



# Allowing Discrimination!?: Proposed Section 1557 Rules

June 26, 2019



*Dedicated to creating a nation where the best health and health care are equally accessible and affordable to all*

# Welcome



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Partnerships  
Manager,  
Families USA



# Housekeeping

- Today's presentation is being recorded
- The slides and recording will be made available
- To ask questions:
  - Type your question in the chat box

# Allowing discrimination!?: Proposed Section 1557 rules

## Today's Agenda

- Section 1557 and the Affordable Care Act
- LGBTQ Protections
- Implications for Reproductive Health Care
- Impacts on Limited English Proficiency Populations
- Q&A on Section 1557

# Allowing Discrimination!?



**Cheryl Fish-  
Parcham**

Director of Access  
Initiatives,  
Families USA

# Allowing Discrimination!?

## Section 1557 of the Affordable Care Act

### The law itself:

Applies to health programs and activities, any part of which is getting federal financial assistance or is administered by an Executive Agency or entity established under Title I of the Affordable Care Act

Can't exclude, deny benefits or discriminate on any grounds in:

- Title VI of the civil rights act (race, color, national origin)
- Title IX of the Education Amendments (sex)
- The Age Discrimination Act (age)
- Section 504 of the Rehab Act (disability)

# Allowing Discrimination!?

Rules **currently** in place were finalized May 2016 –  
proposed rules undo current protections

**Currently, 45 CFR Part 92:**

Covers a wide range of health programs, facilities, and health insurers if any part:

- Gets grants/funding from HHS, or takes Medicaid or Medicare, is part of the health care marketplace/established under Title I of the ACA. Also applies to HHS itself.

# Allowing Discrimination!?

May 2016 rules had strong protections now in jeopardy

## Current rules explain:

Can't deny or limit care, or set up a benefit design, that would discriminate based on race, color, national origin, sex, age, or disability

Prohibited sex discrimination includes gender identity, sexual orientation, sex stereotyping

Notices of rights including for LEP and those who use auxiliary devices;

People with disabilities and people with limited English must have meaningful access;

Doesn't apply if would violate applicable Federal statutory protections for religious freedom and conscience

People who have been discriminated against can file grievances; complain through HHS Office of Civil Rights; go to court



# Allowing Discrimination!?

## Proposed rule

### Comment – these are not final!

- **Eliminates definitions** – including of “covered entities” and “on the basis of sex”
- Eliminates important **language access requirements**
- Eliminates **notice requirements**
- Eliminates the requirement for health plans and facilities to have a **written grievance procedure and compliance coordinator**
- **Narrows the list of covered entities**
- **Eliminates private right of action** that allows people to go to court for relief

# Allowing Discrimination!?

Proposed rules would strip away protections

Published for Public Comment June 14:

<https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>

Submit  
comments by  
August 13!

# Allowing Discrimination!?



**Luc Athayde-  
Rizzaro**

Policy Counsel,  
National Center for  
Transgender Equality



# Section 1557 and LGBT protections



**Luc Athayde-Rizzaro** (he/they)  
Policy Counsel  
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# IMPORTANCE OF 1557 FOR THE LGBT COMMUNITY

Sex discrimination protections include:

- Sex stereotypes
- Gender identity
- Sexual orientation
- Increased access to private and public coverage
- Removal of transgender exclusions



## 2016 HHS REGULATIONS

HHS 2016 regulations clarifies protections

Discrimination against LGBT patients include:

- Denying access to care
- Harassing or giving lesser care
- Forcing to have intrusive and unnecessary examinations
- Not treating people in accordance to their gender identity



## 2016 HHS REGULATIONS

### Insurance policies/companies:

- Cannot have blanket or categorical exclusions for transition-related care
- Cannot limit coverage of transition-related care if offered for other services
- Cannot deny coverage for care typically associated with one gender
- Cannot refuse to enroll, cancel coverage, or impose higher rates for someone because they are transgender

