

New Health Care Rights Law Proposed Rule—What Advocates for Older Adults Need to Know

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Housekeeping

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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.

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Justice in Aging's Commitment to Advancing Equity

To achieve Justice in Aging, we must:

- [Advance equity](#) for low-income older adults in economic security, health care, housing, and elder justice initiatives.
- Address the enduring harms and inequities caused by systemic racism and other forms of discrimination that uniquely impact low-income older adults in marginalized communities.
- Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, and economic class.

Agenda

- Background on the Health Care Rights Law (Section 1557) & regulations
- Covered Entities & Medicare Part B
- Enforcement
- Language Access and Notice Provisions
- Sex Discrimination
- How to engage in the public comment process
- Q&A



Section 1557 Basics

What Is Section 1557/HCRL?

- The Health Care Rights Law (HCRL) is Section 1557 of the Affordable Care Act
- Prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in health programs and activities
- The *only* federal law that prohibits discrimination specifically in healthcare

What Are Section 1557's Protections Based On?

- Incorporates existing civil rights protections and applies to healthcare
 - Title VI of the Civil Rights Act of 1964
 - Title IX of the Education Amendments of 1972
 - The Age Discrimination Act of 1975
 - Section 504 of the Rehabilitation Act of 1973

Historical Background

- 2016: Obama HHS issued regulations
- Subsequent litigation challenged 2016 rule
- 2020: Trump HHS issued new regulations
- Additional litigation filed challenging the 2020 rule, including [Chinatown Services Center v. HHS](#)
- 2022: Biden HHS issues new proposed rule
 - Comments Due October 3, 2022



The New Proposed HCRL Rule

New 2022 Proposed Rule

- Restores and expands:
 - Affirmative protections for LGBTQ+ individuals
 - Notice of nondiscrimination & language access requirements
 - The scope of covered entities that must comply with 1557
 - Requirements for covered entities to have 1557 policies, procedures and employee training
- Adds new nondiscrimination protections in telehealth, clinical algorithms, benefit design
 - Clarifies that the “integration mandate” of Section 504 of the Rehabilitation Act applies to covered entities with respect to the design & implementation of health coverage and benefits
- Recognizes a private right of action to enforce the law

Who Is Covered?

- Covered entities include recipients of federal financial assistance (FFA), HHS itself, and an entity established under Title I of the ACA.
- FFA: Any grant, loan, credit, subsidy, contract (other than procurement), or any other arrangement the Federal Government provides assistance.
 - Includes situations where HHS plays a role in providing or administering

What's a Health Program or Activity?

- Provides, administers, or provides assistance to people obtaining health-related services, health insurance coverage, or other health-related coverage,
- Provides clinical, pharmaceutical, or medical care,
- Engages in health research
- Provides health education for health care professionals

Examples of Health Programs or Activities

- State or local health agencies
- Hospitals
- Health clinics
- Health insurance issuers
- Physician's practices
- Pharmacies
- Community-based health care provider
- Nursing facilities
- Residential or community-based treatment facilities
- Similar entities

New

Medicare Part B Providers

- Change in interpretation
- **Proposed: Medicare Part B counts as FFA**
- For purposes of Title VI, Title IX, Section 504, the Age Act, and Sec. 1557
- Similarities to Medicare Part A
- Medicare Part B providers “accept assignment” and get paid by HHS

Enforcement

- Enforcement mechanisms for the underlying statutes apply for purposes of Sec. 1557
- Age Act contains an administrative exhaustion requirement
- For recipients of FFA, uses Title VI procedures for administrative enforcement actions *except* for age

Intersectionality

- Proposed rule silent on how to address intersectional claims
 - E.g., language and age; race, gender identity and age
- *Recommendation:* HHS should include language in the final rule to clarify that administrative exhaustion is not required to bring an intersectional claim including age under Sec. 1557

New Grievances & Coordinators

- Written grievance policy
- Covered entities* must designate a 1557 coordinator
- Ultimate oversight for ensuring coordination with entity's compliance
 - Grievances
 - Recordkeeping
 - Language access procedures
 - Effective communication procedures
 - Coordinate training



Notice & Language Access

Notice of Nondiscrimination

- The proposed rule would require covered entities to provide a notice of nondiscrimination to participants, beneficiaries, enrollees, and applicants of its health programs and activities, **and** members of the public
- The notice must contain 8 categories of information, including the availability of and info on how to obtain **timely and free** reasonable modifications, auxiliary aids and services, and language assistance services (e.g., interpreters and translations)
- Must be provided on an annual basis and upon request
- Must be posted at a conspicuous location on health program or activity website **and** clear and prominent physical locations where it is reasonable to expect individuals seeking services to be able to read or hear the notice

In-Language Tagline Notices

- Proposed rule would require *new* Notice of Availability of Language Assistance Services and Auxiliary Aids and Services (or “Notice of Availability”)
- In top 15 languages by state
 - *Recommendation:* HHS should consider a more localized standard such as service area or county
- Must be provided annually to individuals, posted publicly, and included in specific electronic and written communications
 - 10 categories of communications including: applications; notices of denial or termination of eligibility; notices of appeal and grievance rights; Explanations of Benefits (EOBs); consent forms; discharge papers; member handbooks; and complaint forms
- *New* opt out provision allows individuals to choose not to receive the Notice of Availability in each communication
 - Notice must still be provided annually and decision to opt-out renewed

