

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Section 1557

Civil Rights Protections in Health Care

What Medicare Advocates Need to Know

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JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

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FIGHTING SENIOR POVERTY THROUGH LAW

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems with getting on to the webinar? Send an e-mail to trainings@justiceinaging.org.
- Slides and a recording are available at Justice in Aging - Resources for Advocates - Webinars: <http://www.justiceinaging.org/resources-for-advocates/webinars>. See also the chat box for this web address.

Today's Discussion

Basics

Who is covered?

Timing

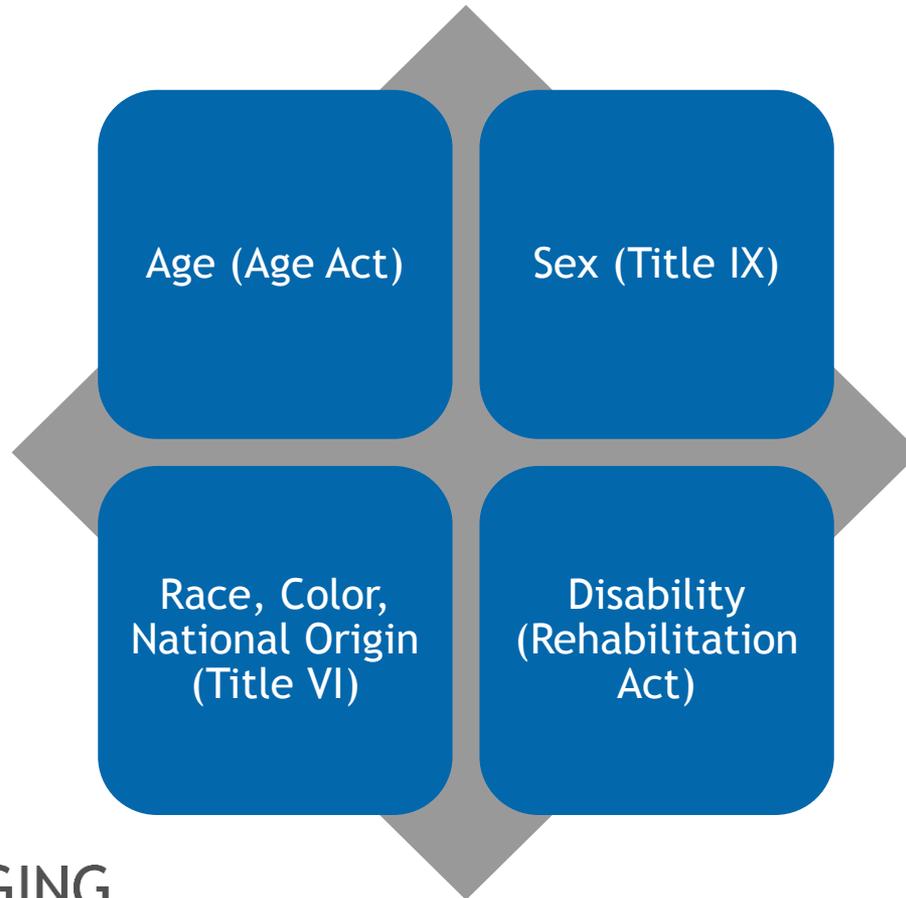
Specific
Identity
Considerations

Enforcement

Basics

- Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in federal health programs or activities.

Prohibited Bases of Discrimination



Who is covered?

- All health programs and activities, *any part of which* receives Federal financial assistance from HHS, including:
 - HHS, including the Centers for Medicare and Medicaid Services (CMS)
 - Health programs and activities administered by HHS
 - Federal marketplaces and State-based marketplaces
 - Medicare Advantage Plans, Medicare Part D plans, Medicare-Medicaid Plans
 - State Medicaid programs and managed care plans

What is Federal Financial Assistance?

- Any type of arrangement in which the Federal government provides or makes available assistance by HHS or that HHS plays a role in providing or administering, including tax credits and other subsidies under Title I of the ACA.

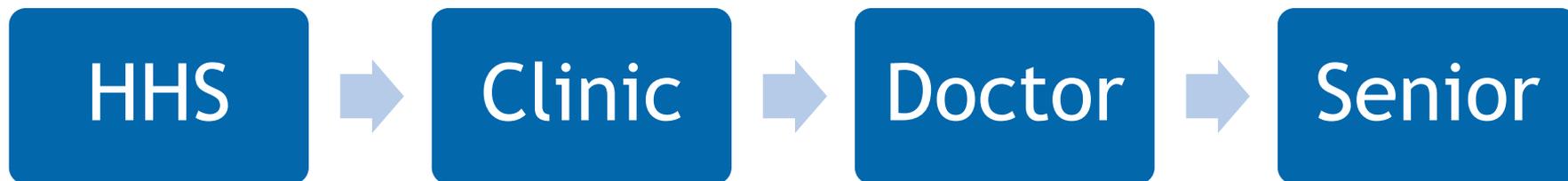
Health Program or Activity

- Provision or administration of health-related services or health-related insurance coverage and the provision of assistance in obtaining health-related services or health-related insurance coverage.
- Ongoing exclusion of Medicare Part B providers

Exclusion of Medicare Part B providers presents an advocacy opportunity!

