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Legal Sidebar

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

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On May 6, 2024, the Department of Health and Human Services (HHS), through its Office for Civil Rights (OCR), issued a final rule implementing Section 1557 of the Affordable Care Act (ACA). Through reference to another law, Title IX of the Education Amendments of 1972 (Title IX), Section 1557 prohibits (among other things) sex discrimination by health programs and activities that receive federal funding. HHS previously issued Section 1557 regulations in 2016 and again in 2020. The 2024 rule makes various changes from the 2020 rule and from the proposed rule that HHS issued in 2022. This Sidebar discusses the 2024 rule's approach to several legal issues that have arisen, and been litigated, over how to interpret the precise scope and meaning of Section 1557's incorporation of Title IX.

As detailed below, the 2024 rule interprets Section 1557's cross-reference to Title IX to prohibit gender identity and sexual orientation discrimination by covered health programs. The rule differs from the proposed rule announced by HHS in its 2022 Notice of Proposed Rulemaking (NPRM) as to how HHS intends to apply the prohibition on gender identity discrimination, particularly when individuals seek "gender transition or other gender-affirming care." Consistent with the 2022 NPRM, the 2024 rule construes Section 1557 to not incorporate Title IX's religious exemption or its abortion neutrality provision. The final rule does contain more specific guidance and stronger safeguards than HHS originally proposed for entities seeking to invoke federal conscience and religious protections. This Sidebar begins by discussing the unique textual features of Section 1557 that have given rise to some of these legal questions, before turning to the 2024 rule and concluding with considerations for Congress. Some material in this Sidebar is adapted from CRS Legal Sidebar LSB10813, *Proposed HHS Rule Addressing Section 1557 of the ACA's Incorporation of Title IX*, by Christine J. Back (2022), which provides further background on the 2022 NPRM.

Section 1557 of the ACA

Section 1557 prohibits certain forms of discrimination by, among other entities, any "health program or activity" that receives federal financial assistance. (For more information on covered entities, see CRS Legal Sidebar LSB11160, *The Scope of ACA Section 1557: "Health Program or Activity"*, by Hannah-Alise Rogers (2024)). In defining unlawful discrimination, Section 1557 uses unique statutory phrasing, and the way Section 1557 is drafted has had significant implications for how the law has been interpreted.

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While other major federal civil rights statutes narratively describe protected characteristics in the statutory text, Section 1557 cross-references four *other* civil rights statutes to define prohibited discrimination. Specifically, the law forbids discrimination "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 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 [Section 504 of the Rehabilitation Act]." The four cross-referenced statutes prohibit discrimination "on the ground of race, color, or national origin" (Title VI); "by reason of . . . disability" (Section 504 of the Rehabilitation Act); and "on the basis of age" (Age Discrimination Act) in federally funded programs; and "on the basis of sex" in federally funded education programs (Title IX).

The Section 1557 cross-references mostly identify another statute's name—"title VI," for example—immediately followed by a citation to that statute in the *U.S. Code*—"42 U.S.C. § 2000d et seq." Three of the cross-references also contain the abbreviation "et seq.," common legal shorthand used to refer to the rest of the provisions constituting a given law. Each cross-referenced statute has multiple provisions. Rather than specify its own enforcement mechanism, Section 1557 adopts the "enforcement mechanisms provided for and available under" the cross-referenced statutes.

Issues Related to Section 1557's Incorporation of Title IX

Section 1557 litigation has frequently focused on the law's cross-reference to Title IX. Title IX defines unlawful discrimination by broadly prohibiting discrimination "on the basis of sex." It also lists nine exceptions. One of these, commonly referred to as the "religious exemption," exempts religious institutions from Title IX when compliance conflicts with a religious tenet. A 1988 amendment, referred to as the "abortion neutrality" provision, states that Title IX shall be construed to neither require nor prohibit any person or entity to provide abortion-related benefits or services. The amendment 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 differed on the questions of whether Section 1557 prohibits discrimination based on sexual orientation and gender identity and whether it incorporates Title IX's religious exemption and abortion neutrality provision. 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 reached the opposite conclusion in all respects. Both regulations were challenged in litigation. As explained below, the 2024 rule adopts positions similar, though not identical, to those in the 2016 rule.

2024 Rule on Sexual Orientation and Gender Identity Discrimination

HHS's 2024 rule interprets Title IX and Section 1557's prohibition of discrimination "on the basis of sex" to prohibit sexual orientation and gender identity discrimination. The rule relies in part on the Supreme Court's 2020 decision *Bostock v. Clayton County*. In *Bostock*, the Court interpreted Title VII of the Civil Rights Act, which prohibits employment discrimination "because of . . . sex," to prohibit sexual orientation and gender identity discrimination. In HHS's view, textual similarities between Title IX and Title VII render it appropriate to apply *Bostock*'s rationale to Title IX and therefore to Section 1557.

