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Legal Sidebar

Proposed HHS Rule Addressing Section 1557 of the ACA's Incorporation of Title IX

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The Department of Health and Human Services (HHS) recently issued a Notice of Proposed Rulemaking (NPRM) implementing Section 1557 of the Affordable Care Act (ACA). Section 1557 sets out the ACA's antidiscrimination requirements applicable to certain health care-related entities. HHS previously issued Section 1557 regulations in 2016 and again in 2020, but aspects of both rules were challenged and enjoined in litigation. The U.S. Court of Appeals for the Fifth Circuit issued a ruling on August 26, 2022, upholding a district court's permanent injunction related to the 2016 rule.

While the 2022 NPRM proposes various changes, this Legal Sidebar discusses HHS's position on several legal issues that arose in this earlier litigation and that are addressed in the 2022 NPRM, over how to interpret the precise scope and meaning of Section 1557's incorporation of another statute—Title IX of the Education Amendments of 1972 (Title IX). Title IX, among other things, prohibits discrimination "on the basis of sex" in federally funded education programs or activities.

As detailed below, the 2022 NPRM proposes interpreting Section 1557's cross-reference to Title IX to prohibit gender identity and sexual orientation-based discrimination by covered health care-related entities. The NPRM also proposes construing Section 1557 to not incorporate Title IX's religious exemption or its abortion neutrality provision. This Sidebar begins with a discussion of the unique textual features of Section 1557 that have given rise to some of these legal questions, before turning to the NPRM's discussion of its interpretations and concluding with potential considerations for Congress.

Section 1557 of the ACA

Section 1557 contains antidiscrimination requirements that apply to various health care-related entities, such as hospitals and medical facilities that receive federal financial assistance, as well as programs or activities "administered by an Executive Agency or any entity established under this title." In defining unlawful discrimination, Section 1557 uses a unique statutory phrasing. While other major federal civil rights statutes narratively proscribe unlawful conduct based on protected characteristics in the statutory text, Section 1557 sets out its requirements by cross-referencing four *other* civil rights statutes. Specifically, Section 1557(a) provides that "an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of

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1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29 . . . be subjected to discrimination" by covered health care entities.

In Section 1557, each cross-reference identifies the name of the other statute—"title VI," for example—immediately followed by a citation to that statute in the United States Code—"42 U.S.C. § 2000d et seq." Three of the four cross-references also contain the abbreviation "et seq.," common legal shorthand derived from a Latin phrase used to refer to the rest of the provisions that constitute a given law or Act. "Et seq.," for example, appears often in federal court decisions for that purpose. Each cross-referenced statute in Section 1557 consists of multiple provisions. As a general matter, the four cross-referenced statutes prohibit discrimination in federally funded programs or activities "on the ground of race, color, or national origin" (Title VI), "on the basis of sex" in education programs (Title IX), "by reason of . . . disability" (Section 504 of the Rehabilitation Act), and "on the basis of age" (Age Discrimination Act).

Section 1557 also provides that 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." The requirements and enforcement mechanisms of these four statutes differ in various ways and are explored in other CRS products.

Issues Related to Section 1557's Incorporation of Title IX

While Section 1557 incorporates four statutes, its cross-reference to Title IX has been the main focus of litigation. Section 1557 provides that "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . be subjected to discrimination" by covered health care entities. Title IX, in turn, contains various provisions and exceptions.

Section 901(a) of Title IX defines unlawful discrimination through a broadly phrased prohibition of discrimination "on the basis of sex" and nine exceptions specifying conduct that does not violate this mandate. Title IX's antidiscrimination mandate and exceptions are codified at 20 U.S.C. § 1681(a)(1)-(9). Of the exceptions, Title IX's religious exemption provides that for educational institutions controlled by a religious organization, "this section shall not apply . . . if the application of this subsection would not be consistent with the religious tenets of such organization." Thus, while religious educational entities are generally subject to Title IX's requirements, Section 901(a)(3) excepts such entities when compliance with Title IX would conflict with a religious tenet. Title IX also contains a provision titled "Neutrality with respect to abortion" (added as an amendment to the statute in 1988), codified at 20 U.S.C. § 1688. The abortion neutrality provision provides that Title IX shall neither be construed to require any person or entity to provide abortion-related benefits or services, nor to prohibit any person or entity from providing such assistance. The provision also states that Title IX shall not be construed to permit penalizing an individual for seeking or receiving abortion-related benefits or services.

HHS regulations from 2016 and 2020 proposed different ways of interpreting which aspects of Title IX Section 1557 incorporates. In particular, these regulations differed on the questions of whether Section 1557's cross-reference to Title IX incorporates Title IX's religious exemption and its abortion neutrality provision, and whether Section 1557, by way of incorporating Title IX, prohibits discrimination based on sexual orientation and gender identity. HHS's 2016 rule construed Section 1557 to prohibit discrimination based on gender identity and sexual orientation (when based on sex-stereotyping); and to not incorporate Title IX's religious exemption or abortion neutrality provision. HHS's 2020 rule interpreted Section 1557 to not reach discrimination based on sexual orientation or gender identity, reading Title IX's plain text to not proscribe such conduct. The 2020 rule also construed Section 1557 to incorporate Title IX's religious exemption and abortion neutrality provision. Both sets of regulations were challenged in litigation. As explained below, HHS's 2022 NPRM adopts positions much like those in its 2016 rule.

