TEXAS HOSPITAL ASSOCIATION

THA TAKEAWAYS

HHS Final Rule on Nondiscrimination in Health Programs and Activities

On May 18, the U.S. Department of Health and Human Services (HHS) released the Final Rule, "Nondiscrimination in Health Programs and Activities" implementing Section 1557 of the Patient Protection and Affordable Care Act, which prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs and activities.

The Final Rule went into effect July 18, but provisions related to posting of notices becomes effective Oct. 18, 2016 and provisions related to benefit plan design will become effective the first day of the first plan year beginning on or after Jan. 1, 2017. The HHS Office for Civil Rights will enforce the rule.

The Final Rule applies to covered entities that operate a health program or activity that receives federal financial assistance under programs operated by HHS (e.g., Medicare and Medicaid) and applies to hospitals, clinics, medical practices, solo practitioners, nursing homes, other healthcare entities, health insurance marketplaces and issuers that participate in those programs and any health program HHS administers itself. Covered entities are not required to comply with the Final Rule if compliance would violate federal protections for religious freedom or conscience.

General Provisions

- Health care providers must provide equal access to health care items and services without discrimination on the basis of sex or gender identity.
- Health care providers must take reasonable steps to provide Limited English Proficiency patients with meaningful access to health care services, which may include the provision of language translation and interpretation services. Providers also must post a notice of individuals' rights that includes information for communication assistance for LEP individuals.
    - The notice must include taglines indicating the availability of language assistance in the top 15 languages spoken by LEP individuals in the state in which the health care provider is located. (See below)
    - The rule prohibits the use of low-quality video interpretation services and the use of unqualified staff as translators.
    - It limits a provider's ability to rely on a patient's minor child or an accompanying adult to provide interpretation.
- Health care providers continue to be required to ensure effective communication with individuals with disabilities, which may involve the use of auxiliary aids and services, such as alternative formats and sign language.

    - Providers must ensure that individuals with disabilities have meaningful access to programs and activities provided through electronic and information technology with specified exceptions for financial or administrative burdens or when providing access would result in a fundamental alteration in the nature of the program or activity, as well as marketing practices and benefit designs.
    - The rule also applies the standards for physical accessibility of new construction or alteration of buildings and facilities from the 2010 Americans with Disabilities Act.
- Health care providers with more than 15 employees must implement a grievance procedure for handling complaints of discrimination and appoint a Compliance Coordinator who is responsible for the provider's compliance efforts. A model grievance procedure is included as Appendix C to the Final Rule and attached to this memo.

Action Items

By Oct. 18, 2016, covered entities must take the following actions:

- Each covered entity that employs 15 or more persons must designate at least one employee to coordinate its compliance efforts.
- Each covered entity that employs 15 or more persons must adopt grievance procedures that incorporate appropriate due process standards.
- Review and update programs to ensure LEP individuals have meaningful access to health care items and services without reliance on patient family members or children to provide interpretation.
- Review and update programs and services to ensure they are accessible to individuals with disabilities through the use of appropriate auxiliary aids and services.
- Post a nondiscrimination notice (with 15 taglines) in a conspicuous public and website location where it will be visible to patients.
- Update "significant publications" and "significant communications"—including notices relating to rights or benefits, 'vital documents', outreach, education and marketing materials—to include the nondiscrimination notice, including taglines. The OCR's template Notices of Nondiscrimination and Taglines are available on the OCR's website.

The following pages provide a more detailed outline of the Section 1557 compliance requirements as laid out in the Final Rule.

I. Nondiscrimination Provisions & Specific Applications to Health Programs/Activities

The Final Rule provides specific guidance regarding several populations that have historically been subject to discrimination.

a. Meaningful Access for Individuals with Limited English Proficiency

The Final Rule requires reasonable steps to be taken to provide meaningful access to each individual with limited English proficiency likely to be encountered in health programs and activities. Failing to do so is considered a form of national origin discrimination. In evaluating compliance, OCR will give weight to the importance of the health program/activity and other factors, including whether an effective written language access plan has been developed and implemented.

