# Latest Section 1557 Rule Rescinds Transgender Patients' Rights – But SCOTUS says, "Not so Fast"

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August 25, 2020

The U.S. Department of Health and Human Services (HHS) finalized the Section 1557 final rule in June, gearing it toward removing civil rights protections for transgender or non-binary patients seeking federal payor coverage for treatment. But in follow-up statements, and recent U.S. Supreme Court decisions, it has been recommended that providers proceed as if nothing has changed.

The rule, issued June 12 and set to go into effect on Aug. 18, also includes language that would ease access requirements, including eliminating notice and tagline requirements, and *narrow* the definition of "sex" as a basis for discrimination under Section 1557, shrinking the applicability and scope of the regulations, among other changes.

Even though the regulations implementing Section 1557 will be different, if and when these changes go into effect, federal (and state) nondiscrimination and anti-discrimination laws are unchanged, and remain enforceable.

The rule is titled Nondiscrimination in Health and Health Education Programs and Activities, Delegation of Authority, and refers to Section 1557 of the 2010 Patient Protection and Affordable Care Act (PPACA). According to HHS, Section 1557 "prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities." Under a 2016 rule issued by the Obama Administration, the federal government had interpreted Section 1557 to mean that discrimination on the basis of "sex" included discrimination on the basis of sexual orientation and gender identity. The rule affirmed the liberal interpretation of 1557 indicating that insurers could not deny coverage specific to a transgender patient's needs, such as hormone therapy. Also, barring a good-faith conscience exemption, providers could not deny treatment.

The rule is not solely about sex-basis interpretation, as it also specifies requirements for meeting the needs of limited English-proficient (LEP) patients, including intake forms and advertising materials. Discrimination standards for disabled patients were also specified, but their rights are largely covered by the Americans with Disabilities Act.

Now, getting back to the "sex-basis" part of the 2016 rules, they have been actively challenged, and a few injunctions recorded. In 2019, the Trump Administration proposed a new Section 1557 rule that officially rescinded the Obama Administration's interpretation in regard to non-binary patients. The new final rule proclaims that HHS, the Centers for Medicare & Medicaid Services (CMS), and the HHS Office for Civil Rights (OCR) are, according to the HHS fact sheet, "returning … to the plain meaning of the word 'sex' as male or female, and as determined by biology" in their enforcement.

This new interpretation, combined with a revised "conscience" rule finalized by HHS and OCR in May, which strengthened a provider's right to refuse treatment on religious or belief grounds, at first glance could support a provider's right to refuse accommodation to non-binary patients in their treatment, records, and forms. Many are talking about this in the context of forms of hormone therapy for transition patients, or transition-relation treatments.

There are still protections for medically necessary treatment under the Civil Rights Act that are clear, as defined under Title XVII of the Social Security Act, Section 1862[a][1][a], as it pertains to meeting the requirements for "medical necessity." An example would be treating a patient who does not identify as male or female, but non-binary, seen for diabetes or hypertension. As long as the diagnoses for these conditions were covered under the nationally recognized standard of care, then the sexual orientation of the patient would not and should not be a factor for the patient receiving treatment.

A few days after the new final rule was released, the Supreme Court ruled "that discrimination based on sex does include sexual orientation and gender identity, in the context of employment law." (*Bostock v. Clayton Country, Ga*)

So the new rule and the Supreme Court will face some legal challenges, looking at different areas of the law where this topic is now a part of the statutory language. There still remain conscience and religious freedom laws on the books that were not affected by the recent Supreme Court decision, but those relate to individual providers, so a healthcare provider entity that accepts federal dollars needs to ensure that patients are treated in a non-discriminatory manner.

There may be providers considering taking the position that the HHS rule allows them to refuse to treat a transgender patient, barring any applicable state laws to the contrary, but many legal teams strongly advise against that mindset. That could be considered a breach of ethics, according to Lora Zimmer, an attorney with McCarty Law in Appleton, Wisc., who also said that "the courts could decide to use the U.S. Supreme Court's interpretation of 'sex' in the context of discrimination laws and apply it to the healthcare setting as well."

A provider could still stand on their rights under the RFRA (Religious Freedom Restoration Act) to deny transgender-specific services to patients, again, barring state law to the contrary (similar to abortion), but then you open up another can of worms called the First Amendment of the Unites States Constitution, guaranteeing religious freedom. I wouldn't want to be a medical provider turning away a patient without a good reason – a really good reason – whether it is legal or not, under state or federal law.

