

HHS Final Rule, “Nondiscrimination in Health Programs and Activities” Implementing Section 1557 of the ACA

On May 18, 2016, the Department of Health and Human Services (HHS) released the Final Rule, <http://bit.ly/2d9RJbb>, “Nondiscrimination in Health Programs and Activities” implementing Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs and activities. (45 C.F.R. §§ 92.1-92.303 81 Fed. Reg. 31376-31473 (2016)). The Final Rule, which will be enforced by the Office for Civil Rights (OCR) went into effect July 18 and requires hospitals to take certain actions by October 16, 2016.

The Final Rule applies to **covered entities** that operate a health program or activity that receives federal financial assistance under programs operated by HHS (e.g., Medicare¹ and Medicaid) and applies to hospitals, clinics, medical practices, solo practitioners, nursing homes, other healthcare entities, health insurance marketplaces and issuers that participate in those programs and any health program HHS administers itself. Covered entities are not required to comply with the Final Rule if compliance would violate federal protections for religious freedom or conscience. Additionally, the Final Rule does not apply to employment discrimination.

I. General Provisions

The Final Rule prohibits covered entities from discriminating on the basis of race, color, national origin, sex, age, or disability in healthcare programs or activities. (45 C.F.R. § 92.101(a)). Specifically, covered entities **may not**:

1. Deny an individual any service, financial aid, or other benefit provided under the program;
2. Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
3. Subject an individual to segregation or separate treatment in any matter related to his or her receipt of any service, financial aid, or other benefit under the program;
4. Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
5. Treat an individual differently from others in determining whether he or she satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet to be provided any service, financial aid, or other benefit provided under the program; or
6. Deny an individual an opportunity to participate in the program through the provision of services or otherwise afford him or her an opportunity to do so which is different from that afforded others under the program.

¹ Excluding Medicare Part B.

II. Action Items

Within 90 days of the effective date of the Final Rule, i.e., **Oct. 16, 2016**, covered entities must take the following actions.

A) Designate a Responsible Employee

Each covered entity that employs *15 or more persons* must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Section 1557.

B) Adopt Grievance Procedures

Each covered entity that employs *15 or more persons* must 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.

C) Notices and Taglines

i) Notice of Nondiscrimination and Taglines - Facility, Web Site and Significant Publications

Covered entities must take appropriate initial and continuing steps to inform beneficiaries, enrollees, applicants and members of the public by posting and publishing notice of nondiscrimination:

1. It does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities;
2. It 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. It 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;²
4. How to obtain the aids and services in paragraphs (2) and (3) above;
5. The name of the employee responsible for compliance and how to contact that person;
6. About the availability of the grievance procedure and how to file a grievance; and
7. How to file a discrimination complaint with OCR.

This information must be posted in *visible font size* in:

1. Conspicuous physical locations where the entity serves the public;
2. A conspicuous location on the entity's Web site accessible from the home page of the Web site;³ and
3. Significant publications and communications targeted at members of the public unless the publications/communications are small-sized.

² An individual with limited English proficiency is an individual whose primary language for communication is not English and who has a limited ability to read, write, speak or understand English.

³ Covered entities may satisfy this obligation by including a prominent link on their home page to the notice, and links written in non-English languages to taglines.

OCR has indicated that the phrase “significant communications and significant publications” will be interpreted broadly. Although the Final Rule does not provide a list of such communications, it confirmed they include: outreach, education, and marketing materials; patient handbooks; notices requiring a response from individuals; written notices such as those pertaining to rights or benefits, consent and complaint forms; written notices of eligibility criteria, rights, denial, loss or decreases in benefits or services; and applications to participate in services or programs. HHS published a sample **Notice of Nondiscrimination** in 45 C.F.R. Part 92, Appendix A. Covered entities, however, are not required to use the sample notice.

Along with the nondiscrimination notice, covered entities must also post a short statement, i.e., a *tagline* in at least the top 15 languages spoken by individuals with limited English proficiency in the relevant state(s) informing them about the availability of free language assistance services and how to access them. HHS provided a *sample tagline*:

ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).

