

# JUSTICE IN AGING

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FIGHTING SENIOR POVERTY THROUGH LAW

## Changes to the Rule Implementing the Health Care Rights Law & the Impact on Older Adults

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Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency.

# Diversity, Equity, and Inclusion

To achieve Justice in Aging, we must:

- Acknowledge systemic racism and discrimination
- Address the enduring negative effects of racism and differential treatment
- Promote access and equity in economic security, health care, and the courts for our nation's low-income older adults
- Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, economic class

# Today's Presentation

- What is the Health Care Rights Law
- What changes are being proposed
- What is the impact on older adults
- How can you fight back

# Basics—The Law

- The Health Care Rights Law (HCRL), also known as Section 1557, is a part of the Affordable Care Act (ACA)
- It is the only federal law that prohibits discrimination on the basis of race, color, national origin, sex, age, or disability specifically in federal health programs or activities
- The HCRL has been in effect since 2010 & continues to be in effect today

# Basics—The Regulations

2014-2016

- Department of Health & Human Services (HHS) developed regulations implementing the law

July 2016/  
January 2017

- Final HCRL Rules became effective
- These rules are still in effect today

Present  
(June 2019)

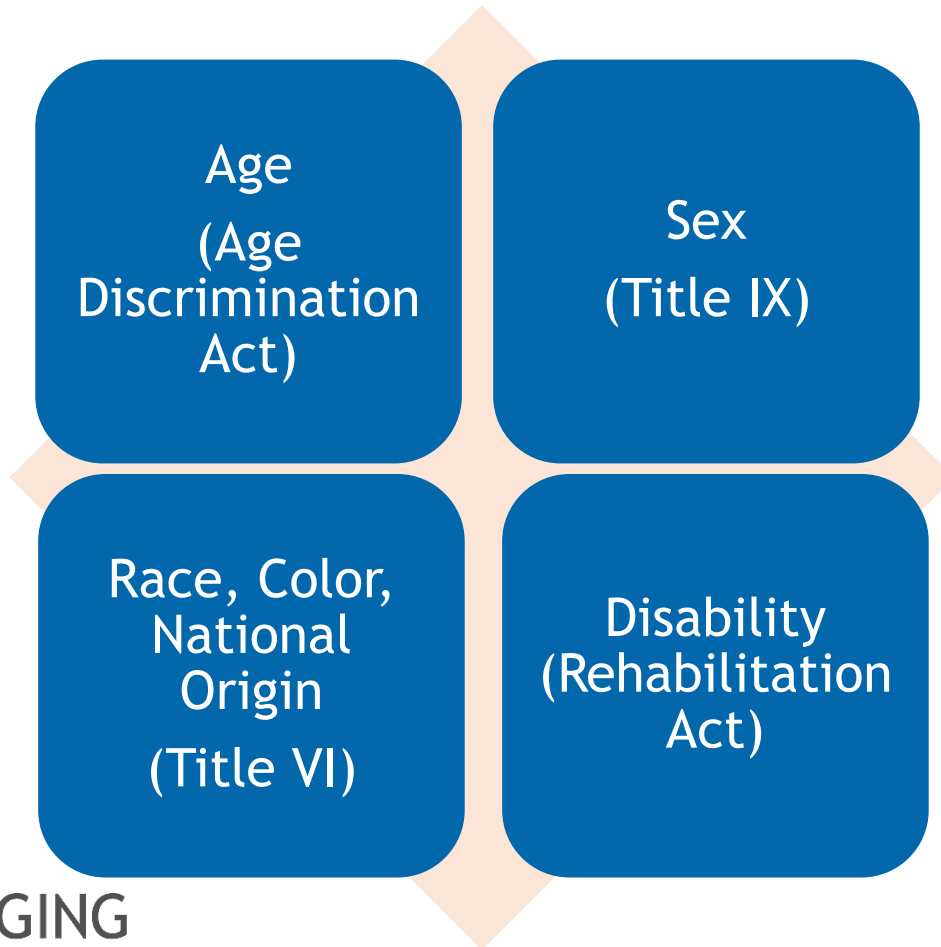
- HHS under the Trump Administration proposed major revisions to the regulations





