

DISCRIMINATION IN FEDERALLY FUNDED HEALTH CARE PROGRAMS - PART III: HHS NEW REGULATIONS REGARDING EQUAL ACCESS FOR INDIVIDUALS WITH DISABILITY UNDER SECTION 1557 OF THE AFFORDABLE CARE ACT

This is the third article in a series discussing the Department of Health and Human Services ("HHS") Office of Civil Rights ("OCR") final rule ("Final Rule") implementing Section 1557 of the Patient Protection and Affordable Care Act ("ACA"). Failure to comply with the Final Rule can result in the loss of federal funding, and individuals who believe they experienced discrimination may sue the offender, either individually or as part of a class action.

BACKGROUND

Although the ACA has been effective and enforced since 2010, the Final Rule became effective, with an additional 90 days for some notice provisions and a longer compliance period for certain insurance-related provisions, on July 18, 2016. The Final Rule defines how the broad nondiscrimination and equal access provisions of Section 1557 apply to Covered Entities (defined below) and sets out the specific rules required to comply with Section 1557. The Final Rule protects federal health program and activity beneficiaries and participants, such as patients. Except where related to certain employer health benefit plans, OCR explains the Final Rule is not a protection against employment discrimination. For example, ACA-related whistleblower rights are not addressed in this Final Rule.

This article only discusses the disability-related provisions of the Final Rule.¹ For information on compliance with other facets of the Final Rule, such as sex discrimination and protection for participants with limited English proficiency, please see the other articles in our series [here](#) and [here](#).

APPLICATION

Relevant to this article, the Final Rule applies to the following:

1. Every health program and activity where any part of the program or activity receives federal financial assistance through HHS, including Medicaid, Medicare Parts A, C or D, meaningful use information technology and the Children's Health Insurance Program ("CHIP"); and
2. Every health program or activity administered by HHS, including Indian Health Services programs.²

If you or your organization fall within either of these categories, you are covered by the Final Rule. In this article, entities and providers to which the Final Rule applies are referred to as "Covered Entities."

"Health program and activity" includes all the operations of entities primarily involved in providing health-related services or health-related insurance coverage, including hospitals, health clinics, group health plans, health insurance issuers, physician practices, community health centers, nursing facilities, residential or community-based treatment facilities and other similar entities.

The Final Rule specifies that Section 1557 applies to the *recipient* of the federal financial assistance and that the responsibility for compliance follows the federal financial assistance. As a result, there are situations in which a hospital or clinic may be liable, whereas the individual provider who violated the law is not. Moreover, OCR specifically excludes Medicare Part B funds from the definition of "federal financial assistance." Accordingly, hospitals should consider addressing provider compliance in employment agreement provisions and medical staff bylaws.

EQUAL ACCESS FOR PERSONS WITH DISABILITIES

In the Final Rule, OCR interprets the Section 1557 provision stating an individual shall not, on the basis of grounds prohibited by Section 504 of the Rehabilitation Act of 1973 ("Section 504"), be excluded from participation in, be denied the benefits of or be subjected to discrimination by any covered entity. Section 504 prohibits discrimination on the basis of disability. The Final Rule adopts the Section 504 and ADA definition of disability. Accordingly, disability means, with respect to an individual, "a physical or mental impairment that substantially limit[s] one or more major life activities of such an individual; a record of such an impairment, or being regarded as having such

an impairment . . . " Equal access for participants living with disabilities includes the following components:

- *Effective Communications.* Under the Final Rule, Covered Entities must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with other individuals. These steps may include, for example, providing appropriate auxiliary aids and services. The Final Rule provides a comprehensive list of auxiliary aids and services for the deaf or hard of hearing, including: qualified interpreters, either on site or through video; assistive listening devices such as amplifier phones; captioning; and other types of assistive technology. For blind or low-vision individuals, the Final Rule includes a list of appropriate steps, such as qualified readers, audio versions of documents, screen reading software and Braille.

Interpreters need not be certified but must be "qualified"; that is, an interpreter must demonstrate the necessary characteristics and competencies to perform the required task. According to the Final Rule, a qualified interpreter for an individual with a disability is an interpreter who adheres to interpreter ethics principles and is able to interpret effectively, accurately and impartially, both in receiving information and expressing it, using necessary specialized vocabulary, terminology and phraseology. As noted, an interpreter need not be certified, but certification is a factor that OCR will consider when called upon to determine competency. Notably, certification alone will not qualify the interpreter; rather, the interpreter must be competent to perform the required task. For example, a certified interpreter who arrives late to appointments or has not practiced recently may not be considered "qualified" under the Final Rule.

