

The State of Play for Immigrants & Language Access in 2019

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About NHeLP

- National non-profit law firm 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
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Trump's Invisible Wall

PUBLIC CHARGE: Visas and green card processing <i>outside</i> the U.S. <small>(DOS - Foreign Affairs Manual (FAM))</small>	PUBLIC CHARGE: Visa extensions & Status changes <small>(DHS Proposed Rule)</small>	PUBLIC CHARGE: Green card processing <i>inside</i> the U.S. <small>(DHS Proposed Rule)</small>	SPONSOR DEEMING & LIABILITY: Potential application to more programs <small>(White House memo)</small>	PUBLIC CHARGE: Grounds for deportation <small>(Anticipated DOJ NPRM)</small>	FEE WAIVER: Removing receipt of means-tested benefits from eligibility list <small>(DHS Proposed Rule)</small>
CITIZENSHIP QUESTION IN CENSUS 2020: Chills civic participation and will limit funding for basic needs programs that depend on accurate count <small>(SCOTUS decision)</small>	PUBLIC HOUSING ACCESS: Closes door to mixed status families <small>(HUD Proposed Rule)</small>		ACCESS TO SSA BENEFITS: Closes door to limited English proficient speakers <small>(SSA Proposed Rule)</small>	ACCESS TO FOOD STAMPS: Closes door to those who are unemployed and underemployed <small>(USDA Proposed Rule)</small>	

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Roadmap

- Public Charge
- Nondiscrimination/Section 1557
- 2020 and beyond

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Public Charge



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The GOOD NEWS first!

- On Friday, October 10, courts issued injunctions **PROHIBITING** the rule from going into effect!!!!
 - WA District Court – nationwide injunction
 - NY District Court – nationwide injunction
 - CA District Court – injunction in plaintiff's states (CA, DC, ME, OR, PA)
- Many steps remain in the court fights
 - Injunction is only first step
 - Courts will move to hear the case “on the merits”
 - Any decision will likely be appealed

For now, the current policies regarding public charge remain in effect!

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What is Public Charge?

- “**Public Charge**” is a term used in immigration law – an immigrant who is deemed **likely to become a “public charge”** may be denied admission to the U.S. or lawful permanent resident status.
- A public charge assessment is made:
 - When a person **applies** to enter the U.S. or
 - **Applies to adjust status** to become a Lawful Permanent Resident (LPR), Applies to enter the U.S.
 - A green card holder leaves the U.S. for more than 180 consecutive days (6 months) and reenters

NOTE: It does not apply when someone applies to become a U.S. citizen!

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Longstanding public charge test

Definition

A person who is considered “likely to become **primarily dependent** on the government for subsistence.”

Benefits Considered

Only two types of benefits considered:

1. **Cash assistance** for income maintenance
2. Institutionalization for **long-term care** at government expense

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Current public charge test *in the U.S.*

Totality of Circumstances

- Age
- Health
- Family status
- Financial status
- Education and skills
- Affidavit of support



The public charge assessment is forward looking

Is the person likely to rely on cash or long-term care in the future?

- No one factor (including past use of cash benefits) can alone determine whether or not someone is a “public charge”
- Positive factors can be weighed against negative factors

Source: NILC & CLASP, Protecting Immigrant Families
Advancing Our Future Campaign: Public Charge 101 PowerPoint presentation

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Does this test apply to everyone?

