



Section 1557 of the Affordable Care Act

**Selected Highlights of the Final Regulation Impacting
State Medicaid, CHIP, and Basic Health Program
Agencies**

State Operations Technical Assistance Call

July 19, 2016



SECTION 1557 OF THE ACA

- Section 1557 ***prohibits discrimination based on race, color, national origin, sex, age or disability*** in health programs and activities that receive Federal funds.
- Section 1557 builds on long-standing Federal civil rights laws
 - 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
 - Age Discrimination Act of 1975



SECTION 1557 OF THE ACA

- Section 1557 is integral to achieving the ACA's goals of expanding access to health insurance coverage and health care and reducing health disparities.
- Section 1557 assists populations that have been most vulnerable to discrimination in health care and health coverage, including:
 - Women
 - Members of the LGBT community
 - Individuals with disabilities
 - Individuals with limited English proficiency



SECTION 1557 REGULATION

- Section 1557 was effective upon the enactment of the Affordable Care Act (March 2010) and OCR has been enforcing it since then.
- OCR's final regulation implementing Section 1557 was published in the Federal Register on May 18, 2016 (Nondiscrimination in Health Programs and Activities, Final Rule (81 FR 31376)).



WHAT IS NEW ABOUT SECTION 1557 OF THE AFFORDABLE CARE ACT AND THE REGULATION

- First Federal civil rights law and regulation to focus exclusively on non-discrimination in health programs and activities.
- First Federal civil rights law and regulation to prohibit sex discrimination broadly in health coverage and care; the regulation details sex non-discrimination requirements.
- The law and regulation apply civil rights obligations to the Marketplaces and all of the health plans of issuers participating in the Marketplaces, thereby expanding the scope of civil rights protections in health plans.
- While it incorporates existing civil rights obligations, the regulation also clarifies requirements for accessibility by persons with limited English proficiency (LEP) and persons with disabilities.



WHO MUST COMPLY WITH SECTION 1557

- All health programs and activities that receive Federal financial assistance from HHS
- All health programs and activities administered by ACA Title I entities (State-based and Federally-facilitated Health Insurance Marketplaces).
- All health programs and activities administered by HHS (e.g., Centers for Medicare & Medicaid Services, National Institutes of Health, Substance Abuse and Mental Health Services Administration, Health Resources and Services Administration).



DEFINITION OF HEALTH PROGRAM OR ACTIVITY

- Health program or activity is broadly defined in § 92.4 in the regulation and includes:
 - The provision or administration of health related services, including behavioral health services
 - State agencies, including Medicaid, CHIP, Basic Health Programs
 - Medicare programs
 - Hospitals
 - Nursing facilities, intermediate care facilities for persons with intellectual/developmental disabilities, community residential facilities
 - Health-related insurance
 - Wellness programs
 - Health research and education programs
- Includes all of the operations of an entity principally engaged in health services or health coverage.



ENFORCEMENT OF SECTION 1557 REGULATION

- Imports existing civil rights enforcement procedures for OCR enforcement. §§ 92.301 to 92.303
- Provides for a private right of action against federally assisted programs and State-based Marketplaces. § 92.302(d)
- Provides for enforcement tools for failure to provide information during OCR investigations. § 92.302(c)
- Provides for compensatory damages. § 92.301(b)



WHAT STATE MEDICAID, CHIP, AND BASIC HEALTH AGENCIES MUST DO BY WHEN

- Effective **July 18, 2016:**
 - Designate an employee to serve as the compliance coordinator - § 92.7(a)
 - Responsible for coordinating compliance
 - Responsible for investigating complaints
 - Adopt a grievance procedure - § 92.7(b)
 - Must afford due process and prompt and equitable resolution of grievances
 - Appendix C to the final regulation is a sample



WHAT STATE MEDICAID, CHIP, AND BASIC HEALTH AGENCIES MUST DO BY WHEN - NOTICE

- Effective **October 17, 2016:**
- Post a nondiscrimination notice - § 92.8(a), (b)(1)
 - Seven elements required in the notice - § 92.8(a)(1)-(7)
 - Agency may combine content of notice with other notices - § 92.8(h)
- Post taglines in at least the top 15 languages in the relevant State or States - § 92.8(d)(1)
 - Taglines are a gateway to language assistance services
 - A language in the top 15 must be posted, regardless of the percentage of individuals with LEP who speak the language
 - This obligation should not be confused with translating documents



NOTICE (CONTINUED)

- Posting requirements for notice and taglines - § 92.8(f)(1)(i)-(iii)
 - In significant publications and significant communications (except those that are small-size)
 - In conspicuous physical locations where the agency interacts with the public
 - On the agency's website, accessible from the home page
- In **small-size** significant publications and significant communications, must post:
 - A nondiscrimination statement - § 92.8(b)(2), (g)(1)
 - At least 2 taglines - § 92.8(d)(2), (g)(2)
- Appendices to the final regulation include sample notice of nondiscrimination, nondiscrimination statement, and taglines that State Medicaid agencies can use.