Following OCR’s recommendation to use the five-year U.S. Census American Community Survey to determine those languages, OHA has identified the *top 15 languages* spoken at home by populations with limited English proficiency in Oklahoma, rank ordered, as follows:

1. Spanish	6. Arabic	11. Laotian
2. Vietnamese	7. Burmese	12. Thai
3. Chinese	8. Hmong	13. Urdu
4. Korean	9. Tagalog	14. Cherokee
5. German	10. French	15. Farsi

ii) Statement of Nondiscrimination and Taglines – Small Sized Publications

For significant publications and significant communications that are *small-sized* (e.g., postcards, pamphlets and tri-fold brochures), the covered entity must post in a *conspicuously visible font*:

1. A **statement of nondiscrimination** noting that the covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities; and
2. **Taglines** in at least the *top two languages* spoken by individuals with limited English proficiency in the state.

Sample taglines, translated into 64 languages (which covers the top 15 languages spoken by populations with limited English proficiency in all states), are provided by OCR at <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html>.

The taglines for the top 15 languages spoken in Oklahoma are provided by OHA at <http://bit.ly/2dkoXoq>.

III. Nondiscrimination Provisions & Specific Applications to Health Programs/Activities

As noted above, the basic requirement of the Final Rule is that consumers cannot be denied health services or health coverage or discriminated against in other ways in health services or coverage because of their race, color, national origin, sex, age or disability. The Final Rule provides specific guidance regarding several populations that have historically been subject to discrimination.

A) Meaningful Access for Individuals with Limited English Proficiency

The Final Rule requires reasonable steps to be taken to provide meaningful access to each individual with limited English proficiency likely to be encountered in health programs and activities. Failing to do so is considered a form of national origin discrimination. In evaluating compliance, OCR will give weight to the importance of the health program/activity and other factors, including whether an effective written language access plan has been developed and implemented.

Language assistance services must be (1) provided free of charge; (2) be accurate and timely; and (3) protect the privacy and independence of the individual with limited English proficiency. Oral interpretation, when provided as the reasonable step for meaningful access, must be provided by a *qualified interpreter*⁴ and a *qualified translator*⁵ must be used for translating written content in paper or electronic form.

The Final Rule makes clear that **persons who should not be used to interpret** include:

1. Adult accompanying individuals with limited English proficiency, except:
 - a. In an emergency where no qualified interpreter is immediately available; or
 - b. The individual with limited English proficiency requests it and the accompanying adult agrees.
2. Minor child, except in an emergency where no qualified interpreter is immediately available.
3. Staff other than bilingual/multilingual staff qualified to communicate directly with individuals with limited English proficiency.

Video remote interpreting (VRI) sessions, if provided, should deliver high quality images, large enough to delineate the individual with limited English proficiency and interpreter's faces and clear, audible transmission of voices. Users of the technology must receive adequate training.

Acceptance of language assistance services by individuals with limited English proficiency is not required. If services are declined, however, covered entities may still choose to utilize qualified interpreters to assist their communication with a patient. Additionally, covered entities do not need to honor interpreter gender preferences that may be expressed by a patient.

⁴ A "qualified interpreter" is defined as one who adheres to generally accepted interpreter ethics principles, including confidentiality; has demonstrated proficiency in spoken English and at least one other spoken language; and is able to interpret effectively, accurately and impartially, both receptively and expressly, to and from both languages, using any necessary specialized vocabulary, terminology and phraseology. (Note: The rule does not require an interpreter to be licensed as an interpreter under state law, but he/she must have the relevant proficiency.)

⁵ A "qualified translator" is defined as one who: (1) adheres to generally accepted translator ethics principles, including client confidentiality; (2) has demonstrated proficiency in writing and understanding both written English and at least one other written non-English language; and (3) is able to translate effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary, terminology and phraseology.

