

Third Times the Charm? A new proposed rule for Section 1557

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About NHeLP

- National non-profit law firm committed to improving health care access and quality for underserved individuals and families
- Offices: CA, DC, NC
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Roadmap

- Background
- New Proposed Regulations
- Next Steps
- Questions

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August 4, 2022

- HHS Office for Civil Rights (OCR) issued new [proposed regulations](#) implementing Section 1557 of the Affordable Care Act
- This is the **THIRD** set of regulations implementing Section 1557
 - The new regulations propose to repeal many of the [Trump-era](#) provisions, update/amend some [Obama-era](#) provisions, and add some new provisions
- What does this mean for language access?

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Background



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BACKGROUND: Title VI of the Civil Rights Act of 1964

- Title VI is where the right to language access started
 - “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d
 - “National origin” includes individuals with limited English proficiency (LEP)
- Title VI, its implementing regulations and the OCR LEP Guidance (based on Title VI) all remain in effect

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BACKGROUND: Section 1557 of the Affordable Care Act

- Broad nondiscrimination protection
- First time healthcare discrimination is prohibited based on sex
 - includes sexual orientation, gender identity, including transgender individuals; sex stereotyping; sexual characteristics including Intersex traits
- Reinforces longstanding protections for race, ethnicity, **national origin**, age & disability



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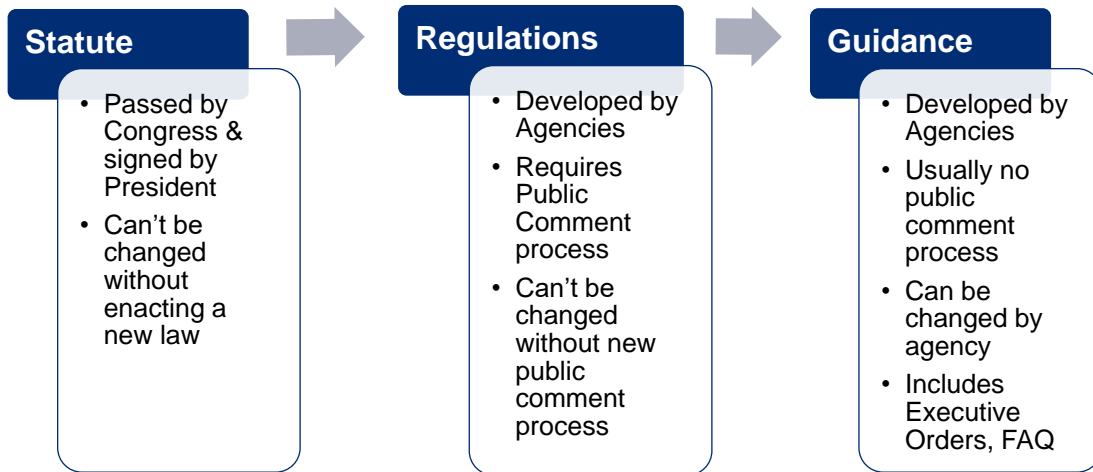
BACKGROUND: Goal of Section 1557

- Bring all civil rights protections under 1 provision
 - Title VI (discrimination on the basis of race/color/national origin)
 - Title IX (discrimination on the basis of sex)
 - Sec. 504 (discrimination on the basis of disability)
 - Age Discrimination
- Why?
 - Intersectionality
 - Differing remedies under each civil rights law
 - Expand protections against sex discrimination into health care