Changes to Notice & Tagline Requirements

Type of Notice	Obama Admin	Trump Admin	Biden Admin
Notice of Non-discrimination	<ul style="list-style-type: none"> • Required with “significant communications” • Posted in physical locations & websites 	Not required	<ul style="list-style-type: none"> • Required annually & upon request • Posted in physical locations & websites
In-language notices or “taglines”	Required short statements indicating the availability of language assistance services to be included in the top 15 languages on all “significant communications”	Not required	Requires Notice of Availability of Language Assistance Services and Auxiliary Aids and Services in top 15 languages on specific electronic and written communications

Prohibiting Discrimination Based on Language

- Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, or national origin
 - National origin interpreted to include language *Lau v. Nichols*, 414 U.S. 563 (1974)
- Section 1557 incorporates Title VI
 - Proposed rule would help clarify by requiring the nondiscrimination notice to describe national origin discrimination as including limited English proficiency (LEP) and primary language
- Medicare, state & local laws provide additional protections

Meaningful Access

- Proposed rule would restore and clarify the covered entity's duty to take reasonable steps to provide meaningful access to **each** LEP individual eligible to be served or likely to be directly affected by its health programs or activities
- HHS notes importance of a case-by-case determination of reasonable steps, especially in the health care context
 - Example: A translated generic brochure describing a surgical procedure is unlikely to provide sufficient information to an individual patient or their caregiver undergoing that surgery. A reasonable step would be to provide an interpreter for discussions with the surgeon.
- *Recommendation*: HHS should ensure meaningful access applies to companions/caregivers who are LEP

Additional Language Access Provisions

- Improvements to rules on who is a qualified interpreter and clearer limits on use of non-qualified interpreters such as family members
- Defines & limits use of machine translation
- Requires covered entities to train relevant employees on language access policies & procedures
- *Recommendation:* HHS should require covered entities to have communication access plans to understand the language and disability access needs of the populations they serve



Sex Discrimination

Discrimination on the Basis of Sex

- Consistent with latest Supreme Court precedent, the new proposed rule explicitly says the law's prohibition against discrimination "on the basis of sex" applies to:
 - Sex stereotypes
 - Sex characteristics, including intersex traits
 - Pregnancy or related conditions
 - Sexual orientation
 - And gender identity

Changes in Definition of “Sex”

Trait	Obama Admin	Trump Admin	Biden Admin
Sex stereotypes	Included	Removed	Restored
Sex characteristics, intersex traits	Not explicitly included (but enforced as “sex”)	Removed	Included explicitly
Pregnancy etc.	Included	Removed	Restored
Sexual orientation	Not explicitly included (but enforced as “sex stereotype”)	Removed	Included explicitly
Gender identity	Included	Removed	Restored

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

Sex Characteristics

- Discrimination based on anatomical or physiological sex characteristics
 - E.g., genitals, gonads, chromosomes, hormone function, and brain development/anatomy
- Includes discrimination on the basis of intersex traits

Transgender Discrimination

- Gender identity has been interpreted to include transgender status
 - *Recommendation:* HHS should explicitly include transgender status as well as gender identity in the regulatory text
- Must treat individuals consistent with their gender identity
- 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 (Cont.)

- 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.

Medicaid & PACE Programs

- The proposed prohibitions against discrimination on the basis of sexual orientation and gender identity apply to:
 - Medicaid and related managed care programs
 - Program of All-Inclusive Care for the Elderly (PACE)
- *Recommendation:* HHS should make the prohibitions under these programs consistent with those under Sec. 1557, i.e., include “sex stereotypes, sex characteristics,” etc.



How to Engage in Public Comment

Comment to Support the New Proposed Rule

- Who?
 - Advocacy organizations, health and social services providers, elected officials, anyone invested in the well-being of older adults
- What?
 - Sharing stories and on the ground experiences from people serving older adults are the most important way to support this rule.
- How?
 - [Template comment for older adult advocates](#)
 - Additional template comments addressing disability, LGBTQ+ people, and other aspects of the rule
- Where?
 - [Regulations.gov](#)
- When?
 - On or before **October 3, 2022**

Non-Profit Organizations Can Comment!

- Submitting public comments to an agency is not considered lobbying under **federal** law.
 - Lobbying involves legislative proposals while regulations implement existing laws.
- Encouraging your networks to submit comments is also permitted.
 - This will not hurt your organization's Section 501(c)(3) tax exemption
- Be aware of restrictions on particular funding you receive
 - If your funder does not allow policy advocacy, consider commenting on your own time.

What Else Can You Do?

- Share stories
 - [Email Justice in Aging](#) to share stories about how discrimination in health and long-term care harms your clients or how strong protections and language access help.
 - Encourage individuals to share their stories directly with HHS:
 - [SAGE \(LGBTQ+ Elders\)](#)
 - [My Care Counts \(General\)](#)
 - [Protect Trans Health](#)
- Spread the word
 - Share these resources with your networks and encourage others to comment.
 - Amplify the comment portals on social media using [#PutPatientsFirst](#) [#ProtectTransHealth](#) [#MyCareMatters](#) [#LanguageAccessNow](#)

Additional Resources

- [Justice in Aging's Health Care Rights Law resource page](#)
- [HHS Office for Civil Rights Fact Sheet: Proposed Rule - Section 1557 of the Affordable Care Act](#)
- [Health Affairs summary of the 2022 proposed rule](#)
- [NHeLP Q&A on the 2022 Proposed Rule Addressing Nondiscrimination Protections under the ACA's Section 1557](#)

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Questions?

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