B) **Effective Communication, Accessibility and Reasonable Modifications for Individuals with Disabilities**

Covered entities must take appropriate steps to ensure communication with individuals with disabilities⁶ are as effective as with others. This includes providing appropriate auxiliary aids and services to those with impaired sensory, manual or speaking skills, where necessary for effective communication.

The Final Rule does not define what constitutes “communications that are as effective as communications with others” and instead, adopts the communication standards found at 28 C.F.R. §§ 35.160 -35.164. Those standards indicate that the covered entity **shall not**:

1. Require an individual with a disability to bring another individual to interpret for him/her;
2. Rely on an adult accompanying the individual to interpret except:
 - a. In an emergency where no qualified interpreter is immediately available; or
 - b. The individual requests it, the accompanying adult agrees and reliance on that adult is appropriate under the circumstances; or
3. Rely on a minor child, except in an emergency where no qualified interpreter is immediately available.

If the covered entity chooses to provide qualified interpreters via VRI services, it must ensure that it provides: (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, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her 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 VRI.

A qualified interpreter⁷ for an individual with a disability generally means one who, via a remote interpreting service or in person: (1) adheres to generally accepted interpreter ethics principles, including client confidentiality; and (2) is able to interpret effectively, accurately, and impartially, both receptively and expressly, using any necessary specialized vocabulary, terminology and phraseology.

Electronic information technology must be made accessible to individuals with disabilities, unless doing so would result in undue financial and administrative burdens or a fundamental alteration in the nature of the health programs/activities. In such cases, alternative formats for providing information can be used but must ensure, to the maximum extent possible, that individuals with disabilities have access to the benefits or services. Reasonable modifications to policies, practices or procedures should also be made, in a manner consistent with the terms of the Americans with Disabilities Act (ADA) Title II.

⁶A “disability” is defined as “a physical or mental impairment that substantially limits one or more major life activities of such individual.”

⁷The interpreter need not be licensed as an interpreter under state law, but must have the relevant proficiency.

Covered entities must also ensure that newly constructed or altered buildings or facilities used for health programs/activities or on behalf of a covered entity comply with the 2010 Standards and Uniform Federal Accessibility Standards.⁸

It should be noted that the Final Rule is consistent with existing requirements under the ADA and Section 504 of the Rehabilitation Act of 1973 and therefore, covered entities should not interpret the new rule to limit any rights, remedies or legal requirements available under those laws and should comply with those laws and relevant state laws.

C) **Protecting Individuals Against Sex Discrimination**

Equal access to health programs/activities must be provided without discrimination on the basis of sex. The Final Rule clarifies what constitutes “discrimination on the basis of sex” specifically prohibiting discrimination based on: (1) an individual’s sex, (2) pregnancy, childbirth or related medical conditions, (3) gender identity, and (4) sex stereotyping. The Final Rule states that:

1. Women must be treated equally with men in the health care they receive and the insurance they obtain.
2. Individuals cannot be denied health care or health coverage based on their sex, including gender identity and sex stereotyping.
3. Categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory.
4. Covered entities must treat individuals consistent with their gender identity, including in access to facilities. Covered entities may not deny or limit treatment for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender. The health service sought, however, must be medically appropriate.
5. Sex-specific health programs and activities are permissible only where the covered entity can demonstrate an exceedingly persuasive justification, i.e., that the sex-specific program is substantially related to the achievement of an important health-related or scientific objective.

i. Pregnancy

The Final Rule is consistent with existing regulations and prior court and federal agencies’ interpretations that discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth, or related medical conditions. The Final Rule does not replace any existing protection provided by federal provider conscience or religious freedom laws.

ii. Gender Identity and Sex Stereotyping

The Final Rule defines *gender identity* as an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth. A *transgender individual* is an individual whose gender identity differs from the sex assigned to that person at birth. *Sex stereotypes* are defined as stereotypical

⁸ Please refer to the Final Rule for more details at 45 C.F.R. § 92.203.

notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics.

