



November 6, 2015

Jocelyn Samuels
Director
Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA02)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

RE: RIN Number 0945-AA02: Nondiscrimination in Health Programs and Activities Proposed Rule

Dear Director Samuels:

On behalf of Kidney Care Partners (KCP), I would like to thank you for providing us with the opportunity to comment on the “Nondiscrimination in Health Programs and Activities” proposed rule (Proposed Rule). KCP is an alliance of members of the kidney care community that serves as a forum for patient advocates, dialysis care professionals, providers, and manufacturers to advance policies that support the provision of high quality care for individuals with both chronic kidney disease (CKD) and End-Stage Renal Disease (ESRD).

KCP strongly supports the Proposed Rule and urges the Office for Civil Rights (OCR) to finalize it as proposed with a few modifications suggested in the letter. First, we recommend that OCR clarify that individuals with ESRD (also known as kidney failure) who require dialysis are classified as disabled, consistent with other federal laws, and, therefore, Exchange plans may not discriminate against them. As described in detail below, this clarification is important because dialysis patients have had an extremely difficult time obtaining relief when State-based Marketplace plans discriminated against them. Second, we recommend that OCR take a more proactive role in making sure that the Marketplaces do not discriminate against individuals with kidney failure who rely upon dialysis to sustain life, by allowing for a complaint process, including expedited review, for those who believe they have experienced discrimination because of their disability.

I. KCP Supports Applying the Prohibition on Discrimination to the State-Based and Federal Marketplaces, as well as to Entities Offering Health-Related Insurance or Other Health-Related Coverage.

KCP supports the provisions of the Proposed Rule that define the Federally-facilitated Marketplaces and the State-based Marketplaces as being subject to the protections offered in the Proposed Rule. We also support the application of the prohibition on discrimination to covered entities that provide or administer health-related insurance or other health-related coverage. Applying the prohibition on discrimination to this broad group of entities is critically important to protecting individuals with disabilities. In particular, as the Marketplaces evolve, OCR is in the best position to make sure that individuals with disabilities are protected from discrimination.

II. KCP Recommends that OCR Clarify in the Final Rule that Individuals with Kidney Failure Requiring Dialysis are Protected by the Antidiscrimination Provisions.

OCR should clarify that the protections described in the Proposed Rule extend to individuals whose lives are dependent on dialysis treatments at least three times per week. The Rehabilitation Acts of 1973 and 1993 recognize that individuals receiving dialysis because of kidney failure are disabled and, therefore, protects them against being turned down for a job or promotion or being fired because of their disability if they can do the assigned job. Given that OCR proposes to rely upon the definitions of the Americans with Disabilities Act (ADA) and the Rehabilitation Acts, we believe that the protections against discrimination set forth in the Proposed Rule also apply to dialysis-dependent individuals, *i.e.* those with kidney failure. We ask that OCR specifically reference this group of individuals in the final rule to avoid any confusion about the applicability of the final rule to this group of individuals.

Providing this clarification is extremely important because State-based Marketplaces have approved plans that discriminate against individuals with kidney failure who require dialysis treatments. In September, KCP raised concerns about the proposed 2017 Benchmark plans in Arkansas, Louisiana, Alabama, Georgia, Maine, New Hampshire, Oregon, and Washington and submitted a comment letter to the Centers for Medicare and Medicaid Services on the Proposed 2017 Essential Health Benefits Benchmark Plans. The problems outlined below provide illustrative examples of the discrimination individuals who rely upon dialysis face in some of the State-based Marketplaces.

