Questions and Answers on the proposed rollback of nondiscrimination protections under the ACA's Section 1557

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In courts and through regulatory action, the administration is vigorously working to dismantle the Affordable Care Act (ACA). On May 24, 2019, the administration released a proposed regulation that would undermine or eliminate key protections of the ACA's nondiscrimination provision, § 1557, from individuals who have experienced discrimination in health care programs and settings.[1]

In its proposed rulemaking, the administration seeks to:

- Exempt a broad array of health care programs and entities from compliance with § 1557;
- Eradicate nondiscrimination protections for LGBT persons in multiple HHS regulations;
- End provisions that help ensure that persons with Limited English Proficiency (LEP) can access health care services;
- Eliminate requirements that health facilities and other covered entities post public notices informing patients of their rights and how to file complaints;
- Harm people with HIV/AIDS and other serious or chronic conditions by removing protections against discriminatory health plan benefit design;
- Impede access to reproductive health care and in particular, abortion services;
- Sanction discrimination by religiously affiliated hospitals, providers, and health plans; and
- Limit enforcement by restricting the ability of plaintiffs to file court actions.

The following provides background on § 1557, current regulations implementing this provision, the administration's proposal, and what you can do to help stop the rollback of these important

[1] U.S. Dep't of Health & Human Servs., *Nondiscrimination in Health and Health Education Programs or Activities*, RIN 0945-AA11, 84 Fed. Reg. 27846 (June 14, 2019) (hereinafter "proposed rule"))(to be codified at 42 C.F.R pts. 438, 440, and 460; 45 C.F.R. pts. 86, 92, 147, 155-56), https://www.govinfo.gov/content/pkg/FR-2019-06-14/pdf/2019-11512.pdf.

legal protections. The final section profiles individuals who have benefitted from § 1557 after experiencing discrimination in health care programs or settings.

Background

Q. What is § 1557?

A. Section 1557 is the nondiscrimination provision of the ACA.[1] It prohibits discrimination in health programs and activities receiving federal financial assistance, health programs and activities administered by the executive branch, as well as entities created under the ACA, including the Marketplaces and health plans sold through the Marketplaces. Section 1557's protections extend to discrimination on the basis of race, color, national origin (including language access), sex, age, and disability by referring to existing civil rights laws.[2] It is the first federal law to ban sex discrimination in health care. Section 1557 recognizes that individuals may be part of multiple protected classes and may face discrimination because they belong to one or more of these classes.

Section 1557 went into effect the day the ACA became law on March 23, 2010. The provision is self-implementing - meaning it does not rely on regulations to take effect. The Department of Health and Human Services (HHS) underwent an extensive process to develop regulations for § 1557, including a Request for Information, proposed rule, and final rule.[3] HHS considered more than 24,875 public comments submitted for the proposed rule.[4] This new proposed rule seeks to ignore the reasoned process HHS has already undertaken.

Remember, even if the administration changes or refuses to enforce current regulations, only Congress can amend or repeal § 1557.

Q. What kinds of programs and providers must comply with § 1557?

A. Section 1557 applies to health care programs and activities receiving federal financial assistance or funding; programs administered by the federal government, including Medicaid and Medicare; and entities created under Title I of the ACA. Covered entities include hospitals, clinics, and health care provider's offices; and issuers selling health insurance plans within and outside of the ACA Marketplaces.[5] If an entity is principally engaged in providing or administering health services or health insurance coverage, the current regulations state that all of its activities are covered by § 1557 if any part receives federal financial assistance.[6]

Q. Did the final regulations implementing § 1557 include new laws or policies that allowed providers to deny care on the basis of religious or moral beliefs?

A. No, the final regulations implementing § 1557 in 2016 did not include new health care "religious refusals." In its preamble, however, HHS recognized that § 1557 did not displace existing federal refusal laws and any application of § 1557 that would be a violation of these refusals would not be required.[7]

Q. Why is the administration revising the regulations for § 1557?

A. The administration cites to a federal district court ruling in the *Franciscan Alliance v. Azar* case as its reason for revising the existing § 1557 regulations. However, the court did not overturn the existing regulations or order HHS to change them.

