



Questions and Answers on the 2022 Proposed Rule Addressing Nondiscrimination Protections under the ACA's Section 1557

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In courts and through regulatory action, the Biden-Harris administration is vigorously working to address health equity. This includes strengthening the Affordable Care Act's (ACA) nondiscrimination requirements. On August 4, 2022, the administration released a proposed rule that would reinstate key provisions of the ACA's nondiscrimination requirements repealed by the prior administration. The proposed rule, issued by the Department of Health and Human Services' (HHS) Office for Civil Rights (OCR), also includes new provisions responding to recent legal and policy developments.

This issue brief provides background on § 1557, the Biden-Harris administration's 2022 Notice of Proposed Rulemaking (2022 Proposed Rule), and what you can do to support these important legal protections. For the purposes of this issue brief, we refer to three different § 1557 regulations: [2016 Final Regulations](#)¹ (issued by the Obama Administration), [2020 Final Regulations](#)² (issued by the Trump Administration), and the [2022 Proposed Rule](#)³ (issued by the Biden Administration). The issue brief is divided into four sections:

- [Background](#)
- [Proposed revisions to § 1557 regulations—Specific Applications to Protected Groups](#)
- [Proposed revisions to § 1557 regulations—Other Provisions](#)
- [How to Get Involved or File a Complaint](#)

Background

This section includes the following questions and answers:

- [What is § 1557?](#)
- [Does § 1557 address intersectional discrimination?](#)
- [What kinds of programs and providers must comply with § 1557?](#)
- [What is the scope of the 2022 Proposed Rule?](#)
- [Why is the administration revising the regulations for § 1557?](#)

- [Does the 2022 Proposed Rule expand the applicability of § 1557?](#)

Q 1. What is § 1557?

- A. Section 1557 is the nondiscrimination provision of the ACA.⁴ It prohibits discrimination in: health programs and activities receiving federal financial assistance; health programs and activities administered by the executive branch; and 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 limited English proficiency and primary language), sex (including pregnancy or related conditions; sexual orientation; gender identity; sex stereotypes; and sex characteristics, including intersex traits), age, and disability by referring to pre-existing federal civil rights laws.⁵ It is the first federal law to ban sex discrimination in health care.

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 initially develop regulations for § 1557, including a Request for Information, proposed rule, and final rule (2016 Final Regulations).⁶ The Trump Administration then proposed changes to the 2016 Final Regulations, which it finalized in 2020 (2020 Final Regulations).⁷ Now, through its 2022 Proposed Rule, the Biden-Harris administration is proposing changes to the 2020 Final Regulations.

Q 2. Does § 1557 address intersectional discrimination?

- A. Section 1557 is intended to protect individuals from discrimination in health care on the basis of all the protected categories—race, color, national origin, sex, age, and disability. Additionally, § 1557 recognizes that people often experience discrimination based on more than one protected category, a fact unaddressed by previous civil rights laws which each focused on only selected groups (e.g. Title VI protected individuals from discrimination on the basis of race, color and national origin while Section 504 protected individuals from discrimination on the basis of disability). Prior to § 1557, the challenge for individuals facing multiple forms of discrimination was that each civil rights law has unique requirements and sometimes differing legal standards to prove discrimination. For example, if an Latinx woman with a disability experienced discrimination when seeking health care, it may be impossible to separate out only one of these identities (i.e., race, disability, and sex) as the basis of discrimination, but she might have had to file separate complaints or meet different standards to prove discrimination on each identity. Under § 1557, she has the same rights for her intersecting identities.

The majority of federal courts have correctly recognized that discrimination on the basis of a combination or the interrelationship of multiple protected characteristics is actionable under federal nondiscrimination laws. These courts recognize that “where two bases of discrimination exist, the two grounds cannot be neatly reduced to distinct components” because they often “do not exist in isolation.”⁸ For example, “African American women are subjected to unique stereotypes that neither African American men nor white women must endure.”⁹

Q 3. 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 run by the federal government, including Medicare and the federal marketplace (healthcare.gov); and entities created under Title I of the ACA. While § 1557 applies across the entire federal government, the 2022 Proposed Rule only addresses health programs and activities within the Department of Health and Human Services.

Entities subject to § 1557 (“covered entities”) include virtually all healthcare providers—hospitals, clinics, and health care provider’s offices; and issuers selling health insurance plans within and outside of the ACA Marketplaces.¹⁰ If an entity is principally engaged in providing or administering health services or health insurance coverage, the proposed regulations state that all of its activities are covered by § 1557 if any part receives federal financial assistance.¹¹

The 2022 Proposed Rule restores regulations that recognize § 1557’s applicability to federal health programs like Medicaid and Medicare, the ACA’s state and federal Marketplaces and the plans sold through them, as well as other commercial health plans if the insurer receives any form of federal financial assistance.¹² The Proposed Rule further clarifies that § 1557 applies to [short term, limited duration plans](#) and excepted benefits if the issuer receives federal financial assistance.¹³ These plans are exempt from ACA coverage requirements such as [Essential Health Benefits](#), but are subject to § 1557.

Under the law (and underscored in the 2016 Final Regulations and 2022 Proposed Rule), when an entity is principally engaged in providing or administering health services, all of its activities are covered by § 1557 if any part receives federal financial assistance. This means, for example, that if a hospital system receives federal funding to transition to electronic medical records, then the entire hospital operations, including outpatient clinics, surgical units, and labs, must comply with § 1557. The 2020 Final Regulations sought to exempt most health insurance plans and federal health programs from § 1557, despite plain language of the law that says it applies to “any health program or activity, any part of

which receives federal financial assistance,” as well as health programs “administered by an executive agency.”¹⁴

Q 4. What is the scope of the 2022 Proposed Rule?

A. Section 1557 is critical both in the scope of discrimination prohibited as well as its recognition of intersectional discrimination.

In the 2022 Proposed Rule, the administration seeks to:

- apply nondiscrimination protections to a broad array of health care programs and entities;
- require notices that inform individuals of their rights and require training of staff who interact with the public and those who determine the entity’s § 1557 policies and procedures;
- ensure protection against discrimination based on gender identity, sexual orientation, sex stereotypes, and sex characteristics (including intersex traits);
- protect access to sexual and reproductive health care and in particular, abortion;
- ensure that persons with Limited English Proficiency (LEP) and people with disabilities can access health care services with the communication or other assistance they may need to do so;
- reinstate protections against discriminatory health plan benefit design and prohibit discrimination in telehealth, algorithms, and on the basis of association; and
- prohibit discrimination by religiously affiliated hospitals, providers, and health plans while recognizing individual providers who have a religious or conscience objection can, in limited circumstances, be exempt from providing certain health care services.