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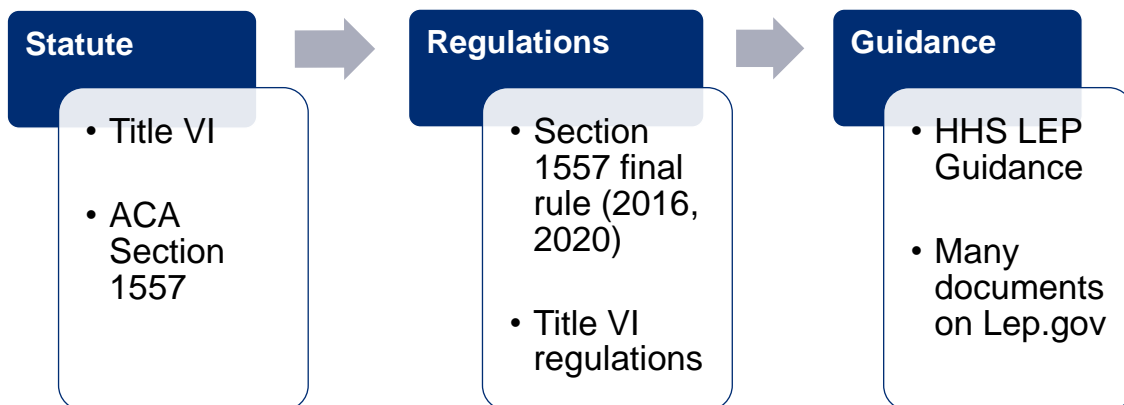
Hierarchy of Law



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Hierarchy of Law



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History of Section 1557



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BACKGROUND: Section 1557 – Scope

- any health program or activity any part of which receives federal funding;
 - any health program or activity that is administered by an Executive agency; and
 - any entity created under Title I of the Affordable Care Act (including health insurance marketplaces)
- This is **broader** than Title VI which only applied to those receiving federal funding

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BACKGROUND: Who Is Covered?

Title VI & Sec. 1557

- All public and private entities receiving federal financial assistance, including:
 - State, county, and local agencies (inc. Medicaid, CHIP)
 - Hospitals, clinics, and clinicians' offices
 - Refugee resettlement agencies
 - Nursing homes
 - Mental Health Centers
 - All entities receiving federal funds or under contract to those receiving federal funds

Section 1557

- Federally administered programs
 - Medicare
 - Federally Facilitated Marketplace
- Entities created under ACA Title I
 - state marketplaces
 - Qualified Health Plans (also receive federal funds)

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New Proposed Regulations

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New Proposed Regulation (August 4, 2022)

- Changes 2020 final rule implementing Section 1557
- Significant changes outside of language access:
 - Reinstates protections against discrimination based on gender identity, sex stereotypes and termination of pregnancy; adds protections against discrimination based on sexual orientation & sex characteristics inc. intersex traits
 - Reinstates definition section
 - Reinstates requirements to have a compliance coordinator and written grievance procedures and requires staff training
 - Reinstates enforcement-related provisions & remedies
 - Reinstates other regulations in Medicaid, Medicare, CHIP & Marketplaces to provide explicit nondiscrimination protections based on sexual orientation and gender identity

Sources: U.S. Dep't of Health & Human Servs., Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-08-04/pdf/2022-16217.pdf>.

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Definitions

- Defines national origin, limited English proficient individual, language assistance services
- **Language assistance services** may include, but are not limited to:
 - oral language assistance, including interpretation in non-English languages provided in-person or remotely by a qualified interpreter for a limited English proficient individual, and the use of qualified bilingual or multilingual staff to communicate directly with limited English proficient individuals;
 - written translation, performed by a qualified translator, of written content in paper or electronic form into or from languages other than English; and
 - written notice of availability of language assistance services

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Definition: Qualified Interpreter/Translator for an LEP individual

- Reinstates & tweaks definition; interpreter/translator is an individual who:
 - has demonstrated proficiency in speaking and understanding both spoken English and at least one other spoken language
 - is able to interpret/translate effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary while preserving the tone, sentiment, and emotional level of the original oral statement
 - demonstrates proficiency in, and has above average familiarity with speaking or understanding, both spoken English and at least one other spoken (written) language and
 - adheres to generally accepted interpreter ethics principles including client confidentiality

- **NOTE:** Due to this definition, implicit recognition that not all interpreters can translate and vice versa

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Definition: Qualified Interpreter/Translator for an individual with a disability