Public charge does NOT apply to everyone

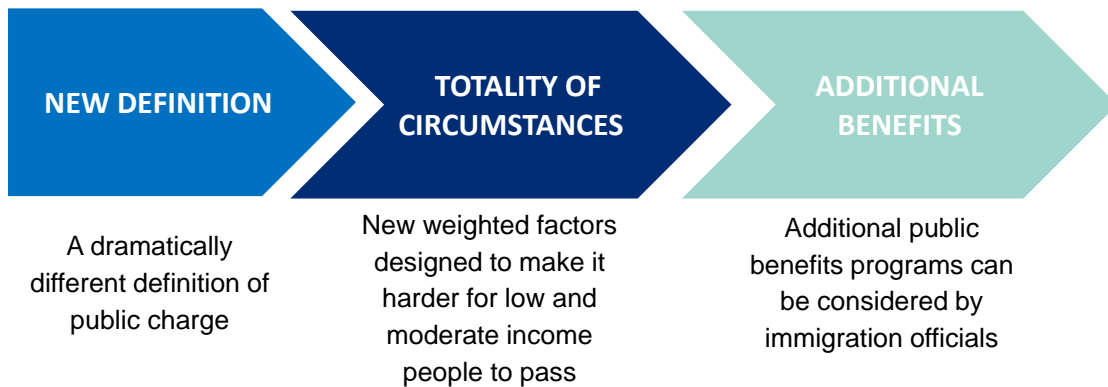
- Excluded immigrants include:
 - Lawful Permanent Residents (Green card holders)
 - Immigrants applying for citizenship
 - Refugees and Asylees
 - VAWA self-petitioners
 - Survivors of Domestic Violence, Trafficking, or other Serious Crimes (Applicants/ recipients of U or T visa)
 - Special Immigrant Juveniles
 - Certain Parolees, and several other categories of non-citizens

Source: NILC & CLASP, Protecting Immigrant Families
Advancing Our Future Campaign: Public Charge 101 PowerPoint presentation

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August 14, 2019 DHS Final Rule



Source: NILC & CLASP, Protecting Immigrant Families
Advancing Our Future Campaign: Public Charge 101 PowerPoint presentation

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August 14, 2019 DHS Final Rule



* Included under current policy as well

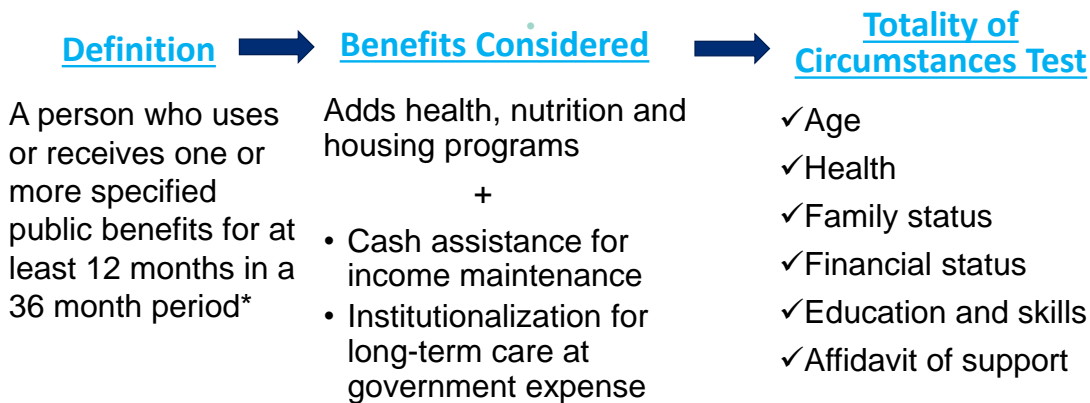
** Exceptions for emergency Medicaid & certain disability services offered in school

Source: NILC & CLASP, Protecting Immigrant Families
Advancing Our Future Campaign: Public Charge 101 PowerPoint presentation

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August 14, 2019 DHS Final Rule



* Receiving two benefits in one month counts as 2 months of benefits

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Add Standards and Evidence to Totality of Circumstances Factors

Age: working age is 18 – 62 years old

Health: Diagnosed with medical condition that could affect ability to work/study or require extensive care/institutionalization in the future

Family: Household size

Financial resources: Income =>125% FPL (or assets); received any public benefit; has private health insurance or can pay for reasonably foreseeable medical expenses

Skills and work experience: includes assessment of English proficiency; education level is negative if not at least a high school degree or equivalent

Also includes positively and negatively weighted factors

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Public benefits **excluded** in Final Rule

**Children's
Health Insurance
Program**

WIC

Medicare

**Affordable Care
Act Tax Credits**

**School Based
Nutrition
Services**

**State & local
noncash
benefits**

Any benefit not *specifically listed* in the regulation will not be considered

Source: NILC & CLASP, Protecting Immigrant Families
Advancing Our Future Campaign: Public Charge 101 PowerPoint presentation

