Transgender Care and Language Accessibility

The New Affordable Care Act Requirements for Healthcare Programs and Activities

By Andrea Lee

This summer, healthcare discrimination got a controversial update. Effective July 28, 2016, most healthcare providers and programs are prohibited from discriminating against transgender individuals and must go further to provide translation assistance to the rising number of non-English speakers in the United States.

These changes took effect under the Final Rule implementing Section 1557 of the Affordable Care Act.[1] Section 1557 of the act prohibits discrimination based on race, color, national origin, sex, age, or disability in certain health programs and activities.[2] While this provision may sound familiar, Section 1557 is actually the first federal civil rights law to prohibit discrimination on the basis of sex in health programs and activities.[3] "Sex" is defined broadly by the Final Rule to prohibit discrimination not only based on sex (male versus female), but also against transgender persons.[4]

Section 1557's Final Rule also requires healthcare providers and programs to include taglines in 15 non-English languages in significant patient communications.[5] Although this undoubtedly requires the redrafting of patient materials, it furthers the national initiative that all patients—including those with limited English proficiency—understand their healthcare forms, invoices, medication instructions, and the like.

Far-reaching application

Section 1557 applies to most healthcare entities—specifically, all "covered entities," which are defined by the Final Rule as all entities that operate a health program or activity, any part of which receives federal financial assistance.[6] Examples of covered entities include hospitals, skilled nursing facilities, home health agencies, hospices, physicians, and qualified health plan issuers that receive federal financial assistance from Medicare or Medicaid (excluding those providers that only accept Medicare Part B).[7] The Final Rule covers some 133,000 facilities and 900,000 physicians nationwide, as well as the 169 insurers in the health insurance marketplaces.[8]

Transgender discrimination

Nearly 1.4 million people in the United States identify as transgender,[9] with approximately 32,900 of them in the state of Michigan.[10] According to 2008 and 2010 surveys conducted by advocacy groups, transgender individuals face barriers when seeking healthcare. For example, 26.7 percent of transgender respondents reported that they have been refused healthcare, 28 percent

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reported being subjected to harassment in medical settings, and 50 percent reported having to teach their medical providers about transgender care.[11]

Section 1557's Final Rule is notable, as it requires covered entities to treat individuals consistent with their gender identity. The Final Rule also prohibits covered entities from denying healthcare services to a transgender individual because the individual's sex assigned at birth is different from the one to which the health services would ordinarily be available.[12] For example, under the Final Rule, providers are now prohibited from denying treatment for ovarian cancer to a transgender male (a person who was assigned female at birth but whose gender identity is that of a man) or from denying a mammogram or pap smear for a transgender male who has breast tissue or an intact cervix. The Final Rule also requires that covered entities treat all patients consistent with their gender identity, including with regard to access to facilities.[13] To comply, covered entities should ensure that intake policies collect a patient's gender identity and that rooming policies are consistent with the identity the patient disclosed.

Notably, the Final Rule does not address sexual orientation discrimination, which is distinguishable from gender identity. Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted.[14]

Enforcement

In July 2015, the Office for Civil Rights entered into the first-of-its-kind voluntary resolution agreement regarding Section 1557 transgender discrimination.[15] The office entered into the voluntary resolution agreement with the Brooklyn Hospital Center in New York after a transgender individual filed a complaint alleging discrimination based on sex in the assignment of patient rooms.[16] In the voluntary resolution agreement, the Brooklyn Hospital Center agreed to take various proactive steps, including revising admission policies and procedures; implementing an intake process that provides patients an opportunity to identify their sex, gender, and transgender status; revising room placement policies and procedures to ensure appropriate nondiscriminatory assignment of rooms; and training staff on the new policies.[17]

Despite Section 1557's quiet beginning, the release of the Final Rule has prompted litigation nationwide. Most significant is *Franciscan Alliance v Burwell*.[18] This case was filed on August 23, 2016, by a Catholic healthcare system, Christian medical association, and five states (Kansas, Kentucky, Nebraska, Texas, and Wisconsin). The plaintiffs alleged that the Final Rule violates the federal Administrative Procedure Act and multiple other federal laws and constitutional provisions.[19] Other pending litigation includes *Josef Robinson v Dignity Health*,[20] in which a transgender employee disputes an employer's denial of coverage for gender reassignment treatment through the employer's self-funded insurance plan, and *Rumble v Fairview Health Servs*,[21] in which a transgender male alleges an emergency room doctor and intake staff discriminated against him and mistreated him because of his gender identity.