In *Franciscan Alliance*, a group of religiously affiliated health plans and several states challenged portions of the 2016 final rulemaking for § 1557. Foremost was the claim that HHS exceeded its authority when it defined sex discrimination to include gender identity and pregnancy status including termination of pregnancy. Judge Reed O'Connor issued a nationwide injunction preventing HHS from enforcing those portions of the regulations as a preliminary matter.[8] (Note - this is the same judge who ruled in December 2018 the entire ACA is unconstitutional.[9]) However, the injunction does not prevent individuals from enforcing these provisions in other courts.

The court stayed further judicial proceedings after HHS assurances it would revisit and revise the rule. In December 2018, the court lifted the stay and issued a briefing schedule, with all filings due May 24, 2019.[10] In April 2019, the U.S. Department of Justice (DOJ) announced the government was now siding with the plaintiffs and would no longer defend the 2016 regulations.[11]

Even with the nationwide injunction preventing HHS enforcement of prohibitions of discrimination on the basis of gender identity and pregnancy status including termination of pregnancy, several other federal courts have upheld § 1557's protections based on gender identity, finding that those protections are statutory and do not rely on regulations.[12]

To date, the court has not yet issued a final ruling on the merits in *Franciscan Alliance*. Thus, any changes the administration makes to the regulations implementing § 1557 are not pursuant to a court order. Moreover, any decision by Judge O'Connor will likely be appealed.

Notably, the administration's "repeal and replacement" of § 1557 regulations go much further than the definition of sex discrimination at issue in *Franciscan Alliance*.[13]

Proposed revisions to § 1557 regulations

Q. How does the proposed regulation limit the applicability of § 1557?

A. The administration's proposal would limit the applicability of § 1557 in two ways. First, it would significantly limit the number of federal health programs subject to § 1557. Current HHS § 1557 regulations apply to any health program or activity administered by the agency.[14] The proposed rule states that § 1557 applies only to federal health programs and activities administered by an agency established by Title I of the ACA, contrary to the intent and design of the law.[15]

Second, the proposed rule narrows the applicability of § 1557's protections. Under current rules, if an entity is principally engaged in providing or administering health services or health insurance coverage, all of its activities are covered by § 1557 if any part receives federal financial assistance.[16] The proposed rule eliminates the comprehensive definitions of "covered entities" and "health program or activity" in the current regulations. Furthermore, it would limit the extent to which § 1557 applies to health insurance companies. The proposed rule declares that an entity "principally engaged in providing health ***insurance*** shall not be considered to be principally engaged in providing health ***care***" (emphasis added).[17] Thus, the rule would exempt much of the plans, products, and operations of most health insurance companies from § 1557's nondiscrimination protections.

Q. How does the proposed regulation harm transgender persons?

A. Twenty-nine percent of transgender individuals were refused to be seen by a health care provider on the basis of their perceived or actual gender identity and 29 percent experienced unwanted physical contact from a health care provider.[18] Additionally, the 2015 U.S. Transgender Survey found that 23 percent respondents did not see a provider for needed health care because of fears of mistreatment or discrimination.[19]

Under current law and regulations, § 1557 prohibits discrimination on the basis of sex, including someone's gender identity.[20] In addition, current regulations expressly prohibit coverage exclusions for gender-affirming care, and prohibit plans from imposing limits or restrictions on health services provided to transgender persons, for services traditionally provided to persons of one sex.[21]

However, the proposed rule completely eliminates gender identity as part of the definition of sex discrimination. It also removes sections of the existing regulations that prohibit health plans from excluding gender-affirming care.

Q. How does the proposed regulation harm LGB individuals?

A. According to one survey, eight percent of lesbian, gay, and bisexual individuals had an experience within the year prior to the survey where a doctor or other health care provider refused to see them because of their actual or perceived sexual orientation and 7 percent experienced unwanted physical contact and violence from a health care provider.[22] The study *When Health Care Isn't Caring* found that 56 percent of LGB people reported experiencing discrimination from health care providers – including refusals of care, harsh language, or even physical abuse – because of their sexual orientation.[23] HHS' Healthy People 2020 initiative recognizes, "LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights."[24]

Current § 1557 regulations protect against discrimination based on sex stereotypes.[25] While regulations do not expressly include discrimination on the basis of sexual

orientation, HHS stated that § 1557's prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on sex stereotypes. The definition of sex stereotypes includes stereotypical 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. Sex stereotypes also include gendered expectations related to the appropriate roles of a certain sex.