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Additional Exceptions

- Emergency Medicaid
- Medicaid for individuals under 21 years of age
- Medicaid received by a woman during pregnancy and for 60 days after
- Individuals with Disabilities Education Act (IDEA) services or benefits funded by Medicaid
- School-based Medicaid services
- State-funded Medicaid (replacement programs)
- Any benefits received while a person was exempt from public charge (e.g., asylees/refugees)
- Benefits received by a family member are not considered in determining whether the individual is likely to be a public charge unless the individual is also receiving

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The Chilling Effect

- The Administration's proposal may deter legal immigrants and mixed-status families from using public benefits they are eligible to receive due to:
 - Confusion over what benefits are covered
 - The complexity of the rule's structure
 - Discretionary application of the rule

After 1996 eligibility changes, there was a 25% decrease in use of Medicaid by children of foreign-born residents, the majority of these children were still eligible.¹

In a 2018 survey at public health clinics in CA:²

- Two-thirds of health providers reported an increase in parents' fear about enrolling kids in Medicaid, WIC
- Nearly half of providers reported an increase in no shows at public health clinics.

Source: NILC & CLASP, Protecting Immigrant Families
Advancing Our Future Campaign: Public Charge 101 PowerPoint presentation

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The Chilling Effect: The Big Picture

As many as **26 million** people in families with immigrants might be chilled from participating in programs that make their families healthier and stronger.

1 in 4 children have an immigrant parent



Source: NILC & CLASP, Protecting Immigrant Families
Advancing Our Future Campaign: Public Charge 101 PowerPoint presentation

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Hurts All of Us

We are all worse off when people do not have access to key health care, nutrition, and housing supports.

- Proposed rule is grounded in the false claim that receiving benefits means that you're not contributing.
- The vast majority (91%) of those who would be newly affected are working but being paid low-wages.*
- Investments in key supports pay off in the long run and lead to improved health and better economic outcomes.
- Immigrants and their family members may go uninsured because of fears.

Source: NILC & CLASP, Protecting Immigrant Families
Advancing Our Future Campaign: Public Charge 101 PowerPoint presentation

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CA Preliminary Injunction Order

- DHS interpretation likely outside the bounds of the statute
 - Rule's definition of public charge contradicts longstanding interpretations
 - Example – one could receive < \$.50/day and be deemed public charge (SNAP benefits)
- DHS acted arbitrarily and capriciously during the legally-required process to implement the changes they proposed
 - DHS failed to grapple with the predictable effects on local governments and concluded that the harms are an acceptable price to pay
 - DHS understood that individuals would disenroll even if not subject to public charge determination, yet refused to consider that cost
 - DHS didn't consider impact on public health

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What's Next?

- Legal Challenges will proceed in multiple courts
- DOS interim final rule, conforming DOS policies to DHS final rule, will likely be challenged
- DOJ rule on deportability based on public charge is under review at White House and could be released as a proposed rule soon

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Nondiscrimination/Section 1557

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Title VI of the Civil Rights Act of 1964

“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

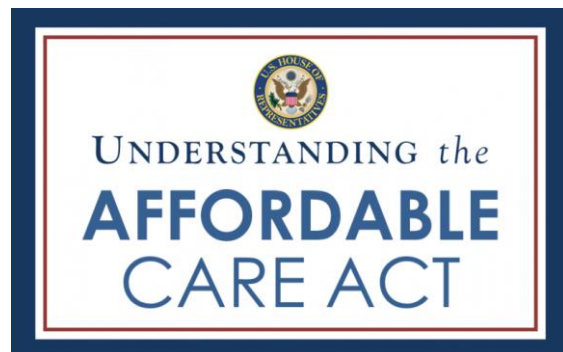
“National origin” includes individuals with limited English proficiency (LEP)

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Section 1557 of the Affordable Care Act

- First time healthcare discrimination is prohibited based on:
 - sex;
 - gender identity, including transgender individuals; and
 - sex stereotyping
- Reinforces longstanding protections for race, ethnicity, **national origin**, age & disability
- It is **broader** than Title VI which only applied to those receiving federal funding



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Who Is Covered by Title VI & 1557?