Federal courts before and after *Bostock* considered whether Section 1557 prohibits sexual orientation and/or gender identity discrimination and reached different conclusions. In *Franciscan Alliance v. Burwell*, a federal district court enjoined (and later vacated) the 2016 rule's definition of sex discrimination to include gender identity discrimination. In contrast, two other federal district courts enjoined portions of the 2020 rule's treatment of sex discrimination. One interpreted Section 1557 to cover sexual orientation and gender identity discrimination by its plain language. The other held that HHS

had not adequately explained its repeal of the 2016 rule's definition of sex discrimination to include sex stereotyping, which, the court asserted, sometimes includes gender identity discrimination. Acknowledging *Franciscan Alliance* in the 2024 rule, HHS states that "[t]he legal landscape in this area has changed," citing *Bostock* as well as a number of courts that have, since *Bostock*, interpreted Title IX (and in some cases Section 1557) to prohibit gender identity discrimination. HHS also acknowledges that one district court post-*Bostock* has interpreted Section 1557 to not prohibit gender identity or sexual orientation discrimination, and HHS states that it will not apply those portions of the 2024 rule to the class of plaintiffs covered by that case while an appeal is pending.

The 2024 rule sets out certain conduct that HHS views as unlawful sex discrimination in the health care and health insurance contexts. Certain provisions are consistent with the 2022 NPRM. The 2024 rule prohibits covered entities from denying or limiting services because of a person's sex, sexual orientation, or gender identity. It also prohibits covered entities from operating sex-specific activities, such as rooming assignments, "in a manner that subjects any individual to more than de minimis harm, including by . . . preventing an individual from participating in a health program or activity consistent with the individual's gender identity." HHS rejects criticism that it is "disregarding sex-based distinctions in medicine" and explains that providers may make "medically relevant" sex-related inquiries and "use sex-based distinctions to administer individualized care" unless doing so causes "more than *de minimis* harm."

In some aspects, the final provisions governing access to "gender transition or other gender-affirming care" also remain the same from the NPRM. As in the NPRM, the final rule forbids "[d]eny[ing] or limit[ing] . . . 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," and it forbids covered insurers to categorically exclude or limit coverage of "all health services related to gender transition or other gender-affirming care." The final rule also provides, as the NPRM did, that covered entities are never required to provide or cover any service when a denial is based on a "legitimate, nondiscriminatory reason," including a "reasonabl[e] determin[ation] that such health service is not clinically appropriate for a particular individual."

In other respects, the final rule diverges from the NPRM. The NPRM proposed regulatory text stating that "a provider's belief that gender transition or other gender-affirming care can never be beneficial for such individuals (or its compliance with a state or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate." HHS eliminated that text from the final rule. The final rule now provides that refusals to provide any service "must not be based on unlawful animus or bias, or constitute a pretext for discrimination." While the rule therefore prohibits insurance companies from categorically refusing to cover any gender-affirming care, it leaves open the possibility that providers could, consistent with Section 1557, categorically refuse to provide or refer for any such care based on their judgment that it is never clinically warranted, so long as that decision is not a pretext for discrimination. HHS also added text clarifying that the prohibitions on sex discrimination do not prevent a covered entity from "availing itself" of protections for freedom of conscience and religion.

2024 Rule on Religious Exemption and Abortion Neutrality

The 2024 rule, like the 2016 rule, interprets Section 1557 to not incorporate Title IX's religious exemption or its abortion neutrality provision. Litigation over these issues has generated mixed results. Evaluating the 2016 rule, the district court in *Franciscan Alliance* concluded that the use 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 *Whitman-Walker Clinic v. HHS*, a different district court concluded that HHS violated the Administrative Procedure Act by incorporating the religious exemption into the 2020 rule without adequately considering its effect on health care access.

The 2022 NPRM and 2024 preamble emphasize that Section 1557 incorporates only the "ground prohibited" by Title IX and Title IX's "enforcement mechanism." The most "natural understanding" of that language, HHS asserted in 2022, is that "ground prohibited" "refers simply to the basis on which discrimination is prohibited . . . *i.e.*, . . . sex" and that "when Congress wanted to incorporate aspects of the referenced statutes . . . , it did so expressly." HHS concludes in the 2024 rule that neither Title IX's religious exemption nor its abortion neutrality provision speak to a "ground prohibited" or "enforcement mechanism," and that Section 1557 therefore does not incorporate them. Acknowledging *Franciscan Alliance*, HHS states that including the term "et seq." in Section 1557's cross-reference to Title IX is part of Congress's ordinary practice when generally referencing another statute and that the citation to the whole statute does not override Section 1557's narrower reference to the "ground prohibited."