The final rule also says providers "may return to the language access standard previously in place" before the 2016 rule.

HHS also projected that all of its proposed Section 1557 changes will result in approximately $3.6 billion in undiscounted cost savings over the first five years after implementation, primarily from eliminating the notice and tagline requirements. HHS asserted that its original cost projections for the notice and tagline requirements only accounted for "employee time required to initially download, print, and post notices in public areas," but did not account for the recurring costs of paper, ink/toner, and additional postage for the required initial or subsequent mailings of these notices. There could be other cost savings not accounted for.

After considering public comments, in this final rule, HHS revised its Section 1557 regulations, Title IX regulations, and specific regulations of CMS, as proposed, with minor and primarily technical corrections. On Aug. 18, this final rule was published into HHS law, and we can expect potential future lawsuits to argue the merits, should care be denied to patients on a "sex basis" that is not specific to male or female.

You can find this now published in the Federal Register: https://www.federalregister.gov/documents/2020/06/19/2020-11758/nondiscrimination-in-health-and-health-education-programs-or-activities-delegation-of-authority

**Programming Note:** Terry Fletcher is a member of the ICD10monitor Editorial Board. Listen to her report this story live today during Talk Ten Tuesdays, 1010:30 a.m. EST.

## Terry A. Fletcher BS, CPC, CCC, CEMC, CCS, CCS-P, CMC, CMSCS, ACS-CA, SCP-CA, QMGC, QMCRC, QMPM

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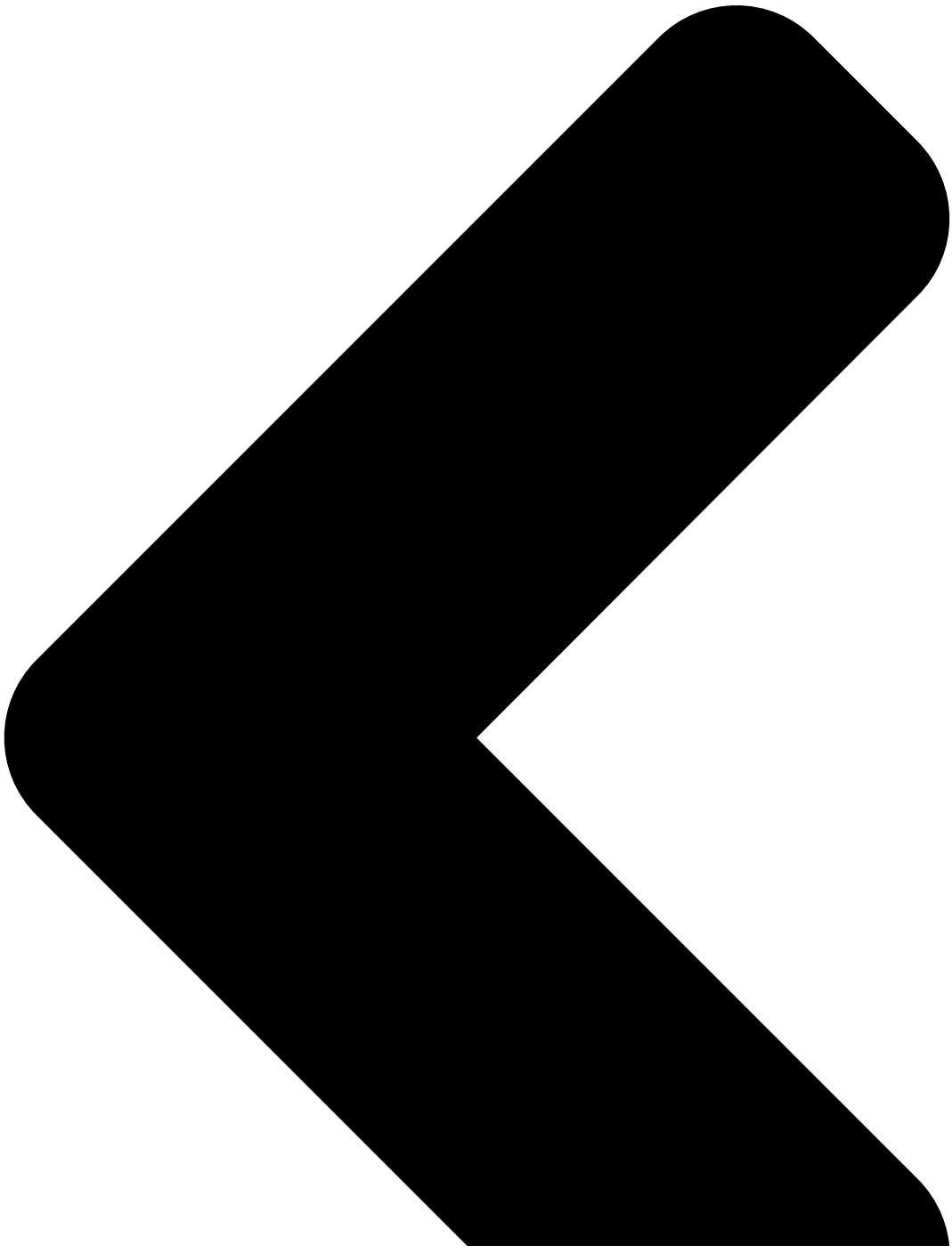