Language assistance services must be (1) provided free of charge; (2) be accurate and timely; and (3) protect the privacy and independence of the individual with limited English proficiency. Oral interpretation, when provided as the reasonable step for meaningful access, must be provided by a qualified interpreter and a qualified translator must be used for translating written content in paper or electronic form.

The Final Rule makes clear that persons who should not be used to interpret include:

a. Adult accompanying individuals with limited English proficiency, except:
    i. In an emergency where no qualified interpreter is immediately available;
    ii. The individual with limited English proficiency requests it and the accompanying adult agrees.
b. Minor child, except in an emergency where no qualified interpreter is immediately available.
c. Staff other than bilingual/multilingual staff qualified to communicate directly with individuals with limited English proficiency.

Video remote interpreting (VRI) sessions, if provided, should deliver high quality images, large enough to delineate the individual with limited English proficiency and interpreter's faces and clear, audible transmission of voices. Users of the technology must receive adequate training.

Acceptance of language assistance services by individuals with limited English proficiency is not required. If services are declined, however, covered entities may still choose to utilize qualified interpreters to assist their communication with a patient. Additionally, covered entities may not be required to honor interpreter gender preferences that may be expressed by a patient.

b. Effective Communication, Accessibility and Reasonable Modifications for Individuals with Disabilities

Covered entities must take appropriate steps to ensure communication with individuals with disabilities is as effective as with others. This includes providing appropriate auxiliary aids and services to those with impaired sensory, manual or speaking skills, where necessary for effective communication.

The Final Rule does not define what constitutes "communications that are as effective as communications with others" and instead, adopts the communication standards found at 28 C.F.R. §§ 35.160 -35.164. Those standards indicate that the covered entity shall not:

a. Require an individual with a disability to bring another individual to interpret for him/her;
    i. Rely on an adult accompanying the individual to interpret except:
    ii. In an emergency where no qualified interpreter is immediately available; or
b. The individual requests it, the accompanying adult agrees and reliance on that adult is appropriate under the circumstances; or
c. Rely on a minor child, except in an emergency where no qualified interpreter is immediately available.

If the covered entity chooses to provide qualified interpreters via VRI services, it must ensure that it provides:

a. real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
b. a sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;
c. a clear, audible transmission of voices; and
d. adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

A qualified interpreter for an individual with a disability generally means one who, via a remote interpreting service or in person: (1) adheres to generally accepted interpreter ethics principles, including client confidentiality; and (2) is able to interpret effectively, accurately, and impartially, both receptively and expressly, using any necessary specialized vocabulary, terminology and phraseology.

Electronic information technology must be made 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 programs/activities. In such cases, alternative formats for providing information can be used but must ensure, to the maximum extent possible, that individuals with disabilities have access to the benefits or services. Reasonable modifications to policies, practices or procedures should also be made, in a manner consistent with the terms of the Americans with Disabilities Act (ADA) Title II. Covered entities must also ensure that newly constructed or altered buildings or facilities used for health programs/activities or on behalf of a covered entity comply with the 2010 Standards and Uniform Federal Accessibility Standards.

II. Protecting Individuals Against Sex Discrimination

Equal access to health programs/activities must be provided without discrimination on the basis of sex. The Final Rule clarifies what constitutes "discrimination on the basis of

sex" specifically prohibiting discrimination based on: (1) an individual's sex, (2) pregnancy, childbirth or related medical conditions, (3) gender identity, and (4) sex stereotyping.