# The Health Care Rights Law

# Prohibited Bases of Discrimination





# Covered Entities

- All health programs and activities, *any part of which receives federal financial assistance*, including:
  - U.S. Department of Health & Human Services (HHS)
    - Centers for Medicare & Medicaid Services (CMS), CDC, etc.
  - Health programs and activities administered by HHS
  - Federal marketplaces and state-based marketplaces
  - Medicare Advantage Plans, Medicare Part D plans, Medicare-Medicaid Plans
  - State Medicaid programs and managed care plans

# What Is Federal Financial Assistance?

- Any type of arrangement in which the Federal government:
  1. Provides or makes available assistance by HHS; or
  2. HHS plays a role in providing or administering (e.g., tax credits and other subsidies under Title I of the ACA)
- Includes grants and loans of federal funds, federal property, federal personnel, and any federal agreement or contract to provide assistance. 45 C.F.R. § 80.13(f).

# Health Program or Activity

- Provision or administration of health-related services or health-related insurance coverage and the provision of assistance in obtaining health-related services or health-related insurance coverage
- *Note: Medicare Part B is excluded, but most Medicare providers receive other federal financial assistance that would require them to comply*

# Individuals Can Enforce Their Rights Under the HCRL

- Complain to covered entity
- File complaint with HHS Office for Civil Rights (OCR)
  - Corrective action plans
  - Referral to DOJ for litigation
- File a lawsuit in federal court
  - Private right of action for claims of intentional discrimination and disparate impact discrimination available
  - Generally no exhaustion requirement
  - Compensatory damages are available





# Specific Protections

# Current Rules

- Rely on existing definitions and case law as much as possible
- Include general principles rather than bright lines
- Expand nondiscrimination rights based on sex and national origin
- Prohibit discrimination based on *perceived* race, color, national origin, sex, age, or disability
- Prohibit intersectional discrimination



# Disability

- Adopts definition in the Rehabilitation Act which comes from the ADA
- Olmstead claim can be an HCRL claim
- Requires *all* covered entities (regardless of size) to provide auxiliary aids.

## JOHN

Needs a Hoyer lift to safely get on an examining table.

- No doctor in the network of John's Medicare Advantage plan has a lift. John cannot get a complete physical.

# Age Discrimination

- Arbitrary age distinctions without justification prohibited
- Consistent with the Age Act

Okay to set arbitrary age cut-offs if elected legislative group does it but not okay to do so by regulation.

# Sex Discrimination

- Bases: Pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity
- Gender identity spectrum includes gender identities that are beyond male and female

**SEXUAL ORIENTATION DISCRIMINATION IS  
EXPLICITLY NOT COVERED**

# Sex Stereotyping

- Gendered expectations re speech, dress, hair, mannerisms, body characteristics
- Includes expectations that individual will consistently identify with only one gender and act in conformance with stereotypes of that gender
- Gendered expectations related to the appropriate roles of a certain sex

Many forms of sexual orientation discrimination can be addressed as sex stereotyping.

# Transgender Discrimination

- Must treat individuals consistent with their gender identity
- But can't deny needed sex-specific health services because of gender identity

## MARIA

A transgender woman who is dually eligible for Medicare and Medicaid.

- Staff at the Adult Day Center she attends insist on using her prior male name, refuse to use correct pronouns when talking about her, and frequently ridicule her appearance.
- Every time Maria needs a prostate exam, her Medicare Advantage plan makes her go through an appeal.

# Transgender Discrimination

- Can't categorically exclude or limit all health services related to gender transition
- Can't otherwise deny or limit coverage of services related to transition if denial or restriction results in discrimination against a transgender individual

## PAUL

A transgender man, eligible for Medicaid only, not Medicare.

- When Paul seeks Medicaid coverage for a hysterectomy to address his diagnosed gender dysphoria, his state Medicaid program categorically refuses to provide coverage.



# Franciscan Alliance v. Burwell

- Nationwide preliminary injunction prohibits HHS from enforcing transgender regulations.
- Insurance companies and providers argued regulations forced them to violate their religious beliefs.
- Not restrained from enforcing other parts of regulations. Underlying statute is unchanged.