One plan in Oregon has indicated to their beneficiaries that once a beneficiary develops kidney failure and requires dialysis treatments, the beneficiary

must enroll in Medicare. The plan fails to indicate that the beneficiary has a choice as to whether to enroll in Medicare or to retain their Marketplace plan. This plan further incentivize the switch in health plans by paying the beneficiary's Part B premium amounts during the coordination period, if the beneficiary enrolls in Medicare.¹

Also in Oregon, one plan's (PacificSource) Evidence of Coverage (EOC) notes, "Benefits for members who are receiving services for end-stage renal disease (ESRD), who are eligible for Medicare, are limited to 125% of the current Medicare allowable amount for participating and non-participating ESRD service providers. Benefits will continue to be paid at the cost share level applied to other benefits in the same category for members who are not eligible for Medicare." The EOC further provides, "If you are Medicare eligible due to age, this plan only pays the portion of covered charges that would not be paid by Medicare Parts A and B. This rule applies regardless of whether you are actually enrolled in Medicare Parts A and B. In other words, this plan pays secondary for anyone eligible for Medicare Parts A and B, even if they have not enrolled in Medicare. ... The rules above may not apply to disabled people under 65 and ESRD patients enrolled in Medicare."

In Georgia (Humana Employers Health Plan of Georgia, Inc-Copay Option 22) states: "If you are eligible for *Medicare Part B*, but are not enrolled, *your* benefits under the *master group contract* may be coordinated as if you were enrolled in *Medicare Part B*. We may not pay benefits to the extent that benefits would have been payable under *Medicare Part B*, if you had enrolled. Therefore, it is important that you enroll in *Medicare Part B* if you are eligible to do so." This plan would force beneficiaries into Medicare even if the beneficiary has not enrolled, which violates federal law.

Another plan in New Hampshire seeks to treat beneficiaries in a similar manner (Anthem –Matthew Thornton Blue):

The following applies when this Plan is Secondary to Medicare: If you are entitled to Medicare but not enrolled in Medicare or you are enrolled in Medicare Part A and not enrolled in Medicare Part B, Anthem will calculate benefits as if you were enrolled in Medicare. Services ordinarily covered under Medicare will not be covered under this Plan and you will be responsible for any charge relating to such services. You are encouraged to contact your local Social Security Office to discuss Medicare rules regarding enrollment.

¹We recognize that insurers are permitted to pay beneficiaries' Part B premiums under OIG Advisory Opinion 13-16, 11/7/2013, ([see othxo://oio.hhs.gov/fraud/docs/odvisoNooinions/201j/AdvOpn13-16.pdf](http://oio.hhs.gov/fraud/docs/odvisoNooinions/201j/AdvOpn13-16.pdf)). However, that opinion permits the payment of these premiums only if the beneficiary "wishes to enroll in Medicare" and the plan does "not pressure, require, or otherwise unduly influence or coerce Group Enrollees with ESRD to enroll in Medicare Part B."

As the Center for Consumer Information & Insurance Oversight (CCIIO) has stated in guidance to issuers, Medicare eligibility alone, upon a diagnosis of ESRD, does not require individuals to enroll in the program, and Medicare eligible individuals can choose to remain in Marketplace coverage.² Yet, these plans seek to enforce such enrollment, discriminating against individuals with kidney failure who require dialysis treatments by failing to provide coverage that is substantially equivalent and is inconsistent with the CCIIO guidance.

In addition, many Marketplace plans have refused to accept third party payments from a non-profit, public charity (the American Kidney Fund) of premium and cost sharing for individuals with kidney failure who require dialysis, despite the fact that these plans accept such payments for individuals living with HIV/AIDS. CMS has not indicated that Marketplace plans should not accept such payments. Yet, these plans are treating these dialysis-dependent individuals differently than those with HIV/AIDS based upon their medical condition. This is contrary to the requirements of the Affordable Care Act that prohibit insurers from discriminating against individuals based, among other things, an individual's "health status" or "medical condition (including both physical and mental illnesses)."³

These are only a few examples of the problems individuals with kidney failure who require dialysis treatments have shared. We believe that the protections outlined in the Proposed Rule would prohibit the practices described above. We ask that OCR clarify in the final rule that practices such as those outlined above are prohibited.

Individuals with kidney failure who rely upon dialysis treatments should be allowed to retain their Marketplace plans if they would like to do so. There are many reasons they may wish to retain their current health plan. These include potentially lower premiums, deductibles, and copayments, as well as different benefits that may not be available to them under the Medicare program. Switching to the Medicare program may also impact their family members. For example, the costs an individual would incur as a Medicare beneficiary would not count against the Marketplace plan deductible of the family, increasing the overall cost of health insurance for them all.

