Proposed Rule
Section 1557 of the Affordable Care Act

On May 24, 2019, Department of Health and Human Services (HHS) proposed regulatory reform related to regulations issued under Section 1557 of the Affordable Care Act (ACA).

BACKGROUND

What is Section 1557 of the ACA?

Section 1557 of the Patient Protection and Affordable Care Act (ACA) prohibits a health program that receives federal funding or a program administered under Title I of the ACA from discriminating on the basis of race, color, national origin, sex, age, or disability.

It prohibits this discrimination by reference to longstanding civil rights laws. The Prohibition against discrimination based on sex is established through reference to Title IX of the Education Amendments of 1972 (Title IX).

Section 1557 allows (but does not require) the HHS Secretary to promulgate regulations to enforce this section.

Obama Administration Implementation on Section 1557?

May 18, 2016: HHS under the Obama Administration finalized its proposed regulations for Section 1557. This regulation (45 CFR § 92.4) defined discrimination "on the basis of sex:"

> *On the basis of sex includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity*

Although this definition was established through reference to Title IX, it was inconsistent with the Danforth Amendment within Title IX. The Danforth Amendment states, *"Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion."*

State Litigation

On August 23, 2016, Texas, Wisconsin, Nebraska, Kentucky, Kansas and three private health care providers challenged the regulation in court (*Franciscan Alliance v. Burwell*). Two other cases were also filed. The court responded to the *Franciscan Alliance* case by issuing a nationwide preliminary injunction on December 31, 2016. It prohibited HHS from enforcing its regulation against discrimination on the basis of "termination of pregnancy" and "gender identity."

The court found that the Department erroneously interpreted "sex" under Title IX, and it stated that the regulation was arbitrary and capricious because it failed to incorporate Title IX's religious and abortion exemptions. It held that the plaintiffs were also likely correct that the regulation had violated the Administrative Procedure Act (APA) and the Religious Freedom Restoration Act (RFRA). A second federal court agreed.

The court stayed proceedings in July 2017 to allow time for HHS to reconsider. On February 4, 2019, the plaintiffs renewed their motion for a summary judgement. The proposed rule aligns the regulations with the understanding recognized by the court.

PRO-LIFE IMPLICATIONS OF PROPOSED RULE

In Section 86.18 of the proposed rule, HHS adds the abortion exemption language included in the text of Title IX (20 U.S.C. 1688).[1] Paragraph (a) states that no recipient of federal funding will be forced to pay for or perform an abortion. Paragraph (b) states that no entity shall be required or prohibited from providing or paying for a service related to an abortion. Paragraph (c) clarifies that enforcement will be consistent with the First Amendment, Title IX's religious exemption, the Religious Freedom Restoration Act, the Church Amendments, the Coats-Snowe Amendment, Section 1303 of the ACA, and appropriations provisions including the Hyde Amendment and Weldon Amendment.

In Section 92.6 of the proposed rule, HHS states that this regulation will not invalidate or limit the rights available in Title IX, or the other laws upon which the definitions in Section 1557 are based.

RELEVANT TEXT

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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§ 86.18 *Amendments to conform to statutory exemptions.*

(a) Nothing in this part shall be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal Funds to perform or pay for an abortion.

(b) Nothing in this part shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in the preceding sentence shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

(c) This part shall be construed consistently with, as applicable, the First Amendment to the Constitution, Title IX's religious exemptions (20 U.S.C. 1681(a)(3) and 1687(4)), the Religious Freedom Restoration Act (42 U.S.C. 2000b et seq.), and provisions related to abortion in the Church Amendments (42 U.S.C. 300a-7), the Coats-Snowe Amendment (42 U.S.C. 238n), Section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. 18023), and appropriation rider provisions relating to abortion, to the extent they remain in effect or applicable, such as the Hyde Amendment (e.g., Consolidated Appropriations Act, 2019, Pub. L. 115–245, Div. B, sec. 506-507), the Helms Amendment (e.g.,

[1] Footnote from proposed rule: The Civil Rights Restoration Act (CRRA) added the following language to Title IX, "Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion." Pub. L. 100-259, 102 Stat. 28 (Mar. 22, 1988) (codified at 20 U.S.C. 1688). The CRRA also included a rule of construction stating that "No provision of this Act or any amendment made by this Act shall be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion."

Continuing Appropriations Act, 2019, Pub. L. 116–6, Div. F, Title III), and the Weldon Amendment (e.g., Consolidated Appropriations Act, 2019, Pub. L. 115–245, Div. B, sec. 507(d)).

PART 92—NONDISCRIMINATION ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AGE, OR DISABILITY IN HEALTH PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE AND PROGRAMS OR ACTIVITIES ADMINISTERED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES UNDER TITLE I OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT OR BY ENTITIES ESTABLISHED UNDER SUCH TITLE

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§ 92.6 Relationship to other laws.

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(b) Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any of the statutes cited in paragraph (a) or provided by the Architectural Barriers Act of 1968 (42 U.S.C. 4151 et seq.); the Americans with Disabilities Act of 1990, as amended by the Americans with Disabilities Act Amendments Act of 2008 (42 U.S.C. 12181 et seq.), Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), the Coats-Snowe Amendment (42 U.S.C. 238n), the Church Amendments (42 U.S.C. 300a-7), the Religious Freedom Restoration Act (42 U.S.C. 2000bb et seq.), Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), Section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. 18023), the Weldon Amendment (Consolidated Appropriations Act, 2019, Pub. L. 115-245, Div. B sec. 209 and sec. 506(d) (Sept. 28, 2018)), or any related, successor, or similar Federal laws or regulations, such application shall not be imposed or required.