

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

## Rollbacks in the Health Care Rights Rule and Related Litigation

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September 22, 2020

# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems with getting on to the webinar? Send an e-mail to [trainings@justiceinaging.org](mailto:trainings@justiceinaging.org).
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# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

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.

Want to receive Justice in Aging trainings and materials?

## *Join Our Network!*

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Open a text and text the message "4justice" to the number 51555.

# 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 Agenda

- Overview of the Health Care Rights Law Rule & Recent Changes
- Litigation Challenging the Changes to the HCRL Rule
- Language Access Rights in Health Care for Older Adults
- Advocacy Opportunities

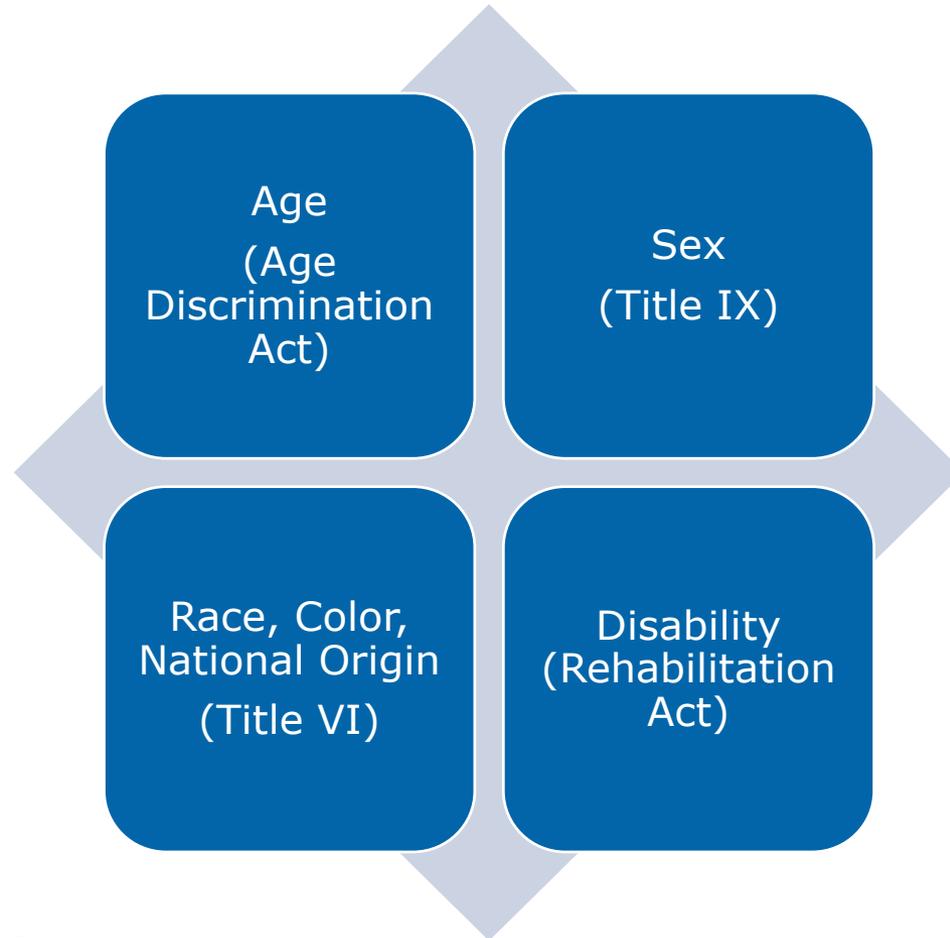


The Health Care Rights Law Rule

# The Health Care Rights 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

# Prohibited Bases of Discrimination



# The HCRL Regulations

## 2014-2016

- Dept. of Health & Human Services under the Obama Administration developed regulations to implement the law

## July 2016/January 2017

- Final HCRL Rules became effective
- The 2016 rules were in effect for 4 years

## June 2020

- HHS under the Trump Administration made major revisions to the regulations
- Parts of the final rule took effect August 18, 2020

# 2016 Requirements for Notices 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

# Sample Taglines

- ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).
- ATENCIÓN: si habla español, tiene a su disposición servicios gratuitos de asistencia lingüística. Llame al 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).
- 注意：如果您使用繁體中文，您可以免費獲得語言援助服務。請致電 1-xxx-xxx-xxxx (TTY : 1- xxx-xxx-xxxx)



# Other Changes in the 2020 Final Rule

- Rolls back affirmative protections for transgender and LGB individuals
- Reduces the scope of entities that must comply with 1557
- Restricts individual's ability to enforce the law:
  - Eliminates recognition of private right of action
  - Precludes disparate impact and intersectional discrimination claims

# 2020 Rule's Language Assistance Requirements

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

# 2020 Rule's Interpreter Requirements

- When an interpreter is required, the individual must:
  - Adhere to generally accepted interpreter ethics principles, like confidentiality;
  - Demonstrate proficiency in speaking and understanding English and the other language; and
  - Interpret effectively, accurately, and impartially using necessary specialized vocabulary
- Similar requirements for translators.

