November 9, 2015

The Honorable Sylvia M. Burwell
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Electronic Submission via: http://www.regulations.gov/#!submitComment;D=HHS-OCR-2015-0006-0001

RIN: 0945-AA02

Re: Comments on Proposed Rule: Nondiscrimination in Health Programs and Activities, Implementation of Section 1557 of the Affordable Care Act

Dear Secretary Burwell:

AccessMatters appreciates the opportunity to comment on the proposed rule, "Nondiscrimination in Health Programs and Activities" issued by the Department of Health and Human Services on September 8, 2015 to clarify and implement Section 1557 of the Affordable Care Act (ACA).

My name is Melissa Weiler Gerber, and I am honored to serve as the President and CEO of AccessMatters, formerly Family Planning Council. AccessMatters, a private nonprofit organization based in Philadelphia, is the catalyst for providing access to sexual and reproductive health care for teens and adults in need. AccessMatters develops, manages and disseminates programs, information and trainings that are culturally relevant, evidence based, and adaptable to an ever-changing healthcare environment. Through research, training, delivery of evidenced-based programs, community engagement, and advocacy, AccessMatters works to transform access to sexual and reproductive health.

AccessMatters represents a network of over 60 health centers reaching over 100,000 teens and adults in Southeastern Pennsylvania. As such, we have a unique perspective built from a 40 year history of transforming access to sexual and reproductive health. AccessMatters' programs and services include a family planning program, HIV prevention and care programs, cancer screening programs, and services targeting LGBT youth and adults, individuals with disabilities, and individuals with low-English proficiency.

AccessMatters commends HHS for clarifying Section 1557 and strongly supports many of the proposed rule's nondiscrimination protections. We appreciate the opportunity to highlight some concerns regarding provisions within the proposed rule. We also take this opportunity to recommend that additional clarification from HHS be added in areas identified below. AccessMatters believes the new standards for implementation of Section 1557 will be important in advancing health equity and reducing health disparities.

AccessMatters has organized our response herein in relation to the following content areas of Section 1557: Sex Discrimination, National Origin Discrimination and Language Access, Disability Discrimination, Religious Exemption, Notices and Remedies, and Enforcement.

Sex Discrimination

AccessMatters is pleased to see that the definition of sex discrimination prohibits discrimination on the basis of, among other factors, pregnancy, and the termination of pregnancy, as well as recovery from pregnancy, childbirth, or related medical condition. We further appreciate that Section 1557 prohibits discrimination on the basis of gender identity and sex stereotyping, and protections for transgender individuals.

AccessMatters strongly encourages adding "sexual orientation" as an enumerated protected class, consistent with the EEOC decision in *Baldwin v. Foxx* (EEOC Appeal #0120133080, 2015), establishing that sexual orientation is inextricably linked to sex-based beliefs. We believe that this rule clarification is a critical opportunity to state that discrimination on the basis of gender identity and sexual orientation is a form of sex discrimination and to clarify that the concept of sex stereotyping extends to claims of sex discrimination on the basis of sexual orientation. The 2011 landmark report by the Institute of Medicine documents health disparities experienced by LGBT individuals and their families often as a result of discrimination in

healthcare systems; these include being denied needed treatment, being subjected to judgmental and abusive language, and postponing needed medical care because of discrimination from providers.

National Origin Discrimination and Language Access

AccessMatters strongly supports meaningful access to healthcare services for individuals with limited English proficiency and appreciates the clarification around this. However, while the provision of language assistance and interpreters in healthcare settings is laudable, it may pose an undue burden on small clinics or facilities in geographic areas where a large number of non-English languages (greater than three) are prevalent, thereby jeopardizing their ability to continue to provide services. It may be helpful for HHS to enumerate a threshold provision in this rule to avoid such unintended consequences.

Disability Discrimination

Provision of health information through technology is key to accessing and delivering healthcare services. Frequent changes in software and technology platforms, however, may make this particularly challenging for small clinics or facilities to implement. For example, an organization's website may be designed to be ADA and Section 508 compliant, but not easily be readable on a mobile platform. Likewise, design features that enable technology for visual and hearing impaired may make the system less usable for individuals with cognitive or mental disabilities. AccessMatters encourages HHS to provide guidance to healthcare entities that identifies the type of health information technology and details evidence-based approaches for augmenting health information order to be responsive to individuals with significant health needs.