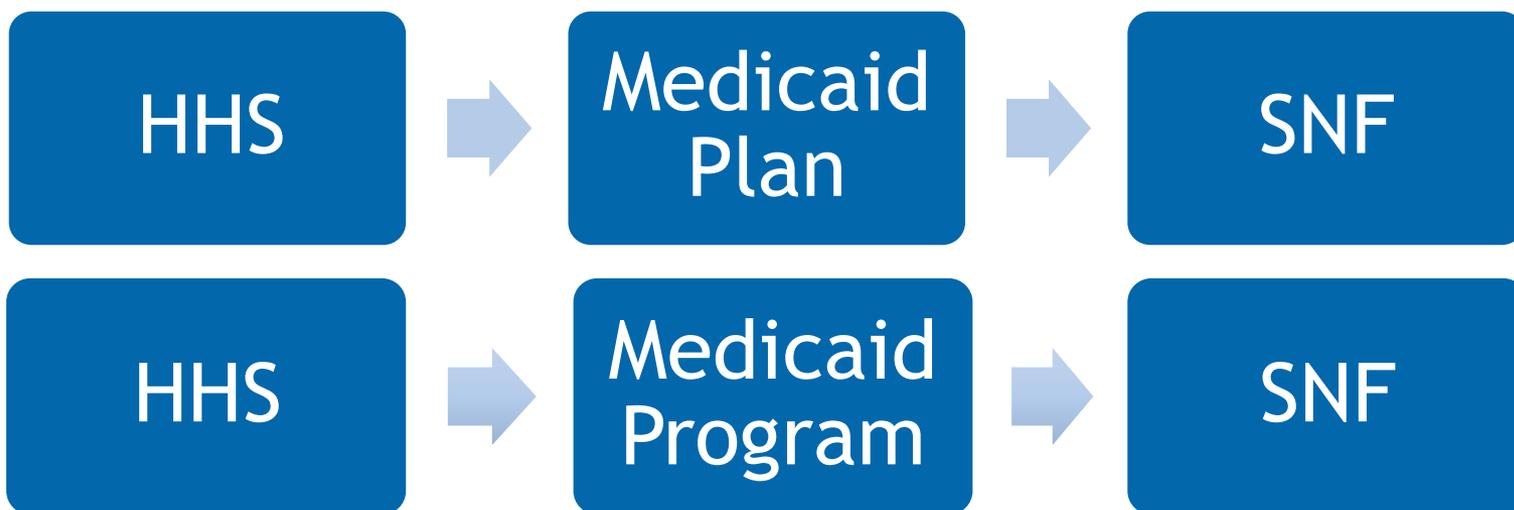
What about contractors?

- Because courts look to the entity Congress intended to assist or subsidize using FFA, contractors providing health services may not be directly liable under Sec. 1557. They may be liable through some other form of FFA (Medicare, Medicaid payments, etc.).



Contractor Implications

- Potentially complicated by managed care and delegated models
- Ultimately liability does fall with *one* entity



When?

- Effective Date for Final Regs:
- Generally **July 18, 2016**
- Provisions that require changes to health insurance and group health plan benefit design are effective January 1, 2017.

Section 1557 is already in effect!

Enforcement

- Complain to the covered entity.
- File a complaint with HHS Office of Civil Rights (OCR).
 - Corrective action plans
 - Referral to DOJ for litigation
- File a lawsuit in federal court.
 - Private right of action for claims of intentional discrimination and disparate impact discrimination available
 - Compensatory damages are available.

Specific Identity Considerations

General Themes

- OCR relies on existing definitions and case law as much as possible
- Preference for general principles rather than bright lines
- Big news is about sex discrimination and national origin discrimination
- Includes discrimination based on perceived race, color, national origin, sex, age, or disability
- Includes intersectional discrimination

Disability

- Adopts definition in the Rehabilitation Act which comes from the ADA
- Olmstead claim can be a 1557 claim
- Requires all entities to provide auxiliary aids, regardless of size.

JOHN

Needs a Hoyer lift to safely get on an examining table.

- No doctor in the network of John's Medicare Advantage plan has a lift. John cannot get a complete physical.

Age discrimination

- Little discussion
- Arbitrary age distinctions without justification prohibited
- Consistent with the Age Act

Ok to set arbitrary age cut-offs if federal law or if enacted by elected legislative group

Sex discrimination

- Bases: Pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.
- Gender identity spectrum includes gender identities that are beyond male and female.