Regulations follow over two decades of federal care law



## NEW HHS PROPOSED RULE

- HHS justifies changes based on single district court ruling
- New rule would:
  - Erase all references to the ACA's protections against discrimination on the basis of gender identity
  - Erase all references to long-standing Supreme Court precedent recognizing protection from discrimination on the basis of sex stereotypes





## NEW HHS PROPOSED RULE

- New rule would:
  - Erase all references to gender identity and sexual orientation in several other long-standing HHS regulations (mostly CMS).
  - Effectively wipe out protections for LGBTQ people in Affordable Care Act plans, Medicaid plans, and the Program of All-Inclusive Care for the Elderly



## NEW HHS PROPOSED RULE

- Immediate practical effects
  - Although it does not change the law, the proposed rule will sow confusion and promote discrimination
  - Encourage hospitals to deny care to transgender people and enable insurance companies to deny coverage for health care services that they cover for non-transgender people.
  - Discourage transgender patients from seeking health care in the first place, or from speaking up if turned away.



## IMMEDIATE PUSHBACK AGAINST THE RULE

- Statements from:
  - Major medical and health provider associations
  - Health plans
  - Insurance regulators
  - State governors
- 20,000 + individual comments



## HOW YOU CAN HELP

- **Submit federal comments on Section 1557 and other rules that affect LGBT people**
- **Lift up the Protect Trans Health campaign**
- **Ask other stakeholders to speak out**
- **Support bills that would shore up protections, like the Equality Act and HEAA**
- **Help educate your communities about their rights**

# Allowing Discrimination!?



## **Shaina Goodman**

Director of Policy for  
Reproductive Health  
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National Partnership  
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Families



national partnership  
for women & families

## **1557 Rule: Implications for Reproductive Health Care**

- Yet another opportunity for the Trump administration to attack access to reproductive health care, and to abortion care specifically
- Single out abortion care and communicate that it is “not health care”
- Give license to health care entities and providers to discriminate against people based on their current, or prior, reproductive health care decisions

## IMPLICATIONS FOR REPRODUCTIVE HEALTH CARE

- The proposed rule could allow women and pregnant people to be denied critical reproductive health care services when they need it most
  - **People could not only be denied access to abortion care itself – but could also be denied any medical care or treatment, or denied health care coverage, for having previously had an abortion.**
  - **A pharmacy could refuse to fill a prescription for contraception, or any prescription that they see as related to contraception or abortion.**
  - **People could be denied prenatal care for conceiving outside of marriage, or because they are part of a same-sex couple.**
  - **For a person experiencing ectopic pregnancy or miscarriage, a health care provider could deny life-saving care if they think that person has had an abortion.**



## INTERSECTIONS WITH SEXUAL ORIENTATION & GENDER IDENTITY DISCRIMINATION

- LGBTQ people also need basic reproductive health care services like gynecological exams, contraception, abortion, pregnancy/prenatal care, fertility care, etc.
- If the rule goes into effect, we can anticipate that LGBTQ people will experience particular harms because of their identity when attempting to access these services specifically

- The 1557 proposed rule reinforces the previous refusal of care rule, finalized in early May
  - **Broadly expanded the category of health care entities, providers and individuals that could claim a religious or moral exemption to providing care**
  - **Essentially no limits on what constitutes a religious or moral reason for denying care**
- Similarly, the refusal provisions in this rule would allow more health care entities, including insurance companies, to discriminate against patients
  - **Does so by way of incorporating language from Title IX, the First Amendment, RFRA, and provisions related to abortion in Church Amendment, Coats Amendment, Section 1303 of the ACA, and appropriations riders restricting abortion.**

- Join the weeks of action on social media to amplify potential harms
  - **Repro week begins July 1**
- Submit comments – and even if you're not a reproductive health, rights or justice organization, include a statement opposing the rule on those grounds



## CONTACT US

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# Allowing Discrimination!?