The Proposed Rule also changes agency policy and would apply § 1557 to Medicare Part B, determining that payments made under Part B do constitute “federal financial assistance”. When Medicare was first enacted in 1965, the federal government made payments directly to Medicare Part A providers (e.g. hospitals) but did not directly pay Medicare Part B providers (e.g. outpatient providers), instead sending payments to enrollees who then paid the Part B providers. Thus, HHS initially concluded that Part B providers did not receive federal financial assistance because the payments went to the enrollee and often did not cover the full amount billed by the provider. HHS also excluded these payments by defining them as “contracts of insurance” which were exempt from prior civil rights statutes. Despite the specific inclusion of “contracts of insurance” in the § 1557’s statutory text and changes in the operation of Medicare whereby the federal government now directly pays Part B providers, HHS did not initially apply § 1557 to Part B providers. The Proposed Rule recognizes that both the statutory text of § 1557 as well as the change

in how Medicare Part B providers are paid should result in § 1557 applying to Medicare Part B providers. It further applies prior civil rights statutes to Medicare Part B as well—Title VI and IX of the Civil Rights Act, Section 504 of the Rehabilitation Act and the Age Act.

This clarification is important for people with disabilities, as Medicare Part B provides essential coverage, including preventative care, durable medical equipment, mental health and substance disorder treatment, to many individuals under age 65 with disabilities, as well as older adults with disabilities. It also is important for individuals with limited English proficiency to ensure language access services are available for services provided solely through Medicare Part B.

Q 5. Why is the administration revising the regulations for § 1557?

- A. The administration cites a number of reasons for revising the 2020 Final Regulations. The 2022 Proposed Rule says the rulemaking will better align the regulations with the statutory text of § 1557. The changes will reflect recent developments in civil rights law, address unnecessary confusion in compliance and enforcement that arose from the 2020 Final Regulations, and better address issues of discrimination. The administration also considered civil rights issues raised during the coronavirus pandemic.¹⁵

First, after the 2020 Final Regulations were finalized, the Supreme Court decided that sex discrimination includes discrimination on the basis of sexual orientation and gender identity.¹⁶ On May 10, 2021, the Department of Health and Human Services (HHS) publicly announced, consistent with this decision, that it would interpret § 1557's prohibition on sex to include sexual orientation and gender identity (see Q&A 8).¹⁷

Second, the administration concluded that the 2020 Final Regulations caused unnecessary confusion in compliance with § 1557 by not providing clear procedural requirements. Further, the 2020 Final Regulations "significantly" pared down regulatory language related to the specific discriminatory activities prohibited and that covered entities and protected individuals need additional clarity regarding the specific discriminatory actions prohibited. Unfortunately, many individuals may face discrimination based on intersectional factors (e.g. an Asian transgender man may face both race and sex discrimination) and the 2020 Final Regulations did not address this.

Third, this administration has made a significant commitment to addressing health equity in a series of Executive Orders as well as departmental policies. Since his inauguration, President Biden has issued more than 12 directives aimed at promoting equity, including civil rights enforcement.¹⁸ The 2022 Proposed Rule supports the administration's commitments in these areas. The preamble to the Proposed Rule includes a significant discussion of the importance of health equity and the ongoing discrimination many

individuals continue to face based on race, color, national origin, sex, sexual orientation, gender identity, sex stereotypes, sex characteristics, age, and disability.¹⁹

Q 6. Does the 2022 Proposed Rule expand the applicability of § 1557?

A. Agencies such as the U.S. Department of Health and Human Services **cannot** expand the applicability of federal laws, including § 1557. Thus, the 2022 Proposed Rule helps clarify who is protected under the law and which entities are subject to its requirements, but does not expand its protections or application beyond the statutory parameters.

Proposed revisions to § 1557 regulations—Specific Applications to Protected Groups

This section includes the following questions and answers:

- [How does the 2022 Proposed Rule address discrimination on the basis of sex?](#)
- [How does the 2022 Proposed Rule affect LGBTQI+ persons?](#)
- [How does the 2022 Proposed Rule address pregnancy or related conditions, including abortions?](#)
- [How does the 2022 Proposed Rule address sex stereotypes in health care?](#)
- [How does the 2022 Proposed Rule impact people with HIV/AIDS and other serious or chronic medical conditions?](#)
- [Does the 2022 Proposed Rule include policies that allow providers to deny care on the basis of religious or moral beliefs?](#)
- [How does the 2022 Proposed Rule affect individuals with limited English proficiency \(LEP\)?](#)
- [How does the 2022 Proposed Rule affect people with disabilities?](#)

Q 7. How does the 2022 Proposed Rule address discrimination on the basis of sex?

A. Discrimination on the basis of sex and intersecting nondominant identities, such as race and disability, is pervasive in our health care system. This discrimination undermines the health of women and Lesbian, Gay, Bisexual, Transgender, Queer and Intersex plus (LGBTQI+) people. For example, in a 2014 survey of U.S. women with chronic pain, 91 percent felt the health care system discriminates against women, and 45 percent had been told that their pain was in their heads.²⁰ In 2019 a national survey of over 2,700 women, one in six reported mistreatment during childbirth.²¹ Rates were highest for Indigenous (32.8 percent), Hispanic (25 percent), and Black women (22.5 percent). A 2018 California survey found that Black, Asian, and Pacific Islander women who gave birth in hospitals reported higher rates of mistreatment such as harsh language and rough handling during their stays than white women.²²

A 2017 national study found that LGBTQ people experience discrimination in health care settings that discourage them from seeking care and that they may have trouble identifying alternative services.²³ For example, 29 percent of transgender people who had visited a doctor or health care providers' office in the last year said that their doctor or provider refused to see them based on their actual or perceived gender identity. In an earlier 2010 national survey of LGBT people and people with HIV, more than half of all respondents had experienced health care providers' refusals of needed care; refusals to touch them or use of excessive precautions; use of harsh or abusive language; blame for their health status; or physical roughness or abuse.²⁴ As the only federal civil rights law with specific protections against discrimination on the basis of sex in health programs and activities, § 1557 is vital to combatting these challenges.

