people lacking English-language skills rather than relying on capacity-strapped nonprofit community organizations to do the work all the time.”¹⁹

These stories raise serious doubts about OCR’s estimates of cost savings from repealing the language access notice and tagline requirements as they fail to consider the human and economic burden on LEP individuals and the organizations that serve them.

In summary, for the above reasons, the proposed changes published in the May 24, 2019 Proposed Rule are unnecessary, untimely, and inconsistent with the federal government’s whole-of-government response to the unprecedented COVID-19 pandemic, inconsistent with comments submitted by APIAHF, NHeLP, AAPCHO and language access advocates nationwide, and fail to consider the human and economic impact on LEP individuals and the organizations that serve them.

¹⁸ Story provided by HOPE Clinic, a partner of the Asian & Pacific Islander American Health Forum.

¹⁹ Story provided by Monsoon, a partner of the Asian & Pacific Islander American Health Forum.