**Mara Youdelman**

Managing Attorney,  
National Health Law  
Program

# About NHeLP

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- National non-profit committed to improving health care access and quality for underserved individuals and families
- State & Local Partners:
  - Disability rights advocates – 50 states + DC
  - Poverty & legal aid advocates – 50 states + DC
- Offices: CA, DC, NC
- Join our mailing list at [www.healthlaw.org](http://www.healthlaw.org)
- Follow us on Facebook & Twitter: @nhelp\_org

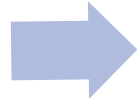


# Hierarchy of Law

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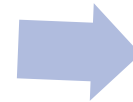
## Statute

- Passed by Congress & signed by President
- Can't be changed without enacting a new law



## Regulations

- Developed by Agencies
- Requires Public Comment process
- Can't be changed without new public comment process



## Guidance

- Developed by Agencies
- Can generally be rescinded or changed by agency without public comment
- Includes policy letters, FAQ

# Changes to Applicability– Part 1

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- Limits the number of federal health programs subject to § 1557
  - 2016 regulations -- § 1557 applies to any health program or activity administered by HHS
  - 2019 NPRM -- § 1557 applies only to federal health programs and activities administered by an agency established by Title I of the ACA, contrary to the intent and design of the law



# Changes to Applicability – Part 2

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- Limits the extent to which § 1557 applies to health insurance companies
  - 2016 regulations – any entity principally engaged in providing health care is subject to § 1557 if any part receives federal financial assistance
  - 2019 NPRM -- declares that an entity “principally engaged in providing health *insurance* shall not be considered to be principally engaged in providing health *care*” (emphasis added)
    - exempts much of the plans, products, and operations of most health insurance companies from § 1557’s nondiscrimination protections

# Language Taglines

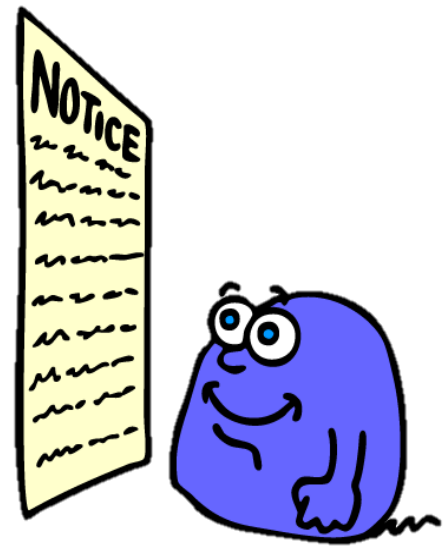
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- 2016 – taglines on all “significant” documents and notices in top 15 languages in a state
- 2019 – no taglines required on any documents
  - NPRM says this saves \$3.1B
  - Complaints by insurers and pharmacy benefit managers that “significant” documents was too broad and they were including taglines with every document (EOB, notice, etc.)
- Tagline requirements may still exist in other federal regulations – e.g. Medicare Part D (Rx program)

# Notices

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- 2016 – employers with at least 15 employees must
  - provide notices about its nondiscrimination policies
  - Provide information about availability of auxiliary aids/services & language services (and how to request them)
  - designate at least one employee to carry out the responsibilities under Section 1557
  - adopt grievance procedures with appropriate due process standards to resolve actions prohibited under Section 1557
  - must include taglines in top 15 languages in each state
- 2019 (proposed) – no notices



# Changes to Enforcement

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- Eliminates requirement to designate an employee responsible for ensuring compliance and investigating complaints
- Deletes provisions recognizing Sec. 1557 includes a private right of action
- Limits remedies available to persons who experience discrimination
- Seeks to preclude many disparate impact and most intersectional claims

# NHeLP Resources

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- Press release -- <https://healthlaw.org/news/administration-announces-proposed-regulation-change-to-subvert-acas-civil-rights-protections/>
- Blog Post -- <https://healthlaw.org/administrations-proposed-regulation-change-to-acas-nondiscrimination-provision-would-rollback-civil-and-health-rights-progress/>
- Q&A -- <https://9kqpw4dcaw91s37koz5jx17-wpengine.netdna-ssl.com/wp-content/uploads/2019/06/1557-Reg-Revision-QA-update-6.6.2019.pdf>
- NHeLP's Civil Rights & Health Equity Page -- <https://healthlaw.org/our-work/policy/civil-rights-and-health-equity/>

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