The 2022 Proposed Rule reinstates a definition of discrimination on the basis of sex, which HHS previously included in its 2016 Final Regulations and then removed in 2020. HHS proposes to define sex discrimination as discrimination that includes, but is not limited to, "discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity."²⁵ The 2022 Proposed Rule also requires that covered entities provide individuals "equal access to its health programs and activities without discrimination on the basis of sex" and delineates the kinds of policies and practices that deny or limit such access.²⁶ HHS' approach shows promise for improving equity in access to coverage, care, and health care service delivery for LGBTQI+ people and women. The following questions explore specific related issues.

Q 8. How does the 2022 Proposed Rule affect LGBTQI+ persons?

- A. The 2022 Proposed rule reinstates nondiscrimination protections for LGBTQI+ individuals that were removed in the 2020 Final Regulations and expands on the protections that were enumerated in the 2016 Final Regulations. The 2022 Proposed Rule clarifies that discrimination on the basis of sex includes discrimination based on sex stereotypes, sexual orientation, gender identity, and sex characteristics including intersex traits.²⁷

The preamble to the 2022 Proposed Rule notes that LGBTQI+ people "face pervasive health disparities and barriers in accessing needed health care."²⁸ The 2022 Proposed Rule recognizes that, especially in light of the Supreme Court's 2020 decision in *Bostock*, § 1557's prohibition of discrimination on the basis of sex in health care programs and activities must extend to protect people against discrimination on the basis of sexual orientation and gender identity.²⁹

The 2022 Proposed Rule explicitly defines sex discrimination for the purposes of § 1557 to include "discrimination on the basis of sex stereotypes; sex characteristics, including

intersex traits; . . . sexual orientation; and gender identity.”³⁰ This provision is designed to provide protection from discrimination based on sex stereotypes, which are assumptions about how an individual should look, act, or present themselves that are based on their sex. Thus, for example, if a health clinic refused to provide care to a Genderqueer Butch Lesbian because her gender presentation was not stereotypically feminine, that could constitute sex discrimination.

Similarly, the 2022 Proposed Rule prohibits discrimination against Lesbian, Gay, Bisexual, and Queer people based on their sexual orientation. Thus, for example, a hospital’s policy to only place Gay men in single rooms, when it places heterosexual men in shared rooms, could constitute sex discrimination.

The 2022 Proposed Rule also protects Transgender, Non-Binary, Gender Non-Conforming, Gender Expansive, and other Gender Diverse individuals from discrimination based on gender identity. Thus, for example, if a pharmacist asked a Non-Binary person questions about their genitals before administering a vaccination, when the pharmacist did not ask those questions of cisgender people, that could constitute discrimination.

Finally, the 2022 Proposed Rule protects Intersex, Transgender, Non-Binary, Gender Non-Conforming, Gender Expansive, and other Gender Diverse individuals based on variations in sex characteristics—genitals, gonads, chromosomes, hormonal factors, or other physical sex characteristics.³¹ These protections are especially important for Intersex people who have sex characteristics that do not fit typical binary definitions of male or female bodies. Thus, for example, if a clinician refused to prescribe medically necessary hormone therapy to an Intersex person, but prescribes hormone therapy to non-Intersex patients, that refusal could constitute discrimination. The 2022 Proposed Rule also protects Transgender, Non-Binary, Gender Expansive, and Gender Diverse people from discrimination based on variations in and/or perceived sex characteristics that do not fit typical binary definitions of male or female bodies. For example, if a clinician refused to provide a prostate exam to a Transgender woman because she has breasts and a vulva, that could be discriminatory.

The 2022 Proposed Rule also has several other provisions specifically aimed at protecting LGBTQI+ people, especially TQI+ people. It explicitly requires equal access to health programs and activities without discrimination based on sex.³² These provisions provide specific protections for Intersex, Transgender, Non-Binary, Gender Non-Conforming, Gender Expansive, and other Gender Diverse individuals to access medically necessary care by implementing specific protections to ensure access to necessary gender-affirming and transition-related care, and protections to ensure access to so-called “sex specific” care (such as mammograms and prostate exams) regardless of someone’s sex assigned at birth, recorded gender, or gender identity.³³ The Proposed Rule also explicitly prohibits categorical coverage exclusions of transition-related and gender-affirming services.³⁴

In addition, the rule prohibits sex discrimination based on “marital, parental, or family status.”³⁵ This provision provides explicit protections for LGBTQI+ people in non-traditional familial and romantic relationships. For example, a hospital refusing to allow a pregnant woman’s female partner to accompany them to prenatal visits, while allowing the male partners of other pregnant women to attend prenatal visits, could constitute sex discrimination.

Q 9. How does the 2022 Proposed Rule address pregnancy or related conditions, including abortions?

A. In the preamble to the 2022 Proposed Rule, HHS recognizes that discrimination on the basis of pregnancy or related conditions is a form of sex discrimination that can have serious health consequences, such as denial of medication or treatment.³⁶ It further acknowledges the intersectionality of race, disability, and sex in shaping maternal health outcomes. HHS stresses the role of persistent bias and racism in the health care system, as well as other social determinants of health, in shaping racial inequities in maternal health outcomes.³⁷ It notes how disability and pregnancy intersect and may impact maternal mortality and morbidity.³⁸ At NHeLP, we are acutely aware of how additional forces of discrimination, such as the xenophobia experienced by immigrants of color, also compound to shape health care access and quality before, during, and after pregnancy.

In its 2016 Final Regulations, HHS defined pregnancy-related sex discrimination to include that which is “on the basis of pregnancy, false pregnancy, termination of pregnancy [i.e., abortion], or recovery therefrom, childbirth or related medical conditions[.]” Later that year, a federal district court barred HHS from implementing the regulations’ prohibition against discrimination on the basis of gender identity or abortion.³⁹ In 2021, the court prevented HHS from enforcing § 1557’s gender identity and abortion protections against the plaintiffs in the case, a group of religiously affiliated health plans and several states.⁴⁰

In the preamble to the Proposed Rule, HHS argues that while the 2020 Final Regulations eliminated the definition of discrimination on the basis of sex altogether, § 1557 continued to prohibit discrimination on any grounds prohibited under Title IX and implementing regulations, such as pregnancy, abortions, and related conditions.⁴¹ HHS also states that the court’s bar on implementation of the 2016 Federal Regulations’ protections against discrimination based on gender identity and abortion does not apply to the new rule.⁴² Thus, HHS seeks to restore implementation of these protections.

