

## Q&A: Changes to the Rules Implementing the Health Care Rights Law

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Latest Update: On August 17, the U.S. District Court for the Eastern District of New York stayed the Trump Administration's repeal of the 2016 definitions of "on the basis of sex," "gender identity," and "sex stereotyping". This means that HHS is prohibited from implementing this aspect of the 2020 rule. Separately, on September 2, the U.S. District Court for the District of Columbia granted a partial preliminary injunction blocking the final rule's incorporation of certain religious exemptions as well as the repeal of "sex stereotyping" definition. However, the courts left in place other changes to the rule, including the elimination of notice and language access protections, which went into effect on August 18. As litigation proceeds, we will continue to provide updates regarding changes to the final rule.

### What is the Health Care Rights Law?

The Health Care Rights Law (HCRL), also known as Section 1557 of the Affordable Care Act, is a landmark federal law that prohibits discrimination in health care.<sup>1</sup> It is the only federal law that bans discrimination on the basis of race, color, national origin, sex, age, and disability specifically in health programs and activities that receive federal financial assistance. It does so by incorporating longstanding federal civil rights laws, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, and applying them to health care activities. The HCRL is the first federal law to prohibit sex discrimination in health care.

### Why is the Health Care Rights Law important to older adults?

Older adults, particularly seniors of color, seniors with limited English proficiency (LEP), and LGBTQ older adults, often face discrimination in accessing health care services. While longstanding federal civil rights statutes are important, they sometimes have failed to adequately prevent discrimination. The HCRL and its corresponding regulations clarified how these important civil rights statutes specifically apply to health care, better protecting older adults and other marginalized communities from discrimination.

The HCRL regulations issued by the Department of Health and Human Services (HHS) under President Barack Obama in 2016 defined the scope of protections under Section 1557.<sup>2</sup> The regulations, for example,

spelled out protections for transgender older adults based on gender identity, and required health care insurance companies and providers to provide notice of non-discrimination and rights to language assistance, including notice in non-English languages.<sup>3</sup> The 2016 regulations also clarified that a private right of action exists for disparate impact discrimination claims under the statute, giving victims the opportunity to challenge that discrimination in federal district court.<sup>4</sup> For older adults who might experience discrimination because of intersecting identities (e.g., age and race), the 2016 regulations explained that the HCRL recognizes intersectional discrimination claims.<sup>5</sup>

## What changes did the Trump Administration make to the rules implementing the Health Care Rights Law?

On June 19, 2020, HHS under President Trump finalized major changes to the HCRL regulations, to be effective August 18, 2020.<sup>6</sup> These changes severely undermine the rights of transgender older adults and LEP seniors to access health care free from discrimination and in a language they understand, and harshly limit the ways victims of discrimination can seek redress in court.

The changes include eliminating protections for transgender individuals by deleting the definition of gender identity and explicit prohibitions on health plans excluding gender-affirming care.<sup>7</sup> With such changes, HHS not only reverses previous regulations but also runs counter to the recent Supreme Court decision in *Bostock*<sup>8</sup> as well as over a decade of caselaw that says federal sex discrimination laws protect transgender communities.<sup>9</sup>

The new rule also rolls back the requirement that insurers, providers, and other covered entities post notices of non-discrimination and language assistance on websites and in public places. It eliminates the requirement that insurers, including Medicare Advantage and Part D plans, as well as providers, include taglines in the top 15 languages spoken in the state on all significant documents such as explanations of benefits.<sup>10</sup>

In addition, HHS limits the scope of health care entities that are required to comply with the regulations. It declares that health insurance companies are not principally engaged in health care, so they are only subject to Section 1557's rules for their plans that receive federal funding. While Medicare Advantage, Part D, Medicaid managed care, and Qualified Health Plans are still subject to the rule because they receive federal funding, the rule exempts most private employer health plans. It also exempts parts of HHS itself from complying with 1557.<sup>11</sup>

Finally, the regulations state that the enforcement provisions in the underlying statute, e.g., Title VI in a race discrimination context, would govern the enforcement of the HCRL. This drastically limits the private right of action for disparate impact claims.

## Are older adults still protected from discrimination? What should individuals do if they are discriminated against?

The HCRL and the statutes it incorporates are still the law of the land, and discrimination on the basis of race, color, national origin, sex, age, and disability are still prohibited. HHS does not have the power to

change the law. Also, many states have their own anti-discrimination laws that remain unchanged regardless of federal administrative actions. However, the changes may confuse consumers, providers, and insurance companies and may lead to more discrimination.

Individuals who experience discrimination still have means available to enforce their rights, including complaining to the provider or insurer, filing a complaint with the HHS Office for Civil Rights, and bringing a lawsuit. While we do not provide direct legal services or represent individuals, Justice in Aging is available for [case consultations](#) with attorneys and advocates.

## What can advocates do to fight against these changes?

HHS's Final Rule on the Health Care Rights Law is facing legal challenges, which have already delayed parts of the final rule from taking effect. To continue to support these efforts, we need your help documenting the harm, including fear and confusion, that these changes cause. Please [email us](#) with any issues encountered by your clients or your organization related to language access, access to care for LGBTQ older adults, or other discrimination. And remember, HHS has not and cannot change the law through regulations, and individuals who experience discrimination in health care are still protected under the law.

[Visit our website](#) for updates and more resources.

## Endnotes

- 1 42 U.S.C. § 18116.
- 2 81 Fed. Reg. 31376 (May 18, 2016).
- 3 81 Fed. Reg. 31387–88, 31467 codifying 45 C.F.R. § 92.206 (the 2016 rules defined gender identity as “an individual’s internal sense of gender, which may be different from an individual’s sex assigned at birth and which may be male, female, neither, or a combination of male and female”); 81 Fed. Reg. 31395 codifying notice requirements at 45 C.F.R. § 92.8.
- 4 81 Fed. Reg. at 31439-40.
- 5 81 Fed. Reg. at 31405.
- 6 85 Fed. Reg. at 37160. (June 19, 2020). HHS issued a notice of proposed rulemaking (NPRM) in June 2019. 84 Fed. Reg. at 27846. (June 14, 2019). Justice in Aging and over 200,000 other organizations and individuals submitted comments.
- 7 85 Fed. Reg. at 37167, 37174, 37183, 37201 (repealing 45 C.F.R. § 92.4 and 45 C.F.R. § 92.206)
- 8 *Bostock v. Clayton County*, 590 U.S. \_\_\_ (2020) (in which the Court held that the Title VII of the Civil Rights Act prohibition on discrimination “because of sex” includes discrimination on the basis of sexual orientation and gender identity in employment.)
- 9 National Center for Transgender Equality, “Federal Case Law on Transgender People and Discrimination,” available at [transequality.org/federal-case-law-on-transgender-people-and-discrimination](https://transequality.org/federal-case-law-on-transgender-people-and-discrimination).
- 10 85 Fed. Reg. at 37175 et seq. (repealing 45 C.F.R. § 92.8(d) and Appendix B of the 2016 Rule)
- 11 National Health Law Program, “HHS Eliminates or Weakens Regulatory Protections Against Discrimination in Health Care,” available at [healthlaw.org/resource/hhs-eliminates-or-weakens-regulatory-protections-against-discrimination-in-health-care/](https://healthlaw.org/resource/hhs-eliminates-or-weakens-regulatory-protections-against-discrimination-in-health-care/).