However, the proposed rule eliminates sex stereotyping from the definitions section of the current regulations.[26] It goes even further, by purging references to "sexual orientation" appearing in other HHS regulations, including those preventing discrimination in Essential Health Benefits, Qualified Health Plan marketing and design, outreach and enrollment activities, as well as Medicaid managed care and Programs for All-inclusive Care of the Elderly (PACE).[27]

Q. How does this proposed regulation affect individuals with LEP?

A. Over 66 million people in the U.S. speak a language other than English at home and approximately 25 million do not speak English "very well" and may be considered LEP.[28] Older adults who did not grow up in the United States are likely to face discrimination because they are more likely to have limited English proficiency, different mannerisms, or dress in comparison to their younger peers.[29] Language-related barriers may severely limit an individual's opportunity to access health care, assess options, express choices, and ask questions or seek assistance.

Current § 1557 regulations require covered entities to take reasonable steps to provide meaningful access to each individual with limited English proficiency eligible to be served or likely to be encountered.[30] These can include taglines on all significant documents, translation services, and access to qualified interpreters.[31] Current regulations also require covered entities to post notices informing patients of the availability of language access services, as well as auxiliary aids and services for people with disabilities.

However, the proposed rule significantly weakens protections for individuals who are LEP. The administration seeks to remove requirements for taglines and posted notices.[32] It also eliminates recommendations that covered entities develop language access plans to help them be prepared to meet the needs of individuals with LEP.

The National Health Law Program will provide a more detailed analysis of how the proposed rule would change current language access standards and protections for persons who are LEP.

Q. How does this proposed regulation affect requirements to inform individuals of their rights?

A. The proposed rule eliminates notice requirements, which are critical to informing individuals about their rights and how to file complaints if they face discrimination.[33] Current regulations require that all covered entities both conspicuously post a notice about Section 1557's nondiscrimination requirements and include this notice with all significant documents.[34] The notice must include the following information:

- the entity does not discriminate on the basis of race, color, national origin, sex, age or disability in its health programs and activities;
- auxiliary aids and services are available for individuals with disabilities free of charge and in a timely manner, as well as materials in alternate formats;
- language assistance services are available for individuals with limited English proficiency free of charge and in a timely manner;
- how to request auxiliary aids and services and language services;
- the contact information of a responsible employee designated to coordinate compliance (applicable to entities with 15 or more employees);
- the availability of a grievance procedure and how to file a grievance (applicable to entities with 15 or more employees); and
- how to file a complaint with the HHS Office for Civil Rights (OCR).

By eliminating the notice requirement and designated employee to coordinate compliance and investigate complaints, HHS acknowledged "an unknown number of persons are likely not aware of their right to file complaints with the HHS OCR and some unknown subset of this population may suffer remediable grievances, but will not complain to OCR absent notices informing them of the process."[35]

Q. How does the administration's proposed regulation harm people with HIV/AIDS and other serious or chronic medical conditions?

A. Before the ACA, health insurers routinely discriminated against people with HIV/AIDS and other serious or chronic conditions by charging them exorbitant premiums, excluding coverage for their conditions, or refusing to provide health coverage at all. Although the ACA ended these practices, some insurers still sought ways to discourage people with significant health needs from enrolling in their plans.

For example, the National Health Law Program and The AIDS Institute filed a complaint with HHS OCR charging that four Florida health insurers discriminated against persons living with HIV/AIDS by placing all drugs used in the treatment of HIV, including generics, in the highest cost sharing tiers.[36] Researchers at the Harvard School of Public Health found that the practice of placing HIV drugs in the highest cost sharing tier, which they called "adverse tiering," to be widespread.[37] The Pharmaceutical Research and Manufacturers Association (PhRMA) contracted for an analysis of the formularies for 123 silver-level marketplace plans and found similar problems regarding multiple sclerosis and cancer. PhRMA concluded that there was a "lack of adequate formulary scrutiny on the part of state and federal regulators" because "[r]equiring high

cost sharing for all medicines in a class is exactly the type of practice the ACA was designed to prevent."[38]

HHS agreed. In the 2016 final rulemaking for § 1557, HHS expressly prohibited discriminatory plan benefit design and marketing.[39] Moreover, HHS specifically cited to the practice of placing all drugs used to treat a certain condition, such as HIV/AIDS, as an example of discriminatory benefit design in the § 1557 final rulemaking, as well as other HHS rulemaking and guidance.[40]