Section 1557 has also prompted discussion in Michigan about the Michigan Department of Insurance and Financial Services' selection of Priority Health's HMO plan as the state's health insurance marketplace "benchmark plan" in 2012 and 2017. The state benchmark plan serves as the model for the essential health benefits that every Affordable Care Act health plan sold in the state must provide.[22] Because Priority Health's HMO does not cover transgender healthcare, other plans in Michigan exchanges may refuse to cover such care going forward, citing the state's benchmark plan exclusion.[23] In May 2015, an unnamed petitioner filed an appeal with the Michigan Department of Insurance and Financial Services following the denial of gender transition surgery by Priority Health, but was unsuccessful.[24] In that appeal, the department held that Priority Health's HMO plan is consistent with Section 1557, which does not require the coverage of gender transformation surgery.[25] The department also cited 10 other states that have benchmark plans excluding gender transformation surgery.[26]

Translation and taglines

In addition to addressing gender identity, the Final Rule also makes significant changes to language access requirements for covered entities. The United States has seen a continuing increase in the number of individuals with limited English proficiency.[27] These are individuals for whom English is not their primary language or who have a limited ability to read, write, speak, or understand English.[28] In the United States today, approximately 8.6 percent of the population have limited English proficiency, which amounts to more than 25 million people.[29] Contrary to popular beliefs, this large population is not limited to states like California, Florida, New York, and Texas. For example, in Michigan, 9.1 percent of the state's population speak a language other than English at home.[30] In the metropolitan Detroit area, that percentage climbs to 12 percent with 126 different languages spoken in Detroit-area homes.[31]

Language barriers in healthcare settings pose serious problems. These barriers can lead to direct consequences such as death, delays in service, misdiagnoses, unnecessary tests, and prescription errors. Language barriers can also cause communication problems such as misunderstanding and lack of

compliance with instructions, which can result in higher hospital readmissions, adverse events, and more frequent emergency room visits.[32] Additionally, language barriers can make already difficult-to-understand written forms, instructions, and invoices indiscernible.

For decades, recipients of federal financial assistance have had a responsibility to ensure that individuals with limited English proficiency have meaningful access to programs and activities.[33] The Final Rule is the first major federal clarification on this requirement in 13 years.[34] Among other things, it adds a requirement that covered entities post taglines in at least the top 15 non-English languages spoken in the state in a visible font size in all "significant publications or significant communications" targeted to beneficiaries or members of the public.[35] Significant publications include documents such as patient handbooks, outreach publications, written notices pertaining to patient rights and benefits, and marketing materials.[36] Special rules apply for small-sized communications such as trifold brochures.[37]

The 15 taglines will indicate the availability of language services for individuals with limited English proficiency and must be provided regardless of the number or proportion of such individuals served or encountered in the provider's service population or the frequency with which such individuals encounter the provider. Taglines must also be posted in the physical location of the covered entity where it interacts with the public, as well as on the covered entity's website.[38] The translated taglines for each state's top 15 non-English languages can be found on the Department of Health and Human Services website.[39] This new requirement adds to the existing Michigan initiatives to address language needs in healthcare, such as the current requirement to provide translated materials in Spanish and English before HIV testing.[40]

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The Office for Civil Rights has made available a table displaying the top 15 non-English languages spoken by individuals with limited English proficiency in each state that can be used by entities in Michigan to identify the required taglines.[41] This will, of course, vary with each new census, thus requiring monitoring as censuses are conducted every five years.