Title VI & Sec. 1557

- State, county, and local agencies (including 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

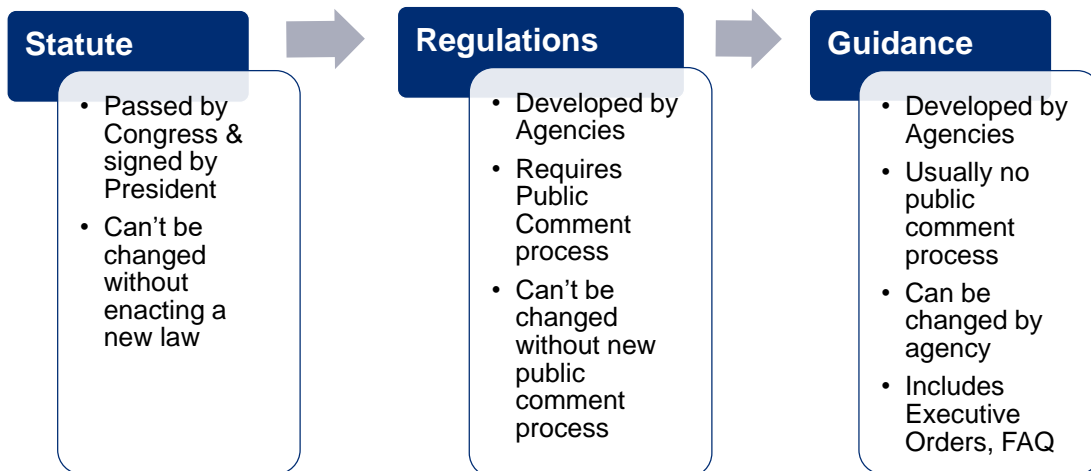
Sec. 1557

- Federally administered programs including Medicare & Federally Facilitated Marketplace
- State marketplaces
- Qualified Health Plans (also receive federal funds)

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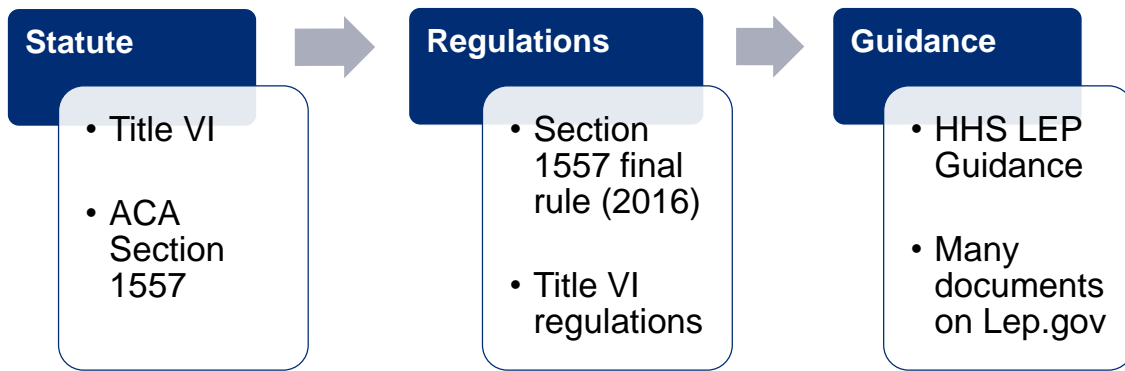
Hierarchy of Law



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Hierarchy of Law



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History of Sec. 1557



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Proposed 1557 NPRM (2019)

- Seeks to change 2016 final rule implementing 1557
- Significant changes **outside of** language access:
 - Rollback of protections against discrimination based on gender identity, sex stereotypes and termination of pregnancy
 - Eliminates definition section
 - Eliminates requirements to have a compliance coordinator and written grievance procedures
 - Repeals enforcement-related provisions & changes remedies
 - Changes other regulations to follow these and eliminate explicit nondiscrimination protections based on sexual orientation and gender identity

Source: Proposed Rule: Nondiscrimination in Health and Health Education Programs or Activities; <https://www.hhs.gov/sites/default/files/1557-nprm-hhs.pdf>; see also, Katie Keith, Health Affairs Blog: HHS Proposes To Strip Gender Identity, Language Access Protections From ACA Anti-Discrimination Rule, <https://www.healthaffairs.org/doi/10.1377/hblog20190525.831858/full/>.

