Operationalizing Compliance with Section 1557 of the Affordable Care Act

The New Nondiscrimination Requirements for Healthcare Providers
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Background on Section 1557
The Affordable Care Act

- Section 1557 is a part of the ACA and entitled “Nondiscrimination.”

- HHS considers Section 1557 “important to achieving the ACA’s goals of expanding access to health care and coverage, eliminating barriers, and reducing health disparities.”

- Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability.
Background on Section 1557
The new civil rights provision in healthcare

- Section 1557 builds upon the pre-existing nondiscrimination regime in healthcare and provides for new protections.

- It is the first civil rights statute specifically addressing nondiscrimination in the healthcare industry.

- It is the first civil rights statute to prohibit discrimination on the basis of sex in healthcare.

Background on Section 1557
Under the radar until now

- Section 1557 has flown under the radar until now.
  - The ACA is an enormous piece of legislation.
  - High profile litigation challenging the ACA.
  - Section 1557 itself is opaque.
  - HHS finally issues regulations under Section 1557 in 2016.
Background on Section 1557

Repeal and replace Section 1557?

- The budget reconciliation process cannot be used to repeal Section 1557.

- The window to repeal regulations through the Congressional Review Act has closed.
  - HHS has indicated an intent to revise the final rule through notice and comment rule-making.
  - HHS could selectively enforce the final rule.

- Will Section 1557 survive any grand compromise?

Section 1557 and the Final Rule’s Requirements
Section 1557’s Requirements
The text of Section 1557

- Section 1557: Nondiscrimination
  - (a) IN GENERAL.--Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

Section 1557’s Requirements
The text of Section 1557 continued

- (b) CONTINUED APPLICATION OF LAWS.--Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or the Age Discrimination Act of 1975 (42 U.S.C. 611 et seq.), or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).
- (c) REGULATIONS.--The Secretary may promulgate regulations to implement this section.
Section 1557’s Requirements
Breaking the text down – what does it do?

- An individual shall not, [on the basis of race, color, national origin, sex, age, or disability] be excluded from participation in, be denied the benefits of, or be subjected to discrimination.

Section 1557’s Requirements
Breaking the text down – who is covered?

- “Any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance . . . .”

  - The regulation applies to health programs or activities that receive federal financial assistance from HHS.
Section 1557’s Requirements

Breaking the text down – what are the remedies?

- “The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.”

Section 1557’s Requirements

The pre-existing nondiscrimination laws stay in place

- (b) CONTINUED APPLICATION OF LAWS.—Nothing in this title shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under [the pre-existing regime] or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).
Section 1557’s Requirements

HHS may issue regulations

- (c) REGULATIONS.--The Secretary may promulgate regulations to implement this section.

Section 1557’s Requirements

Who is covered by Section 1557?

- All health programs or activities that receive Federal financial assistance.
  - Medicare, Medicaid, grants, tax-subsidies and credits
  - Caveat: Providers that accept Medicare Part B only are not covered—according to HHS.

- Hospitals, health clinics, physicians’ practices, nursing homes, community health centers.
  - All of the entity’s operations are covered.
  - According to HHS, a covered entity may receive the federal financial assistance directly or indirectly.
  - HHS may require the entity that controls the covered entity to take remedial action.
Section 1557’s Protections

What is prohibited?

- Section 1557 prohibits both intentional discrimination and *unintentional* discrimination.

- “Disparate impact discrimination”
  - A facially neutral policy or practice that disproportionately affects a protected class.

- Section 1557 also prohibits retaliation against a patient or person who reports discrimination.

Section 1557’s Protections

Race, color, or national origin protections

- A covered entity may not:
  - Segregate, delay, or deny services or benefits based on an individual’s race, color, or national origin.

  - Examples: room assignments; requiring disclosure of citizenship or immigration status.
  - Section 1557 protects all individuals, whether in the country lawfully or not.
Section 1557’s Protections
Race, color, or national origin protections

- A covered entity may not:
  - Delay or deny effective language assistance services to individuals with limited English proficiency (LEP).
  - “National origin” includes a person’s place of origin, or physical, cultural, or linguistic characteristics of a national origin group.
    - A member of a religious group may be included here.