HHS also points to the fact that Title IX and Section 1557 operate in different contexts: education versus health care. Many of the exceptions to Title IX are education-specific, suggesting that they do not apply to Section 1557, HHS reasons. Regarding the religious exemption particularly, HHS stated in 2022 and reiterates in 2024 that incorporating it into Section 1557 would significantly undermine the ACA's purpose "to expand access to health insurance and increase consumer protections." According to HHS, while individuals typically choose to attend a religiously affiliated school, individuals may lack choice in their health care providers, "particularly in exigent circumstances, or in cases where the quality or range of care may vary dramatically among providers." The 2022 NPRM asserted that there are "an increasing number of communities . . . with limited options to access health care from non-religiously affiliated health care providers," and incorporating the religious exemption would thus "seriously compromise Congress's principal objective in the ACA of increasing access to health care."

On abortion neutrality, HHS adds that incorporating that provision in the Section 1557 regulations is "unnecessary," pointing to separate provisions of the ACA governing abortion. These provisions, among other things, allow qualified health plans to cover abortion-related services or not, consistent with state law. Throughout the 2024 preamble, HHS emphasizes that a covered entity's refusal to provide, cover, or refer for abortions does not, in and of itself, violate Section 1557. Further, HHS reaffirms that nothing in the ACA has any effect on federal statutes, including the Weldon Amendment, the Coats-Snowe Amendment, and the Church Amendment, that protect certain health care entities with conscience objections to various abortion-related activities. HHS also advises that Section 1557 does not affect the Religious Freedom Restoration Act (RFRA), under which the government may not substantially burden a person's religious exercise unless it shows that the law, as applied to the person, is the least restrictive means of advancing a compelling government interest. (For more on RFRA, see CRS In Focus IF11490, *The Religious Freedom Restoration Act: A Primer*, by Whitney K. Novak (2020)).

HHS concludes in the 2024 preamble that *Franciscan Alliance* does not prohibit its approach in this "new rulemaking" and points to its "detailed explanation" for its interpretation of the law and "strengthened" provisions for religious freedom and conscience protections in the final rule. These provisions are discussed below. Given the role of other laws governing conscience objections to abortion and religious objections to the application of federal law generally, the practical impact of HHS's determination not to import the Title IX abortion neutrality provision or religious exemption into Section 1557 is unclear.

Administrative Process Concerning Religious or Conscience Objections

The 2024 rule revises the provisions regarding religious or conscience objections from HHS's 2022 proposal. The 2022 NPRM proposed a regulation stating that Section 1557 and its regulations did not "invalidate or limit the rights, remedies, procedures, or legal standards available to individuals under Federal conscience or religious freedom laws." The final rule provides instead that the rule shall not apply "[i]nsofar as the application of any requirement under this part would violate applicable Federal protections for religious freedom and conscience" and references those protections more specifically. The 2022 NPRM proposed a new administrative process for entities seeking a religious or conscience

exemption to Section 1557. An entity could notify HHS of its objection, and OCR would "h[o]ld in abeyance" any "ongoing investigation or enforcement activity" while it "consider[ed] those views." OCR would then notify the entity as to whether it was exempt from or entitled to "modified application" of certain provisions of Section 1557. The final rule indicates that covered entities need not seek assurance of an exemption in advance of relying on those protections. HHS states that it added this provision in response to comments from religious entities that objected that a notification process would itself burden their religious exercise. A recipient *may* seek an assurance from OCR that it is entitled to a religious exemption by filing a notification containing specified information about its objection. The recipient will be entitled to a "temporary exemption from administrative investigation and enforcement" related to conduct falling within the scope of its objection until OCR makes a determination. Covered entities may now appeal an exemption denial.

In litigation over Section 1557, religious entities have raised RFRA claims challenging HHS's prior rules. Courts have taken different approaches to these claims. In *Christian Employers Alliance v. United States EEOC*, for example, a district court permanently enjoined HHS from enforcing Section 1557 against the plaintiffs to require them to provide or insure "gender-transition procedures" in part because, the court held, the government had less burdensome options at its disposal than requiring covered entities to seek case-by-case exemptions. A different district court held, in contrast, that the plaintiffs in the case before it lacked the required injury to show standing for their RFRA claims, in part because they could raise RFRA as a defense to any enforcement action or proactively seek an exemption from HHS.

Considerations for Congress

HHS and the courts have expressed conflicting perspectives regarding Section 1557's incorporation of Title IX's antidiscrimination mandate. HHS has shifted views on whether Section 1557 prohibits sexual orientation and gender identity discrimination, whether it incorporates Title IX's religious exemption or abortion neutrality provision, and how the agency will handle covered entities who seek religion- or conscience-based exemptions. Courts, too, have reached different conclusions on these matters. For example, some courts have read the statutory text to unambiguously prohibit sexual orientation and gender identity discrimination, regardless of HHS's view. Other courts have reached the opposite conclusion from the statute's plain language. One lawsuit has already been filed challenging the 2024 rule's approach to gender identity discrimination.

Congress could clarify these conflicting perspectives. It could, for example, amend Section 1557 to expressly prohibit, or not, sexual orientation and gender identity discrimination. If the former, Congress could describe what conduct amounts to unlawful discrimination on those bases and whether any exceptions may apply. More generally, Congress could 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.

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