- Reinstates & tweaks definition; interpreter/translator is an individual who:
 - via a video remote interpreting service (VRI) or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

- Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

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Definition: Auxiliary Aids and Services

- Qualified interpreters
- Note takers; real-time computer-aided transcription services; written materials; exchange of written notes
- Telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning
- Voice, text, and video-based telecommunications products and systems; videotext displays; accessible information and communication technology (ICT); or other effective methods of making aurally delivered information available to persons who are deaf or hard of hearing
- Qualified readers; taped texts; audio recordings; Braille materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible information and communication technology; or other effective methods of making visually delivered materials available to persons who are blind or have low vision
- Acquisition or modification of equipment and devices
- Other similar services and actions
- This is **not** an exhaustive list

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Definition: Qualified bilingual/multilingual staff

- An individual who is a member of a covered entity's workforce who is designated to provide in-language oral assistance as part of the person's current assigned job responsibilities who has demonstrated to the covered entity that they are:
 - proficient in speaking and understanding both spoken English and at least one other spoken language, including any necessary specialized vocabulary, terminology and phraseology; and
 - able to effectively, accurately, and impartially communicate directly with limited English proficient individuals in their primary languages

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Definition: Machine Translation

- automated translations, without the assistance of or review by a qualified human translator, that is text-based and provides instant translations between various languages, sometimes with an option for audio input or output
- a qualified human translator must review machine translation if an entity uses machine translation for text that is critical to the:
 - rights, benefits, or meaningful access of a limited English proficient individual;
 - when accuracy is essential; or
 - when the source documents or materials contain complex, non-literal or technical language

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LEP General Requirement

- Focus is on the **individual** eligible to be served or likely to be directly affected
- A covered entity must take reasonable steps to provide meaningful access to each limited English proficient individual
- In evaluating compliance with ensuring meaningful access, OCR shall:
 - evaluate and give substantial weight to the nature and importance of the health program/activity and the particular communication at issue; and
 - take into account other relevant factors, including the effectiveness of a covered entity's written language access procedures

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Language assistance services requirements

- Free of charge
- Accurate
- Timely
- Protect the privacy & independent decision-making authority of the LEP individual

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Use of Family Members/Minors for LEP

- Same as existing regulations with tweaks
 - Prohibits use of minors except **as a temporary measure** in emergencies
 - Prohibits use of accompanying adults except **as a temporary measure** in emergencies while finding a qualified interpreter
 - Prohibits reliance on staff other than qualified bilingual/multilingual staff to communicate with individuals with LEP
 - Individual can use an accompanying adult as an interpreter if that person:
 - agrees to do so;
 - the request & agreement is documented; and
 - reliance on that adult is **appropriate under the circumstances**



NOTE: Some entities may want to have their own interpreter present even if a patient wants to use a family member/friend

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Remote Interpreting Services (LEP)

- Reinstates requirement for real-time video and maintains requirements for audio remote interpreting
 - video requires a “sharply delineated image that is large enough to display the interpreter’s face. . .”
 - real-time, full motion video and audio over a dedicated high-speed, wide bandwidth connection or wireless connection that delivers
 - high-quality video images that don’t produce lags; choppy, blurry or grainy images; or irregular pauses in communication
 - high-quality audio without lags or irregular pauses in communication
- Existing and proposed both require:
 - a clear, audible transmission of voices; and
 - adequate training to quickly and efficiently set up and operate the remote interpreting service

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Responsibilities of Covered Entities

- Ensure entity does not discriminate
- Disseminate/post notices – general & availability of language services/auxiliary aids & services
- Develop relevant policies & procedures
- Designate Section 1557 Coordinator (if entity has 15 or more employees)
- Train relevant employees
- Ensure interpreters, translators and bilingual staff providing language/communication services are qualified

