November 9, 2015

Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue S.W.
Washington, D.C. 20201

Re: Comments on Proposed Nondiscrimination in Health Programs and Activities
45 CFR Part 92, RIN 0945-AA02

Submitted electronically via www.regulations.gov

To Whom It May Concern:

On behalf of the Center for Advocacy for the Rights and Interests of the Elderly (CARIE), thank you for the opportunity to provide comments regarding the proposed regulations implementing Section 1557 of the Affordable Care Act (ACA) and for the Department of Health and Human Services’ (HHS) effort to develop comprehensive regulations to prevent discrimination in health programs and activities. Founded in 1977, CARIE, is a non-profit advocacy organization working to improve the well-being, rights and autonomy of older adults. CARIE routinely helps older adults and their caregivers understand and resolve problems related to Medicare, Medicaid, and long term services and supports. Through our work, we are acutely aware of the needs, issues and problems that older adults and their families encounter in regard to discrimination.

CARIE applauds HHS for its commitment to ending discrimination in all federal health programs and activities. We strongly support the proposed regulations’ prohibition of discrimination on the basis of race, color, national origin (including immigration status and language), sex (including sex stereotyping and gender identity), disability, and age. We also fully support the comments and recommendations submitted by Justice in Aging. CARIE offers the following recommendations that we hope you will consider to strengthen the proposed regulations.

Ensure the prohibition on sex discrimination includes all sexual orientation and gender identity discrimination (§ 92.4 and § 92.2)

We applaud HHS’s efforts to promote equal access to health and long-term care for all communities including those who are lesbian, gay, bisexual, and transgender (LGBT). CARIE strongly supports the proposal that discrimination “on the basis of sex” includes discrimination on the basis of gender identity.
The inclusion of gender identity in the protection against discrimination “on the basis of sex” is an important protection for older adults as discrimination on the basis of gender identity and sexual orientation is well documented in health and long-term care settings. Including these clear protections will be a powerful tool in fighting discrimination against transgender people and those who do not identify as male or female. Providing protections against discrimination based on gender identity is long overdue and key to eliminating health disparities among older adults. However, we urge HHS to specifically include sexual orientation in the definition as we are concerned that the protections on the basis of sex discrimination do not currently include discrimination on the basis of sexual orientation. Without an explicit prohibition on discrimination on the basis of sexual orientation, LGBT older adults will continue to face discrimination. The final regulations should protect all members of the LGBT community and they should be able to access the health and long-term care they need without fearing or experiencing discrimination.

CARIE also strongly oppose adding any exemption that would permit discrimination based on religious views. Health care providers who want to receive federal funds should be prohibited from discriminating against anyone in need of federally funded health and long-term care services since doing so will continue to create unnecessary barriers to needed care and increase health disparities. If a provider wants to receive federal funding, they should not have the option to discriminate against members of the LGBT community based on a religious exemption.

**Ensure strong prohibition against discrimination for those who are limited English proficient (LEP)**

There are approximately five million older Americans who are considered limited English proficient (LEP) and a significant number of these individuals are also low-income. CARIE supports the proposed regulations that describe protections for meaningful access to health care for individuals with LEP to help reduce health disparities and increase access to care. This issue is of particular concern with the growth of managed care. When managed care organizations fail to ensure access to interpreters or fail to provide key information in a consumer’s language, they collect premiums for LEP consumers without making health care accessible leading to inferior care. While the proposed regulations provide important protections, the following areas should be strengthened:

- § 92.4 should be revised to clearly state that “on the basis of race, color, and national origin” includes discrimination based on language and on immigration status.

- CARIE supports the proposal to make sample notices and taglines available in the top 15 languages spoken by individuals with LEP. However, the notice requirement found in §92.8 should be made more inclusive. Providers should be required to post taglines for each language group that makes up 5% or 1,000 persons, whichever is less, of the population eligible to be served in its network instead of simply posting taglines in the top 15 languages spoken nationally by individuals with LEP. They should also have
documents for their programs and activities available and translated into the same languages for which they have taglines. Additionally, HHS should include in the text of the regulation a definition of “vital document,” mirroring the definition in current HHS guidance. The definition should state that vital documents include but are not limited to: consent and complaint forms; intake forms with the potential for important consequences; notices advising LEP persons of free language assistance; and applications to participate in a recipient’s program or activity or to receive recipient benefits or services. Providing this level of specificity will assist both in compliance and enforcement.

- CARIE strongly recommends the use of numerical and percentage thresholds, and we oppose a multi-factor test (§ 92.201). We are concerned that the proposed regulation does not set any specific criteria for determining when written documents should be subject to translation requirements. The translation requirements need to be clear, simple and enforceable. We urge HHS to apply a bright line numerical and percentage threshold test since years of Medicare and Medicaid experience show that a test weighing factors without concrete markers does not work. In Medicare Part C and D, percentage thresholds alone have failed in extending language access to large numbers of LEP individuals in large states. Therefore, we recommend HHS adopt the lower 5% or 1,000 individuals in a service area threshold for the translation of vital documents, websites, and outreach and education materials. It is vital to have a threshold that is based on both percentage and numerical information. The regulations should require that oral interpreter services be available on demand and free of charge and when in-person oral interpretation is not available, providers should use video or telephonic interpreter services to provide interpretation. With the availability of language line services, there is no excuse not to make this service available when needed.

- We recommend HHS engage in beneficiary testing of the sample notice language and make changes to the sample notices based on testing results (§ 92.302). The current Sample Notice (Appendix A to Part 92) reads as boilerplate and is far too confusing for an individual, particularly an individual who is low literacy or LEP, to understand the technical terms and complex policy jargon. We also recommend the notice include a heading that explains the notice’s purpose in plain language. For example, “We’re here to help. Tell us if you need language assistance or assistance with a disability.”

**Expand the regulations to include Medicare Part B providers as covered entities**

We oppose the proposed exclusion of Part B providers from the regulations. All Medicare providers, without exception, should be subject to this regulation to ensure Medicare
beneficiaries do not experience discrimination. The regulations should specifically identify Part B providers as covered entities.

**Strengthen enforcement and compliance by ensuring the final regulations set clear and specific standards**

We appreciate that the proposed regulations explicitly clarify that Section 1557 allows an individual or entity to file suit in federal district court when a violation of the section or the regulations has occurred. This right is essential to ensuring these nondiscrimination provisions are adequately enforced (§ 92.302). HHS should add specific guidance to the private enforcement right. This is a timely opportunity for the agency to assist the courts in setting the applicable standard to employ when adjudicating discrimination claims and would bring a new level of commitment to nondiscrimination in health care.

Finally, data collection is critical to monitoring compliance with antidiscrimination requirements. HHS should require demographic data be collected on race, ethnicity, language, sex, gender, gender identity, sexual orientation, disability status, and age.

Thank you again for issuing these groundbreaking proposed regulations, and for the opportunity to share our comments and recommendations. If you have any questions, please feel free to contact me directly at menio@carie.org or 267-546-3434.

Sincerely,

Diane A. Menio
Executive Director