Private right of action

The requirements of Section 1557 and its Final Rule are not toothless. Because Section 1557 combines the protections found under Title VI, Title IX, the Age Act, and Section 504, it is enforced through all mechanisms available under these statutes.[42] This means that Section 1557 includes a private right of action for disparate impact claims as well as disparate treatment claims, regardless of the plaintiff's protected class.[43] For example, under this approach, given that the Age Act authorizes a private right of action for disparate impact claims, that same private right of action would exist for disparate impact claims based on race, color, or national origin that would otherwise not be available.[44] A Minnesota district court observed the significance of this when stating that Section 1557 "creat[ed] a new, health-specific, anti-discrimination cause of action that is subject to a singular standard, regardless of a plaintiff's protected class status."[45] The court held that reading Section 1557 otherwise would lead to an illogical result.[46] For example, a plaintiff's Section 1557 race discrimination claim could allege only disparate treatment, but a plaintiff's Section 1557 age, disability, or sex discrimination claims could allege disparate treatment or disparate impact.[47]

Conclusion

Although July 28 marked the effective date for most parts of the Final Rule, the preliminary stages of these policy initiatives and the pending litigation challenging Section 1557 on constitutional grounds make Section 1557 an area to watch.

Update: Just before publication of this article, Judge Reed O'Connor ruled in the plaintiffs' favor in *Franciscan Alliance* and granted a nationwide injunction, temporarily blocking section 1557's prohibition on discrimination on the basis of gender identity and termination of pregnancy.[48] The injunction does not apply, however, to other parts of the Final Rule,

such as the requirement to post non-English taglines in significant publications, as previously discussed. Additionally, *Robinson v Dignity Health* was stayed pending the United States Supreme Court's decision in *Gloucester County School Board v GG*.[49] *Gloucester* may decide the issue of whether discrimination on the basis of gender identity is sex discrimination under Title IX of the Education Amendments of 1972.[50] This Supreme Court decision could also therefore determine the meaning of Section 1557's sex discrimination provision, since Section 1557 explicitly incorporates prohibited sex discrimination under Title IX.[51] You can follow Andrea on Twitter @AndreaLeeAtt for updates on this evolving area of the law. ■