MORE INFORMATION ON THE NOTICE REQUIREMENT

- Preamble discussion on § 92.8 (not binding but explanatory for covered entities, including State Medicaid agencies)
 - Flexibility to implement requirements as long as the actions do not compromise intent to clearly inform individuals of their Section 1557 rights
 - Provision of notice and taglines is effective if the content is sufficiently conspicuous and visible that an individual could reasonably be expected to see and be able to read the information



SPOTLIGHT ON TAGLINES

- “[P]ost taglines in at least the top 15 languages spoken by individuals with limited English proficiency of the relevant State or States” - § 92.8(d)(1)
- (For small-size documents, at least the top 2 languages) - § 92.8(d)(2)
- What does this mean?
- “languages spoken by individuals with LEP”
 - Spoken by individuals who are LEP versus by the public at-large
- “of the relevant State or States”
 - Spoken in State (or U.S. Territory) where individuals live who entity serves
 - Entities serving multiple States can aggregate LEP populations to derive top 15
- “at least the top 15 languages” (or “at least the top 2 languages”)
 - Prevalence (most language speakers of a language)



REASONABLE STEPS TO PROVIDE LEP INDIVIDUALS MEANINGFUL ACCESS

- A State Medicaid agency must take reasonable steps to provide meaningful access for individuals with LEP. Evaluation of compliance is a flexible, fact-dependent standard. § 92.201(a)-(b)
- Development and implementation of a language access plan is encouraged - § 92.201(b)(2)
 - Plans help covered entities, including State Medicaid agencies, to be prepared to take reasonable steps to provide meaningful access to each individual with LEP who may require assistance.
 - A plan is one factor, among other relevant factors, that OCR will consider in determining compliance.
- OCR will also evaluate, and give substantial weight to, the nature and importance of the health program or activity (including the communication at issue) - § 92.201(b)(1)



HIGHLIGHTS OF MEANINGFUL ACCESS PROVISION AND RELATED DEFINITIONS

- Individuals providing oral language assistance or written translation must be qualified. §§ 92.4, 92.201(d)-(e)
 - Includes bilingual/multilingual staff
 - Oral interpreters
 - Translators
- Regulation codifies restrictions on the use of family members, friends, and children to interpret or facilitate communication. § 92.201(d)-(e)
- If video remote interpreting is used, the services must meet certain quality standards. § 92.201(f)



DISABILITY REQUIREMENTS UNDER SECTION 1557 REGULATION

- Covered entities must make reasonable changes to policies, practices and procedures where necessary to provide equal access for individuals with disabilities. § 92.205
- Covered entities must ensure effective communication with persons with disabilities. § 92.205
- Requires entities to give “primary consideration” to individual’s choice of auxiliary aids and services. § 92.202(a)
- Codifies application of appropriate auxiliary aids and services, including sign language interpreters, to entities with fewer than 15 employees. § 92.202(b)
- An individual providing qualified interpretation for an individual with a disability, e.g. sign language interpreter, must be qualified. § 92.4



DISABILITY REQUIREMENTS (CONTINUED)

- Covered entities must ensure newly constructed and altered facilities are physically accessible to individuals with disabilities. § 92.203
- The regulation includes a safe harbor for construction that was done in compliance with standards applicable at the time. § 92.203
- Covered entities must make all health programs and activities provided through electronic and information technology accessible to individuals with disabilities. § 92.204
- Covered entities must ensure non-discrimination in marketing and benefit design of health plans (which includes drug-tiering). § 92.207



SEX DISCRIMINATION PROVISIONS IN SECTION 1557 REGULATION § 92.206

Sex discrimination prohibited under Section 1557 includes discrimination based on:

- An individual's sex
- Pregnancy, childbirth and related medical conditions
- Gender identity
- Sex stereotyping



SEX DISCRIMINATION DEFINITIONS IN SECTION 1557 REGULATION: § 92.4

Definition of “on the basis of sex”

- Includes but is not limited to, discrimination on the basis of sex stereotyping and gender identity

Definition of “gender Identity”

- Means an individual’s internal sense of gender, which may be male, female, neither, or a combination of male and female, and may be different from one’s sex assigned at birth

Definition of “sex stereotypes”

- Includes expectations that individuals will act in conformity with gender expressions associated with being male or female, such as appropriate roles of a certain sex.