However, the proposed rule removes the current prohibition on discriminatory plan benefit design in the § 1557 regulations. While other statutory and regulatory provisions barring discriminatory benefit design and marketing remain, it is unclear whether they would afford individuals who experience these discriminatory practices the opportunity to file complaints to the extent provided under the current § 1557 regulations.[41]

Q. How does the administration's proposed regulation harm women and impede access to abortion services?

A. Before the ACA, women experienced pervasive discrimination in health care settings and by insurers. For example, women paid more than men for their insurance and were often unable to find coverage for necessary services, such as maternity care. For example, in 2011, in the individual market, 62 percent of individuals did not have plans that covered maternity care.[42]

Section 1557 prohibits discrimination on the basis of sex, including pregnancy status, termination of pregnancy, childbirth and related medical conditions, gender identity, and sex stereotyping. Any discrimination on the basis of pregnancy is specifically prohibited in Title IX regulations, and § 1557 adopted these same restrictions.[43] Moreover, the final regulations implementing § 1557 made clear that § 1557 did not displace existing federal refusal laws and did not include new refusals.[44]

The proposed regulation may affect overall access to care for women and others. Because the proposed regulation incorporates Title IX's religious exemption, a religious provider could say that they do not have to comply with sex discrimination protections. The administration also proposes that § 1557 would not apply if any part of the rule would "violate, depart from, or contradict definitions, exemptions, affirmative rights or protections" under civil rights laws, federal religious refusal laws, the Religious Freedom Restoration Act, and other laws and policies.[45]

The proposed regulation, in particular, could harm women and individuals seeking abortion services by incorporating Title IX's exemption on abortion services and additional policies that make accessing abortion and other health care services more difficult.

Q. How does the proposed rule affect the ability of providers to refuse medically necessary care?

A. Recently, HHS finalized a regulation that expanded the scope of who can deny services and which services can be denied under existing federal laws that permit refusals of care.[46] In combination, this proposed regulation to rollback § 1557 protections and HHS' expansion of laws that allow providers and entities to deny care could harm individuals seeking health care, particularly sexual and reproductive health care, by creating additional barriers to access.

Q. How does the proposed rule affect compliance and enforcement of § 1557's protections?

A. Section 1557 provides a private cause of action whereby individuals who experience discrimination can file in federal court.[47] The proposed rule eliminates this provision. However, multiple courts have found that § 1557 provides a private cause of action.[48]

The proposed rule also limits remedies available to persons who experience discrimination and seeks to preclude many disparate impact and most intersectional claims.

What action can you take to defend § 1557?

A. Section 1557's protections help ensure that individuals can access health care by prohibiting discrimination in health care programs and activities. Before the administration can revise regulations, under federal law it must solicit and consider public comments. Public comments provide an important opportunity for your voice to be heard. Any individual or organization can comment. Moreover, public comments establish the administrative record, which courts consider when evaluating whether regulatory changes are lawful and based upon facts. Both organizations and individuals should consider submitting comments outlining their concerns with the proposed changes.

Individuals - Describe your experiences with discrimination in health care settings or programs. Have you been denied care? Has fear of discrimination prevented you from accessing care? Please share your story. If you are transgender, please visit https://protecttranshealth.org/ for further information and assistance in providing comments.

Organizations - the National Health Law Program (as well as other organizations) will provide template comments that your group can use. Because the numbers of comments submitted count, we will not be doing a sign-on letter. It is also important that organizations tailor their comments to their specific expertise or experiences. Please make the most of these resources.

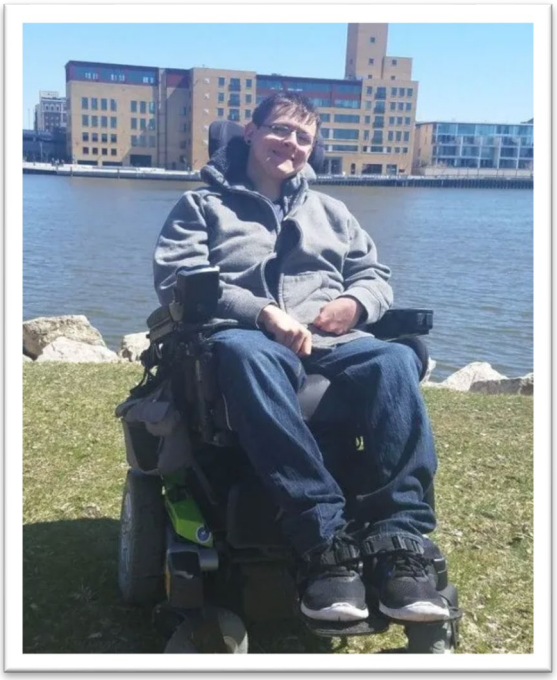
What can you do if you have experienced discrimination in a health care setting, program, or by an insurer?