To that end, the Proposed Rule expressly includes “pregnancy and related conditions” in its new definition of discrimination on the basis of sex.⁴³ Covered entities would continue to be subject to the specific prohibitions found in Title IX regulations, which mirror the 2016 Final

Regulations' definition.⁴⁴ The Proposed Rule would prohibit a range of discrimination related to reproductive and sexual health services. For example, it may prohibit covered entities from discriminating against people who are seeking information about abortions, deciding to have abortions, or previously had abortions. It may bar discrimination based on adverse pregnancy outcomes or miscarriage management. If a pharmacy typically provides contraceptives but refuses to fill emergency contraceptives because they could prevent ovulation or block fertilization, this may also violate the 2022 Proposed Rule.⁴⁵

In addition to the approaches above, HHS seeks comment on whether it should add an additional provision specifically prohibiting discrimination based on pregnancy-related conditions as a form of sex-based discrimination. It also seeks comment on how the Supreme Court's recent decision to overturn the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization* will impact implementation of § 1557.⁴⁶

Q 10. How does the 2022 Proposed Rule address sex stereotypes in health care?

- A. The 2022 Proposed Rule restores protections against discrimination based on sex stereotypes, providing a means of protection against discrimination that is deeply endemic to our health care system.⁴⁷ Sex stereotypes are stereotypical ideas about masculinity or femininity, such as expectations about how people should represent or communicate their gender to others.⁴⁸ They also include gendered expectations about roles based on sex. Sex stereotypes can reflect the belief that gender can only be binary and individuals cannot have a gender identity other than male or female.⁴⁹

Sex stereotypes are a profound barrier to equitable health care access and service delivery for women and LGBTQI+ people (see Q&A 8 for specific implications for LGBTQI+ people). For thousands of years, sex stereotypes have driven health care providers to discriminatorily misdiagnose women with "hysteria," an umbrella explanation crafted for a wide range of physical and behavioral symptoms that only effected people with uteruses.⁵⁰ The American Psychiatric Association recognized hysteria as an official diagnosis until the 1980 Diagnostic and Statistical Manual of Mental Disorders.⁵¹ In more recent decades, health care providers have rebranded symptoms experienced by people with uteruses as "medically unexplained symptoms" and other umbrella terms.⁵²

Today, women and LGBTQI+ people, and especially people of color, are subjected to persistent sex stereotypes in health care delivery. For example, health care providers often label women, and especially Black and other women of color "chronic complainers" and telling them that their symptoms are "all in their head."⁵³ As a result, women, and especially women of color, often experience years- or decades-long delays in accurate diagnosis and treatment for serious conditions.⁵⁴ For example, average estimates of diagnostic delay for people with endometriosis range from 7–11 years.⁵⁵ Sex stereotypes also often underpin

the mistreatment of women in reproductive and sexual health care and beyond. Providers are also much more likely to prescribe women sedatives, rather than pain medication, for their symptoms than men.⁵⁶ Because providers are half as likely to prescribe Black patients with pain medication than white patients, this discriminatory practice likely disproportionately impacts and harms Black women.⁵⁷

Restoring implementation of § 1557's protections against sex stereotypes may help deter health care discrimination based on sex stereotypes and incentivize preventive measures, such as training to recognize and address implicit gender bias in health care.⁵⁸ It also offers patients a recourse to address harmful discrimination based on sex stereotypes and intersecting discrimination. These protections are crucial for women and LGBTQI+ people.

Q 11. How does the 2022 Proposed Rule impact people with HIV/AIDS and other serious or chronic medical conditions?

- A. Section 1557 prohibits health insurance companies from discriminating through marketing practices and benefit design. These protections are especially important for people with HIV and those with other serious or chronic conditions. 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 medications used in the treatment of HIV, including generics, in the highest cost sharing tiers. HHS agreed, and included provisions in the 2016 Final Regulations expressly prohibiting discriminatory plan benefit design and marketing.⁵⁹

However, the 2020 Final Regulations eliminated provisions prohibiting discriminatory plan design and marketing. In addition, the 2020 Final Regulations also sought to exempt most private health insurance plans from § 1557's nondiscrimination protections, including protections for persons with HIV. While the law still provided such protections, the rule change made it harder for persons pursuing claims of discriminatory benefit design and marketing, particularly against employer plans sold outside the ACA marketplaces.

The 2022 Proposed Rule restores regulations that expressly prohibit health insurers from marketing practices and benefit designs that discriminate.⁶⁰ This clarification will help deter insurers from discriminating through benefit design and marketing, and will support health program beneficiaries, consumers, and advocates seeking to challenge discriminatory practices by insurers.

Q 12. Does the 2022 Proposed Rule include policies that allow providers to deny care on the basis of religious or moral beliefs?

- A. Health care refusals remain a troubling reality for many populations who are already marginalized and underserved. In particular, religious refusals have a harmful impact on access to health care for LGBTQI+ people and women, including accessing sexual and reproductive health services such as abortion and gender-affirming care.⁶¹

The preamble to the 2022 Proposed Rule acknowledges that in some cases, the application of federal conscience or religious freedom laws may exempt covered entities from complying with some provisions of the rule, including its prohibition on sex discrimination.⁶² It affirms that federal health care refusal laws⁶³ could apply to covered entities, with caveats.

For example, under the Emergency Medical Treatment and Active Labor Act (EMTALA), hospital emergency departments must provide patients who have emergency medical conditions with stabilizing treatment or, if necessary, an appropriate transfer to another hospital with the capacity to provide care.⁶⁴ Pregnant patients may have emergency medical conditions such as ectopic pregnancy, miscarriage complications, or severe symptoms from preeclampsia. If abortion is the stabilizing treatment, the patient's clinician must provide that treatment. Federal health care refusal laws do not override EMTALA's protections.