2022 NPRM on Sexual Orientation and Gender Identity Discrimination

HHS's 2022 NPRM interprets Title IX's prohibition of discrimination "on the basis of sex," and Section 1557's incorporation of Title IX, to prohibit discrimination based on sexual orientation and gender identity. In support of that interpretation, the 2022 NPRM relies on the Supreme Court's 2020 decision *Bostock v. Clayton County*, in which the Court interpreted the prohibition of discrimination "because of . . . sex" in another statute—Title VII of the Civil Rights Act of 1964—to prohibit discrimination based on sexual orientation and gender identity. In the agency's view, under the rationale of the *Bostock* decision, Title IX—and Section 1557's incorporation of Title IX—are best interpreted to prohibit discrimination based on sexual orientation and gender identity, given textual similarities between Title IX and Title VII. The 2022 NPRM also proposes various regulatory provisions setting out conduct that, in HHS's view, amounts to unlawful sex discrimination in the health care context, such as denying or limiting health services "sought for [the] purpose of gender transition or other gender-affirming care that the covered entity would provide to an individual for other purposes if the denial or limitation is based on a patient's sex assigned at birth, gender identity, or gender otherwise recorded."

2022 NPRM Interpretation Concerning Title IX's Other Provisions

The 2022 NPRM, like the 2016 rule, interprets Section 1557's cross-reference to Title IX to *not* incorporate that statute's religious exemption or its abortion neutrality provision. Those aspects of the 2016 rule were challenged in litigation; a federal district court in the 2016 decision *Franciscan Alliance v. Burwell* concluded that HHS's interpretation construing Section 1557 to not incorporate those Title IX provisions violated the Administrative Procedure Act (APA). The district court reasoned that the specific inclusion of "et seq." in Section 1557's cross-reference to Title IX "can only mean Congress intended to incorporate the entire statutory structure, including abortion and religious exemptions." In litigation challenging the 2020 rule, another district court concluded, in the 2020 decision *Whitman-Walker Clinic v. HHS*, that the agency violated the APA by changing its regulations to incorporate these Title IX provisions without adequately considering and addressing the effect of that regulatory change on health care access. Given that basis for its conclusion, the *Whitman-Walker* court did not reach other potential considerations relating to the 2020 rule's incorporation of Title IX's exceptions.

Acknowledging and discussing the 2016 *Franciscan Alliance* decision, the 2022 NPRM, as explained in more detail below, principally emphasizes the phrase "ground prohibited" in Section 1557 to conclude that the statute incorporates only Title IX's prohibition against sex discrimination. The NPRM also states that "[a]t the very least, Section 1557 does not unambiguously require HHS to incorporate any of the Title IX exceptions into its regulatory scheme." The 2022 NPRM does not explicitly refer to or address Section 1557's use of "et seq." in its cross-reference to Title IX.

Title IX's Religious Exemption and Abortion Neutrality Provision

The 2022 NPRM explains that in HHS's view, "[u]nder the most natural understanding of Section 1557's text, as well as the statute's structure and purpose, the statutory term 'ground prohibited' is best understood as incorporating the bases of the discrimination prohibitions in the referenced statutes (race, color, national origin, sex, age, and disability)." Elaborating on this position, HHS points to Section 1557's express reference to the "enforcement mechanisms" of these statutes, and the lack of such an express reference to exceptions under these statutes. HHS asserts that this distinction shows that "when Congress wanted to incorporate aspects of the referenced statutes other than the 'grounds' of prohibited discrimination, it did so expressly." The NPRM also states that because Section 1557 addresses health care, and Title IX's exceptions "are specifically concerned with educational institutions" and the educational context, Title IX's exceptions are "ill-suited for application to health programs and activities."

On Title IX's religious exemption in particular, the NPRM states that incorporating it into Section 1557 would "seriously compromise Congress's principal objective in the ACA of increasing access to health care." According to HHS, unlike the educational context in which individuals may or may not elect to attend a religiously affiliated institution, individuals "may have little or no choice about where to seek [health] care, particularly in exigent circumstances, or in cases where the quality or range of care may vary dramatically among providers." The NPRM asserts that there is "an increasing number of communities . . . with limited options to access health care from non-religiously affiliated health care providers," and that incorporating Title IX's religious exemption would thus undermine congressional intent to expand health care access. To protect religious liberty interests and conflicts of conscience, the NPRM states that other federal statutes and conscience protections are available to covered entities, such as the Religious Freedom Restoration Act (RFRA).