SEXUAL ORIENTATION DISCRIMINATION IS NOT COVERED

Transgender discrimination

- Must treat individuals consistent with their gender identity
- But can't deny needed sex-specific health services because of gender identity

MARIA

A transgender woman who is dually eligible for Medicare and Medicaid.

- Staff at the Adult Day Center she attends insist on using her prior male name, refuse to use correct pronouns when talking about her, and frequently ridicule her appearance.
- Every time Maria needs a prostate exam, her Medicare Advantage plan makes her go through an appeal.

Transgender discrimination

- Can't categorically exclude or limit all health services related to gender transition
- Can't otherwise deny or limit coverage of services related to transition if denial or restriction results in discrimination against a transgender individual

PAUL

A transgender man, eligible for Medicaid only, not Medicare.

- When Paul seeks Medicaid coverage for a hysterectomy to address his diagnosed gender dysphoria, his state Medicaid program categorically refuses to provide coverage.

Sex stereotyping

- Gendered expectations re speech, dress, hair, mannerisms, body characteristics
- Includes expectations that individual will consistently identify with only one gender and act in conformance with stereotypes of that gender
- Gendered expectations related to the appropriate roles of a certain sex

Much sexual orientation discrimination can be addressed as sex stereotyping

National origin discrimination

- Uses EEOC definition: includes not only an individual's place of origin but also ancestor's place of origin and includes an individual's manifestation of the physical, cultural, or linguistic characteristics of a national origin group.
- No definitions of race or color

National origin discrimination

- Must “take reasonable steps to provide meaningful access” to each LEP individual
- Required language assistance must be:
 - Free, accurate, timely and protect privacy and independence of LEP individual

No bright lines on interpretation/translation

- Look primarily at the nature and importance of the health program or activity and the particular communication at issue, to the individual with LEP.
- Interpreter required when oral interpretation is a reasonable step to provide meaningful access for the individual with LEP
- No specific guidance on what triggers a translation requirement
- OCR will take into account whether entity has an appropriate language access plan, but a plan is not required

Factors discussed in commentary

- Length, complexity and context of communication
- Prevalence of language
- Frequency in which entity encounters language
- Whether entity has explored individual's preference
- Cost
- Resources available to entity

- When interpretation required, must use
 - Qualified bilingual or multilingual staff
 - Language proficiency incl. specialized vocabulary
 - Communicate effectively, accurately and impartially w/ individual
 - Qualified interpreter
 - All above plus interpreter ethics incl. confidentiality
 - No children except emergency
 - No adult friend/family except emergency or individual specifically requests it

Notice of non-discrimination and taglines

- Include in “significant” publications.
 - Includes patient handbooks, outreach publications, or written notices pertaining to rights or benefits or requiring response from the individual
- In conspicuous physical locations, conspicuously on websites
- Taglines in top 15 languages in state—combine if multi-state
- Short form for small publications
- HHS created translated sample notices

MEI-LEI

- A dual eligible, speaks Cantonese and very limited English
- When she picks up her Part D prescription, the pharmacist explains important precautions in English. She tells him she does not understand. The pharmacist asks another Cantonese-speaking customer who is standing in line to interpret. Mei-Lei complains to her Part D plan and they tell her that the problem is between her and the pharmacy.
- When she set up an appointment with her new cardiologist, Mei-Lei was told that she must bring her own interpreter for the visit.
- When she recently was re-assessed for Medicaid personal care hours, she received a notice reducing her hours and explaining her fair hearing appeal rights. The notice was written only in English.

1557 Advocacy

Educate your clients!

- About their right to an interpreter at their doctor appointments
- About the disadvantages of relying on family members as interpreters
- About their right to ask 1-800-Medicare or their Medicare plan or their pharmacist or Medicaid to provide an interpreter (usually by phone) to explain any documents or letters they receive, instructions about their medications, or services they receive
- About how to complain: recording dates, facts, etc.

Medicare advocacy

- Changing the Part B exclusion
- CMS translations of its own documents: Medicare & You, eligibility notices, coverage denials, etc.
- CMS guidance re: translations by Medicare Advantage plans and Part D plans
- Oversight of network adequacy for language and physical access

State Medicaid agency and plan advocacy

- Are there discriminatory categorical exclusions from state Medicaid coverage?
- What notices is your Medicaid agency or plan translating? Are alternate formats available?
- Does your Medicaid agency or plan offer prompt and accurate interpretation services to help beneficiaries understand notices and to answer questions?

Pursuing a complaint

- If your client is enrolled in a managed care plan, complain to the plan. The plan is responsible for the acts of its providers.
- File a complaint with the HHS Office of Civil Rights.
- Consider litigation in federal court (no exhaustion requirement).
- Contact Justice in Aging.

Questions?

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