

# National Senior Citizens Law Center



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Teresa Decaro  
Acting Director  
Medicare Drug & Health Plan Contract Administration Group  
VIA EMAIL TO: [Teresa.Decaro@cms.hhs.gov](mailto:Teresa.Decaro@cms.hhs.gov)

Dear Ms. Decaro:

We write to highlight the importance of written translations for limited English proficient (LEP) Medicare beneficiaries and to encourage the Centers for Medicare & Medicaid Services to strengthen plan translation requirements in the 2010 Medicare Marketing Guidelines. This letter is intended to supplement the joint comments we submitted with California Health Advocates and others on the Guidelines using the standard comment form.

According to the U.S. Census Bureau, over 3 million persons who are 65 and older speak English less than “very well,” which is the Census Bureau’s working definition of LEP.<sup>1</sup> Additional numbers of LEP persons with disabilities are not counted in these Census data. For these millions, access to information in a language they understand can be the difference between getting needed care and prescription drugs and going without, sometimes with disastrous health consequence.

We appreciate that in the Marketing Guidance as well as in the 2010 Call Letter CMS has recognized that private Medicare plans are required to provide language appropriate service, including translated written materials, to these beneficiaries. We believe, however, that the current requirements that CMS places on plan sponsors offer inadequate protection to LEP beneficiaries and need to be strengthened.

As recipients of federal financial assistance, private Medicare plans are subject to Title VI of the Civil Rights Act of 1964. Title VI 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 benefit of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance.”<sup>2</sup> The Supreme Court has held that national origin discrimination includes discrimination based on limited English proficiency.<sup>3</sup>

In compliance with Title IV, Executive Order 13166<sup>4</sup> and guidance from the Department of Justice,<sup>5</sup> the Department of Health and Human Services created its own guidance to federal

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<sup>1</sup> [2005-2007 American Community Survey 3-Year Estimates](http://www.factfinder.census.gov), Table C16004, available at [www.factfinder.census.gov](http://www.factfinder.census.gov)

<sup>2</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (2006).

<sup>3</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>4</sup> 65 Fed. Reg. 50121 (Aug. 16 (2000))

financial assistance recipients on compliance with the prohibition against national origin discrimination found in Title VI.<sup>6</sup> The guidance sets out a four-part analysis for recipients to use when evaluating the extent of their obligations under the Act and establishes a “safe harbor” provision. Organizations that meet the safe harbor requirements are presumed to be in compliance with the guidance and the Act.

Unfortunately, the current standard for translation of written materials in the Medicare Part D and Medicare Advantage programs does not reflect the four part analysis outlined in the HHS guidance and falls far short of the safe harbor provision. As a result, the current standard fails to provide LEP beneficiaries with sufficient access to translated materials. In the three and a half years since the Part D program began, we have not seen a single essential plan document (e.g., Annual Notice of Change, Evidence of Coverage, Explanation of Benefits) translated into a language other than Spanish.<sup>7</sup> Even Spanish language documents are rarely available. Millions of LEP Medicare beneficiaries have been forced to provide their own translators or else go without vital information about their health care coverage.

In order to ensure that plans are complying with the requirements of Title VI and the guidelines established in the HSS LEP guidance, we recommend CMS adopt the following edits and additions to the current first paragraph of draft Section 30.6 of the Medicare Marketing Guidelines.

*Plan sponsors ~~should~~ **must** make marketing materials available in any language that is the primary language of more than ~~ten~~ **five percent or 1,000, whichever is less, of the total population of any county which** a plan sponsors’ Plan Benefit Package (PBP) ~~service area~~ serves. Plans should rely on data from the U.S. Census Bureau when determining whether the threshold has been met.*

*Once materials are translated into a language, they should be made available to any beneficiary, regardless of where they live, if the benefits of the PBP they are enrolled in or seeking information about are the same as the benefits offered by the PBP for which materials have been translated.*

*In addition, plan sponsors must make marketing materials available in any language in which the sponsor or any of its agents or brokers does any marketing or advertising.*

*Plan sponsors must develop a system for tracking the language needs of enrollees and ensuring that enrollees that have requested materials in a language for which translations exist actually receive translated material. Until such tracking mechanisms are in place, all English materials must include taglines in all languages that meet the threshold informing beneficiaries of the availability of translated materials.*

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<sup>5</sup> 66 Fed. Reg. 5398 (Jan. 18, 2001)

<sup>6</sup> Available at [www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html](http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html).

