

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Prohibiting Health Services Discrimination: Proposed Rule and Insight for Aging Advocates

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October 28, 2015

justiceinaging.org

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Justice in Aging is a national non-profit organization that fights senior poverty through law. We secure health and economic security for older adults of limited income and resources by preserving their access to the courts, advocating for laws that protect their rights, and training advocates around the country to serve the growing number of older Americans living in poverty.

Visit us at - justiceinaging.org

Housekeeping

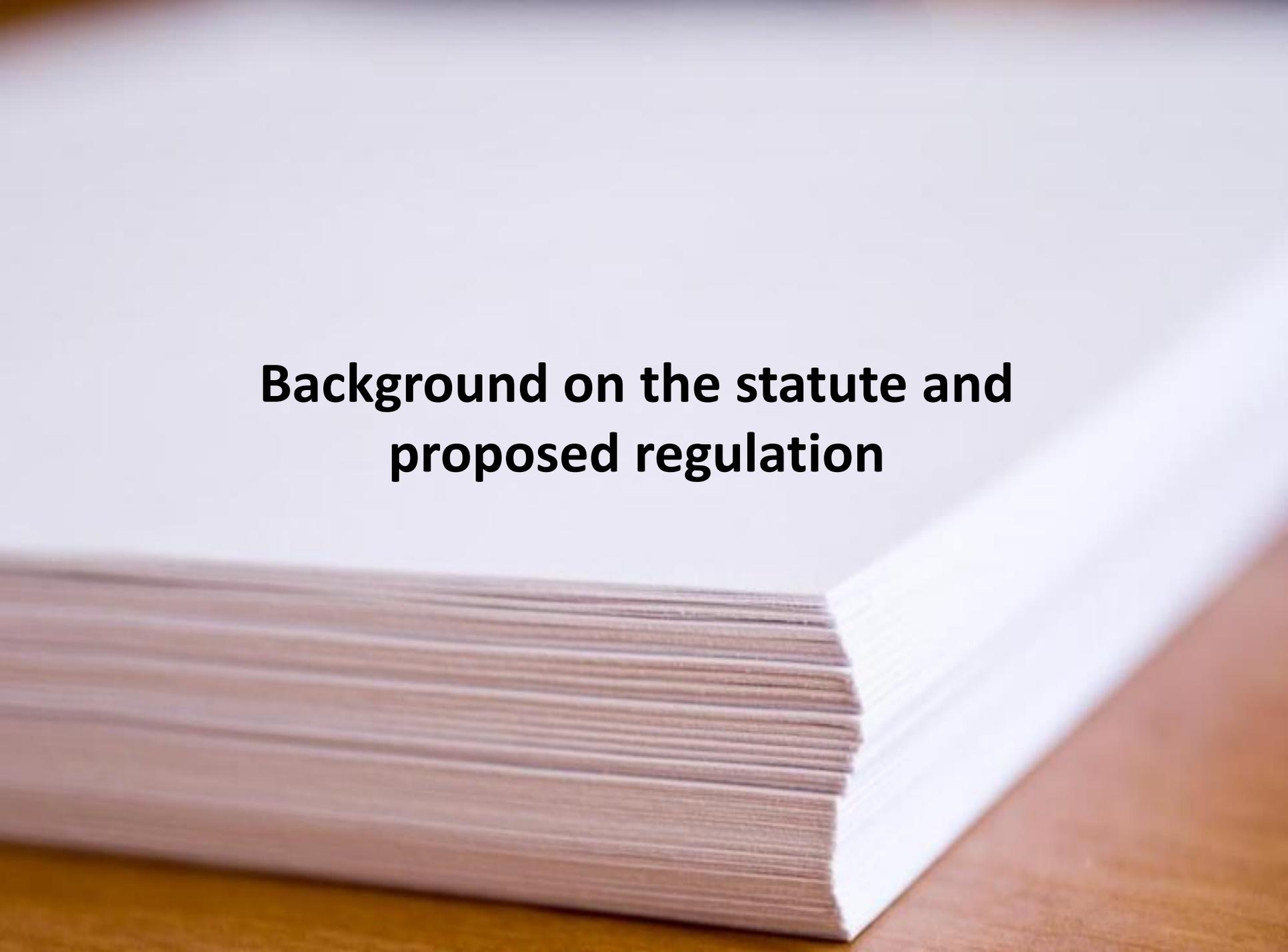
- All on mute. Use Chat function for questions and for technical concerns.
- Problems with getting on to the webinar? email trainings@nsclc.org.
- Slides are available in the chat box. Slides and a recording are available at Justice in Aging – Resources for Advocates – Webinars:
<http://www.justiceinaging.org/resources-for-advocates/webinars>.