SEX DISCRIMINATION REQUIREMENTS IN SECTION 1557 REGULATION: § 92.206

- Under Section 1557, covered entities, including State Medicaid agencies, must:
 - Provide equal access to health care and insurance coverage regardless of an individual's sex, including gender identity and sex stereotypes.
 - Treat individuals consistent with their gender identity, including with respect to access to facilities.
- But cannot:
 - Deny or limit sex-specific health services based solely on the fact that the gender recorded for the individual does not align with the sex that usually receives those types of sex-specific services.



SEX DISCRIMINATION REQUIREMENTS – GENDER CODING § 92.207

- Record coding that flags a gender mismatch for certain sex-specific services, by itself, is not prohibited if it does not result in a delay or denial of services.
- Requiring transgender individuals to repeatedly go through an appeals process to correct gender coding issues in order to obtain coverage for certain services may be discriminatory.
- Covered entities should utilize interim methods to correct gender coding mismatch issues.
- Covered entities are free to develop methods for processing claims for sex-specific services by transgender individuals as long as process is not overly burdensome and provides timely access to care.



SEX DISCRIMINATION REQUIREMENTS – GENDER TRANSITION RELATED CARE

- Bright line test: Categorical exclusions for all health care services related to gender transition are per se discriminatory. § 92.207(b)(4)
- Denial for specific health services related to gender transition will be evaluated based on the application of longstanding nondiscrimination principles to the facts of the particular plan.
§ 92.207(b)(5)
- The regulation does not affirmatively require issuers to cover any particular procedure or treatment for gender transition-related care.
- Issuers must have neutral standards and administer them in a nondiscriminatory manner.
- The regulation does not restrict an issuer from determining whether a particular health service is medically necessary or otherwise meets applicable coverage requirements in any individual case.
§ 92.207(d)



SEX DISCRIMINATION REQUIREMENTS: SEX-SPECIFIC PROGRAMS AND ACTIVITIES

§ 92.101(b)(3)(iv)

- Sex-specific programs and activities are permitted only if the covered entity can demonstrate an exceedingly persuasive justification, that is, that the program is substantially related to achievement of an important health-related or scientific objective.
- Justification that relies on generalizations or stereotypes would not be sufficient.



VISIT OUR WEBSITE!

www.hhs.gov/ocr

The screenshot shows the top navigation bar of the HHS.gov Office for Civil Rights website. It includes the HHS.gov logo, the Office for Civil Rights name, and the U.S. Department of Health & Human Services affiliation. Below the navigation bar is a search bar with the placeholder text "I'm looking for..." and a magnifying glass icon. To the right of the search bar is a link to the "HHS A-Z Index". Below the search bar is a row of four navigation buttons: "About Us" (with a people icon), "Filing with OCR" (with a document icon), "Civil Rights" (with a shield icon), and "Health Information Privacy" (with a shield icon). Below this row is a "Newsroom" button (with a document icon). Below the buttons is a breadcrumb trail: "HHS Home > Office for Civil Rights (OCR)". At the bottom of the header is a utility bar with "Text Resize" (with "A A A" icons), "Print" (with a printer icon), and "Share" (with Facebook, Twitter, and a plus icon).

Office for Civil Rights (OCR)

The screenshot shows the main content area of the Office for Civil Rights (OCR) website. On the left is a sidebar with the heading "I would like info on. . ." and three links: "Contact the Office for Civil Rights", "Section 1557: Nondiscrimination", and "Health Information Privacy". To the right of the sidebar is a large image of a diverse group of people. Below the image is a section titled "Section 1557" with the subtitle "Civil Rights Provision of the Affordable Care Act".

On OCR's website....

- Read about civil rights and HIPAA laws
- Download factsheets
- Access sample policies and resources in English and other languages
- File a complaint
- Contact us!



SPECIFIC RESOURCES AVAILABLE ON OCR'S WEBSITE

- Sample grievance procedure
- Sample notice and nondiscrimination statement translated into 64 languages as a resource -- translations are not required to be posted
- Sample tagline translated into 64 languages
- Staff training materials
- Summary and fact sheets about Section 1557 translated into multiple languages



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