Section 1557’s Protections
Communicating with patients with LEP

- A covered entity must:
  - Take reasonable steps to provide meaningful access to each individual with LEP. Reasonable steps may include the provision of language assistance services, including offering a qualified interpreter where oral interpretation is reasonable.
    - “Qualified” is defined in the final rule.
  - An individual with LEP is an individual whose primary language is not English and who has limited ability to read, write, speak, or understand English.
  - Language services must be provided for free and in a timely manner.
Section 1557’s Protections
Communicating with patients with LEP

- A covered entity may not:
  - Require an individual to provide his or her own interpreter.
  - Rely on a minor child to interpret, unless it is an emergency.
  - Rely on interpreters the individual prefers where there are competency or confidentiality concerns.
  - Rely on unqualified bilingual or multilingual staff.
Communicating with patients with LEP

- In evaluating whether an entity is meeting its meaningful access obligations under Section 1557, HHS shall:
  - “Evaluate and give substantial weight to, the nature and importance of the health program of activity and the particular communication at issue, to the individual with limited English proficiency; and
  - Take into account other relevant factors, including whether a covered entity has developed and implemented an effective written language access plan, that is appropriate to its particular circumstances.”

An effective written language access plan

- According to OCR, an effective plan should address:
  - How an entity will determine a patient’s primary language
  - Identify a telephone oral interpretation service
  - Identify a written translation service
  - Identify the types of language assistance services needed in particular circumstances
  - Identify any documents for which written translations should be routinely available

- See 81 Fed. Reg. at 31415.
Litigation and Enforcement

Extent of the Meaningful Access Obligation

- To determine the extent of a provider’s meaningful access obligation, providers should generally continue to look to the 2003 HHS LEP Guidance.

- “Flexible and fact-dependent standard,” that starts with these four factors:
  - Number and proportion of LEP persons eligible to be served or likely to be encountered by the program;
  - The frequency with which LEP individuals come in contact with the program;
  - The nature and importance of the program, activity, or service to people’s lives;
  - The resources available to the provider.

Section 1557’s Protections

Communicating with patients with LEP

- Additional resources
  - § 92.201 of the final rule (Meaningful access for individuals with limited English proficiency).
  - Resources at www.minorityhealth.hhs.gov
  - Federal interagency resources www.LEP.gov
Section 1557’s Protections

Sex discrimination is prohibited

- Covered entities must:
  - Provide equal access to healthcare and programs without discrimination based on sex, including pregnancy, gender identity, or sex stereotypes.
  - Treat individuals consistent with their gender identities, including access to bathrooms and patient rooms.

- The scope of this prohibition is being litigated at present and may be revised by HHS.
  - A Federal court has issued a nationwide injunction against HHS’s enforcement of Section 1557’s protections on the basis of gender identity and termination of pregnancy.
  - But a second Federal court has ruled that Section 1557 itself prohibits discrimination on the basis of gender identity.

Sex discrimination includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery from pregnancy, childbirth or related medical conditions.

Sex stereotyping means notions of masculinity or femininity (e.g. men should be the primary earner in a family, women should wear make-up).
Sex discrimination is prohibited

- Discrimination on the basis of an individual’s sexual orientation alone is not a form of sex discrimination.

- HHS OCR will, however, review complaints that allege sexual orientation discrimination for sex stereotyping discrimination.

- HHS OCR will monitor the evolving case law on sexual orientation discrimination as sex discrimination.

Section 1557’s Protections

Section 1557 protects transgender individuals whose gender identity is different from the sex assigned to them at birth.

- Providers may not deny transgender individuals sex-specific health services because their expressed gender does not align with the sex that usually receives those services.

- Sex-specific programs are allowed only if a covered entity can show an exceedingly persuasive justification for the program.
Section 1557’s Protections
Age discrimination is prohibited

- A covered entity may not deny, exclude, or limit a service based on an individual's age.

- A covered entity may base its actions on age when it is a factor necessary to the normal operation, or achievement of a statutory objective of a program.

- A covered entity may also provide different treatment based on age when it is justified by medical evidence or based on a specialty.

Section 1557’s Protections
Disability discrimination is prohibited

- **Disability** means 1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; 2) having a record of such an impairment; or 3) being regarding as having such an impairment.