<sup>7</sup> . See [PLEASE HOLD: MEDICARE PLANS LEAVE LIMITED ENGLISH PROFICIENT BENEFICIARIES WAITING FOR ACCESS](#) (2008) and [MEDICARE PRESCRIPTION DRUG PLANS FAIL LIMITED ENGLISH PROFICIENT BENEFICIARIES](#) (2007), both available at [www.nslc.org/areas/medicare-part-d/part-d-library/Reports-and-Studies](http://www.nslc.org/areas/medicare-part-d/part-d-library/Reports-and-Studies).

Below we explain the reason for each of the above recommendations.

*Plan sponsors ~~should~~ must...*

The translation requirement must be mandatory. Telling plans what they should do does not send a strong enough message to plans about the seriousness with which CMS takes the requirements found in Title VI. If this is only something plans should do, CMS will have limited authority to enforce the provision.

*...any language that is the primary language of more than ~~ten~~ **five percent or 1,000, whichever is less, of the total population of any county which a plan sponsors' Plan Benefit Package (PBP) service area serves.***

Under the current standard, which combines a high threshold with a large service area, very few beneficiaries are eligible to receive translated materials. The issue is particularly acute with stand-alone PDPs. The PDP plan benefit package service areas, which consist of the 37 regions established by CMS, are large enough to dilute LEP percentages, despite significant LEP populations. Spanish meets the ten percent threshold in only ten PDP regions. No other language comes close. To the extent that the current policy works at all, it imposes obligations primarily on Medicare Advantage plans operating in small PBP service areas with concentrations of particular ethnic minority groups.

The ten percent threshold needs to be lowered and a numerical trigger must be added. The “five percent or 1,000, whichever is less,” standard is taken directly from the safe harbor provision in the HHS guidance. The numerical threshold is necessary to ensure that significant concentrations of LEP beneficiaries living in large, ethnically diverse areas can receive materials. For example, under the current standard, despite the fact that nearly 200,000 people in Los Angeles County identify Tagalog as their primary language, plans in Los Angeles County are not required to translate materials into Tagalog since that language represents only two percent of the county’s large and ethnically diverse population. Conversely, plans are required to translate materials into German in McIntosh County, North Dakota where 35 percent of the population (1,145 individuals) identify German as their primary language.

The geographic range in the requirement must also be narrowed and standardized. The current standard excludes significant populations of LEP beneficiaries while creating different requirements for different types of plans serving the same beneficiaries. The PBP service area of a PDP is one or more states. The PBP service area of a PFFS plan can include hundreds of different counties spread out across the country. The PBP service area of an HMO is usually no more than two or three counties located near one another. As a result, an MA-PD, HMO operating in San Francisco is required to translate materials into Chinese while a PDP also serving San Francisco, and the rest of California, is not. Moving from a “PBP service area” to a “county” standard will ensure that beneficiaries speaking the same language living in the same area have the same access to translated materials regardless of the type of plan they join or are seeking information from.

***...of the total population...Plans should rely on data from the U.S. Census Bureau when determining whether the threshold has been met.***

It is essential that the Guidelines create a uniform standard for determining when a plan is obligated to translate materials. By not defining the relevant population for purposes of meeting the threshold, as is the case in the current draft Guidelines, CMS leaves it up to plans to create their own definitions. One plan might look only at current members while another plan may look only at individuals in a certain age bracket. All plans should be using the same definition and the same data so that plans operating in the same communities are subject to the same access standards for individuals in those communities. A common definition will also make it easier for CMS to enforce this requirement. Ideally, CMS would conduct its own analysis to determine which languages meet the threshold in each county and then notify plans operating in those counties that materials need to be translated. Because specific data about the language needs of Medicare beneficiaries is not currently available, we recommend adopting the more inclusive standard of total population.