In 2020, HHS amended its Title IX regulations to incorporate the Danforth Amendment (Title IX's abortion neutrality provision) and amended § 1557 regulations to specify that application could not depart from or contradict Title IX's exemptions, rights, or protections.⁶⁵ The 2022 Proposed Rule seeks to repeal the 2020 Final Regulations' application of the Danforth Amendment to § 1557.⁶⁶

Neither the 2016 nor the 2020 Final Regulations provided specific procedures for recipients to raise religious- or conscience-based concerns. While the 2022 Proposed Rule makes clear no blanket exemption from its provisions exist for religious entities, it does not provide detail about what circumstances or services that might be impacted by such exemptions. Instead, the Proposed Rule establishes procedures whereby recipients may raise concerns. An entity that wishes to assert an exemption would submit a request to OCR, which will then engage in a "fact-sensitive, case-by-case analysis" to determine whether the covered entity is entitled to an exemption from provisions of the rule; OCR's analysis will "account for any harm an exemption could have on third parties."⁶⁷

Q 13. How does the 2022 Proposed Rule affect individuals with limited English proficiency (LEP)?

- A. Over 66 million people in the U.S. speak a language other than English at home and over 26 million households are limited English proficient.⁶⁸ Language-related barriers may severely limit an individual's opportunity to access health care, assess options, express choices, and ask questions or seek assistance. As one recent example, the LEP population—in particular Spanish speakers and speakers of Asian and Pacific Island languages—are among the least likely to be vaccinated, and have suffered disproportionate rates of COVID-19 infections and deaths.⁶⁹ Further, 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.⁷⁰

The 2022 Proposed Rule requires covered entities to take reasonable steps to provide meaningful access to each individual with limited English proficiency eligible or likely to be served.⁷¹ The 2022 Proposed Rule reinstates provisions from the 2016 Final Regulations regarding definitions for language assistance services, limited English proficient individual, qualified interpreter, qualified translator, qualified bilingual/multilingual staff, and adds a definition of “machine translation”.⁷² It also restores a number of the provisions stripped by the Trump admin including: a requirement to take reasonable steps to provide meaningful access to each individual with LEP; standards for video remote interpreting; and notices to inform individuals of their rights.

The 2022 Proposed Rule adds a requirement that 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 an individual with LEP;
- when accuracy is essential; or
- when the source documents or materials contain complex, non-literal or technical language.⁷³

The Proposed Rule also reinstates requirements to notify individuals with LEP of the availability of language services. The 2016 Final Regulations included requirements for “taglines” on significant documents. The Proposed Rule reinstated notification requirements albeit with a new name and some changed parameters. First, the name is now “notice of availability of language assistance services and auxiliary aids and services” to cover notice to both people with LEP or disabilities. The notice must be provided in English and the top 15 languages in the state. Instead of having the taglines required on all “significant” documents as the 2016 Final Regulations required, this notice must be provided annually, upon request, at a conspicuous location on the entity's website, and in a clear and

prominent physical location. The notice must further appear in certain electronic and written communications including:

- notice of nondiscrimination;
- notice of privacy practices;
- application and intake forms;
- 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;
- communication related to a public health emergency;
- consent forms and certain instructions;
- discharge papers;
- complaint forms; and
- patient and member handbooks.

The 2022 Proposed Rule offers an “opt-out” provision if individuals want to opt out of receiving this notice, with details about how the opt-out would work including documentation of the opt-out and the individual's language and provides the notice and all materials and communications in the individual's primary language.⁷⁴

Additionally, as discussed in Q. 4, the 2022 Proposed Rule applies § 1557 and Title VI of the Civil Rights Act to Medicare Part B providers. This provision is important to ensure language services are available to individuals with LEP in all health care settings.

Q 14. How does the 2022 Proposed Rule affect people with disabilities?

A. Prior to the ACA and §1557, disability discrimination in health insurance was simply “business as usual.”⁷⁵ The ACA, including § 1557, sought to end discriminatory practices such as screening out individuals preexisting conditions, limiting access to behavioral health services, and using discriminatory benefit designs to exclude people with disabilities from coverage or forcing them to pay much higher health care costs.⁷⁶ Section 1557 also protects against disability discrimination in health care more broadly than just insurance, ensuring that a wide array of health care entities provide non-discriminatory coverage and care.

The Proposed Rule promotes equal access to health care by addressing effective communication, physical accessibility, benefit design, treatment of companions to people with disabilities and companions with disabilities, the right to receive services in integrated, community settings, and the use of clinical algorithms resulting in biased decisions.⁷⁷

The proposed rule includes three clarifications of particular significance to people with disabilities. First, the proposed rule establishes clear standards for § 1557 procedures, including standards for requesting effective communication and reasonable modifications, and how people can file a complaint about discrimination.⁷⁸ Second, the Proposed Rule recognizes that § 1557, like other disability nondiscrimination provisions, obligates covered entities to provide services in the most integrated setting appropriate to the needs of individuals with disabilities.⁷⁹ And last, the Proposed Rule addresses the role of technology in providing equitable care, and includes protections regarding access in telehealth services and health related information and community technology, including mobile apps.⁸⁰ While the Proposed Rule should be strengthened to ensure it provides sufficient, qualified communication access and access to technology, and to ensure it prevents discrimination through the use of algorithms, the proposed rule includes important protections for people with disabilities.

Additionally, as discussed in Q 4, the 2022 Proposed Rule applies § 1557 and Section 504 of the Rehabilitation Act to Medicare Part B providers who were previously exempt from compliance.

Proposed revisions to § 1557 regulations—Other Provisions

This section includes the following questions and answers:

- [How does the 2022 Proposed Rule affect requirements to inform individuals of their rights?](#)
- [How does the 2022 Proposed Rule affect compliance and enforcement of § 1557's protections?](#)
- [What are some of the other notable changes in the 2022 Proposed Rule?](#)

Q 15. How does the 2022 Proposed Rule affect requirements to inform individuals of their rights?

A. Civil rights protections can seem meaningless when people do not know what their rights are and how to enforce compliance. The 2016 Final Regulations understood this by requiring covered entities to post public notices so that beneficiaries, enrollees, applicants, or members of the public could know they have the right to receive health care services without discrimination. Covered entities like hospitals and health plans were also required to provide information on grievance procedures and how to file complaints with appropriate regulators, such as OCR.