Therefore, KCP strongly supports the proposed language for 45 C.F.R. § 92.207, which states that: "A covered entity shall not, in providing or administering health-related insurance or other health-related coverage, discriminate on the basis of race, color, national origin, sex, age, or disability." We

² CCIIO, "Frequently Asked Questions Regarding Medicare and the Marketplace" (updated Aug. 28, 2014), at 9.

³ 42 U.S.C. § 300gg-4(a)(1)-(2).

believe the actions some Marketplaces have already proposed in their Benchmark Plans are contrary to the prohibition on:

Deny[ing], cancel[ling], limit[ing], or refus[ing] to issue or renew a health insurance plan or policy, or other health coverage, or deny[ing] or limit[ing] coverage of a claim, or impos[ing] additional cost sharing or other limitations or restrictions, on the basis of an enrollee's or prospective enrollee's race, color, national origin, sex, age, or disability.⁴

To ensure that the Marketplaces are clear that these protections apply to individuals with kidney failure who require dialysis, we ask that the preamble to the final rule include examples of policies that would violate 45 C.F.R. § 92.207.

III. KCP Recommends that OCR Enhance the Proposed Process for Identifying and Ending Discrimination in the Marketplaces.

In addition to clarifying the applicability of the protections to individuals with kidney failure who require dialysis treatments, KCP also recommends that OCR take a more proactive role in ensuring that Marketplaces do not discriminate against these individuals. We support the current requirements and actions outlined in the Proposed Rule, including:

- The requirement that each insurer seeking to participate in a Marketplace submit an assurance that its health programs and activities will not discriminate against individuals with disabilities (*see* proposed 45 C.F.R. § 92.5);
- The requirement that Marketplaces found to have discriminated against individuals with disabilities be required to take remedial action to “overcome the effects of that discrimination” (*see* proposed 45 C.F.R. § 92.6);
- The grievance and notice requirements (*see* proposed 45 C.F.R. §§ 92.7 & 92.8);
- The right for an individual to bring a civil action in a United States District Court in which a recipient or State-based Marketplace is located (*see* proposed 45 C.F.R. § 92.302(c)); and
- The ability of OCR to access the information it needs to pursue an investigation of the Department of Health and Human Services (*see* proposed 45 C.F.R. § 92.303).

We also believe that OCR should augment these requirements and enforcement activities by establishing a process by which individuals who believe they have been discriminated against because of their disability by either State-

⁴80 *Fed. Reg.* 54172, 54219 (Sept 8, 2015).

based or Federally-facilitated Marketplaces can file a complaint with OCR. Because of the limited time between the review of proposed Benchmark plans and the enrollment period, there should also be an expedited process if an individual or provider identifies an alleged discriminatory action by a Marketplace during that review period. The results of these reviews should be made public and if discrimination is identified, the provisions requiring the Marketplace to take remedial action should apply. This process could be modeled off of 45 C.F.R. Part 80, which allows for a complaint process for alleged discrimination based upon race, color, and national origin. In addition, OCR should expand the private right of action to allow providers caring for individuals who may be discriminated because of their disability against or relatives who also benefit from the plan that may be discriminating against their family member in the plan to bring a civil rights action.

IV. Conclusion

KCP appreciates the opportunity to review and provide comments on the Proposed Rule. As OCR finalizes these provisions, we ask that the final rule clearly state that: (1) individuals with kidney failure requiring dialysis are individuals with disabilities and the protections against discrimination apply to them; (2) OCR establish a complaint process for individuals who believe they have experienced discrimination so they can seek relief at the Agency level; and (3) Marketplaces that have acted inappropriately will be forced to take remedial action. We welcome the opportunity to discuss our comments with you. Please do not hesitate to contact Kathy Lester at (202) 534-1773 or klester@lesterhealthlaw.com if you have any questions.

Sincerely,



Edward R. Jones, M.D.
Chairman
Kidney Care Partners

List of KCP Members

AbbVie
Akebia Therapeutics, Inc.
American Kidney Fund
American Nephrology Nurses' Association
American Renal Associates, Inc.
American Society of Nephrology
American Society of Pediatric Nephrology
Amgen
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