The Final Rule clarifies that sex stereotypes also include gendered expectations related to the appropriate roles of a certain sex. In so doing, OCR noted that it adopted the approach taken by the federal government and several courts that sex stereotypes encompass not only stereotypes concerning the biological differences between the sexes, but also include stereotypes concerning gender norms. Therefore, OCR recognizes that:

[S]ex stereotypes can include the expectation that individuals consistently identify with only one of two genders (male or female), and that they act in conformity with the gender-related expressions stereotypically associated with that gender. Sex stereotypes can also include a belief that gender can only be binary and therefore, individuals cannot have a gender identity other than male or female. OCR recognizes that an individual's gender identity involves the interrelationship between an individual's biology, gender, internal sense of self and gender expression related to the perception; thus, the gender identity spectrum includes an array of possible gender identities beyond male and female.

See 81 Fed. Reg. 31392.

Although the Final Rule does not resolve the issue of whether discrimination on the basis of an individual's sexual orientation alone is sex discrimination under Section 1557, OCR noted that it will evaluate those complaints to see if they involve the types of stereotyping that can be addressed under Section 1557.

IV. Enforcement

If HHS determines that a covered entity has violated the rules, HHS may require the entity to take remedial action or impose compensatory damages as allowed by other anti-discrimination statutes. Injured individuals may also assert a private cause of action to recover damages from a covered entity.

Appendices

- A. Sample Notice About Nondiscrimination and Accessibility Requirement (OCR)
- B. Sample Tagline Informing Individuals with Limited English Proficiency of Language Assistance Services (OCR)
- C. Sample ACA Section 1557 Grievance Procedure (OCR)

APPENDIX A TO PART 92—SAMPLE NOTICE INFORMING INDIVIDUALS ABOUT NONDISCRIMINATION AND ACCESSIBILITY REQUIREMENTS AND SAMPLE NONDISCRIMINATION STATEMENT: DISCRIMINATION IS AGAINST THE LAW

[Name of covered entity] complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex. [Name of covered entity] does not exclude people or treat them differently because of race, color, national origin, age, disability, or sex.

[Name of covered entity]:

. Provides free aids and services to people with disabilities to communicate effectively with us, such as:

- . Qualified sign language interpreters
- . Written information in other formats (large print, audio, accessible electronic formats, other formats)
- . Provides free language services to people whose primary language is not English, such as:
 - . Qualified interpreters
 - . Information written in other languages

If you need these services, contact [Name of Civil Rights Coordinator]

If you believe that [Name of covered entity] has failed to provide these services or discriminated in another way on the basis of race, color, national origin, age, disability, or sex, you can file a grievance with: [Name and Title of Civil Rights Coordinator], [Mailing Address], [Telephone number], [TTY number--if covered entity has one], [Fax], [Email]. You can file a grievance in person or by mail, fax, or email. If you need help filing a grievance, [Name and Title of Civil Rights Coordinator] is available to help you. You can also file a civil rights complaint with the U.S. Department of Health and Human Services, Office for Civil Rights electronically through the Office for Civil Rights Complaint Portal, available at <https://ocrportal.hhs.gov/ocr/portal/lobby.jsf>, or by mail or phone at: U.S. Department of Health and Human Services, 200 Independence Avenue SW., Room 509F, HHH Building, Washington, DC 20201, 1-800-368-1019, 800-537-7697 (TDD).

Complaint forms are available at <http://www.hhs.gov/ocr/office/file/index.html>.

Nondiscrimination statement for significant publications and signification communications that are small-size:

[Name of covered entity] complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex.

HISTORY: [81 FR 31376, 31465, May 18, 2016, as corrected at 81 FR 46613, July 18, 2016]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
42 U.S.C. 18116, 5 U.S.C. 301.

NOTES: [EFFECTIVE DATE NOTE: 81 FR 31376, 31465, May 18, 2016, added Part 92, effective July 18, 2016.]

APPENDIX B TO PART 92—SAMPLE TAGLINE INFORMING INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY OF LANGUAGE ASSISTANCE SERVICES

ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).

HISTORY: [81 FR 31376, 31465, May 18, 2016]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
42 U.S.C. 18116, 5 U.S.C. 301.