A. If you experience discrimination by a provider or by your insurance company, you can still file a complaint with your state insurance commission or the Office for Civil Rights at HHS. Remember, § 1557 is still the law! You may also go to court to stop ongoing acts of discrimination. Please contact an attorney, such as a local legal services provider or state bar association, for help.

How § 1557 helps people who have experience discrimination

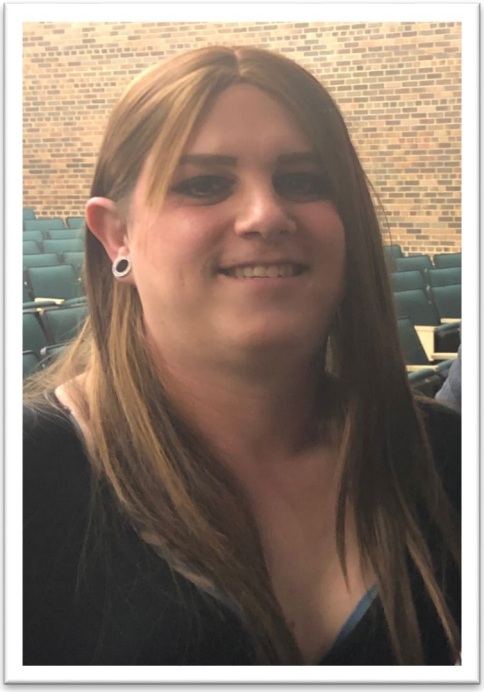
Flack, et al. v. Wisconsin Department of Health Services

Cody Flack, a transgender man with cerebral palsy, relies on Supplemental Security Income as his sole means of support.[49] He first identified as a boy at age 5, and has been transitioning to his male identity since he was 18. Cody began hormone therapy in 2012, and had a hysterectomy which was covered by Wisconsin Medicaid to treat dysmenorrhea, which he said helped significantly reduce his gender dysphoria.[50] But when he sought a double mastectomy and male chest reconstruction with support from his doctors, Wisconsin Medicaid denied coverage.[51] Because Cody was unable to pay for the surgery himself, he went through a period of hopelessness, during which he considered performing the chest reconstruction on himself and contemplated suicide.[52]



Sara Ann Makenzie, a 41-year-old transgender woman, contemplated self-mutilation and suicide after she was informed that Medicaid would not pay for the procedures to address her gender dysphoria.[53] Makenzie took out a $5,000 personal loan to pay for surgery when coverage was denied, but could not afford to take out a loan for the more expensive genital reconstruction procedure, which was also not covered.[54]

Marie Kelly, a 38-year-old transgender woman, has been taking feminizing hormone treatments to address her gender dysphoria since 2011.[55] She suffered from worsening symptoms and anxiety related to her male-appearing facial hair, chest, and genitalia.[56] She had even taken steps to hide her face in public, and feared that someone may notice her genitalia in public and attack her.[57] Because of these worsening symptoms, she sought gender-affirming procedures. Her medical providers deemed these procedures medically necessary, but Wisconsin Medicaid refused to cover them.[58] Without Medicaid coverage of these procedures, she is unable to afford them.



Courtney Sherwin, a 35-year-old transgender woman, was prescribed three hormone treatments by her primary care physician in March 2018.[59] Before receiving feminizing hormone treatments, she lived with significant gender dysphoria, and considered suicide on several occasions.[60] Wisconsin Medicaid only covers one of her three hormone treatments, requiring Courtney to pay for the other two medications out-of-pocket.[61] Wisconsin Medicaid also refused to cover gender-confirming surgeries, including orchiectomy, which doctors have determined is medically necessary to prevent the dangerous adverse side effects she experiences from one of her hormone treatments.[62]