# National Origin Discrimination

- Uses EEOC definition: includes not only an individual's place of origin but also ancestor's place of origin and includes an individual's manifestation of the physical, cultural, or linguistic characteristics of a national origin group
- No definitions of race or color

# National Origin Discrimination— Limited English Proficiency

- Must “take reasonable steps to provide meaningful access” to each LEP individual
- Required language assistance must be:
  - Free, accurate, timely and protect privacy and independence of LEP individual

# No Bright Lines on Interpretation/Translation

- Look primarily at the nature and importance of the health program or activity and the particular communication at issue, to the individual with LEP
- Interpreter required when oral interpretation is a reasonable step to provide meaningful access for the individual with LEP, and interpreter must be qualified
- No specific guidance on what triggers a translation requirement, but look at factors like prevalence of language, nature of the communication, cost, and more
- OCR will take into account whether entity has an appropriate language access plan, but a plan is not required

# Notice of Non-Discrimination and Taglines

- Include in “significant” publications:
  - Includes patient handbooks, outreach publications, or written notices pertaining to rights or benefits or requiring response from the individual
- In conspicuous physical locations, conspicuously on websites
- Taglines in top 15 languages in state—combine if multi-state
- Short form for small publications
- HHS created translated sample notices

If the enclosed information is not in your primary language, please call UnitedHealthcare Community Plan at 1-800-941-4647, TTY 711

Yog cov ntaub ntauv muab tuaj hauv no tsis yog sau ua koj hom lus, thov hu rau UnitedHealthcare Community Plan ntawm 1-800-941-4647, TTY 711.

Afai o fa'amatalaga ua tuuina atu e le'o tusia i lau gagana masani, faamolemole fa'afesoota'i mai le vaega a le UnitedHealthcare Community Plan ile telefoni 1-800-941-4647, TTY 711.

Если прилагаемая информация представлена не на Вашем родном языке, позвоните представителю UnitedHealthcare Community Plan по тел. 1-800-941-4647, телетайп 711.

Якщо інформація, що додається, подана не на Вашій рідній мові, зателефонуйте до UnitedHealthcare Community Plan 1-800-941-4647 для осіб з порушеннями слуху 711.

동봉한 안내 자료가 귀하의 모국어로 준비되어 있지 않으면 1-800-941-4647, TTY 711로 UnitedHealthcare Community Plan에 전화하십시오.

Dacă informațiile alăturate nu sunt în limba dumneavoastră principală, vă rugăm să sunați la UnitedHealthcare Community Plan, la numărul 1-800-941-4647 TTY 711.

ተያይዞ ያለው መረጃ በቋንቋዎ ካልሆነ፣ እባክዎን በሚከተለው ስልክ ቁጥር ወደ UnitedHealthcare Community Plan ይደውሉ፡- 1-800-941-4647 መስማት ለተሳናቸው/TTY 711።

ተተላሊዙ ዘሎ ሓበሬታ ብቋንቋኩም ተዘይኮይኑ፣ ብኸብረትኩም በዚ ዝስዕብ ቁጥሪ ስልክ ናብ UnitedHealthcare Community Plan ደውሉ፡- 1-800-941-4647 ምስማዕ ንተጸግሙ/TTY 711።

Si la información adjunta no está en su lengua materna, llame a Unitedhealthcare Community Plan al 1-800-941-4647, TTY 711.

ຖ້າຂໍ້ມູນທີ່ຕິດຄັດມານີ້ບໍ່ແມ່ນພາສາຕົ້ນຕໍຂອງທ່ານ, ກະລຸນາໂທຫາ UnitedHealthcare Community Plan ທີ່ ເບີ 1-800-941-4647 TTY 711.

Nếu ngôn ngữ trong thông tin đính kèm này không phải là ngôn ngữ chính của quý vị, xin gọi cho UnitedHealthcare Community Plan theo số 1-800-941-4647, TTY 711.

若隨附資訊的語言不屬於您主要使用語言，請致電 UnitedHealthcare Community Plan，電話號碼為 1-800-941-4647 聽障專線 TTY 711。

ប្រើសិនបើព័ត៌មានដែលភ្ជាប់មកនេះមិនមែនជាភាសាដើមរបស់អ្នកទេ សូមទូរស័ព្ទមកកាន់ UnitedHealthcare Community Plan លេខ 1-800-941-4647, សម្រាប់អ្នកផ្តួង TTY 711។

Kung ang nakalakip na impormasyon ay wala sa iyong pangunahing wika, mangyaring tumawag sa UnitedHealthcare Community Plan sa 1-800-941-4647 (TTY: 711).