- **Physical or mental impairment** means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting major body systems; any mental or psychological disorder such as emotion or mental illness, mental retardation, or learning disabilities.
Disability discrimination is prohibited

- **Physical or mental impairment** also includes visual, speech, and hearing impairments, diabetes, cancer, heart disease, HIV disease, drug addiction, and alcoholism.

Section 1557’s Protections
Disability discrimination is prohibited

- Unless they would result in an undue financial burden or would fundamentally alter the program, covered entities must take the following steps:
  
  - Make reasonable changes to policies, procedures, or practices where necessary to provide equal access for individuals with disabilities.
  
  - Make all health programs and activities provided electronically accessible to individuals with disabilities.
Section 1557’s Protections
Disability discrimination is prohibited

- Covered entities must also ensure newly constructed and altered facilities are physically accessible to individuals with disabilities.

- Provide effective communication with individuals with disabilities, including patients and their companions.

Section 1557’s Protections
Auxiliary aids and services

- A covered entity must provide auxiliary aids and services free of charge and in a timely manner when necessary to ensure an equal opportunity to participate and benefit from the health program.

- Such aids and services include
  - Sign language interpreter
  - Large print materials
  - Text telephones
  - Captioning
  - Screen reader software
  - Video remote interpreting services
Section 1557’s Protections
Auxiliary aids and services

- Section 1557 and the final rule now requires covered entities to give “primary consideration” to an individual’s expressed choice of auxiliary aid.

  - Therefore, covered entities must honor a patient or companion’s requested aid, unless it can demonstrate that another equally effective means of communication is available—or the use of the chosen means would fundamentally alter the program or activity or result in an undue financial or administrative burden.

Section 1557’s Protections
Auxiliary aids and services

- A covered entity may not:
  
  - Require an individual to provide their own interpreter
  - Rely on minor children to interpret (except in an emergency)
  - Rely on interpreters an individual prefers where there are competency, confidentiality, or other concerns
  - Rely on unqualified staff interpreters
Section 1557’s Protections
Website and Digital Accessibility

- The final rule requires healthcare providers to ensure that health programs and services provided through electronic information technology are accessible to individuals with disabilities.
  - Unless doing so would result in undue financial and administrative burdens. If this is the case, then the provider must provide the information in an equally accessible alternative format.

Regulation under Section 1557
Important interpretations adopted by HHS

- In the final rule, HHS adopted several important interpretations of Section 1557.
- These interpretations may or may not get *Chevron* deference in the courts.
Regulation under Section 1557
Examples of interpretations adopted by HHS

- Private physicians that accept Medicare Part B payments *only* are not covered.

- Sex discrimination includes gender identity.

- Faith-based healthcare providers must rely on the Religious Freedom Restoration Act if they conscientiously oppose complying with Section 1557.

- Section 1557 allows for a private right of action for a disparate impact claim of discrimination on the basis of *any* designated protected class.
  - But a federal district court has just recently rejected this interpretation. Expect more litigation on this question, which may require a ruling from the Supreme Court.

Litigation and Enforcement under Section 1557
Litigation and Enforcement

Federal enforcement

- HHS OCR is responsible for enforcing Section 1557 and the final rule.
- HHS OCR has been active in enforcing Section 1557.
  - Voluntary Resolution Agreements require revisions to policies, training for all staff and employees, and ongoing monitoring.
- HHS OCR may suspend or terminate a covered entity from receiving Federal financial assistance or refer matters to the Department of Justice.

Litigation and Enforcement

Private enforcement

- Private plaintiffs (e.g., a patient or a class of patients) can also enforce Section 1557.
- “Both the proposed and the final rule specify that a private right of action is available under Section 1557.”
- “OCR interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation.”
Uncertainty in the courts

- If a plaintiff brings an action under Section 1557, what legal standard applies?
  - Is it a uniform standard and burden of proof regardless of the type of discrimination alleged?
  - Or does the standard and burden or proof under each statute referenced in Section 1557 apply depending on the specific type of discrimination?