The 2020 Final Regulations eliminated notice requirements, even though, as 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.”⁸¹

The 2022 Proposed Rule reestablishes notice requirements so health program beneficiaries and consumers can be made aware of their rights under § 1557, as well as how to file complaints.⁸² The Proposed Rule requires covered entities with 15 or more employees to designate a § 1557 coordinator, establish grievance procedures, and document compliance.⁸³ The rule further requires covered entities to provide training on the civil rights policies and procedures required under the law.⁸⁴ And a separate “notice of availability” must additionally outline how to specifically access language assistance services and auxiliary aids and services.⁸⁵

Covered entities with fifteen or more employees must designate a § 1557 coordinator and establish grievance procedures, to address all the types of discrimination covered by the Proposed Rule.⁸⁶

Q 16. How does the 2022 Proposed Rule affect compliance and enforcement of § 1557’s protections?

- A. The 2022 Proposed Rule establishes procedures for administrative enforcement actions. HHS proposes different procedures for enforcement actions that depend upon the nature of the complaint and how the entity is subject to § 1557. Age-related complaints must follow the procedures provided for under the Age Discrimination Act.⁸⁷ Recipients of federal financial assistance and state-based Marketplaces must follow procedures for Title VI,⁸⁸ while administrative enforcement in federal programs will follow § 504.⁸⁹ HHS OCR continues to serve as the primary investigatory and enforcement entity for § 1557.

These changes will help covered entities comply with their legal obligations under § 1557, and will also help make health program beneficiaries and consumers more aware of their rights and how to challenge unlawful discrimination.

Q 17. What are some of the other notable changes in the 2022 Proposed Rule?

- A. The 2022 Proposed Rule makes other notable additions to regulations implementing § 1557, including those described below.

Algorithms. Algorithms and other types of automated decision-making systems (ADS) play an ever-increasing role in health care eligibility and coverage determinations. However, such systems are imperfect, and can lead to discriminatory determinations and may even embed discrimination.⁹⁰ The 2022 Proposed Rule explains that discrimination through the

use of algorithms is already unlawful under § 1557.⁹¹ And it introduces a stand-alone regulation expressly prohibiting discrimination through decisions based on clinical algorithms.⁹² The new provision puts covered entities on notice that while they are not liable for discrimination in algorithms they use, they will be held accountable for discriminatory decisions they make based on such clinical algorithms.

Telehealth. Telehealth services have greatly expanded due to the COVID-19 pandemic. The 2022 Proposed Rule recognizes that the use of telehealth has increased access to specialists, and for some services, has improved the patient experience. For example, the increased use of telehealth has allowed transgender individuals to access gender affirming care without geographical constraints or fear of stigma and discrimination.⁹³ However, increased reliance on telehealth may exacerbate health disparities. Low-income communities may not have access to broad band services. Furthermore, people with limited English proficiency (LEP) and persons with disabilities may not be able to access or effectively use telehealth services.⁹⁴

Accordingly, the 2022 Proposed Rule adds a new regulation which expressly prohibits discrimination in telehealth.⁹⁵ Again, while discrimination in telehealth services already unlawful under § 1557, the new regulation makes clear that health program beneficiaries and consumers are protected under the law.

Basis of Association. The rule reinstates a provision from the 2016 Final Regulation that prohibits discrimination on the basis of association with an individual with whom the individual receiving services is known to have a relationship.⁹⁶ For example, a therapist refusing to make an appointment for a child because their parents are a Queer Non-Binary couple, or an OB-GYN refusing to provide prenatal care to a pregnant ciswoman because her doula is Transgender could constitute discrimination under the Proposed Rule.

Data Collection. The preamble to the 2022 Proposed Rule discusses the importance of collecting demographic data. HHS considered requiring collection of race, ethnicity, language, sex, gender, gender identity, sexual orientation, disability and age data. While HHS did not include a specific provision in the 2022 Proposed Rule, it does seek comment on data collection to inform both a final rule and OCR's overall civil rights work.⁹⁷

Training. A new provision explicitly requires entities to train relevant employees on the civil rights policies and procedures outlined in the "policies and procedures" provision of the proposed rule. This includes general requirements, nondiscrimination policies, grievance procedures, language access procedures, effective communication procedures, and reasonable modification procedures. This 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.⁹⁸ Relevant employees include those who directly encounter or interact with individuals such as patients, clients, and members of the public; and those who make decisions regarding the services individuals seek from a covered entity's health programs and activities.⁹⁹

Provisions applicable to other programs. The 2022 Proposed Rule restores provisions deleted in the 2020 Final Regulations that protected individuals from sex discrimination in other HHS programs including marketplaces, Medicaid, CHIP (the Children's Health Insurance Program), and PACE (Program of All-Inclusive Care for the Elderly). These provisions would clarify that discrimination on the basis of sex includes discrimination on the basis of sexual orientation and gender identity.¹⁰⁰

How to Get Involved or File a Complaint

Q 18. What action can you take to support § 1557 and the 2022 Proposed Rule?

A. Before a federal agency can finalize proposed regulations, it must solicit and consider public comments. This is required by federal law. Public comments provide an important opportunity for everyone's voice to be heard and have an impact on the administration's policies. 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 providing their personal experience, organizational knowledge and response to the Proposed Rule. For more on the public comment process, see NHeLP's [Do my comments really matter? Demystifying the Public Comment Process](#).

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. NHeLP's "[Why My Care Counts](#)" website will host a number of comment portals that will be open in the coming weeks.

Organizations—The National Health Law Program (as well as other organizations) will provide template comments that your group can use. These should be available in early September. It is also important that organizations tailor their comments by including their specific expertise or experiences and those of their members, affiliates, patients, and clients.

Q 19. What can people do if they have experienced discrimination in a health care setting or by an insurer?

- A. If an individual experiences discrimination by a provider, by an insurance company, or any entity covered by the § 1557 regulations, the individual can file a complaint with the [Office for Civil Rights at HHS](#). Individuals may also be able to file complaints with a state Insurance Commissioner, Medicaid agency, state or federal marketplace, Health Ombuds or other state entity (depending on state law and policies). Individuals may also go to court to stop ongoing acts of discrimination. Please contact an attorney, such as a local legal services provider or a state bar association, for help.

ENDNOTES

¹ U.S. Dep't of Health & Human Servs., *Nondiscrimination in Health Programs and Activities, Final Rule*, 45 C.F.R. Part 92, 81 Fed. Reg. 31376 (May 18, 2016), hereinafter "2016 Final Regulations".