The National Health Law Program, joined by private law firms Relman, Dane & Colfax and Milwaukee-based Davis & Pledl, S.C. filed suit against the Wisconsin Medicaid program charging that the state's exclusion of gender affirming care violated § 1557 and other laws.[63] The District Court of Wisconsin agreed, and issued a statewide injunction against Wisconsin's Medicaid exclusion of gender affirming care. Notably, the court found that § 1557's protections against gender identity discrimination are statutory, and do not rely on the regulation which the court in Franciscan Alliance enjoined HHS enforcement.[64]

When the U.S. District Court issued its injunction, Sara said "The decision made me feel like a whole person, alive and accepted, with so much hope."[65]

Prescott v. Rady Children's Hospital-San Diego

Photo credit: National Center for Lesbian

Kyler Prescott was a 14 year-old, transgender boy who battled against depression, bullying, and harassment by his peers. Kyler also experienced abuse from the very people he turned to for help. While he was seeking treatment for suicidal ideation at Rady Children's Hospital-San Diego, staffers in their Emergency Care Center and Child and Adolescent Psychiatry Services unit chided Kyler that he was "too pretty to be a boy" and continually addressed him as a girl, despite repeated protestations by Kyler and his mother. Within weeks, Kyler took his own life. Kyler's mother, Katharine Prescott, filed a federal lawsuit on behalf of her son, arguing that the abusive treatment he received from hospital staff violated § 1557.

The Transgender Law Center, the National Center for Lesbian Rights, and attorneys at Foley & Lardner LLP filed suit on behalf of Katharine Prescott, alleging discrimination on the basis of Kyler's gender identity in violation of § 1557, among other claims. The court agreed that § 1557's protections against sex discrimination include gender identity, stating that such protections are statutorily based.[66]

ENDNOTES

[1] 42 U.S.C. § 18116.
[2] Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), section 794 of title 29, or the Age Discrimination Act of 1975 [42 U.S.C.§ 6101 et seq.],
[3] U.S. Dep't of Health & Human Servs., *Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities*, 78 Fed. Reg. 46558 (Aug. 1, 2013); U.S. Dep't of Health & Human Servs., *Nondiscrimination in Health Programs and Activities* (Notice of Proposed Rulemaking), 80 Fed. Reg. 54172 (Sept. 8, 2015); U.S. Dep't of Health & Human Servs.,*Nondiscrimination on the Basis of Race, Color, National Origin, Sex, Age, or Disability in Health Programs or Activities Receiving Federal Financial Assistance and Health Programs or Activities Administered by the Department of Health and Human Services or Entities Established under Title I of the Patient Protection and Affordable Care Act*, 45 C.F.R. Part 92, 81 Fed. Reg. 31376 (May 18, 2016).
[4] 81 Fed. Reg. 31376.
[5] 42 U.S.C. § 18116(a); 45 C.F.R. §§ 92.2(a), 92.4.
[6] 45 C.F.R. § 92.4.
[7] 45 C.F.R. § 92.2(b)(2).
[8] *Franciscan Alliance v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).
[9] *Texas v. U.S.*, 340 F. Supp. 3d 579 (N.D. Tex. Dec. 14, 2018), *appeal docketed,* Texas v. U.S., No. 19-10011 (5th Cir.).
[10] Order Granting Motion to Set Briefing Schedule, *Franciscan Alliance, Inc. v. Azar*, No. 7:16-cv-00108-O (N.D. Tex. Dec. 17, 2018), ECF No. 126.
[11] Defendants' Memorandum In Response to Plaintiffs' Motion for Summary Judgment, *Franciscan Alliance, Inc. v. Azar*, No. 7:16-cv (N.D. Tex. Apr. 5, 2019), ECF No. 154.
[12] *Prescott v. Rady Children's Hosp.*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017), *Flack v. Wisconsin Dept. of Health Srvs.*, 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018), *Boyden v. Conlin*, No. 17-cv264-WMC, 2018 (W.D. Wis. September 18, 2018), *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018).
[13] 84 Fed. Reg. 27849.
[14] 45 C.F.R. § 92.2(a). Section 1557 also applies to federal health programs outside of HHS, such as the Office of Personnel Management for federal employees, the Veterans Administration.
[15] Proposed as 45 C.F.R. § 92.3(a)(2). See 84 Fed. Reg. 27860 – 27862.
[16] 45 C.F.R. § 92.4.
[17] Proposed as 45 C.F.R. § 92.3(c). *See* 84 Fed. Reg. 27862 – 27863.
[18] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Ctr. for American Progress, (Jan. 18, 2018), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/?link_id=2&can_id=d90c309ac9b5a0fa50d294d0b1cdf0b2&source=email-rx-for-discrimination&email_referrer=&email_subject=rx-for-discrimination.
[19] Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 5 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.
[20] 45 C.F.R. § 92.4.
[21] 45 C.F.R. §§ 92.206, 92.207(b)(3)-(5). See, *e.g.*, Rebekah Rollston, MD, MPH, PROMOTING CERVICAL CANCER SCREENING AMONG FEMALE-TO-MALE TRANSMASCULINE PATIENTS, The Fenway Institute (May 22, 2019), https://fenwayhealth.org/wp-content/uploads/TFIP-28_TransMenCervicalCancerScreeningBrief_web.pdf.
[22] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Ctr. for American Progress, (Jan. 18, 2018), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/?link_id=2&can_id=d90c309ac9b5a0fa50d294d0b1cdf0b2&source=email-rx-for-discrimination&email_referrer=&email_subject=rx-for-discrimination.
[23] Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV,* 5 (2010), .http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

