

January 27, 2014

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Via Email, Fax and Federal Express

Re: *BlueCross BlueShield of Louisiana's refusal to accept federal Ryan White HIV/AIDS Program premium subsidies for people living with HIV*

Dear Mr. Reitz:

We are national and Louisiana legal organizations that advocate and litigate on behalf of individuals living with HIV. Lambda Legal Defense and Education Fund, Inc., a national organization with members in Louisiana, is committed to achieving full recognition of the civil rights of those with HIV and of lesbians, gay men, bisexuals and transgender people through impact litigation, education and public policy work. AIDSLaw of Louisiana provides free legal services to low-income persons living with HIV and AIDS and is a program of the NO/AIDS Task Force, a Louisiana not-for-profit corporation.

We write to express grave concern regarding the recent policy adopted by BlueCross BlueShield of Louisiana ("BCBS") not to accept federal Ryan White HIV/AIDS Program ("RWHAP") third-party premium subsidies for qualified low-income individuals living with HIV.¹ As BCBS is no doubt well aware, the premium subsidies are provided by the federal RWHAP to assist low-income individuals living with HIV to purchase health insurance they could not otherwise afford. RWHAP funds are a critical safety net to permit people living with HIV to obtain health

¹ Through RWHAP, the federal government functions as the payer of last resort, making grants to states, cities and nonprofit organizations to provide premium subsidies, treatment and medication to people with HIV who have no alternative sources for coverage. The Health Resources and Services Administration ("HRSA") of the U.S. Department of Health and Human Services ("HHS") administers RWHAP at the federal level. The Louisiana Ryan White Health Insurance Program administers RWHAP within Louisiana, and the HIV/AIDS Alliance for Region II ("HAART") serves as the third-party administrator, sending health insurance premium subsidy checks to insurers on behalf of eligible participants within the state. See <http://new.dhh.louisiana.gov/index.cfm/page/1119>.

coverage for essential, life-saving medical care. We understand that beginning in January 2014, BCBS abruptly refused to accept RWHAP premium subsidies paid on behalf of existing policyholders with HIV, and has returned RWHAP premium checks to HAART. These policyholders now cannot afford their BCBS premiums and face the prospect of being dropped from BCBS's rolls and losing their health insurance. We understand that BCBS is also refusing to accept RWHAP premium subsidies from new enrollees, thus effectively blocking eligible low-income Louisianians living with HIV from enrolling in BCBS plans.

BCBS must be aware that by refusing to accept RWHAP premium subsidies, BCBS has made its insurance unaffordable for thousands of eligible individuals living with HIV, who will have no choice but to go uninsured or search for other insurance options. BCBS's alarming new policy strikes at the majority of Louisiana's HIV-affected residents, a large percentage of whom are low-income and eligible for RWHAP subsidies. See HRSA, Dep't of HHS, *Louisiana: Client Characteristics, Ryan White HIV/AIDS Program – State Profiles* (2011), <http://hab.hrsa.gov/stateprofiles/HIV-AIDS-Epidemic.aspx#section1>. In effect, BCBS's new policy acts as a potent device to keep people living with HIV from BCBS's insurance rolls.

We are deeply concerned that this strategy perpetuates the legacy of years of insurance industry practices aimed at excluding those with HIV from coverage. People with HIV historically have faced enormous hurdles to obtaining health insurance coverage and have been victims of notoriously unethical insurance company tactics. Members of Congress were acutely aware of the need to rectify this problem when enacting the Affordable Care Act ("ACA"). For example, Representative McDermott noted reports that at least one major insurer had routinely raised unfounded allegations against people diagnosed with HIV:

Fortis designed a computer program that would automatically flag any policyholder with HIV-AIDS and trigger an automatic fraud investigation. Knowing the treatment was expensive, the executives were looking for anything they could use to revoke health insurance policies for people with HIV. Then, when nothing turned up, they would essentially invent a reason.