Today

Spark interest in historic opportunity to advance health equity for older adults

- Brief background on the proposed 1557 regulation
- Overview of key comment improvements
- Support with comments

#healthequity

A close-up, low-angle shot of a stack of papers or documents. The papers are white and appear to be slightly aged or off-white. They are stacked on a wooden surface, which is visible in the bottom right corner. The background is a plain, light-colored wall. The text is centered over the stack of papers.

**Background on the statute and
proposed regulation**

Statute: Section 1557, Affordable Care Act:

Except as otherwise provided for in this title . . . , an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 . . . title IX of the Education Amendments of 1972 . . . the Age Discrimination Act of 1975 . . . , or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to **discrimination** under, any **health program** or activity, any part of which is receiving **Federal financial assistance**, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title. The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

Why are these regulations so important?

Health Care

- Sec. 1557 specifically applies protections of existing statutes to *health care*.

Connection

- Proposed regulations are the opportunity to spell out what that connection means.

Compliance

- Regulations give guidance to covered entities about compliance.

Enforcement

- Regulations establish parameters for enforcement.

What is in the proposed regulation?

Preamble

Background discussion, reasons for choices, areas where HHS is most interested in comments. Provides guidance but does not have the force of regulation.

Regulations

Broad, proposed regulatory language, covers wide range of entities and situations.

Proposed 45 CFR 92, 80 Fed. Reg. 54172: <http://www.gpo.gov/fdsys/pkg/FR-2015-09-08/pdf/2015-22043.pdf>.

What do health equity advocates want to accomplish?

- Support the many good parts of the regulations
- Strengthen the final regulations with increased specificity
- Fix some important exclusions and interpretation
- **Highlight real world issues** for HHS to help shape enforcement priorities

Who must comply with the regulations?

“Any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title.”

Who must comply with the regulations?

Aging Advocates-Take Note!

- Federal Programs: CMS must comply
- Contracts of insurance
- Medicare Part A providers
- Medicare Advantage plans
- State and county health programs, including Medicaid



Proposal: Does not include Medicare Part B Providers



Discrimination addressed in 1557

- **Sex discrimination:** First statute to explicitly cover sex discrimination in health care.
- **Race and national origin discrimination.** Includes language access.
- **Disability discrimination.**
- **Age discrimination.**

Sex Discrimination

National Origin Discrimination

Why do older adults need these regulations?

- Approximately 5 million of America's older adults are limited English proficient (LEP).
- A significant number of LEP seniors are low-income.
- LEP seniors are diverse and live throughout the U.S.

Examples of current challenges facing LEP older adults:

Dual Eligible Demonstrations

- Lack of competent outreach led to decision based on miscommunication and lack of information.

Transportation

- Lack of language capacity creates burden for beneficiary setting up preauthorization and service appointments.

Providers

- Network adequacy challenges, particularly with shift to managed care.
- Challenge across settings: specialists, pharmacists, behavioral health providers.

What does the proposed rule require?

Reasonable steps to provide meaningful access to each individual with limited English proficiency that the entity serves or encounters in its health programs and activities

How does the proposed rule define individuals who are LEP?

Individual with limited English proficiency means an individual whose primary language for communication is not English and who has a limited ability to read, write, speak, or understand English.

What does the proposed rule say about interpreters?



Qualified
Interpreter

- No minors except in an emergency situation



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- Not clear that availability of an interpreter is always required at a minimum

How does the proposed rule define “meaningful access”?