در صورت اینکه اطلاعات پیوست به زبان اولیه شما نمیباشد . لطفاً با United Healthcare Community Plan با شماره 1-800-941-4647 تماس حاصل نمایید . وسیله ارتباطی برای نا شنوایان- TTY 711.



# Mei Lee

- Dual eligible, monolingual Cantonese speaker
- When she picks up her Part D prescription, the pharmacist explains important precautions in English. She tells him she does not understand. The pharmacist asks another Cantonese-speaking customer to interpret. Mei Lee complains to her Part D plan, and they tell her that the problem is between her and the pharmacy.
- When she set up an appointment with her new cardiologist, Mei Lee was told that she must bring her own interpreter for the visit.
- When she recently was re-assessed for Medicaid personal care hours, she received a notice reducing her hours and explaining her fair hearing appeal rights. The notice was written only in English without any taglines.



# Proposed Changes & Impact on Older Adults

# Proposed Rule Would Undermine Current Protections

## Current Regulations

- **Expand** nondiscrimination rights based on sex and national origin
- Prohibit **intersectional** discrimination
- Prohibit discriminatory plan **benefit design** and marketing

## Proposed Regulations

- **Restrict** nondiscrimination rights for LGBTQ and LEP individuals
- **Eliminate** explicit prohibitions on:
  - intersectional discrimination
  - discriminatory plan benefit design and marketing

# Proposed Changes to Current Rules

- Roll back affirmative protections for transgender and LGB individuals
- Eliminate notice of nondiscrimination & many language access requirements
- Reduce the scope of entities that must comply with 1557
- Restrict individual's ability to enforce the law:
  - Eliminates recognition of private right of action
  - Preclude disparate impact and intersectional discrimination claims

# Impact on Older Adults

- Mei Lee's doctors and pharmacists will no longer have to post a notice of nondiscrimination; she may not receive important documents in her language or with taglines telling her how she can get help.
- Maria could be denied care if the providers at the adult day center refuse to treat her based on their religious beliefs; her Medicare Advantage plan may start routinely denying coverage of prostate exams again.
- John perceives that his doctor is refusing to obtain a Hoyer Lift for him because he is gay. It will be harder for John to challenge this intersectional discrimination.

# How to Talk to Older Adults About these Proposed Changes?

1. **The regulation is not final and you can speak out against it.**
2. **The proposed regulation would not change the law.**
3. **It is still illegal for health care providers to discriminate.**
4. **You still have the right to receive important information in a language you understand.**
5. **You are not alone, and you can fight back!**





# How to Fight Back

# Comment by August 13

## High Quality Organizational Comments

- **Who?** Nonprofits, providers, local, state and national elected officials
- **What?** Templates available soon
- **Where?** Regulations.gov
- **When?** On or before August 13th

## High Quantity Individual Comments

- **Who?** You and your colleagues and friends and family, anyone who cares about seniors!
- **What?** Online forms with customizable text
- **Where?** [ProtectTransHealth.org](https://ProtectTransHealth.org); [JusticeinAging.org](https://JusticeinAging.org) (form coming soon!)
- **When?** Today and every day until August 13th



# About Commenting

## Can non-profit organizations comment? **Yes!**

- Submitting public comments to an agency is not considered lobbying under federal law.
  - Lobbying involves legislative proposals while regulations implement existing laws.
- Can also encourage your networks to submit comments. This will not hurt your organization's Section 501(c)(3) tax exemption
- Be aware of restrictions on funding and consider commenting on your own time.

# What Else Can You Do?

Learn  
More

JusticeinAging.org  
ProtectTransHealth.org

Share  
Stories

[Email Justice in Aging!](#)  
ProtectTransHealth.org

Speak  
up

Use #PutPatientsFirst &  
#ProtectTransHealth on social  
media

# Important Reminders!

1. The regulation is not final and you can speak out against it.
2. The proposed regulation would not change the law.
3. It is still illegal for health care providers to discriminate.
4. You still have the right to receive important information in a language you understand.
5. You are not alone, and you can fight back!

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