



GREATER BOSTON  
LEGAL SERVICES  
*...and justice for all*

July 25, 2011

Department of Labor: RIN 1210-AB45  
Centers for Medicare & Medicaid Services/DHHS: CMS-9993-IFC2  
Internal Revenue Service: REG-125592-10

Re: Group Health Plans and Health Insurance Issuers: Rules Relating to Internal Claims and Appeals and External Review Processes  
37208 Federal Register/Vol.76, No.122, June 24, 2011

Dear Agencies:

We are submitting these comments on behalf of clients of Greater Boston Legal Services (GBLS). GBLS provides free, civil legal assistance to low-income individuals and families in Boston and 31 cities and towns. Assistance ranges from legal advice to full representation to systemic advocacy. GBLS annually assists over 16,000 individuals, many of whom are of limited English proficiency. For over 40% of GBLS' clients, English is not their first language. GBLS' Medicare Advocacy Project provides legal assistance to elders and persons with disabilities to help secure the full Medicare coverage to which they are entitled. In all these areas of representation, MAP represents beneficiaries who do not speak English, or only speak it as a second language (LEP beneficiaries). While many of our clients are on a public health insurance program such as Medicare or Medicaid, there are many who are also on a private group health plan from an employer, former employer, or medical support from a former spouse.

#### Language Access

We believe that your agencies must ensure that LEP individuals have reasonable language access to health care materials under the Affordable Care Act § 1001 which specifically required notices to be provided in a culturally and linguistically appropriate manner. To that end, we strongly feel that the 10% threshold for translation of group plan materials and oral interpretation is too high. A more appropriate standard would be 5% of the plan's population or 500 persons in plan's service area for large group plans, and 25% of population for small plans. Oral interpretation should be provided in all languages at all times

Many of GBLS/MAP clients cannot communicate in English at all. While Spanish is the most prevalent monolingual client demographic, we also have significant numbers of Portuguese, Cantonese, and Creole clients who do not speak English. Under the current proposal, a significant constituency of our client base will not have the benefit of written or verbal translations of group plan materials because no Massachusetts county meets the 10% threshold.

See Percent of the County Population That Speak A Particular Non-English Language and Speak English Less Than “Very Well”, By U.S. County, <http://www.census.gov/acs>. Our clients will face the peculiar prospect of being able to learn about their publically funded health insurance plan, but not about the private plan that covers them. It can be difficult enough to understand health benefits when covered by one plan, in one language, but coverage by two plans, and in two languages, only increases the risk that important benefits will be misunderstood.

Massachusetts is not the only state where non-English speakers will face great difficulty accessing group plan materials under the proposed 10% standard. Only 172 counties in the United States meet the 10% county population threshold for Spanish and only 177 counties would require translated materials at all. There are 3,143 counties in the United States and translation and interpretation services for group plans would only be available in 5.63% of United States counties. Only one county in the entire nation would have more than one non-English language option for group plan materials.

At least fourteen million persons in the United States are not proficient or completely unable to communicate in English. (see “Language Use in the United States: 2007” <http://www.census.gov/prod/2010pubs/acs-12.pdf>) Under the proposed scheme several counties with large high low English speaking populations will not have any translating or oral interpretation access. As a state, 8.5% of Massachusetts’ population cannot read English very well. 17.9% of Suffolk County, MA, or over 260,000 residents, speak English less than very well. (see Percent of People 5 Years and Over Who Speak English Less Than “Very Well”<sup>1</sup>) Over half a million Massachusetts residents of low English proficiency will not have language access to private insurance group or individual health plans. The Commonwealth reports that 98.1% of Massachusetts residents had health insurance coverage during 2010. Further, employer sponsored insurance (ESI) remains, by far, the most common type of coverage among Massachusetts residents, covering about two-thirds of all residents in each year.<sup>2</sup>

Counties like Suffolk, MA where there is a high percentage of low English proficient individuals but no one language meets the 10% proposed threshold are not uncommon. There are several counties whose percentages of low English proficient populations far exceed 10% but not in a particular language.<sup>3</sup> In addition, there are countless counties that have low English proficient populations that narrowly fall short of the 10% threshold. As a result, the proposed threshold leaves millions of individuals at risk of misunderstanding their group plans, failing to take advantage of helpful programs, and lacking the language access necessary to invoke their legal rights in relation to filing claims or appeals in regards to their group plan concerns.