- *Facilities - Alterations and Construction.* The Final Rule requires that Covered Entities' facilities that were altered or constructed on or after the effective date comply with the 2010 ADA standards for accessible design unless they were not previously subject to the 2010 rules. If a Covered Entity was not previously required to comply with the 2010 accessibility requirements, they have two years (i.e., until July 18, 2018) before the 2010 rules will apply to new construction or alterations.
- *Electronic and Information Technology.* Any Covered Entity services or activities furnished using electronic or other information technology must be accessible to individuals with disabilities unless doing so "would result in undue financial and administrative burdens or a fundamental alteration in the nature of the health program or activities." If the Covered Entity faces such a burden or fundamental alteration, then the Covered Entity must provide the information in an alternative format. Under this technology rule, Covered Entities should consider the accessibility of their web and other online services.
- *Equal Access to Services.* Covered Entities must provide individuals with disabilities with equally effective aid, benefits and services, such as treatment. This requirement prohibits needless segregation of persons with disabilities so that care must be provided in integrated settings "unless doing so would fundamentally alter the entities' service systems." OCR acknowledges that scientific or medical reasons can justify distinctions based on disability to ensure that individuals receive safe and high quality care.

Equal access to services can require that a Covered Entity consider appropriate steps to address many different types of disability. For example, a single individual in a wheelchair whose weight is also a disability may require a number of different accommodations, ranging from initial and subsequent communications with staff through scheduling the appointment, through the choice of exam room and method of exam. Many of these specific accommodations may require advance training and preparation of equipment and staff.

- *Policies and Procedures.* The Final Rule also requires reasonable modifications to existing "policies, practices, or procedures" where necessary to avoid disability discrimination unless the modification would fundamentally alter the nature of the health program or activity. This provision will likely require Covered Entities to conduct a full review of their policies and procedures to ensure that any revisions that might be required to comply with the Final Rule are accomplished and implemented as soon as possible.

RELATIONSHIP TO SECTION 504 AND THE ADA

For Covered Entities already following ADA and Section 504 guidance and rules, the question is whether compliance with these laws constitutes compliance with the Final Rule. According to OCR, the answer is "no." While the Final Rule explicitly states that Section 504 exceptions apply to Section 1557, OCR declined to adopt "a deeming approach whereby compliance with another set of laws or regulations automatically constitutes compliance with Section 1557." The commentary also reminds Covered Entities that other disability discrimination protections, such as those available through local and state law, may be greater than those available through Section 1557. Where such greater protections exist, they will apply. OCR does allow entities to revise existing ADA and Section 504 procedures to satisfy the Final Rule. For example, an entity can use the same person as the coordinator for Section 1557, ADA and Section 504 compliance and grievance processes. Also, an existing grievance process can be adapted to include Final Rule requirements so that Covered Entities need not maintain

separate processes for each law.

PRACTICAL TAKEAWAYS

Covered Entities are encouraged to review the Final Rule standards and ensure that their policies, practices and procedures encompass the most protective aspects of all applicable laws addressing disability-related discrimination. It is likely most efficient for Covered Entities to involve their current Section 504 or ADA coordinator, the legal team, administrators, clinical staff and medical staff representatives in a full and careful review of all requirements as the organization moves toward compliance. Finally, Covered Entities should ensure that, as with all compliance activities, their governing bodies are informed and invested in compliance with nondiscrimination laws.

Hall Render has developed a toolkit to assist Covered Entities in achieving compliance with Section 1557 and the Final Rule. For more information about the toolkit, please contact Anne Ruff at (317) 977-1450 or aruff@hallrender.com.

If you have questions about this topic or would like assistance in compliance with the new requirements under Section 1557, please contact:

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¹ Also not covered in this article is OCR's interpretation of how the disability-related protections apply to insurance plans.

² In response to comments by tribal organizations, including requests for exclusion from coverage, HHS clarified the definition of IHS programs and pointed to exceptions and defenses that may be raised by tribes. Tribal health administrators will want to read OCR's responses to comments from Tribes on pages 31380-81 of the Final Rule.