January 27, 2022

Submitted electronically to PMpolicy@cms.hhs.gov

Chiquita Brooks-LaSure, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9911-P, P.O. Box 8016
7500 Security Blvd.
Baltimore, MD 21244-8016

Dr. Ellen Montz
Deputy Administrator and Director
Center for Consumer Information and Insurance Oversight
Department of Health and Human Services
7500 Security Blvd.
Baltimore, MD 21244-8016

Re: 2023 Letter to Issuers in the Federally-Facilitated Exchanges

Dear Administrator Brooks-LaSure and Director Montz:

The National Health Law Program (NHeLP) is a public interest law firm working to advance access to quality health care and protect the legal rights of low-income and underserved people. We appreciate the opportunity to provide these comments on the Centers for Medicare & Medicaid Services (CMS) draft 2023 Letter to Issuers in the Federally-facilitated Exchanges.

Standardized Options (Chapter 1, Section 9)

We provided comments regarding Standardized Options in our comments to the HHS Notice of Benefit and Payment Parameters for 2023. We ask that those comments be incorporated by reference into this comment to the extent they are applicable to the provisions in the draft Letter to Issuers.

Network Adequacy (Chapter 2, Section 3)

We provided significant comments regarding Network Adequacy in our comments to the HHS Notice of Benefit and Payment Parameters for 2023. We ask that those comments be incorporated by reference into this comment to the extent they are applicable to the provisions in the draft Letter to Issuers.

Essential Community Providers (Chapter 2, Section 4)

We provided significant comments regarding Essential Community Providers in our comments to the HHS Notice of Benefit and Payment Parameters for 2023. We ask that those comments be incorporated by reference into this comment to the extent they are applicable to the provisions in the draft Letter to Issuers.

Discriminatory Benefit Design (Chapter 2, Section 10)

We provided comments regarding Discriminatory Benefit Design in our comments to the HHS Notice of Benefit and Payment Parameters for 2023. We ask that those comments be incorporated by reference into this comment to the extent they are applicable to the provisions in the draft Letter to Issuers. We further urge HHS to closely monitor compliance with these requirements both through the QHP accreditation process and ongoing monitoring.

Qualified Health Plan Performance and Oversight (Chapter 5)

We are concerned that HHS's current oversight and compliance monitoring has proven inadequate to identify, remedy, and effectively deter QHP performance problems. As the most recently published review report shows, HHS reviews only a small handful of

plans, relying largely on plan documents.[1] The report identifies deficiencies in a range of issues, from formularies to network adequacy to nondiscrimination compliance. However, the current review process only scratches the surface of plan performance. We urge HHS to engage in a broader, more comprehensive approach.

For example, in the 2018 Letter to Issuers, HHS said compliance review of plans would include examining complaints.[2] In the 2016 Letter to Issuers, HHS said review of plans would include complaints and appeals.[3] However, it is not clear if, or how, HHS considered consumer complaints and appeals because there is no such discussion in the annual review reports.

Consumer complaints and appeals provide on-the-ground perspective of the challenges faced by individuals accessing health care. Complaints and appeals also provide information on plan design and performance in real time. Data about appeals of coverage denials can also indicate if medical utilization is arbitrary, or clinically-based. CCIIO should include review of complaints and appeals as part of QHP monitoring, and share findings in its annual reports.

As part of its review, HHS also examines whether a QHP has an exceptions process for non-formulary drugs.[4] HHS regulations require QHPs and other plans subject to EHB requirements to provide a standard and expedited exceptions process, as well as an external review process, for consumers to access non-formulary drugs.[5] The 2020 Compliance Report observed plans where the non-formulary drug exception request policy was not complete.[6] HHS should further examine how plans notify enrollees of the

---

[1] CCIIO, 2020 Plan Year Federally-Facilitated Exchange Issuer Compliance Review Summary Report (Dec. 30, 2021), https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/2020-PY-FFE-Summary.pdf.
[2] CCIIO, Addendum to 2018 Letter to Issuers in the Federally-facilitated Marketplaces (Feb. 17, 2017), at 56, https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Final-2018-Letter-to-Issuers-in-the-Federally-facilitated-Marketplaces-and-February-17-Addendum.pdf.
[3] CCIIO, 2016 Final Letter to Issuers (Feb. 15, 2015), at 37, https://www.cms.gov/cciio/resources/regulations-and-guidance/downloads/2016-letter-to-issuers-2-20-2015-r.pdf.
[4] See CCIIO Compliance Review Report, *supra* note 1.
[5] 45 C.F.R. § 156.122(c).
[6] CCIIO Compliance Review Report, § 3.1.2, *supra* note 1.

existence of the exceptions process and how to use it. The availability of the exceptions process can especially important for those who experience mid-year formulary changes. HHS should also gather and share data on the use of the standard and expedited exceptions processes, as well as external appeals. High use of the exceptions process to access non-formulary drugs could indicate an inadequate formulary, or that the requisite Pharmacy and Therapeutics Committee is failing to review and update plan formularies as required.[7]

We urge HHS to implement more comprehensive, robust, and transparent review and compliance monitoring to help ensure the QHPs meet their obligations to consumers.