² U.S. Dep't of Health & Human Servs., *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37160 (June 19, 2020), hereinafter "2020 Final Regulations."

³ U.S. Dep't of Health & Human Servs., *Nondiscrimination in Health Programs and Activities*, 87 Fed. Reg. 47824 (Aug. 4, 2022), hereinafter "2022 Proposed Rule" or "Proposed Rule".

⁴ 42 U.S.C. § 18116.

⁵ 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.).

⁶ 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).

⁷ See 2020 Final Regulations, *supra* note 2.

⁸ *Shazor v. Prof'l Transit Mgmt.*, 744 F.3d 948, 957-58 (6th Cir. 2014).

⁹ *Id.*; see also, e.g., *Harris v. Maricopa County Superior Court*, 631 F.3d 963, 976 (9th Cir. 2011); *Jefferies v. Harris Co. Community Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980); *Lam v. University of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994); *Jeffers v. Thompson*, 264 F. Supp. 3d 314, 326 (D. Md. 2003).

¹⁰ 42 U.S.C. § 18116(a); Proposed §§ 92.2(a), 92.4.

¹¹ Proposed § 92.4 (definitions of "covered entity" and "health program or activity").

¹² See Proposed Rule §§ 92.2, 92.4, 92.207.

¹³ See 87 Fed. Reg. 47875.

¹⁴ 42 U.S.C. § 18116(a).

¹⁵ See Part II., Reasons for the Proposed Rulemaking, 87 Fed. Reg. 47829-47837.

¹⁶ *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), available at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

¹⁷ HHS, *HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity* (May 10, 2021), <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html>.

¹⁸ See, e.g., E.O. 13985, 86 FR 7009 (2021); E.O. 13988, 86 FR 7023 (2021); E.O. 13995, 86 FR 7193 (2021); Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies (2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/>; Memorandum on Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States (2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-condemning-and-combatingracism-xenophobia-and-intolerance-against-asian-americans-and-pacific-islanders-in-the-united-states/>; E.O. 14012, 86 FR 8722 (2021); E.O. 14031, 86 FR 29675 (2021); E.O. 14035, 86 FR 34593 (2021); E.O. 14041, 86 FR 50443 (2021); E.O. 14045, 86 FR 51581 (2021); and other Presidential Actions.

¹⁹ HHS, *HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity* (May 10, 2021), <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html>.

²⁰ Women in Pain Survey, NATIONAL PAIN REPORT (2014), <https://www.surveymonkey.com/results/SM-P5J5P29L/>.

²¹ Saraswathi Vedam et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, 16(77) REPRODUCTIVE HEALTH (June 11, 2019).

²² Carol Sakala et al., National Partnership for Women & Families, *Listening to Mothers in California: A Population-Based Survey of Women's Childbearing Experiences, Full Survey Report*, 64-65 (2018).

²³ Shahab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People From Accessing Health Care*, Ctr. for Am. Progress (Jan. 18, 2018).

²⁴ When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV, Lambda Legal (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

²⁵ Proposed Rule § 92.101(a)(2).

²⁶ Proposed Rule § 92.206.

²⁷ Proposed Rule § 92.101(a)(2).

²⁸ 87 Fed. Reg. at 47833.

²⁹ See *Bostock*, *supra* note 16.

³⁰ Proposed Rule § 92.101(a)(2).

³¹ 87 Fed. Reg. at 47831, n. 76.

³² Proposed Rule § 92.206.

³³ Proposed Rule §§ 92.206(b)(4), 92.207(b)(4)-(5).

³⁴ Proposed Rule § 92.207(b)(4)-(5).

³⁵ Proposed Rule § 92.208.

³⁶ 87 Fed. Reg. at 47832; see also U.S. Dep't of Health & Human Servs., *Guidance to Nation's Retail Pharmacies: Obligations Under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services* (Jul. 2022), <https://www.hhs.gov/sites/default/files/pharmacies-guidance.pdf>.

³⁷ 87 Fed. Reg. at 47832.

³⁸ *Id.* at 47837.

³⁹ *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016); *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

⁴⁰ *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361 (N.D. Tex. 2021), *amended*, No. 7:16-cv-00108-O, 2021 WL 6774686 (N.D. Tex. Oct. 1, 2021), *appeal pending*, No. 21-11174 (5th Cir. Nov. 21, 2021).

⁴¹ 87 Fed. Reg. at 47878.

⁴² *Id.* at 47879.

⁴³ Proposed Rule § 92.101(a)(2).

⁴⁴ 87 Fed. Reg. at 47878.

⁴⁵ See U.S. Dep't of Health & Human Servs., *supra* note 36, at 4.

⁴⁶ *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, slip. op. 1 (U.S. June 24, 2022).

⁴⁷ Proposed Rule § 92.101(a)(2).

⁴⁸ Candace Gibson et al., Nat'l Health Law Prog., *Questions and Answers on the Proposed Rollback of Nondiscrimination Protections Under the ACA's Section 1557* (Jun. 14, 2019), <https://healthlaw.org/resource/qa-proposed-rollback-of-nondiscrimination-protections-under-the-acas-section-1557/>.

⁴⁹ See 81 Fed. Reg. 31392.

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⁵¹ *Id.*

⁵² ANUSHAY HOSSAIN, THE PAIN GAP: HOW SEXISM AND RACISM IN HEALTHCARE KILL WOMEN 47 (2021).

⁵³ *Id.* at 46; Vidya Rao, 'You Are Not Listening To Me': Black Women on Pain And Implicit Bias in Medicine, TODAY (Jul. 2020), <https://www.today.com/health/implicit-bias-medicine-how-it-hurts-black-women-t187866>; National Pain Report, *supra* note 19.

⁵⁴ Hossain, *supra* note 52, at 46–47.

⁵⁵ Omar T. Sims, *Stigma and Endometriosis: A Brief Overview and Recommendations to Improve Psychosocial Well-Being and Diagnostic Delay*, 18(15) INT. J. ENVIRON. RES. PUB. HEALTH 8210 (2021).

