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July 02, 2019 10:30AM EST

Trump Administration Discrimination - Deep Dive Chapter Three – Revisions Without a (Legally Valid) Cause?

Welcome to the third installment of *Health Care in Motion's* [in-depth analysis](#) on [proposed revisions](#) to nondiscrimination protections under the Affordable Care Act (ACA) (also known as “Section 1557” or the “Health Care Rights Law”). The proposal is not yet a final rule – *42 days remain until the comment period closes on August 13, 2019. To submit comments, click [here](#).*

Today's *Health Care in Motion* continues our close analysis of the proposal by exploring some of the justifications offered by the U.S. Department of Health and Human Services (HHS) of the need for a new rule in the first place. This edition will also look at the potential impact on reproductive health care and language access. These two issues are associated with high barriers to health care that both Congress and the Obama administration sought to remediate. The Trump administration's new proposal dismisses these reforms in a vein similar to the proposal's approach to [dismantling protections against gender identity discrimination](#).

Pretense: (noun) professed rather than real intention or purpose

The proposal includes a litany of [supposed explanations](#) for rewriting Section 1557 regulations. Among them, and as discussed further below, are assertions that the revisions are required to: (1) resolve disparate interpretations of law; (2) conform the regulations to statutory privileges for religious liberty; and (3) relieve undue regulatory burdens on health care companies.

It doesn't take much study of the recent past to recognize this pretext—Roger Severino, the head of HHS's Office of Civil Rights (OCR), sowed the seeds of an [ideological attack](#) on the rule before he even took over as its chief enforcer. Last October, press reports of internal government plans exposed HHS as spearheading an [inter-agency quest](#) to erase recent, hard-fought rights for transgender and gender nonconforming people. We now bear witness as the agency plays out this [poison hand](#). The proposed regulation's resounding silence concerning inevitable harms to the health and well-being of vulnerable individuals speaks volumes, too. Ultimately, the available evidence suggests that no motivation is more compelling to the Department than disdain.

Order in the Court

We begin by exploring HHS's assertion that the proposed regulations are required to resolve disparate interpretations of civil rights law. HHS argues that substantially repealing the existing regulations supports greater consistency in the interpretation and application of such laws. In making its case, HHS emphasizes [Franciscan Alliance](#), a lawsuit in which a district court (read: a court at the lowest level of the federal court system) issued a preliminary injunction (read: not

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a final ruling) of the existing Section 1557 regulations.

A full picture of how courts have interpreted existing law makes clear that HHS is putting undue importance on this preliminary ruling from a single federal district court. On the question of whether Title VII's use of the term "because of . . . sex" encompasses discrimination based on gender identity and gender non-conformance, at least four federal appeals courts (read: intermediate courts in the federal system one step below the U.S. Supreme Court) have reached conclusions that are directly at odds with *Franciscan Alliance*. Yet, HHS's commentary surrounding the proposed rule relegates this authority to a footnote.¹ While we can appreciate a good [footnote](#), HHS's dismissive treatment of these holdings both exaggerates the existence of conflict among the courts and wrongly implies that the [weight of judicial authority](#) aligns with the Trump administration's new interpretation.

Undermining this particular justification even further is the fact the U.S. Supreme Court has committed to reviewing [discrimination on the basis of sex in a series of employment cases](#) next fall. HHS, allegedly driven by the courts, couldn't wait a few months for the highest court in the country to weigh in? No, because the proposal is part of the Administration's enactment of a regressive ideological agenda that it is determined to drive through.

Nondiscrimination versus Religious Freedom

Section 1557 regulations also represent another opportunity for the Administration to underscore its [invitation to discriminate under the guise of religious freedom and conscience protections](#); HHS justifies the revised regulations as necessary to support compliance with Congressional mandates on the matter.²

As explained in a [previous Health Care in Motion](#), the Health Care Rights Law expressly extends the reach of four federal civil rights laws into the health care system: title VI of the Civil Rights Act of 1964 (Title VI) (prohibiting race-based discrimination), title IX of the Education Amendments of 1972 (Title IX) (prohibiting sex-based discrimination), section 504 of the Rehabilitation Act of 1973 (Section 504) (prohibiting disability-based discrimination), and the Age Discrimination Act of 1975 (Age Act) (prohibiting age-based discrimination). Altogether, Section 1557 effectively prohibits health programs and activities that receive federal funding from discriminating on the basis of race, color, national origin, sex, age, or disability.