# Impact on Older Adults

- Doctors and pharmacists will no longer have to post a notice of nondiscrimination specific to Section 1557
- An LEP older adult may not receive important documents in their language or with taglines telling them how they can get help in their language.
- Transgender older adults could be denied care. Examples:
  - An adult day center refuses to welcome a transwoman based on their religious beliefs;
  - Medicare Advantage plans may start routinely denying coverage of prostate exams for transwomen again.
- An individual with a disability perceives that his doctor is refusing to obtain a Hoyer Lift for him because he is gay. It will be harder for him to challenge this intersectional discrimination.

# Important Reminders

1. The regulation does not change the law.
2. It is still illegal for health care providers to discriminate.
3. LEP individuals still have the right to receive important information in a language they understand.
4. The 2020 final rule is being challenged in court. Courts have blocked changes to the definition of sex discrimination and the incorporation of religious exemptions.

# Individuals Can Still Enforce Their Rights Under the HCRL

- Complain to the insurer or provider
- File a complaint with HHS Office for Civil Rights (OCR)
- File a lawsuit in federal court
- Justice in Aging is available for technical assistance.



# Litigation Challenging the Rule

# Cases Challenging the 2020 Rule

- Whitman Walker Clinic (D.D.C.)
- Asapansa-Johnson Walker (E.D.N.Y.)
- Boston Alliance of Gay, Lesbian, Bisexual, and Transgender Youth (D. Mass.)
- State of Washington (W.D. Wash.)
- State of New York (“Multi-State”) (S.D.N.Y.)

# Current Status of Litigation

- Of the five cases filed, courts have weighed in on preliminary injunction motions in three.
  - Courts have blocked the changes pertaining to discrimination on the basis of sex as well as the inclusion of religious exemptions. Other changes in the 2020 rule remain in effect.
- Plaintiffs in a fourth case have filed for summary judgment.
- You can track the cases [here](#).



# Language Access Rights in Healthcare

# Language Access Protections for Older Adults

- Title VI of the Civil Rights Act of 1964
- Executive Order 13166
- The Health Care Rights Law (Section 1557) of the Affordable Care Act
- Medicare Marketing and Communications Guidelines, Medicare Managed Care Manual
- State and local laws

# Title VI

- Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal funds.
- Interpreted to include language access as a part of national origin. *Lau v. Nichols*, 414 U.S. 563 (1974).
- Enforcement limited by *Alexander v. Sandoval*, 532 U.S. 275 (2001).

# Executive Order 13166

- Made DOJ responsible for guidance
- Ensure LEP people have meaningful access for interpretation and translation
- Four factor test: number or proportion of LEP individuals, frequency of contact, nature and importance of program, and resources
- Safe harbor provision for translation
  - 1,000 individuals or 5% (which ever is less) of the population of persons eligible to be served or likely to be affected or encountered

# Medicare Rules

- Medicare Marketing and Communications Guidelines
  - Anti-discrimination (30.1)
  - Interpreter services at call centers (30.3)
  - Vital documents (100)
- Medicare Managed Care Manual
  - Ensure enrollees are not discriminated against (10.5.2)
  - Provider network standards (110.1.1)
- 42 C.F.R. §§ 422.2268 & 423.2268

# State and Local Laws

- Many jurisdictions have equivalent non-discrimination protections in state law.
- NHeLP has a comprehensive resource on state level language access laws in healthcare programs: [Summary of State Law Requirements Addressing Language Needs in Health Care.](#)

# Case Example 1: Mei Lee

- Dual eligible, monolingual Cantonese speaker
- When she picks up her Part D prescription, the pharmacist explains 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 say that the problem is between her and the pharmacy.
- When setting up an appointment with her cardiologist, Mei Lee was told 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.

# Case Example 2: Dimitri

- Dual eligible, monolingual Russian speaker
- During COVID-19, Dimitri wants to shelter in place because he has multiple chronic conditions and is 75 years old.
- He set up a telehealth appointment through his Medicare Advantage plan because his foot recently started hurting. The MA plan told him that he would need to wait 1 hour and 30 minutes for a Russian interpreter or pay for a shorter wait time.
- Dimitri's drugs are now being mailed to him from his MA plan during the pandemic. He noticed beginning in September that the drug instructions, which are all in English, no longer contain a reference in Russian on where he can call for help.



Advocacy Opportunities

# What Can You Do?

- **Learn more:** [justiceinaging.org](https://justiceinaging.org)
- **Share stories:** [email Justice in Aging](#)
- **Speak up:**
  - On social media using
    - #PutPatientsFirst
    - #LanguageAccessNow
    - #ProtectTransHealth

# Help Us Identify Language Access Harms to Older Adults

- The rule's changes became effective August 18, 2020.
- Each covered entity can decide if/when to modify their notice and tagline policies.
- Look out for:
  - Mailings from Medicare Advantage and Part D plans, like United Healthcare and Kaiser
  - Mailings during the Annual Election Period
  - Increased demand in interpreter/translation services
- Report trends to Justice in Aging!

# Additional Resources

- [Justice in Aging's Health Care Rights Law resource page](#)
- [Q & A: Changes to the Rules Implementing the Health Care Rights Law](#)
- Amicus briefs
  - [State of Washington v. US Department of Health and Human Services](#)
  - [State of New York, et. al. v. US Department of Health and Human Services](#)

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# Questions?

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