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⁵⁹ See also Nondiscrimination in Formulary Design from the NAIC Consumer Representatives' 2016 report *Promoting Access to Affordable Prescription Drugs: Policy Analysis and Consumer Recommendations for State Policymakers, Consumer Advocates, and Health Care Stakeholders*, available at https://advocacy.consumerreports.org/wp-content/uploads/2016/08/Promoting-Access-to-Affordable-Prescription-Drugs_Aug-2016.pdf.

⁶⁰ Proposed Rule § 92.207.

⁶¹ See, e.g., Amy Chen & Hayley Penan, Nat'l Health Law Prog., *Health Care Refusals & How They Undermine Standards of Care Part II: The Impact of Health Care Refusals, Discrimination, and Mistreatment on LGBTQ Patients and Families* (Jun. 13, 2022), <https://healthlaw.org/health-care-refusals-how-they-undermine-standards-of-care-part-ii-the-impact-of-health-care-refusals-discrimination-and-mistreatment-on-lgbtq-patients-and-families>; Shabab Ahmed Mirza & Caitlin Rooney, Ctr. Am. Prog., *Discrimination Prevents LGBTQ People From Accessing Health Care* (2018), <https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care>.

⁶² Proposed Rule § 92.302.

⁶³ Federal healthcare refusal laws include the Weldon Amendment, Church Amendment, and Coats-Snowe Amendment.

⁶⁴ 87 Fed. Reg. at 47879. In July, HHS issued guidance stating that EMTALA also preempts state laws that prohibit abortions without an exception for the life and health of a pregnancy person, or draw the exception more narrowly than EMTALA's definition of emergency medical conditions." CMS, *Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are experiencing Pregnancy Loss* (July 2022), available at <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-0>.

⁶⁵ 20 U.S.C. § 1688 (2012) (The Danforth Amendment reads that "Nothing in this chapter shall be construed to require or prohibit any person . . . to provide or pay for any benefit or service . . . related to an abortion."); 87 Fed. Reg. at 47879; *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016); 85 Fed. Reg. at 37160.

⁶⁶ 87 Fed. Reg. at 47878-47879.

⁶⁷ 87 Fed. Reg. at 47841, 47886.

⁶⁸ American Community Survey, 2020; Table S1601, Language Spoken at Home, American Community Survey 5-Year Estimates, available at <https://data.census.gov/cedsci/table?q=S1601&tid=ACST5Y2020.S1601>; Table S1602, Limited

English Speaking Households, American Community Survey, 5-Year Estimates, <https://data.census.gov/cedsci/table?q=S1602&tid=ACST5Y2020.S1602>.

⁶⁹ A recent report in the *Honolulu Star Advertiser* documents low rates of vaccinations among Hawaiians and Asia-Pacific Islanders in Hawai'i: <https://www.staradvertiser.com/2021/06/08/hawaii-news/officials-step-up-efforts-to-expand-covid-19-vaccine-access-to-underserved-communities/>. This was also documented by Slate <https://slate.com/news-and-politics/2021/04/covid-19-vaccine-for-non-english-speakers.html> and Kaiser Health News <https://khn.org/news/article/press-1-for-english-vaccination-sign-ups-prove-daunting-for-speakers-of-other-languages/>.

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⁷² Proposed Rule § 92.4

⁷³ *Id.*

⁷⁴ Proposed Rule § 92.11(d).

⁷⁵ *See generally*, e.g. Brief for Nat'l Health Law Prog. & Disability Rights California as Amicus Curiae Supporting Respondents, *CVS Pharmacy, Inc. v. Doe*, 141 S.Ct. 2882 (2021); Valarie K. Blake, *An Opening for Civil Rights in Health Insurance After the Affordable Care Act*, 36 B.C. J.L. & Soc. Just. 235 (2016) (describing pre-ACA health insurance discrimination and how the ACA addressed those issues); Sara Rosenbaum *et al.*, *Crossing the Rubicon: The Impact of the Affordable Care Act on the Content of Insurance Coverage for Persons with Disabilities*, 25 Notre Dame J. L. Ethics & Pub. Pol'y 235 (2014) (describing ACA nondiscrimination provisions and focusing on the function of essential health benefits).

⁷⁶ 42 U.S.C. §§ 300gg–4(a)(8) (prohibiting discrimination in insurance regarding eligibility or coverage based on disability); 300gg-11 (prohibiting lifetime limits); 300gg-6 and 18022 (requiring health insurance to be “comprehensive” and including behavioral health as an “essential health benefit.”

⁷⁷ Proposed Rule §§ 92.202-205.

⁷⁸ Proposed Rule §§ 92.7-.8; 92.211; 92.202-.203.

⁷⁹ Proposed Rule § 92.207(b)(6).

⁸⁰ Proposed Rule §§ 92.204(b); 92.211.

⁸¹ 84 Fed. Reg. 27883.

⁸² Proposed Rule § 92.10.

⁸³ Proposed Rule § 92.7.

⁸⁴ Proposed Rule § 92.9.

⁸⁵ Proposed Rule § 92.11.

⁸⁶ Proposed Rule §§ 92.7-92.10.

⁸⁷ Proposed Rule § 92.303(b).

⁸⁸ Proposed Rule § 92.303(a).

⁸⁹ Proposed Rule § 92.304.

⁹⁰ *See e.g.*, NHeLP Comments to the HHS Agency for Healthcare Research and Quality, *Request for Information on the Use of Clinical Algorithms That Have the Potential To Introduce Racial/Ethnic Bias Into Healthcare Delivery* (June 10, 2021), <https://healthlaw.org/resource/nhelp-ahrq-comments/>.

⁹¹ *See* 87 Fed. Reg. 47880.

⁹² Proposed Rule § 92.210.

⁹³ *See* 87 Fed. Reg. 47884.

⁹⁴ *See* NHeLP, *Medicaid Principles on Telehealth*, (May 11, 2020), <https://healthlaw.org/resource/medicaid-principles-on-telehealth/>

⁹⁵ Proposed Rule § 92.211.

⁹⁶ Proposed Rule § 92.209.

⁹⁷ 87 Fed. Reg. 47856.

⁹⁸ Proposed Rule § 92.9.

⁹⁹ 87 Fed. Reg. 47851.

¹⁰⁰ Proposed amendments to 42 C.F.R. §§ 438.3, 440.262, 460.98, 460.112; 45 C.F.R. §§ 155.120, 155.220, 156.200, 156.1230.