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<sup>1</sup> [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=01000US&-\\_box\\_head\\_nbr=GCT1603&-ds\\_name=ACS\\_2009\\_5YR\\_G00\\_&-\\_lang=en&-mt\\_name=ACS\\_2009\\_5YR\\_G00\\_GCT1603\\_US25F&-format=US-25F](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT1603&-ds_name=ACS_2009_5YR_G00_&-_lang=en&-mt_name=ACS_2009_5YR_G00_GCT1603_US25F&-format=US-25F).

<sup>2</sup> [http://www.mass.gov/Eeohhs2/docs/dhcfp/r/pubs/10/mhis\\_report\\_12-2010.pdf](http://www.mass.gov/Eeohhs2/docs/dhcfp/r/pubs/10/mhis_report_12-2010.pdf)

<sup>3</sup> For example; 30.5% of Bethel Census Area, AK; 17.7% of Sevier County, AZ; 18.8% of Alameda County, CA; 15.2% of Cook County, IL; 15.5% of Buena Vista County, IA; 14.9% of Montgomery County, MD; 14.6% of Middlesex County, NJ; 23.3% of Kings County, NY; 17.6% Holmes County, OH; 14.5% of Fairfax County, VA populations cannot speak English very well.

The above numbers are just the tip of the iceberg of low English proficient individuals who will not be provided notices in a culturally and linguistically appropriate manner. Several of the counties that would offer materials in a language other than English still fall significantly short of reaching that county's entire non-English speaking population. For instance, in the Aleutians West Census Area 13% speak Spanish and 16% speak Tagalog and materials will be available for each of these languages. However, 61% in that area do not speak English very well. Similarly, Queens County, NY will offer Spanish materials upon request for the 12% of that county's population that speaks Spanish, yet that leaves 16% of the county's population, over 350,000 individuals, who are not proficient in either Spanish or English with no reliable access to group health materials. Thus, huge numbers of low English proficient individuals' legal right to culturally and linguistically appropriate access is erased by such a stringent threshold.

The 10% monolingual threshold results in a severe under inclusive access for millions of low English proficient individuals who need, and have a legal right to, culturally and linguistically appropriate access to group health plan materials. Title VI of the Civil Rights Act of 1964 mandates that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d). The Supreme Court has interpreted Title VI to assure low English proficient individuals are not inhibited by language in accessing federal programs. *See Lau v. Nichols*, 414 U.S. 563 (1974) (failure to provide English instruction to students of Chinese decent who do not speak English denies them a meaningful opportunity to participate in public education and violates Title VI, 42 U.S.C. § 2000(d)). So it has been well settled that civil rights law mandates that oral interpretation should be provided in the health and health insurance context for all languages, but this proposal only provides oral interpretation when any one language reaches the 10% threshold. If this proposal is implemented, it will effectively shut the door on our clients having the opportunity to discuss in their own language their coverage with their private insurance provider. It's hard to see how that advances the notion of access to health care that is the foundation of the Affordable Care Act.

The proposed regulations also cite the Medicare Part C and D marketing rules as the source of the 10% rule for individual health plans translation. CMS had originally proposed a 10 percent threshold which would have meant that for Part D prescription drug plans, Spanish speakers in only 10 states would have access to translated materials. On April 5, the Centers for Medicare & Medicaid Services (CMS) adopted a final rule that will require Medicare health plans and prescription drug plans to translate marketing materials into any language that is the primary language of at least five percent of individuals in a plan benefit package service area. Agencies should do no less in this context and adopt the 5% rule for private health plans.

DOL, CMS, IRS

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In conclusion, we again urge you not to adopt this proposal as written. Rather, adopt a language access standard that will protect the millions of low English proficient individuals, such as a 5% threshold with a numerical trigger for written translations and offer oral interpretation in all languages.

Thank you for the opportunity to present these comments.

Sincerely,

Sarah F. Anderson  
managing attorney

Alex Corey  
law clerk

Sincerely,