Disparate impact risk and litigation

- “OCR interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation.”
- Therefore, an individual patient could challenge any facially neutral policy or practice that disproportionately impacts individuals on the basis of race, color, national origin, sex, age, or disability.
- This interpretation provides a work-around to a prior Supreme Court decision, Alexander v. Sandoval (2001). But a Federal district court has recently rejected this interpretation.
Example of disparate impact enforcement

- In 2010, the University of Pittsburgh Medical Center closed a hospital in a small, predominantly African-American community.
  - HHS OCR opened an investigation into whether this hospital closure would have a disparate impact on the predominantly minority community.
  - As a part of a Voluntary Resolution Agreement, UPMC agreed to: 1) subsidize expanded hours at a local health center; 2) provide door to door transportation for residents; 3) provide health screening; and 4) designate an employee to help individuals navigate the UPMC health system.

Medicaid and disparate impact

- In 2015, non-profit advocacy groups filed an administrative complaint with HHS alleging that California’s low Medi-Cal reimbursement rates had a disparate impact on access to health care for Latinos.
  - This same reasoning would apply to any policy or practice that limits a provider’s exposure to Medicaid or low-income patients.
Disparate Impact and Meaningful Access to LEP Patients

- “Language access cases … typically proceed under a disparate impact theory. The failure to provide effective language access services amount to national origin discrimination. There is no need to prove intentional discrimination.”
  

Other open questions

- What is a hostile healthcare environment?
  
  - “Consistent with the well-established interpretation of existing civil rights laws, OCR interprets the final rule to prohibit all forms of unlawful harassment based on a protected characteristic.”

- Are attorney’s fees available to a prevailing party under Section 1557?
  
  - 42 U.S.C. 1988 provides for attorney’s fees to a prevailing party under Title IX and Title VI.
  - Is this an enforcement mechanism incorporated by reference into Section 1557?
BACKGROUND

EMORY HEALTHCARE

- Emory University, which includes Emory Healthcare (collectively referred to as Emory), is a premier private teaching, medical, and research institution located in the Atlanta, Georgia region.
- It is a top-ranked research university, and a world-class healthcare system.
- Among its many attributes, it is well regarded for providing an excellent educational experience, developing cutting-edge research, confronting global health challenges, and advancing the delivery of health care services.
BACKGROUND
EMORY HEALTHCARE ORGANIZATIONAL STRUCTURE

EMORY UNIVERSITY
Woodruff Health Science Center

EMORY HEALTHCARE

EMORY SCHOOL OF MEDICINE
EMORY SCHOOL OF PUBLIC HEALTH
EMORY SCHOOL OF NURSING
EMORY WINSHIP CANCER INSTITUTE
YERKES NATIONAL PRIMATE RESEARCH CENTER

EMORY CLINIC

✓ 1,500+ Physicians
✓ 40+ Locations
✓ 2,670,000 Annual Visits

EMORY SPECIALTY ASSOCIATES

✓ 60+ Physicians
✓ 30+ Locations
✓ 480,000 Annual Visits

EMORY HOSPITALS

✓ 6 Hospitals
✓ 1,800 Beds
✓ 70,000 Admissions

EMORY HEALTHCARE NETWORKS

✓ 7 Hospitals
✓ 1,400 employed MDs
✓ 400 private practice MDs

BACKGROUND
EMORY HEALTHCARE HOSPITALS
BACKGROUND
EMORY HEALTHCARE

- Emory University Hospital,
- Emory University Hospital Midtown,
- Emory University Orthopedics & Spine Hospital,
- Emory Rehabilitation Hospital,
- Emory Saint Joseph’s Hospital,
- Emory Johns Creek Hospital,
- Emory University Hospital Smyrna,
- as well as a network of offices called Emory Clinic.