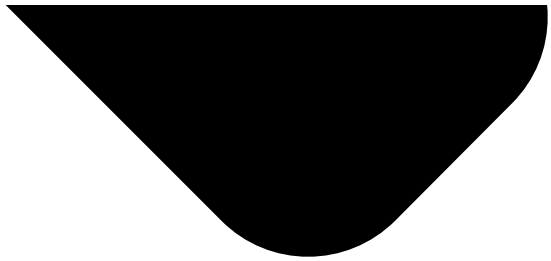

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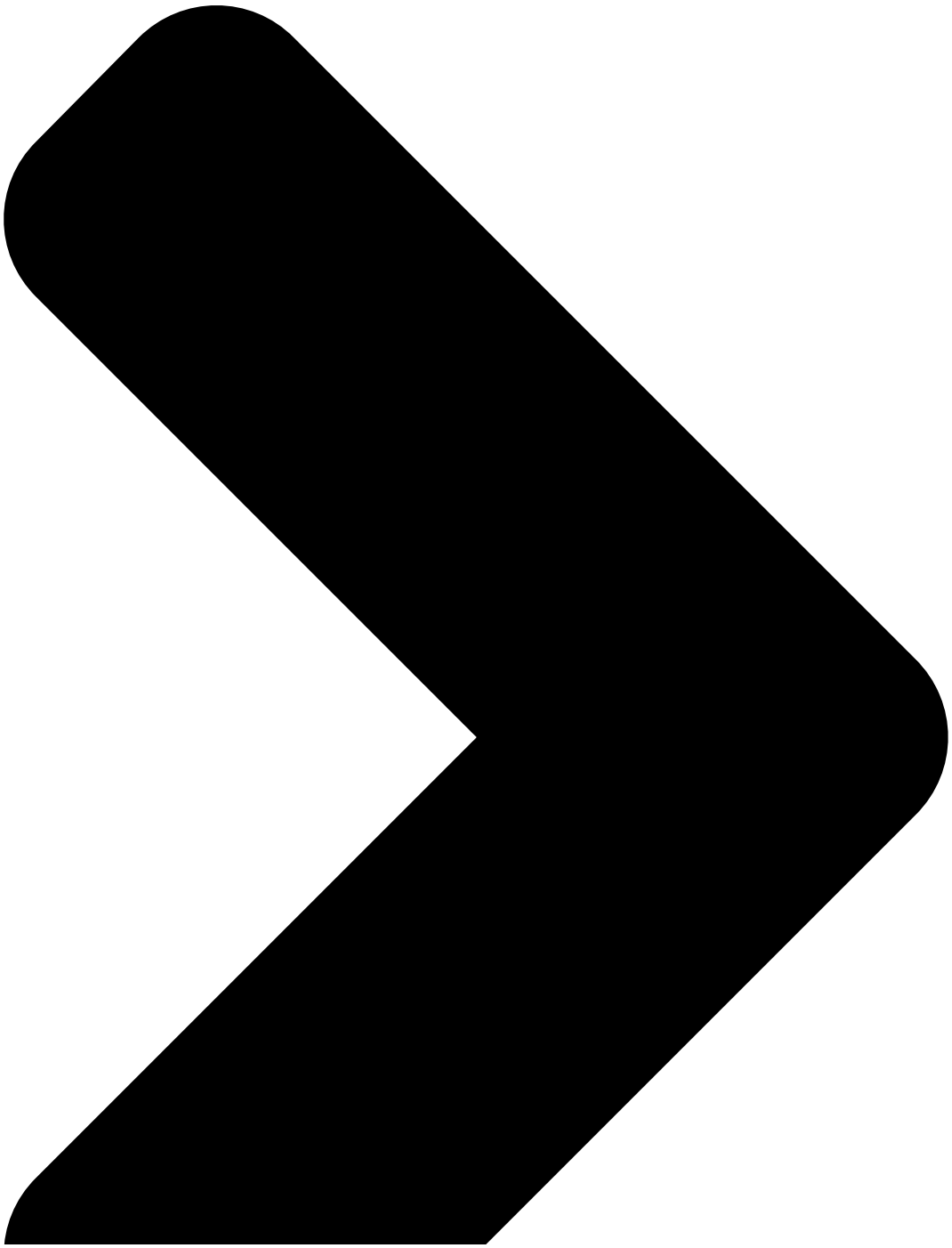