[24] *Healthy People 2020, Lesbian, Gay, Bisexual, and Transgender Health*, U.S. Dept. Health & Human Serv., https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health.
[25]45 C.F.R. § 92.4.
[26] *Id*.
[27] Proposal to amend 45 C.F.R. §§ 147.104(e), 155.120(c)(ii), 155.220(j)(2), 156.200(e), 156.1230(b)(3); 42 C.F.R. §§ 438.3(d)(4) 438.206(c)(2), 438.262; 42 C.F.R. §§ 460.98(b)(3), 460.112(a). Note, the EHB nondiscrimination requirements at 45 C.F.R. § 156.125(b) cross reference 45 C.F.R. § 156.200(e).
[28] American Community Survey, 2017; Table S1603, Characteristics of People by Language Spoken at Home, American Community Survey 1-Year Estimates, available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1603&prodType=table; Table S1601, Language Spoken at Home, American Community Survey, 1-Year Estimates, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1601&prodType=table.
[29] The Leadership Conference on Civil & Human Rights, *Comments in Response to Proposed Religious Refusal Rule*, (Mar. 2018), https://civilrights.org/resource/comments-response-proposed-hhs-religious-refusal-rule/#_edn35.
[30] 45 C.F.R. §§ 92.201–92.204, 45 C.F.R. Appendix B_to_part_92 - Sample Tagline Informing Individuals With Limited English Proficiency of Language Assistance Services; *See also*, Jane Perkins, *et. al*., NAT'L. HEALTH LAW PROGRAM, *Highlights of the Section 1557 Final Rule* (May 16, 2016), https://healthlaw.org/resource/issue-brief-highlights-of-the-section-1557-final-rule/.
[31] Taglines are short 1-2 sentence descriptions in a non-English language that inform an individual with LEP how to access language services. After finalizing the current regulations, OCR provided model taglines translated in multiple languages.
[32] See proposed 45 C.F.R. § 92.102.
[33] *Id*.
[34] 45 C.F.R. § 92.8.
[35] 84 Fed. Reg. 27883.
[36] National Health Law Program & The AIDS Institute, *Re: Discriminatory Pharmacy Benefits Design in Select Qualified Health Plans Offered in Florida, Administrative Complaint filed with the HHS Office for Civil Rights* (May 28, 2014), https://healthlaw.org/resource/nhelp-and-the-aids-institute-complaint-to-hhs-re-hiv-aids-discrimination-by-fl/.
[37] Douglas B. Jacobs, ScB, and Benjamin D. Sommers, MD, PhD, *Using Drugs to Discriminate — Adverse Selection in the Insurance Marketplace*, N ENGL J MED 2015; 372:399-402 (Jan. 29, 2015).
[38] PhRMA, Coverage Without Access: An Analysis of Exchange Plan Benefits for Certain Medicines, http://www.phrma.org/affordable-care-act/coverage-without-access-an-analysis-of-exchange-plan-benefits-for-certain-medicines#sthash.o0bB3Xh0.pdf.
[39] 45 C.F.R. § 92.207(b)(2).
[40] U.S. Dep't of Health & Human Servs.,*Nondiscrimination on the Basis of Race, Color, National Origin, Sex, Age, or Disability in Health Programs or Activities Receiving Federal Financial Assistance and Health Programs or Activities Administered by the Department of Health and Human Services or Entities Established under Title I of the Patient Protection and Affordable Care Act*, 81 Fed. Reg. 31376, at 31434, n. 258 (May 18, 2016). See, *e.g.*, U.S. Dep't of Health & Human Servs., *Notice of Benefit and Payment Parameters for 2016 Final Rule*, 80 Fed. Reg. 10750 (Feb. 27, 2015); Ctrs. Medicare & Medicaid Servs., *Final 2016 Letter to Issuers in the Federally-Facilitated Marketplace*, 37-38 (Feb. 20, 2015).
[41] 42 U.S.C. § 18031(c)(1)(A); 45 C.F.R. § 156.225(b).
[42] Sarah Lueck, Ctr. on Budget & Policy Priorities, *If Essential Health Benefit Standards Are Repealed, Health Plans Would Cover Little*, (Mar. 23, 2017), https://www.cbpp.org/blog/if-essential-health-benefits-standards-are-repealed-health-plans-would-cover-little.
[43] See 45 C.F.R. § 86.40(b) (prohibiting discrimination on the basis of "pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom").
[44] 45 C.F.R. § 92.2(b)(2).
[45] Proposed as 45 C.F.R. § 92.6(b).
[46] 45 C.F.R. § 88.
[47] 42 U.S.C. § 18116; 45 C.F.R. § 92.302(d).