BACKGROUND
EMORY HEALTHCARE

- Emory Healthcare is the most comprehensive health care system in the state of Georgia and a leading academic health center nationally, serving over 600,000 unique patients in 2016.
- Including its network of affiliates, Emory has a physical presence in 27 counties within the state.
OVERVIEW
Hot Topics and Issues Under 1557

- Designation of “Responsible Employee”
- Patient Complaints and Adopting a Grievance Procedure
- Complying with Notice Requirements
- Effective Communication with Patients with Disabilities
- Effective Communication with Patients with Limited English Proficiency (“LEP”)
- Sex, Gender, and Sexual Orientation Discrimination
- Accessibility for Patients with Disabilities
- Interpreting “health program or activity”
- Employee Training and Education
FUNDAMENTAL § 1557 COMPLIANCE

DESIGNATION OF RESPONSIBLE EMPLOYEE

- 45 CFR 92.7(a)
- “Each covered entity that **employs 15 or more persons** shall **designate at least one employee** to coordinate its efforts to comply with and carry out its responsibilities under Section 1557 and this part, including the investigation of any grievance communicated to it alleging noncompliance with Section 1557 or this part or alleging any action that would be prohibited by Section 1557 or this part.”

FUNDAMENTAL § 1557 COMPLIANCE

ADOPTION OF GRIEVANCE PROCEDURES

- 45 CFR 92.7(b)
- “Each covered entity that **employs 15 or more persons** shall adopt grievance procedures that incorporate **appropriate due process standards** and that provide for the **prompt** and equitable resolution of grievances alleging any action that would be prohibited by Section 1557 or this part.”
EMORY HEALTHCARE'S GRIEVANCE PROCEDURE

- Emory Healthcare has adopted an internal grievance procedure for all facilities and clinics providing for prompt and equitable resolution of complaints alleging any action prohibited by Section 1557. Any person who believes s/he has been subjected to discrimination on the basis of race, color, national origin, sex, gender identity, age or disability may file a grievance. It is against the law for any Emory Healthcare facility, clinic or program to retaliate against anyone who files a grievance or cooperates in the investigation of a grievance.

EMORY HEALTHCARE’S GRIEVANCE PROCEDURE

- Grievances must be submitted to the Patient Advocate for the facility where the issue occurred within 30 days of the date the person filing the grievance becomes aware of the alleged discriminatory action. The Patient Advocate shall contact the Director of 1557 Compliance.
EMORY HEALTHCARE
GRIEVANCE PROCEDURE

• https://www.emoryhealthcare.org/patients-visitors/non-discrimination-policy.html

FUNDAMENTAL § 1557 COMPLIANCE
COMPLYING WITH NOTICE REQUIREMENTS

• 45 CFR 92.8(a)
• Each covered entity shall take appropriate initial and continuing steps to notify beneficiaries, enrollees, applicants, and members of the public of the following:
FUNDAMENTAL § 1557 COMPLIANCE
COMPLYING WITH NOTICE REQUIREMENTS

(1) The covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities;

(2) The covered entity provides appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner, when such aids and services are necessary to ensure an equal opportunity to participate to individuals with disabilities;
(3) The covered entity provides language assistance services, including translated documents and oral interpretation, free of charge and in a timely manner, when such services are necessary to provide meaningful access to individuals with limited English proficiency;

(4) How to obtain the aids and services in paragraphs (a)(2) and (3) of this section;
FUNDAMENTAL § 1557 COMPLIANCE
COMPLYING WITH NOTICE REQUIREMENTS

(5) An identification of, and contact information for, the responsible employee designated pursuant to § 92.7(a), if applicable;

(6) The availability of the grievance procedure and how to file a grievance, pursuant to § 92.7(b), if applicable; and
(7) How to file a discrimination complaint with OCR in the Department.

FUNDAMENTAL § 1557 COMPLIANCE
COMPLYING WITH NOTICE REQUIREMENTS

- 45 CFR 92.8(d)
- Within 90 days of the effective date of this part, each covered entity shall:
  - (1) As described in paragraph (f)(1) of this section, post taglines in at least the top 15 languages spoken by individuals with limited English proficiency of the relevant State or States; and
  - (2) As described in paragraph (g)(2) of this section, if applicable, post taglines in at least the top two languages spoken by individuals with limited English proficiency of the relevant State or States.
EMORY HEALTHCARE
COMPLYING WITH NOTICE REQUIREMENTS

• 45 CFR 92.8(f)
  – Each covered entity shall post the notice required by paragraph (a) of this section and the taglines required by paragraph (d)(1) of this section in a conspicuously-visible font size: targeted to beneficiaries, enrollees, applicants, and members of the public, except for significant publications and significant communications that are small-sized, such as postcards and tri-fold brochures;

  – (ii) In conspicuous physical locations where the entity interacts with the public; and

  – (iii) In a conspicuous location on the covered entity's Web site accessible from the home page of the covered entity's Web site.