The Final Rule states:

a. Women must be treated equally with men in the health care they receive and the insurance they obtain.
b. Discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth, or related medical conditions. The Final Rule does not replace any existing protection provided by federal provider conscience or religious freedom laws.
c. Individuals cannot be denied health care or health coverage based on their sex, including gender identity and sex stereotyping.
    i. Gender identity is defined as an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth. A transgender individual is an individual whose gender identity differs from the sex assigned to that person at birth.
    ii. Sex stereotypes are defined as stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. (See 81 Fed. Reg. 31392)
    iii. The Final Rule clarifies that sex stereotypes also include gendered expectations related to the appropriate roles of a certain sex.
d. Categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory.
e. Covered entities must treat individuals consistent with their gender identity, including in access to facilities. Covered entities may not deny or limit treatment for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender. The health service sought, however, must be medically appropriate.
f. Sex-specific health programs and activities are permissible only where the covered entity can demonstrate an exceedingly persuasive justification, i.e., that the sex-specific program is substantially related to the achievement of an important health-related or scientific objective.

Although the Final Rule does not resolve the issue of whether discrimination on the basis of an individual's sexual orientation alone is sex discrimination under Section 1557, OCR noted that it will evaluate those complaints to see if they involve the types of stereotyping that can be addressed under Section 1557.

III. Notices and Taglines

Covered entities must take appropriate initial and continuing steps to inform beneficiaries, enrollees, applicants and members of the public by posting and publishing notice of nondiscrimination:

a. It does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities;
b. It provides appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner, when such aids and services are necessary to ensure an equal opportunity to participate to individuals with disabilities;
c. It provides language assistance services, including translated documents and oral interpretation, free of charge and in a timely manner, when such services are necessary to provide meaningful access to individuals with limited English proficiency;
d. How to obtain the meaningful access aids and services;
e. The name of the employee responsible for compliance and how to contact that person;
f. About the availability of the grievance procedure and how to file a grievance; and
g. How to file a discrimination complaint with OCR.

This information must be posted in *visible font size* in:

a. Conspicuous physical locations where the entity serves the public;
b. A conspicuous location on the entity's website accessible from the home page of the website; and
c. Significant communications and significant publications targeted at members of the public unless the publications/communications are small-sized.

OCR has indicated that the phrase "significant communications and significant publications" will be interpreted broadly. Although the Final Rule does not provide a list of such communications, it confirmed they include: outreach, education, and marketing materials; patient handbooks; notices requiring a response from individuals; written notices such as those pertaining to rights or benefits, consent and complaint forms; written notices of eligibility criteria, rights, denial, loss or decreases in benefits or services; and applications to participate in services or programs.

HHS published a sample **Notice of Nondiscrimination** in 45 C.F.R. Part 92, Appendix A which is also attached to this memo. Covered entities, however, are not required to use the sample notice.

Along with the nondiscrimination notice, covered entities must also post a short statement, i.e., a tagline in at least the top 15 languages spoken by individuals with limited English proficiency in the relevant state(s) informing them about the availability of free language assistance services and how to access them. HHS provided a sample tagline:

ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).

Following OCR'S recommendation to use the five-year U.S. Census Bureau American Community Survey to determine those languages, THA has identified the top 15 languages spoken at home by populations with limited English proficiency in Texas, rank ordered, as follows:

1 Spanish	6 Urdu	11 German
2 Vietnamese	7 Tagalog	12 Gujarati
3 Chinese	8 French	13 Russian
4 Korean	9 Hindi	14 Japanese
5 Arabic	10 Persian	15 Laotian

For significant publications and significant communications that are small-sized (e.g., postcards, pamphlets and tri-fold brochures), the covered entity must post in a *conspicuously visible font*:

a. A statement of nondiscrimination noting that the covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities; and
b. Taglines in at least the top two languages spoken by individuals with limited English proficiency in the state.

Sample taglines, translated into 64 languages (which covers the top 15 languages spoken by populations with limited English proficiency in all 50 states), are provided by OCR at http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html.

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For more information, contact:

Sharon Beasley
Manager, Legal Services
Texas Hospital Association
sbeasley@tha.org