The court in *Franciscan Alliance* held that the Health Care Rights Law incorporates exemptions provided in Title IX.³ Specifically, the court held that the Health Care Rights Law incorporates Title IX's exemption for abortion services (i.e., that Title IX does not require educational institutions to provide or pay for abortion care). The court also held that the Health Care Rights Law incorporates Title IX's exemption for religious educational institutions: prohibitions on sex discrimination "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."⁴ According to the *Franciscan Alliance* court and, now, HHS, the Obama-era regulations are unlawful without these exemptions.

To remedy this supposed flaw, HHS would explicitly recognize a number of religious and conscience exemptions,

¹ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846, 27855 n.61 (June 14, 2019).

² *Id.* at 27849.

³ Title IX of the Education Amendments of 1972 provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." HHS also proposes amending its Title IX regulations to conform with statutory exemptions relating to abortion.

⁴ 20 U.S.C. § 1681(a)(3).

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including those lifted from Title IX and the laundry list of provisions that appeared in the Department's [final rule on conscience protections released last month](#).⁵ In doing so, HHS imposes broader exemptions than what's permitted by the ACA and erects additional barriers to health care access, particularly when it comes to sexual and reproductive health care.

As [others have noted](#), there is nothing in the existing Section 1557 rule that undermines existing religious freedom or conscience rights. To the contrary, the preamble and text of the 2016 Section 1557 rule expressly stated that it was not intended to displace existing federal conscience protection laws (including the Religious Freedom Restoration Act), ACA provisions that reject an abortion coverage mandate, or state laws governing abortion.⁶ This status quo thus belies the new statements of HHS that rulemaking is now necessary to protect religious freedom.

What Section 1557 and its implementing regulations demand, however, is a better balancing of patient rights (and safety and well-being) and religious liberty. Section 1557 and the principles underlying it are a much-needed counterweight; a legal framework that bellows commitment to health care access and establishes that nondiscrimination in health care—including protections based on gender identity and on a woman's reproductive choices—is indeed a compelling government interest.

The proposed rule, then, represents a heavy thumb on the scale for religious liberty across the board. Wherever the Trump administration makes policy on religious liberty, restrictions on abortion rights are not far behind. In this case, HHS proposes to erase the existing rule's explicit acknowledgment that discrimination on the basis of termination of pregnancy impermissibly harms women. In its place, HHS offers the following waffling commentary:

Although this proposed rule does not adopt a position on whether discrimination on the basis of termination of pregnancy can constitute discrimination on the basis of sex, it does not mean that OCR could not consider such claims of discrimination, such as discrimination on the basis of miscarriage or discrimination on the basis of medical complications resulting from a termination of pregnancy.⁷

In other words, when it comes to whether mistreatment on the basis of termination of a pregnancy would even be viewed as discrimination under the proposed rule, regulators at HHS seem to shrug their shoulders and say, "Maybe. . . if we feel like it." Imbuing the rule with so much wiggle room is an invitation for [bureaucrats to abuse their discretion](#) in service of their preferred outcomes.

HHS strains to justify the scope of its actions. Applying rather [circular reasoning](#), the Department cites to the Department of Justice's [April 5, 2019 brief](#) in *Franciscan Alliance*—a brief written on behalf of HHS—to support the fact that the Health Care Rights Law "unambiguously includes Title IX's exemptions." The Title IX exemption for religious educational institutions is interpreted to balloon magically to the advantage of religious institutions generally without explanation. A section of the ACA permitting certain conscience-related exemptions in the specific context of abortion coverage—a provision of the law clearly labeled as pertaining to abortion—[grants, they claim](#), protection for health care providers with conscience objections to health care services *other than abortion*. Further, HHS clamors to expand religious protections while [minimizing](#) experiences of discrimination and dismissing concerns of barriers

⁵ These rules are being challenged on constitutional and other grounds in [several lawsuits](#), including ones led by a handful of states and municipalities, the National Family Planning and Reproductive Health Association and Public Health Solutions, Inc., Planned Parenthood Federation of America, Lambda Legal, Americans United for Separation of Church and State, and the Center for Reproductive Rights.

⁶ See, e.g., 45 C.F.R. § 92.1(b)(2) ("Insofar as the application of any requirement under this part would violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required.").

⁷ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27870 n.159 (June 14, 2019).

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to access as hypothetical. The Trump administration is fond of [attacking its critics](#) as “overreaching.” [Hypocrisy, thy name is Trump](#).