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Four Factor Test & Language Access Plans

- Puts the “4 factor test” (from LEP 2003 Guidance) into regulations – in evaluating compliance, OCR may assess how an entity balances:
 - Number/proportion of LEP individuals eligible to be served or likely to be encountered;
 - Frequency with which LEP individuals come into contact with the entity;
 - Nature and importance of the program/activity; and
 - Resources and costs.
- Concern that previous use of 4 factor test has resulted in entities concluding they don’t have to provide language services
- Eliminates consideration of language access plans in enforcement

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Who's Covered?

- Changes focus from individual to entity
 - 2016 – a covered entity shall take reasonable steps to provide meaningful access **to each LEP individual eligible** to be served or likely to be encountered
 - 2019 (proposed) – any entity operating or administering a health program or activity shall take reasonable steps to ensure meaningful access to such programs/activities **by LEP individuals**
- When language services must be provided, they must be:
 - Free of charge
 - Be accurate and timely
 - Protect the privacy and independence of the individual with LEP

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Interpreter (foreign) & Translator

- An interpreter/translator must:
 - Adhere to generally accepted interpreter/translator ethics principles (including confidentiality)
 - Demonstrate proficiency in speaking/writing & understanding at least spoken/written English and the spoken/written language in need of interpretation
 - Be able to interpret/translate effectively, both receptively and expressly, accurately and impartially, using any necessary specialized vocabulary, terminology & phraseology
- 2019 (proposed) – deletes “qualified” as part of definition
- **NOTE:** Due to this definition, implicit recognition that not all interpreters can translate and vice versa

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Use of Family Members/Minors

- Similar to current regulations
 - Prohibits use of minors except in emergencies
 - Prohibits use of accompanying adults except in emergencies or upon patient request
 - Prohibits reliance on staff other than qualified bilingual/multilingual staff to communicate with individuals with LEP

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

- Deletes requirement for real-time video for foreign language interpreters
 - 2016 – requires a “sharply delineated image that is large enough to display the interpreter’s face. . .”
 - 2019 (proposed) -- “Real-time, audio over a dedicated high-speed, wide bandwidth video connection or wireless connection that delivers high-quality audio without lags or irregular pauses in communication
- 2016 & 2019 (proposed) both require:
 - a clear, audible transmission of voices; and
 - adequate training to quickly and efficiently set up and operate the remote interpreting service

<https://www.hhs.gov/sites/default/files/1557-nprm-hhs.pdf> at p. 189-190.

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Taglines

- 2016 – taglines on all “significant” documents and notices in top 15 languages in a state
- 2019 (proposed) – no taglines required on any documents
 - Administration 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

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Notices

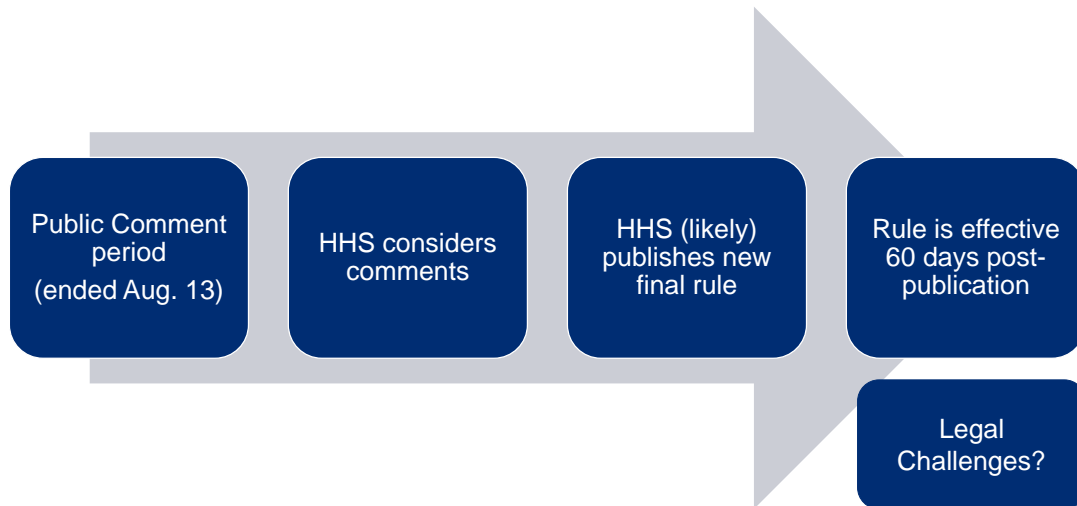
- 2016 – Employers with at least 15 employees must
 - provide notices about its nondiscrimination policies
 - designate at least one employee to carry out the responsibilities under Section 1557
 - adopt grievance procedures with appropriate due process standards to resolve actions prohibited under Section 1557
 - Must include taglines in top 15 languages in each state
- 2019 (proposed) – **no** notices