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General Notice Requirement

- Entities must notify individuals and the public of all of the following:
 - nondiscrimination policy
 - reasonable modifications for individuals with disabilities and appropriate auxiliary aids & services, qualified interpreters and materials in alternate formats for people with disabilities
 - language assistance services including electronic and written translated documents and oral interpretation
 - how to obtain reasonable modifications, appropriate auxiliary aids & services, and language assistance services
 - contact information for the entity's Section 1557 coordinator
 - availability of the grievance procedures and how to file a grievance
 - details on how to file a complaint with HHS OCR
 - how to access the covered entity's website (if it has one)
- Notice must be provided annually, upon request, and in a clear and prominent physical locations

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Notice of availability of language assistance services and auxiliary aids and services (formerly known as “taglines”)

- Notice must be provided in English and the top 15 languages in the state:
 - annually
 - upon request
 - at a conspicuous location on the entity's website and
 - in a clear and prominent physical location
- Opt out option available
- Specific tagline requirements also exist in other federal regulations – e.g. Medicare Part D (Rx program)

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Notice of availability of language assistance services and auxiliary aids and services (contd.)

- Notice must appear in certain written & electronic communications (this a change from prior tagline requirement for “significant” documents):

notice of nondiscrimination	consent forms and certain instructions
notice of privacy practices	complaint forms
application and intake forms	patient and member handbooks
notices of denial or termination of eligibility, benefits or services (including Explanation of Benefits) and notices of appeal and grievances rights	communications related to a person’s rights, eligibility, benefits or services that require or request a response
discharge papers	communication related to a public health emergency

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Translation of Written Materials

- No specific requirements or thresholds for when to translate documents in statutes or regulations
- HHS LEP Guidance (2003) recommended translating “vital” documents & includes safe harbor

SUMMARY

“Vital” documents should be translated
 “Notice of availability” must be included in certain communications



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Policies & Procedures

- Covered entities must develop written policies & procedures to comply with the regulations
- Policies must include:
 - Nondiscrimination policy
 - Grievance procedures (15 or more employees)
 - Language access procedures inc. how employees identify whether someone is LEP, how to obtain services of qualified interpreter/translator; names of qualified bilingual staff; list and location of any electronic and written translated materials and the languages in which they are available
 - Effective communication procedures for persons with disabilities
 - Reasonable modification procedures

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Responsible Employee & Adoption of Grievance Procedures

- Entities with at least 15 employees must
 - designate at least one employee to carry out the responsibilities under Section 1557
 - adopt written grievance procedures with appropriate due process standards to resolve actions prohibited under Section 1557
- OCR asks for comment on whether these provisions should apply to smaller entities



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Training

- Entities must train “relevant employees” on the civil rights policies & procedures outlined in the proposed rule
- Training must be provided within one year of the effective date of a final regulation and for each new employee, within a reasonable time period after a new employee joins an entity’s workforce
- Entities must also document the training provided
- “Relevant employee” discussed in preamble but not regulation itself:
 - those who directly encounter or interact with individuals such as patients, clients, and members of the public
 - those who make decisions regarding the services individuals seek from a covered entity’s health programs and activities

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Medicare Part B

- Historically, Title VI has **not** applied to Medicare Part B (outpatient coverage)
 - In part because Medicare Part B paid enrollees and not providers
- Obama regulations continued this policy and said Section 1557 does not apply to Medicare Part B
- This proposed rule **finally** applies Section 1557 to Medicare Part B
 - Also applies T. VI & T. IX and Sec. 504, & Age Act to Medicare Part B
- This is a significant development
 - the way Medicare pays Part B providers is now no different than how it pays other Medicare, Medicaid or CHIP providers
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Other Relevant Provisions

- Algorithms
- Telehealth
- Basis of Association
- Data Collection
- Prohibition of sex discrimination in other HHS programs inc. Medicaid, CHIP, PACE, marketplaces

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Next Steps

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So where are we?