***Once materials are translated into a language, they should be made available to any beneficiary, regardless of where they live, if the benefits of the PBP they are enrolled in or seeking information about are the same as the benefits offered by the PBP for which materials have been translated.***

Under the current rules, a PDP that serves California and must offer Spanish materials to California members is not required to offer those translated materials to Spanish speakers in Kansas, North Carolina or any other region where the ten percent threshold is not met. In most cases the plan offerings of an organization do not vary significantly, if at all by PBP service area. This is particularly true of PDPs. The PDP benefit offered by a national organization in California is the same benefit offered by the organization in Kansas. The only difference is the premium. If a plan sponsor has already translated the materials for a plan offering into Spanish for California beneficiaries, it should also be required to make the translated versions available to members in Kansas. Changing the amount of the premium so that the Kansas materials are accurate requires no new translating and, therefore, should not represent a significant additional burden.

***In addition, plan sponsors must make marketing materials available in any language that the sponsor or any of its agents or brokers does any marketing or advertising.***

Part D plan sponsors and the agents and brokers representing them market aggressively to LEP beneficiaries. Advocates report that some of the worst marketing abuses they have seen have been targeted at this vulnerable population. It is of critical importance that these individuals can get not just slick marketing mailers but also vital plan documents that tell them precisely what plan benefit packages include, what their rights are and how to access benefits.<sup>8</sup> This basic

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<sup>8</sup> A similar consumer protection requirement related to voluntary marketing efforts appears in the food labeling regulations of the Food and Drug Administration. FDA requires that all mandatory information on a food label appear in English. If, in addition, a food manufacturer chooses to put information or statements in a non-English language on its labels, the manufacturer must include all FDA required information in that language as well. See 21 C.F.R. Sec. 101.15(c)(2) (“If the label contains any representation in a foreign language, all words, statements, and

consumer protection should apply to marketing in any language, not just languages meeting the thresholds discussed above.

***Plan sponsors must develop a system for tracking the language needs of enrollees and ensuring that enrollees that have requested materials in a language for which translations exist actually receive translated material. Until such tracking mechanisms are in place, all English materials must include taglines in all languages that meet the threshold informing beneficiaries of the availability of translated materials.***

In addition to translating materials, plans must have a method for ensuring that the materials are delivered to the beneficiaries that need them. Such a method would include a system for collecting data from beneficiaries on language preference and for ensuring that mailings to those beneficiaries are in the language requested.<sup>9</sup>

As an interim measure, since plans are not currently required to collect language data on their members and, therefore, usually do not have information about their language needs, plans should be required to include taglines in various languages on the first page of each letter or notice the plan sends to its members. Alternatively, plans could include with each notice a cover page with taglines in multiple languages. The taglines should inform recipients that the notice is important and that oral interpretation of the notice and/or translated versions can be obtained by contacting the plan directly.<sup>10</sup>

The stronger requirements for which we advocate clearly are needed and will not unduly burden plan sponsors. CMS has created model documents for all major informational pieces, including the Annual Notice of Change, Summary of Benefits and Explanation of Coverage. Thus all plans are using the same text with only a few sentences here and there customized to plan details. The existence of these models offers the possibility of cooperative efforts to create translations. Moreover, these models only change slightly from year to year. Thus once the initial investment in translations is made, the incremental costs in future years will be limited.

Finally, it is crucial that CMS enforce the requirements in the Guidelines. Very few plans are complying with the current requirements. The vast majority of PDPs in California, for example, still do not translate materials into Spanish. Plans will only comply with this requirement if they know CMS will hold them accountable if they do not.

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other information required by or under authority of the act to appear on the label shall appear thereon in the foreign language.”).

<sup>9</sup> We note that the model enrollment forms for Part D plans (see, e.g., PDB Manual, Ch. 3, Exh. 1) currently include a question asking the enrollee’s language preference, but that form limits its choices to those languages for which the plan offers translated materials. Moreover, to our knowledge, CMS imposes no requirement on plans to attach that information to an enrollee’s file or use that information in any systematic way.

<sup>10</sup> We emphasize that offers of oral translation through customer service lines should only be interim steps. On complex questions involving comparison of plan benefits and coverage rights, oral interpretation is no substitute for written materials. Moreover, secret shopper surveys conducted by NSCLC and our California Part D Language Access Workgroup have shown that the availability and quality of language line interpretation by plans has, to date, been less than satisfactory. See Note 8 above..

## National Senior Citizens Law Center

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We would welcome the opportunity to share more ideas about defining plans' obligation to provide translations of written materials and best practices for fulfilling, monitoring and enforcing that obligation. If you have questions or would like more information, please feel free to contact us.

Thank you for your consideration of this important issue.

Sincerely,

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