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Outlook for 2019



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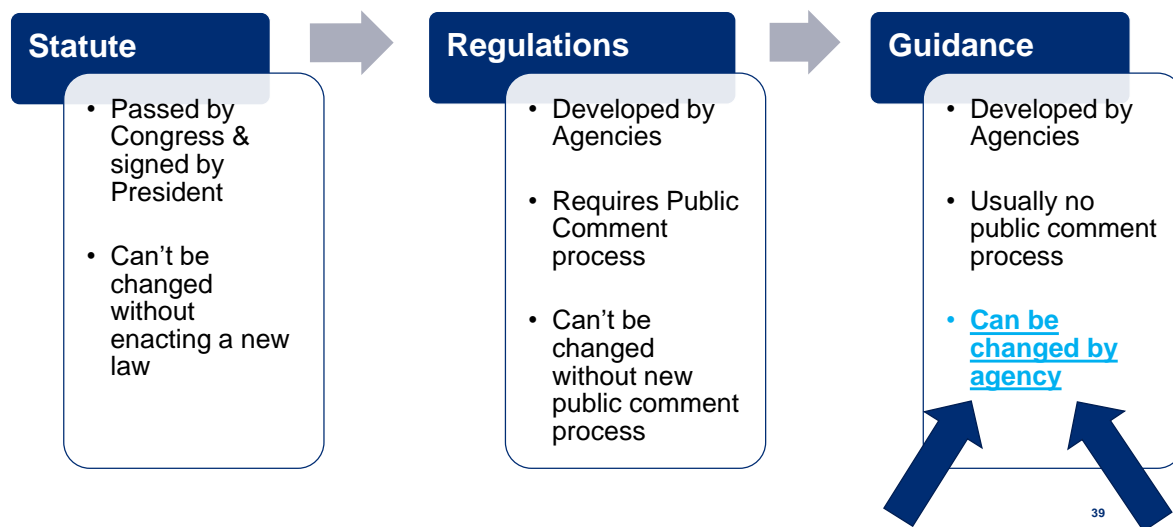
LEP.gov – new pop-up text

...The Department of Justice-issued guidance documents on this website provide informal **non-binding guidance** to assist you in understanding the language access requirements of the Act, the Department's regulations, and Executive Order 13166. The **guidance documents are not intended to be a final agency action, have no legally binding effect, and have no force or effect of law. The documents may be rescinded or modified in the Department's complete discretion, in accordance with applicable laws.** The Department's guidance documents do not establish legally enforceable responsibilities beyond what is required by the terms of the applicable statutes, regulations, or binding judicial precedent...

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Hierarchy of Law



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So what's the impact of LEP.gov?

- It's the optics – Administration is more explicit about limits of LEP guidance
- Enforcement of 2003 LEP Guidance has always ebbed and flowed in different administrations
- Executive Orders can always be rescinded by the President
- May be further revisions to HHS documents if a new final rule on 1557 is released

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Next Steps

- Title VI and Section 1557 still remain the law
- Even if NPRM is finalized, it won't be effective until 60 days after publication and likely will be subject to court challenges
- Even with no specific requirements for translation or taglines, you can still translate documents & use taglines
- Many of the same issues the courts determined that made DHS' decision invalid in the public charge cases exist in the changes to the Section 1557 regulation
 - Also Supreme Court cases on LGBTQ discrimination in the workplace

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Beyond 2019



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2019-2020

- Finalization of 1557 rule (if not before)
- Continued challenges to DHS public charge rule
- Expected issuance of DOJ deportability rule
- Continued xenophobic policies of this Admin
- Elections
- Health Reform 2.0?

The outlook for language access and health reform greatly depend on the election results

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What can you do?

- Monitor developments
- Stay informed
- Educate your clients/patients
- Get engaged!

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Resources

- **NEW!!!!** – [Summary of State Law Requirements Addressing Language Needs in Health Care](#) (2019 update)
- NHeLP's 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/>

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