- Title VI is still law!
- Section 1557 is still law!
- HHS OCR LEP Guidance (2003) still in effect!
- The proposed regulations are **not** in effect yet, they must be finalized after the public comment period, hopefully in early 2023

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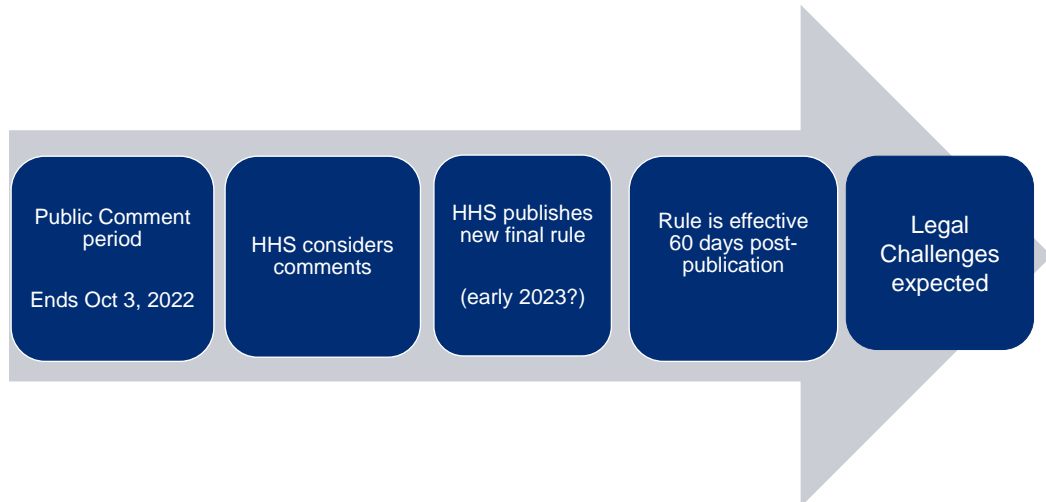
State Laws

- Check for state nondiscrimination laws & regulations
- Check for state language access laws & regulations
 - [Summary of State Law Requirements Addressing Language Needs in Health Care](#) (2019 update)

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Outlook for 2022-2023



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What to do RIGHT NOW?

- Submit comments by October 3, 2022
- Your voice is important – organizations and individuals
 - Share with your networks – anyone can comment including interpreters, translators, patients, interpreter managers, healthcare providers, language companies
 - Include your personal/organizational experience – both stories and data
 - See NHeLP's [Do My Comments Really Matter? Demystifying the Public Comment Process](#)

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Suggestions for Comments

GENERAL

- Are LEP individuals still facing issues communicating with healthcare providers?
- What problems do you see from a lack of language access?
- What problems do you see from a lack of qualified interpreters/translators?

MORE SPECIFIC

- Is the definition of interpreter/translator sufficient? What about relay interpreters?
- What happens when machine translation is not reviewed?
- What happens when staff may not be sufficiently bilingual to provide services in a non-English language?
- Should entities develop a language access/communication plan or are policies & procedures sufficient?
- Should entities with less than 15 employees have to have a Section 1557 coordinator?
- Should training include those who make decisions and not just front-line positions?

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NHeLP's Sec. 1557 Resources

- [NHeLP's Section 1557 webpage](#)
- [Questions & Answers on the 2022 Proposed Rule Addressing Nondiscrimination Protections under ACA's Section 1557](#)
- [Blog: What is Section 1557? An Introduction](#)
- [Blog: How the Proposed Changes to Section 1557 Affect Individuals with LEP](#)
- [General Comment Portal](#) **COMMENTS DUE OCTOBER 3, 2022**
- [Language access Comment Portal](#)
- [Social Media Toolkit](#)

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NHeLP General Resources

- Main webpage – www.healthlaw.org
- Civil Rights & Health Equity Page – <https://healthlaw.org/our-work/policy/civil-rights-and-health-equity/>
- NHeLP's Equity Stance – <https://healthlaw.org/equity-stance/>
- [Summary of State Law Requirements Addressing Language Needs in Health Care](#) (2019 update)

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Your questions



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