The rule proposes a multi-factor test to determine what language services must be offered in a particular circumstance. The factors in the test:

- Nature and importance of the health program or activity, including the particular communication at issue;
- The length and complexity of the communication involved;
- The context in which the communication is taking place;
- The prevalence of the language
- Available resources
- Cost

The proposed rule does not include thresholds for translating written documents



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Translation requirements *need* thresholds to truly be effective.

- Advocacy community agrees: Need thresholds.
- Need Percentage and numerical threshold.
- Data sets should reflect local population concentrations.

How can advocates make the case for thresholds?

Thresholds
are important

- Clear standards foster for compliance, facilitate enforcement, help consumers understand their rights
- Dismal history of compliance without them

Percent AND
numerical

- Percent thresholds alone lead to inequities

How can advocates make the case for thresholds?

***Tell your client stories
Examples are powerful!***

What about notices and taglines?

Non-Discrimination Notice

- On wall
- Mailed or distributed

Taglines

- When required
- What language

Enforcement

What are the current challenges to enforcement?

- General challenge with enforcing civil rights challenges.
- Need for regulations to have teeth.
- Need for clear enforcement mechanisms.

How will nondiscrimination be enforced under the proposed regulation?

Private Right of Action

- Statute creates a private right of action to enforce.
- Proposed rule allows an individual to bring an enforcement action against a covered entity in federal district court

Investigate and Monitor

- Authorizes the Office of Civil Rights to investigate and monitor compliance

What else is needed to give teeth to enforcement?

- Proposed rule amplifies statutory rights
- However, only incorporates protections from existing civil rights statutes.
- Advocates need to demonstrate problems with differing legal standards and burdens of proof.



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Need to clarify that a disparate impact claim can be brought under 1557.

A close-up, slightly blurred photograph of a stack of white papers. A blue pen is resting on the top surface of the papers, angled towards the right. The lighting is soft, creating subtle shadows and highlights on the edges of the paper.

Submitting Comments-Due November 9

Next steps

Submit Comments-Due November 9

- Justice in Aging will be sharing template comments
- Share your specific experience in your comments

Comments are due Monday, November 9 at 5:00 p.m. ET

The screenshot shows the regulations.gov website interface. At the top, the URL is www.regulations.gov/#!documentDetail;D=HHS-OCR-2015-0006-0001. The site logo 'regulations.gov' is prominent, with the tagline 'Your Voice in Federal Decision-Making'. Navigation links for Home, Help, Resources, and Contact Us are visible. A search bar contains the word 'nondiscrimination'. The main content area features a 'PR' icon and the title 'Nondiscrimination in Health Programs and Activities'. A blue 'Comment Now!' button is present, along with the text 'Due Nov 9 2015, at 11:59 PM ET'. The document ID is HHS-OCR-2015-0006-0001. A 'View original printed format' link with a PDF icon is also shown. Social media sharing options for Twitter, Facebook, and Email are available. The 'Document Information' section lists: Date Posted: Sep 8, 2015; RIN: 0945-AA02; CFR: 45 CFR Part 92; Federal Register Number: 2015-22043. A 'Show More Details' link is provided. The 'Comments' section is partially visible at the bottom.

Commenting is easy: <http://1.usa.gov/1XxtGS3>

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Protect Civil Rights NOW

HHS
OCR

- Report civil rights violations now: <http://1.usa.gov/1oANIAd>
- HHS Office of Civil Rights is taking complaints based on statute.
- OCR is not waiting for final regulations

Educate

- Educate advocates and providers about statutory protections and forthcoming regulations.

Resources

Justice in Aging:

LEP Older Adults: <http://bit.ly/1OGcE0T>

LGBT Older Adults: <http://bit.ly/1LAAWaf>

SAGE:

Discrimination: <http://bit.ly/1H8vGGE>

Office of Civil Rights, HHS:

Reporting a Complaint: <http://1.usa.gov/1oANlAd>

Background on 1557: <http://1.usa.gov/1lm6S7v>

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Thank You!

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