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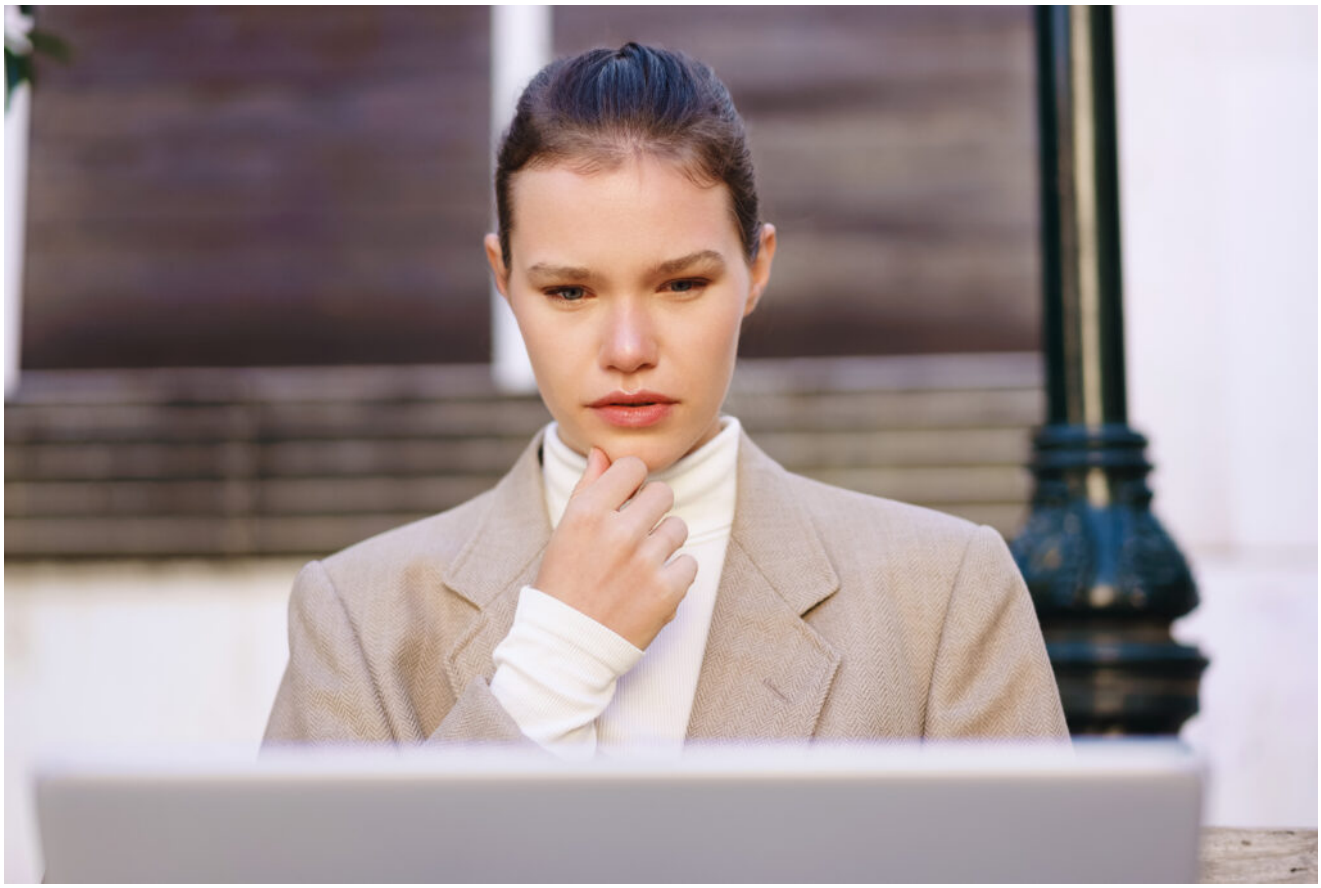

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