156 Cong. Rec. H1717 (daily ed. Mar. 19, 2010) (statement of Rep. McDermott); see also Murray Waas, *Insurer Targeted HIV Patients to Drop Coverage*, Reuters (Mar. 17, 2010), <http://www.reuters.com/article/2010/03/17/us-insurers-idUSTRE62G2DO20100317>. Senator Feinstein commented that, when people "get sick with HIV [insurance companies] just simply cancel their policies and throw them out." 156 Cong. Rec. S1953 (daily ed. Mar. 25, 2010) (statement of Sen. Feinstein); see also 156 Cong. Rec. H1801 (daily ed. Mar. 20, 2010) (statement of Rep. T. Ryan). We fear that BCBS's abrupt decision to reject RWHAP premium subsidies at this critical juncture in implementation of the ACA may be yet the latest manifestation of a troubling pattern of insurance companies' efforts to deter coverage of people with HIV.

We are aware of no legal basis for BCBS's refusal to accept RWHAP premium subsidies and adoption of a strategy effectively barring low-income people living with HIV from participation in BCBS plans. In fact, RWHAP premium subsidies to permit qualified low-income individuals to purchase critical health insurance are explicitly allowed and encouraged by HRSA. See, e.g., HRSA

HIV/AIDS Bureau Policy Clarification Notice 13-05, *Clarifications Regarding Use of Ryan White HIV/AIDS Program Funds for Premium and Cost-Sharing Assistance for Private Health Insurance* (revised 9/13/2013), <http://hab.hrsa.gov/manageyourgrant/pinspals/pcn1305premiumcostsharing.pdf>. While we are aware that HHS's Centers for Medicare and Medicaid Services issued guidance in November 2013 discouraging third-party payments of premiums for Qualified Health Plans from certain *healthcare providers* and *commercial entities*, this guidance obviously does not apply to HHS's own RWHAP premium subsidies for low-income people living with HIV. We believe that BCBS must be well aware that HHS has not sought to suggest that insurers should not or cannot accept RWHAP premium subsidies. Indeed, no other private insurance issuer in Louisiana has adopted BCBS's policy to refuse federal RWHAP premium subsidies, and we are aware of virtually no other issuer in the nation taking this radical step.

Not only is BCBS's unfounded policy jeopardizing the lives of Louisiana residents living with HIV, but we are concerned that BCBS in fact is engaged in actionable discrimination in violation of the ACA (as well as potentially running afoul of other federal and state laws). Under Section 1557 of the ACA, "an individual shall not, on the ground prohibited under . . . section 504 of the Rehabilitation Act of 1973 [which prohibits discrimination on the basis of disability, including HIV], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance[.]" See 42 U.S.C. § 18116; see also, e.g., 45 C.F.R. § 147.104(e) (prohibiting insurers from "employ[ing] marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs in health insurance coverage or discriminate based on an individual's . . . present or predicted disability . . . or other health conditions"); 45 C.F.R. § 156.125(a) ("[a]n issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on an individual's . . . present or predicted disability . . . or other health conditions"); 45 C.F.R. § 156.225(b) (prohibiting insurers from "employ[ing] marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs"). We fear that BCBS's abrupt and suspect decision to reject RWHAP premium subsidies amounts to discrimination in violation of federal law.

That BCBS would leave low-income Louisianians in the lurch at this critical juncture in implementation of the ACA is particularly disappointing, given that BCBS is the oldest and largest health insurer in the State and prides itself on supporting Louisiana communities. BCBS claims "75 years of commitment to the health of all Louisianians." Yet in 2014, it seems to have abandoned its commitment when it comes to the health of Louisianians living with HIV.

We ask that BCBS reverse its unfounded new policy and immediately resume accepting RWHAP premium subsidies, as it has over many years past. If BCBS does not intend to accept RWHAP premium subsidies, then at a minimum it should explain the basis for this radical policy change. BCBS's refusal to accept these premiums puts low-income people with HIV on BCBS's rolls in imminent jeopardy of losing their health coverage and is daily deterring many others from enrolling in BCBS programs. The situation is urgent. **We must therefore request that BCBS respond to us by no later than close of business on Thursday, January 30, 2014.** We very much hope that BCBS will reverse course and resume accepting RWHAP premium subsidies.

Very truly yours,

Lambda Legal Defense and Education Fund, Inc.

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