Meaningful Access (Chapter 6, Section 3)

We strongly support of restoring the meaningful access provisions outlined in CCIIO's 2018 Letter to Issuers. Meaningful access for LEP individuals and people with disabilities must go beyond nondiscrimination; it must also include affirmative support and robust enforcement of the law. In keeping with the Biden Administration's equity priorities,[8] HHS should restore the notice and tagline requirements as well as the definition of covered entities discussed in the 2018 Letter to Issuers and 2016 Rule on Nondiscrimination in Health Programs and Activities.[9] HHS should also continue to monitor entities for appropriate use of interpreting, translation, auxiliary aids and services, and other services to assist in effective communication.

Notice requirements are a critical tool to ensure meaningful access for LEP individuals and people with disabilities. Civil rights protections are of little worth if people do not know what their rights are and what services they are entitled to under the law. As this administration has recognized, affirmatively advancing equity is necessary to redress inequities that serve as barriers to equal opportunity.[10] Therefore, we recommend that HHS, at a minimum, restore the notice requirements to those outlined in the 2016 Nondiscrimination Rule, which include the following information:

- That the covered entity does not discriminate;

[7] 45 C.F.R. § 156.122(a)(3)(iii).
[8] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).
[9] 81 Fed. Reg. 31375 (2016).
[10] Exec. Order No. 13985, *supra* note 8.

- That the covered entity provides auxiliary aids and services for people for no charge and in a timely manner;
- That the covered entity provides language access services for LEP individuals free of charge and in a timely manner;
- How to obtain the auxiliary aids and services and/or interpretation and translation services;
- Identification of and contact information for an employee designated to ensure the entity's compliance with § 1557;
- That there is a grievance procedure and how to file a grievance;
- How to file a discrimination complaint with OCR.

We also recommend that HHS restore the tagline requirements in the 2016 Nondiscrimination Rule.[11] Tagline requirements facilitate access to health care by ensuring at least a minimum amount of notice as to available language access services that help LEP individuals get important information about their health care and coverage. Tagline requirements advance health equity because they aim to allow LEP individuals' access to the same amount of participation and self-determination in health care decisionmaking as non-LEP individuals.

We are encouraged that HHS will soon issue new guidance to improve meaningful access for people with disabilities and LEP individuals that we hope will restore and expand the provisions from the 2016 Nondiscrimination Rule. We recommend that HHS adopt these policies and explore implementing additional policies that have been shown to advance meaningful access. For example, the Migration Policy Institute recently highlighted innovative state and local policies such as training frontline staff on meaningful access rights and procedures, providing technical assistance, establishing accountability mechanisms, and tracking local LEP populations.[12] Disability advocates recommend allowing entities flexibility in adopting new adaptive technologies as they become available and using Plain Language or Easy Read (an accessible format that uses pictures and easy-to-understand language) in notices and significant communications.[13] Robust data collection on individuals who have accessibility needs

[11] 81 Fed. Reg. 31375 (2016).
[12] See Jacob Hofstetter, Margie McHugh, and Anna O'Toole, *A Framework for Language Access*, Migration Policy Institute, at 13, 17-18 (Oct. 21, 2021), https://www.migrationpolicy.org/sites/default/files/publications/language-access-2021_final.pdf.
[13] See DREDF Comments on Proposed Changes to the Section 1557 Regulation, Disability Rights Education & Defense Fund (August 13, 2019), https://dredf.org/2019/08/13/dredf-

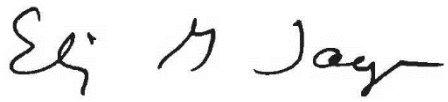
can help HHS monitor and enforce accessibility rules as well as facilitate access to assistive technology.[14] As new tools, technologies, and ideas that advance accessibility become available, HHS should solicit input from advocates and review recommendations to periodically update its guidance.

Conclusion

Thank you for the opportunity to comment on this important issue. Our comments include citations to supporting research and documents for the benefit of HHS in reviewing our comments. We direct HHS to each of the items cited and made available to the agency through active hyperlinks, and we request that HHS consider these, along with the full text of our comments, part of the formal administrative record on this proposed rule.

If you have any questions about our comments, please contact Mara Youdelman at (202) 683-1999 or youdelman@healthlaw.org.

Sincerely,



Elizabeth G. Taylor
Executive Director

comments-on-proposed-changes-to-the-section-1557-regulations/; One Idea Per Line: A Guide to Making Easy Read Resources, Autistic Self-Advocacy Network (accessed Jan. 25, 2022), https://autisticadvocacy.org/resources/accessibility/easyread/.

[14] Hofstetter et al., *supra* note 12 at 25.