NOTES: [EFFECTIVE DATE NOTE: *81 FR 31376, 31465*, May 18, 2016, added Part 92, effective July 18, 2016.]

APPENDIX C TO PART 92—SAMPLE SECTION 1557 OF THE AFFORDABLE CARE ACT GRIEVANCE PROCEDURE

It is the policy of [Name of Covered Entity] not to discriminate on the basis of race, color, national origin, sex, age or disability. [Name of Covered Entity] has adopted an internal grievance procedure providing for prompt and equitable resolution of complaints alleging any action prohibited by Section 1557 of the Affordable Care Act (*42 U.S.C. 18116*) and its implementing regulations at 45 CFR part 92, issued by the U.S. Department of Health and Human Services. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs and activities. Section 1557 and its implementing regulations may be examined in the office of [Name and Title of Section 1557 Coordinator], [Mailing Address], [Telephone number], [TTY number--if covered entity has one], [Fax], [Email], who has been designated to coordinate the efforts of [Name of Covered Entity] to comply with Section 1557.

Any person who believes someone has been subjected to discrimination on the basis of race, color, national origin, sex, age or disability may file a grievance under this procedure. It is against the law for [Name of Covered Entity] to retaliate against anyone who opposes discrimination, files a grievance, or participates in the investigation of a grievance.

Procedure:

. Grievances must be submitted to the Section 1557 Coordinator within (60 days) of the date the person filing the grievance becomes aware of the alleged discriminatory action.

. A complaint must be in writing, containing the name and address of the person filing it. The complaint must state the problem or action alleged to be discriminatory and the remedy or relief sought.

. The Section 1557 Coordinator (or her/his designee) shall conduct an investigation of the complaint. This investigation may be informal, but it will be thorough, affording all interested persons an opportunity to submit evidence relevant to the complaint. The Section 1557 Coordinator will maintain the files and records of [Name of Covered Entity] relating to such grievances. To the extent possible, and in accordance with applicable law, the Section 1557 Coordinator will take appropriate steps to preserve the confidentiality of files and records relating to grievances and will share them only with those who have a need to know.

. The Section 1557 Coordinator will issue a written decision on the grievance, based on a preponderance of the evidence, no later than 30 days after its filing, including a notice to the complainant of their right to pursue further administrative or legal remedies.

. The person filing the grievance may appeal the decision of the Section 1557 Coordinator by writing to the (Administrator/Chief Executive Officer/Board of Directors/etc.) within 15 days of receiving the Section 1557 Coordinator's decision. The (Administrator/Chief Executive Officer/Board of Directors/etc.) shall issue a written decision in response to the appeal no later than 30 days after its filing.

The availability and use of this grievance procedure does not prevent a person from pursuing other legal or administrative remedies, including filing a complaint of discrimination on the basis of race, color, national origin, sex, age or disability in court or with the U.S. Department of Health and Human Services, Office for Civil Rights. A person can file a complaint of discrimination electronically through the Office for Civil Rights Complaint Portal, which is available at: <https://ocrportal.hhs.gov/ocr/portal/lobby.jsf>, or by mail or phone at: U.S. Department of Health and

Human Services, 200 Independence Avenue SW., Room 509F, HHH Building, Washington, DC 20201.

Complaint forms are available at: <http://www.hhs.gov/ocr/office/file/index.html>. Such complaints must be filed within 180 days of the date of the alleged discrimination.

[Name of covered entity] will make appropriate arrangements to ensure that individuals with disabilities and individuals with limited English proficiency are provided auxiliary aids and services or language assistance services, respectively, if needed to participate in this grievance process. Such arrangements may include, but are not limited to, providing qualified interpreters, providing taped cassettes of material for individuals with low vision, or assuring a barrier-free location for the proceedings. The Section 1557 Coordinator will be responsible for such arrangements.

HISTORY: [81 FR 31376, 31465, May 18, 2016]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
42 U.S.C. 18116, 5 U.S.C. 301.

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