AccessMatters supports the provision that prohibits Qualified Health Plans from "employing marketing practices or benefit designs that have the effect of discouraging enrollment by individuals with significant health needs."

Religious Exemption

AccessMatters believes that existing rules, such as the Religious Freedom Restoration Act of 1993 (RFRA), more than sufficiently protect the rights of individuals to be free of government intrusion into religious beliefs. RFRA was intended to provide protection for free exercise rights, applying strict scrutiny, on a case-by-case basis, to federal laws that substantially burden religious exercise. RFRA was not intended to create blanket exemptions to laws, such as Section 1557 of the ACA, that protect against discrimination. Individuals, particularly those in elected public office, or who are providing a public service like healthcare, should not impose their religious beliefs onto individuals who are seeking a service, like a patient seeking healthcare. Similarly, these same individuals should not be allowed to refuse healthcare or service based upon their own religious beliefs. By using religious conviction as the basis of determining whom one may wish to serve or what service one is willing to provide, religious beliefs cease to be privately held and become the imposing of religious conviction on another person, who may have differing religious beliefs or be non-religious.

AccessMatters strongly opposes any new exemption to Section 1557 that would permit discrimination based on individuals' religious views against any person, especially women or LGBT people, or against provision of services deemed medically necessary.

Notices and Remedies

AccessMatters is concerned that notices must include taglines in the top 15 languages spoken nationally. In many states and/or service regions, the top 15 languages nationally will not be useful in meeting the needs of LEP communities. There is significant regional variation in the top 15 non-English languages spoken, so while these might make sense from a national perspective, in some parts of the country other languages might be more frequent (these languages, according to U.S. Census Bureau, listed in order of prevalence are: Spanish, Chinese, French, Tagalog, Vietnamese, Korean, German, Russian, Italian, Portuguese, Polish, Japanese, Persian, Greek, Serbo-Croatian). AccessMatters recommends that covered entities be required to include taglines in the top 15 languages in their state or service region rather than the top 15 languages nationally.

HHS should consider inclusion of reference to the HHS LEP Guidance which requires that vital documents be translated for each language group that makes up five percent or 1,000 persons, whichever is less, of the population of persons eligible to be served or likely to be affected by the program or recipient in its service area. This percentage and numeric threshold is already employed in other federal agency policy guidance, with some programs and agencies employing even lower thresholds.

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AccessMatters supports the inclusion of the administrative complaint process and the provision for civil suit to address discrimination. We recommend that HHS directly state that Section 1557 permits judicial claims as a remedy to address disparate impact discrimination.

Enforcement

According to the definition of Essential Health Benefits (EHB) in Section 1302 of the Affordable Care Act, an issuer cannot claim to provide EHB if its benefit design, or the implementation of its benefit design, discriminates on the basis of an individual's sexual orientation, gender identity, sex, race, color, national origin, disability, age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions. AccessMatters recommends HHS define "benefit design" to include, at a minimum: cost-sharing, formulary tiers, provider networks, prior authorization and other utilization management techniques used by entities in the administration of a health plan.

AccessMatters encourages HHS to develop mechanisms to routinely monitor health plans for "de facto" discrimination in how benefits are administered for each of the protected classes outlined in the Section 1557 rule. These include discriminatory benefit designs that limit access, such as restrictive formularies and inadequate provider networks; high cost-sharing; and a lack of plan transparency that may deprive consumers of information that is essential to making informed enrollment choices. CMS already has utilized one methodology to monitor qualified health plan (QHP) benefit design: performing an outlier analysis on QHP cost sharing (e.g., co-payments and co-insurance) as part of the QHP certification application process in order to ensure nondiscrimination in QHP benefit design. CMS goes on to specify that, with regard to prescription drugs, a plan will be considered an "outlier" if it has "an unusually large number of drugs subject to prior authorization and/or step therapy requirements in a particular category and class." AccessMatters recommends that HHS utilize similar methodology to analyze the administration of benefits for these primary components of benefit design and for each protected class identified in the Section 1557 rule.

AccessMatters appreciates the opportunity to comment on the "Non-discrimination in Health Programs and Activities" proposed rule. Ensuring all individuals have access to quality healthcare is sound public health policy and good for families and communities across the nation. If you require additional information about the issues raised in this letter, please contact me at 215-985-2655 or at melissa.weilergerber@accessmatters.org

Sincerely,

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