The Regulatory Burden of Providing Meaningful Access

According to HHS, a third flaw in the existing Section 1557 regulation lies in the “substantial unanticipated burden” of compliance with various meaningful access provisions.⁸ Among other changes, the proposed rule takes an axe to the following requirements:

- [Notices of nondiscrimination: Health care companies subject to Section 1557](#) must publish and disseminate information about nondiscrimination, including that there are protections from discrimination, language assistance services, and grievance/complaint procedures.
- [Taglines](#): A covered company must provide a short statement describing its ability to provide free language assistance services in 15 non-English languages.
- Language access plans: While not a requirement, language access plans (policies and procedures to guide staff in supporting meaningful access to low English proficiency individuals) are currently considered by OCR when evaluating an entity’s compliance with Section 1557.
- Visual standards in video remote interpreting (VRI) services for low English proficiency individuals: VRI can be used to provide interpreter services when in-person services are not an option. HHS developed basic standards that apply when relying on VRI, including that voice transmissions are clear and audible, and that real-time video does not produce lags, choppy, blurry, or grainy images.
- Grievance and complaint procedures: Covered entities with 15 or more employees are required to designate a compliance coordinator and have in place written grievance procedures.

In justifying their termination, HHS characterizes such provisions as “not justified by need,” “confusing,” and “costly.” Where was this concern for interrupting operations and imposing undue burdens on health care companies when HHS [cut payments](#) that [had been promised to insurers](#) (and [froze other payments](#)), [supported Medicaid coverage losses that affect providers](#), imposed [burdensome reporting requirements](#) on recipients of Title X family planning program funding, and otherwise caused [stock prices to fall](#)?⁹ According to HHS, if the proposed rule is enacted, “it would be less likely that covered entities would need to pay for legal advice or otherwise expend organizational resources to understand their obligations”¹⁰ The health care industry has been in a constant state of flux the past few years at the federal level and, in its wake, the state level. Legal uncertainty abounds – much of it attributable to HHS itself.

More important, however, is the insufficiency of HHS’s analysis. The Department focuses on factors such as the estimated costs of compliance with the notice and tagline requirements provided by a handful of Aetna and UnitedHealth Group representatives and a trade association. As regarding need, HHS claims that the general public is offended by receiving notices and taglines (“out of [environmental concerns](#) or [annoyance](#)”), and looks to the fact that

⁸ *Id.* at 27873.

⁹ It’s also worth noting that the existing rule seeks to balance patient protections with compliance burdens. HHS heavily supported companies in complying with the requirements. The Department published template [materials](#) in 64 different languages, and a [list](#) of the most common non-English languages spoken in each state. The Department left it to the discretion of covered entities to determine what comprised a “significant communication” or “significant publication” such that the notice and tagline requirements may attach.

¹⁰ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27876 (June 14, 2019).

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the “overwhelming majority of beneficiaries speak English.”¹¹ Missing from this analysis is any honest consideration of the [impact](#) on individuals for whom the regulations seek to ensure an equal opportunity to participate in and benefit from health programs and activities. The perspective and voices of such individuals are wholly absent from the proposal.

Contrary to HHS’s diminishing portrayal of the language access provisions, the [summary](#) of select OCR compliance reviews and investigations available on the HHS website sheds some insight into the importance of a robust regulatory framework in ensuring meaningful access. Additional stories are likely to become an important part of the record through the comment period. Commenting ensures that on-the-ground experiences—as submitted by someone personally affected by an issues or someone who works with people that are affected—are taken into account. Let your voice be heard.

* * *

Interested in exploring further issues talked about in our Trump Administration Discrimination Deep Dive and/or commenting on the proposed rule? You can:

- **CONNECT** to the [national organizing effort](#) sponsored by the [Transgender Law Center](#) and the [National Center for Transgender Equality](#).
- **TUNE IN** to what other organizations, such as the [National Women’s Law Center](#), the [National Health Law Program](#), and the [Asian & Pacific Islander American Health Forum](#), are saying about reproductive health care rights and language access rights.
- Review our short resource for [tips](#) on how to write a public **COMMENT**.
- **FOLLOW** the rest of our Deep Dive series. In the next issue, we review the proposed changes to the rule’s enforcement mechanisms and, therefore, how effective a tool it is at protecting people against discrimination.

¹¹ *Id.* at 27858-59.

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