On the abortion neutrality provision, HHS describes its interpretation as "consistent with the 2016 rule" and expresses disagreement with the *Franciscan Alliance* decision, adding that the decision "does not bind this new rulemaking." Meanwhile, the 2022 NPRM states that HHS's Office of Civil Rights (OCR) will apply other statutory and regulatory provisions related to abortion services, citing the Weldon Amendment, the Coats-Snowe Amendment, and the Church Amendment. These amendments apply to certain recipients of federal funding and provide conscience protections to health care entities that do not want to engage in various abortion-related activities. At this stage, it is unclear, given the circumstances and entities addressed in these amendments, whether and how these provisions might apply to the varied entities subject to Section 1557's requirements.

Proposed Administrative Process Concerning Religious or Conscience Laws

The 2022 NPRM also proposes a new administrative process for religious entities subject to HHS oversight or administrative action under Section 1557. Under this proposed process, an entity may inform HHS that "the application of a specific provision or provisions of this [Section 1557] regulation as applied to it would violate Federal conscience or religious freedom laws." The proposed regulation states that HHS's OCR would then consider those views when responding to complaints or determining whether to investigate or initiate an enforcement action regarding the entity's compliance with a regulatory provision. Relatedly, the proposed rule states that OCR would make a determination of whether the entity is exempt from the application of a particular provision or whether a modified application of a particular provision is required. Until OCR makes a determination, under the proposed rule, any "relevant ongoing investigation or enforcement activity regarding the recipient shall be held in abeyance."

Other Statutory Exceptions

While HHS's previous rules took different views on incorporating Title IX's exceptions, they also differed somewhat in their approach to incorporating exceptions in the other three statutes that Section 1557 cross-references. As noted earlier, Section 1557 incorporates three other statutes which also contain multiple provisions that include statutory exceptions. The Age Discrimination Act, for example, has several statutory exceptions that permit age-based considerations in certain circumstances. As discussed below, the 2022 NPRM proposes changes to the existing regulation by removing text expressly referring to exemptions available under these and other statutes. It is unclear at this stage what effects the 2022 NPRM's removal of this text may have.

While HHS's 2016 rule construed Section 1557 to not incorporate Title IX's exceptions, it *did* incorporate the statutory exceptions under Title VI, the Age Discrimination Act, and Section 504. The 2020 rule shared that view but also construed Section 1557 to incorporate Title IX's exceptions. For example, the current regulation, entitled "Relationship to other laws," provides that if the application of Section 1557 would "violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided" by Title VI, Title IX, Section 504, the Age Discrimination Act, and other statutes and

conscience protections, "such application shall not be imposed or required." The 2022 NPRM proposes changes to this provision, and provides some discussion of the changes. Among other things, the proposed rule would remove the above-quoted text so that the provision no longer expressly refers to exemptions. In addition, if adopted, the new regulation would no longer provide that Section 1557's application "shall not be imposed or required in those circumstances."

Potential Considerations for Congress

The recently issued NPRM on Section 1557 expresses the agency's view on several matters of interpretation concerning Title IX, which prompted earlier litigation challenging Section 1557 regulations. HHS has, in 2016, 2020, and now 2022, shifted views on whether Section 1557 prohibits discrimination based on sexual orientation and gender identity, and whether it incorporates Title IX's religious exemption or abortion neutrality provision.

HHS is receiving comments on the NPRM through October 3, 2022, and it may be that, in response to public comments and other considerations, the final rule will differ from what was initially proposed in the 2022 NPRM. In addition, perhaps given the similarities between the interpretations proposed in the 2022 NPRM and HHS's 2016 rule, developments in any pending litigation challenging the 2016 rule may shape the agency's 2022 final rule as well. In a published decision on August 26, 2022, for example, the Fifth Circuit addressed the *Franciscan Alliance* case challenging aspects of the 2016 rule. The appellate court concluded that the plaintiffs' APA claim was moot but that the RFRA claim was not. (Plaintiffs had alleged that aspects of HHS's 2016 rule violated RFRA by substantially burdening their exercise of religion.) The court of appeals upheld a lower court order permanently enjoining HHS "'from interpreting or enforcing Section 1557 ... or any implementing regulations thereto' against Franciscan Alliance 'in a manner that would require [it] to perform' or insure gender-reassignment surgeries or abortions."

As noted above, the legal issues central to this earlier litigation turned on specific textual features of Section 1557 and how to construe its incorporation of Title IX. Congress could clarify these debates by, for example, amending Section 1557 to expressly address whether or not the statute prohibits discrimination based on sexual orientation and gender identity; and if so, what conduct amounts to unlawful discrimination on those bases and whether any exceptions may apply. More generally, Congress could also amend Section 1557 to address prohibited discrimination narratively in the text rather than through statutory cross-references. To the extent that federal courts construe aspects of Section 1557 to be Spending Clause-based legislation, and there is legislative interest in amending Section 1557 based on that authority, Supreme Court precedent requires that such legislation sets out conditions on federal funding in clear and unambiguous terms.

Author Information

Christine J. Back
Legislative Attorney

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