[48] See, *e.g.*, *Audia v. Briar Place, Ltd.*, No. 17 CV 6618, 2018 WL 1920082, at *3 (N.D. Ill. Apr. 24, 2018); *Briscoe v. Health Care Serv. Corp.*, 281 F.Supp.3d 725, 737 (N.D. Ill. 2017); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. CV 17-4803, 2017 WL 4791185, at *5 (E.D. La. Oct. 24, 2017); *Se. Pennsylvania Transp. Auth. v. Gilead Scis., Inc.*, 102 F.Supp.3d 688, 698 (E.D. Pa. 2015); *Callum v. CVS Health Corp.*, 137 F.Supp.3d 817, 848 (D.S.C. 2015); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *7 n.3 (D. Minn. Mar. 16, 2015).
[49] *Flack v. Wis. Dept. of Health Servs.*, 328 F. Supp. 3d 931, 938 (W.D. Wis. 2018).
[50] *Id.*
[51] *Id.* at 938-39.
[52] *Id.*
[53] *Flack v. Wis. Dept of Health Servs.*, 328 F. Supp. 3d 931, 938-39, 941 (W.D. Wis. 2018).
[54] Decl. of Sara Ann Makenzie, ¶ ¶ 20, 33, Dkt. No. 23, *Flack v. Wis. Dep't of Health Servs.*, No. 18-cv-309-wmc.
[55] *Flack v. Wis. Dep't of Health Servs.*, No. 18-cv-309-wmc, 2019 U.S. Dist. LEXIS 68824 *2 (W.D. Wis. Apr. 23, 2019)
[56] *Id.*
[57] Decl. of Marie C. Kelly, ¶ ¶ 14-17, Dkt. No. 93, *Flack v. Wis. Dep't of Health Servs.*, No. 18-cv-309-wmc.
[58] *Flack v. Wis. Dep't of Health Servs.*, No. 18-cv-309-wmc, 2019 U.S. Dist. LEXIS 68824 *3 (W.D. Wis. Apr. 23, 2019)
[59] *Id.* at *5.
[60] *Id.* at *4.
[61] *Id.* at *5.
[62] *Id.*
[63] *Flack v. Wis. Dept of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018); *Flack v. Wis. Dep't of Health Servs.*, No. 18-cv-309-wmc, 2019 U.S. Dist. LEXIS 68824 *3 (W.D. Wis. Apr. 23, 2019).
[64] *Id.*
[65] Nat'l Health Law Program, Federal Court Blocks Wisconsin Regulation Banning Coverage of Health Care Services for Transgender Medicaid Beneficiaries (July 26, 2018) https://healthlaw.org/news/federal-court-blocks-wisconsin-regulation-banning-coverage-of-health-care-services-for-transgender-medicaid-beneficiaries/.
[66] *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017).