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COMPLYING WITH NOTICE REQUIREMENTS
“SIGNIFICANT PUBLICATIONS” AND “SIGNIFICANT COMMUNICATIONS”

• The HHS LEP Guidance provides examples of “vital” documents
  – consent and complaint forms
  – written notices of eligibility criteria, rights, denial, loss, or decreases in benefits or services
  – applications to participate in a recipient's program or activity or to receive recipient benefits or services
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COMPLYING WITH NOTICE REQUIREMENTS
“SIGNIFICANT PUBLICATIONS" AND "SIGNIFICANT COMMUNICATIONS"

• OCR intends for “vital documents" to represent a subset of “significant communications and significant publications”.

EMORY HEALTHCARE

COMPLYING WITH NOTICE REQUIREMENTS
“SIGNIFICANT PUBLICATIONS" AND "SIGNIFICANT COMMUNICATIONS"

• “The HHS LEP Guidance uses the term “vital documents” to address how a covered entity should meet its Title VI obligations to translate entire documents. By contrast, we refer to “significant communications and significant publications” in this rule to identify the documents in which covered entities are required to post the notice of individuals’ rights (or nondiscrimination statement, where applicable) and taglines. We are not adopting an across-the-board requirement for covered entities to translate certain written documents into a threshold number of languages.”
EMORY HEALTHCARE

COMPLYING WITH NOTICE REQUIREMENTS

- Within 90 days of passage
- Can exhaust existing supply of documents
- Start with website first
  - Waiting rooms
  - Elevator bays
- Don’t forget taglines in 15 languages (or 2 for small sized communications)

EFFECTIVE COMMUNICATION WITH PERSONS WITH DISABILITIES

- Section 1557 requires effective communications with individuals with disabilities, incorporating longstanding Department of Justice interpretations of the requirements of federal law.
- The rule incorporates standards under Title II of the Americans with Disabilities Act, which apply to state and local government, rather than the lower standards of Title III, which govern public accommodations.
AUXILIARY AIDS

• Auxiliary aids and services to individuals with impaired sensory, manual, or speaking skills must be provided.

VIDEO REMOTE INTERPRETING SERVICES

• (f) Video remote interpreting services. A covered entity that provides a qualified interpreter for an individual with limited English proficiency through video remote interpreting services in the covered entity's health programs and activities shall provide:
  • (1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
  • (2) A sharply delineated image that is large enough to display the interpreter's face and the participating individual's face regardless of the individual's body position;
  • (3) A clear, audible transmission of voices; and
  • (4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the video remote interpreting.
EFFECTIVE COMMUNICATION WITH PERSONS WITH LIMITED ENGLISH PROFICIENCY ("LEP")

- An individual with LEP is an individual whose **primary language for communication is not English** and who has limited ability to read, speak, write, or understand English (even if he or she has some capacity to do so).
- Twenty-five million individuals in the United States, 8.5 percent of the population, have LEP.
- Failing to take reasonable steps to provide meaningful access to language assistance services is a form of national origin discrimination (which is defined in the rule to include not just an individual’s place of origin but also his or her ancestor’s place of origin, as well as manifestation of the physical, cultural, or linguistic characteristics of a national origin group).

LANGUAGE ASSISTANCE

- LEP individuals cannot be required to provide their own interpreters.
- Language assistance services must be provided in a timely manner.
- Qualified translators and interpreters must be used.
- Staff may not be relied upon to interpret unless they are “qualified bilingual/multilingual staff.”
- Covered entities may not rely on friends or family of individuals for interpretation.
- Friends and family members may not be competent interpreters and often may not be privy to sensitive information.

- EXCEPTION: Section 1557 makes exceptions for the use of friends/family members as interpreters of adult friends or family in emergency situations.
QUALIFIED BILINGUAL/MULTILINGUAL STAFF

- An employee who has been designated to provide oral language assistance as part of their current, assigned job responsibilities and who has demonstrated to Emory that he or she:
  - Is proficient in speaking and understanding both spoken English and at least one other spoken language, including any necessary specialized vocabulary, terminology and phraseology, and
  - is able to effectively, accurately, and impartially communicate directly with individuals with limited English proficiency in their primary languages.