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ENDNOTES

1. US Dep't of Health and Human Services, *Nondiscrimination in Health Programs and Activities*, 81 Fed Reg 31375 (May 18, 2016).
2. 42 USC 18116.
3. 81 Fed Reg 31375.
4. *Id.*
5. *Id.* at 31396.
6. *Id.* at 31445.
7. *Id.* The Final Rule includes a narrow exception for covered entities that employ fewer than 15 people from the requirement of designating a responsible employee and adopting grievance procedures. *Id.* at 31469. Section 1557 does not include a religious exemption, however, the Final Rule does not displace existing protections for religious freedom and conscience. *Id.* at 31376.
8. *Id.*
9. Flores et al., *How Many Adults Identify as Transgender in the United States?* (Los Angeles: The Williams Institute, 2016), p 2. The Final Rule defines "transgender individual" as "an individual whose gender identity is different from the sex assigned to that person at birth." 81 Fed Reg 31467.
10. *How Many Adults Identify*, p 3.
11. US Dep't of Health and Human Services, Nondiscrimination in Health Programs and Activities, 80 FR 54172, 54208 (September 8, 2015), citing Grant, Mottet & Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* <http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf> and Lambda Legal, *When Health Care Isn't Caring* <http://www.lambdalegal.org/publications/when-health-care-isnt-caring>. All websites cited in this article were accessed January 12, 2017.
12. 81 Fed Reg 31427.
13. *Id.* at 31454.
14. American Psychological Ass'n, *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients* (January 2012), p 11 <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf>.
15. US Dep't of Health and Human Services, *Voluntary Resolution Agreement Between the U.S. Department of Health and Human Services, Office for Civil Rights and the Brooklyn Hospital Center* <https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/vra.pdf>.
16. *Id.*
17. *Id.*
18. *Franciscan Alliance, Inc v Burwell*, unpublished opinion of the US District Court in the ND of Texas, issued December 31, 2016 (Docket No. 7:16-cv-00108-O) <https://www.crowell.com/files/20131231-Franciscan-Alliance-v-Burwell.pdf>.
19. The complaint alleges Section 1557 violates the federal Administrative Procedure Act, First Amendment, Fifth Amendment, Religious Freedom Restoration Act, Tenth Amendment, Spending Clause, and anti-commandeering doctrine. *Id.*
20. *Robinson v Dignity Health*, unpublished opinion of the US District Court in the ND of California, issued Minnesota, issued December 6, 2016 (Docket No. 16-cv-03035-YGR).
21. *Rumble v Fairview Health Servs*, unpublished opinion of the US District Court in Minnesota, issued March 16, 2015 (Docket No. 14-cv-2037).
22. Corlette, Lucia & Levin, *Implementing the Affordable Care Act: Choosing an Essential Health Benefits Benchmark Plan* (March 2013).
23. Michigan Department of Insurance and Financial Services, *Michigan's 2017 Essential Health Benefits Benchmark Plan: Executive Report* (July 2015) <https://www.michigan.gov/documents/difs/2017_EHB_Benchmark_Report_493203_7.pdf>.
24. *In the Matter of Petitioner v Priority Health HMO*, MDIFS Order (File No. 147555-001), issued May 19, 2015.
25. *Id.*
26. *Id.*
27. Zong & Batalova, *The Limited English Proficient Population in the United States* (July 8, 2015) <http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states>.
28. US Dep't of Health and Human Services, *Revised Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limiting English Proficient Persons* (August 4, 2003).
29. United States Bureau of the Census, *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 years and Over for United States: 2009–2013* [Data file] <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>.
30. *Id.*
31. *Id.*
32. Karliner et al., *Language Barriers and Understanding of Hospital Discharge Instructions*, 50 Med Care 283 (April 2012).
33. 42 USC 2000d *et seq.*
34. US Dep't of Health and Human Services, *Revised Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limiting English Proficient Persons* (August 4, 2003).
35. 81 Fed Reg 31396.
36. *Id.*
37. *Id.* at 31398.
38. *Id.* at 31396.
39. US Dep't of Health and Human Services, *Translated Resources for Covered Entities* <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/>.
40. MCL 333.5133 and MCL 333.17015.
41. In Michigan, the top 15 languages are Spanish, Arabic, Chinese, Syriac, Vietnamese, Albanian, Korean, Bengali, Polish, German, Italian, Japanese, Russian, Serbo-Croatian, and Tagalog. US Dep't of Health and Human Services, *Resource for Entities Covered by Section 1557 of the Affordable Care Act Estimates of at Least the Top 15 Languages Spoken by Individuals with Limited English Proficiency for the 50 States, the District of Columbia, and the U.S. Territories* <https://www.hhs.gov/sites/default/files/resources-for-covered-entities-top-15-languages-list.pdf>.
42. 81 Fed Reg 31439.
43. *Id.* at 31440. Disparate impact claims are claims relating to practices that appear to be neutral but result in a disproportionate impact on protected groups. Disparate treatment claims are claims in which the plaintiff alleges treatment different from those similarly situated and alleges that the difference was based on a protected characteristic.
44. *Id.* at 31439.
45. *Rumble v Fairview Health Servs*, unpublished opinion of the US District Court in Minnesota, issued March 16, 2015 (Docket No. 14-cv-2037), p *11.
46. *Id.*
47. *Id.*
48. *Franciscan Alliance, Inc*, unpub op.
49. *Id.*
50. *GG ex rel Grimm v Gloucester Co School Bd*, 824 F3d 450 (CA 4, 2016), cert granted 137 S Ct 368 (2016).
51. See 42 USC 18116.