QUALIFIED TRANSLATORS

- Adheres to generally accepted translator ethics principles, including client confidentiality;
- has demonstrated proficiency in writing and understanding both written English and at least one other written non-English language; and
- is able to translate effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary, terminology and phraseology.
SEX, GENDER, AND SEXUAL ORIENTATION DISCRIMINATION

- Under Section 1557, sex discrimination is defined to include discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy or recovery from it, childbirth, or sex stereotyping (including the stereotype that an individual must identify as either male or female).
- Section 1557 prohibits discrimination based on gender identity, which may be different from the sex assigned to an individual at birth.
- Always treat transgender individuals consistently with their own gender identity.
- An individual has a transgender identity if the individual’s identity is different from the sex assigned to the individual at birth.

ACCESSIBILITY FOR PATIENTS WITH DISABILITIES

- A covered entity shall make reasonable modifications to policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the covered entity can demonstrate that making the modifications would fundamentally alter the nature of the health program or activity. For the purposes of this section, the term “reasonable modifications” shall be interpreted in a manner consistent with the term as set forth in the ADA Title II regulation at 28 CFR 35.130(b)(7).
INTERPRETING “HEALTH PROGRAM OR ACTIVITY”
ORGANIZATIONAL SCOPE

• "the term further includes all of the operations of an entity principally engaged in providing or administering health services or health insurance coverage, such as a hospital, health clinic, community health center, group health plan, health insurance issuer, physician’s practice, nursing facility, or residential or community-based treatment facility. We proposed that OCR interpret “principally engaged” in a manner consistent with civil rights laws that use this term."

INTERPRETING “HEALTH PROGRAM OR ACTIVITY”
ORGANIZATIONAL SCOPE

• “the law provides that the term “health program or activity” must be interpreted in a manner that uniformly covers all of the operations of any entity that receives Federal financial assistance and that is principally engaged in health services, health insurance coverage, or other health coverage, even if only part of the health program or activity receives such assistance. This interpretation serves the central purposes of the ACA, and effectuates Congressional intent, by ensuring that entities principally engaged in health services, health insurance coverage, or other health coverage do not discriminate in any of their programs and activities, thereby enhancing access to services and coverage.”
INTERPRETING “HEALTH PROGRAM OR ACTIVITY”

ORGANIZATIONAL SCOPE

• “This approach is consistent with the approach Congress adopted in the CRRA, which amended the four civil rights laws referenced in Section 1557 and defines “program or activity” to mean “all of the operations of . . . an entire corporation, partnership, or other private organization, or an entire sole proprietorship . . . which is principally engaged in the business of providing,” among other things, a range of social and health services. The CRRA establishes that the entire program or activity is required to comply with the prohibitions on discrimination if any part of the program or activity receives Federal financial assistance. The CRRA has been consistently applied since its enactment in 1988, and we believe that Congress adopted a similar approach with respect to the scope of health programs and activities covered by Section 1557. If any part of a health care entity receives Federal financial assistance, then all of its programs and activities are subject to the discrimination prohibition.”

CLINICAL TRIALS & ACADEMIC MEDICAL CENTERS

• We proposed to interpret “health programs and activities” to include programs such as health education and health research programs. Because Federal civil rights laws already prohibit discrimination on the basis of race, color, national origin, disability, or age in all health research programs and activities that receive Federal financial assistance and prohibit discrimination on the basis of sex in all health research programs conducted by colleges and universities, we determined that the application of Section 1557 to health research should impose limited additional burden on covered entities.
**EMPLYEE TRAINING AND EDUCATION**

- In-service required for:
  - Patient Advocates
  - Risk Management
  - Nurse Leadership
  - Executive Team
  - Board of Directors
  - Office of General Counsel
  - Office of Compliance
- All employees required to pass Nondiscrimination in Healthcare Services online course beginning Fiscal year 2018 (which began September 1, 2017).

**ADDITIONAL INFORMATION**

For more information:

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