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Safeguarding Against Discrimination in Telehealth to Meet Requirements of New Federal Guidance and the Proposed Rule Implementing Section 1557 of the Affordable Care Act

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August 24, 2022

With telehealth becoming increasingly prevalent, the federal government has taken steps to protect against discrimination in telehealth and prevent accessibility issues that disproportionately affect individuals with disabilities and Limited English Proficient (LEP) persons.

- On July 29, 2022, the Department of Health and Human Services Office for Civil Rights (HHS) and the Department of Justice (DOJ) Civil Rights Division jointly issued [Guidance on Nondiscrimination in Telehealth: Federal Protections to Ensure Accessibility to People with Disabilities and Limited English Proficient Persons](#) (the Guidance).
- On August 4, 2022, the Department of Health and Human Services (HHS) proposed a new [rule](#) (the Proposed Rule) that would amend its regulations for implementing Section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health care programs and activities.

The Guidance derives authority from various federal civil rights laws and provides several examples of what providers can do to prevent unlawful discrimination in providing telehealth services. The Proposed Rule focuses on accessibility required by Section 1557 of the Affordable Care Act, providing more background on the basis and scope of this authority, as well as enforcement mechanisms that can be applied against providers who fail to comply. Notably, HHS proposes to expand the definition of "federal financial assistance" to include Medicare Part B, extending the scope of Section 1557 protections to all health programs and activities administered by HHS. Pursuant to this authority, CMS proposes adding a provision that explicitly prohibits covered entities from discriminating in their delivery of telehealth services on any of the bases protected by Section 1557—race, color, national origin, age, disability, or sex.

The Guidance and the Proposed Rule underscore the increased focus on nondiscrimination in telehealth. To avoid enforcement under federal civil rights laws, providers should take proactive measures to ensure that telehealth is accessible to all protected individuals. Further detail on what this entails is included below.

HHS and DOJ Joint Guidance Related to Telehealth

The Guidance explains that health care providers who fail to ensure that people with disabilities and LEP persons have access to care via telehealth services may be engaging in unlawful discrimination under several federal civil rights laws. These laws include Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, Title VI of the Civil Rights Act of 1964, Section 1557 of the Affordable Care Act, and HHS regulations implementing Section 1557.

Reasonable Accommodations

To prevent unlawful discrimination, telehealth providers are required to provide reasonable accommodations under federal law. Such accommodations could include the following changes to practices, policies, and procedures to make telehealth care accessible to people with disabilities:

- Offering additional time for appointments for patients with intellectual disabilities to help these patients become familiar with the features of telehealth platforms, and understand what is being asked by the provider during the visit.
- Using platforms that allow a support person to be present with the patient or log in from another location.

Communication Aids and Services

The Guidance also explains that federal law requires telehealth providers give patients free communication aids and services when needed to communicate effectively. Such communication aids and services vary based on the needs of the patients and could include the following:

- Providing a sign language interpreter, and using a platform that allows the interpreter to join the visit for a patient who is deaf.
- Using a platform that can support effective real-time captioning for a patient who is hard of hearing.
- Providing recommendations to the patient on a screen-reader that is compatible for a patient who is blind.
- Providing videos with audio descriptions or paired, with a consultation by phone for patients with visual disabilities.

Language Assistance Services

To prevent national origin discrimination and to provide LEP persons with meaningful access to care, the Guidance notes that language assistance services are often necessary, and must be provided at no cost to the patient. Examples of these services include:

- Providing a non-English statement explaining how to access information in emails or social media postings regarding how to schedule telehealth appointments.
- Using telehealth platforms that can support telephone/remote interpreters, and allowing them to join telehealth sessions.

Provisions of the Proposed Rule Implementing Section 1557 of the Affordable Care Act that Extend its Scope to Medicare Part B Funds and Telehealth

Section 1557 of the Affordable Care Act (ACA) applies to health programs and activities that receive federal financial assistance directly or indirectly from HHS or that are administered by HHS, and any program or activity administered by an entity established under Title I of the Affordable Care Act. This Section does not apply to any employer with regard to its employment practices, including the provision of employee health benefits.

Proposal for Medicare Part B to Meet the Definition of Federal Financial Assistance

HHS's longstanding position has been that Medicare B funding does not constitute federal financial assistance for the purpose of coverage under the federal civil rights laws enforced by HHS, including Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Section 1557 of the ACA. In the Proposed Rule, HHS reverses this position and proposes including funds received under Medicare Part B within the definition of "federal financial assistance" by modifying the definition of this term. The proposed definition and interpretation reflects HHS's view that Medicare Part B payments constitute federal financial assistance and providers subsidized as a result of those payments are recipients.

In the past, Part B funds were excluded on the basis that: 1) Part B funds were a "a contract of insurance or guaranty" that fell within the exception to "federal financial assistance" in Title VI of the Civil Rights Act of 1964, and 2) no federal financial assistance flows from HHS to a doctor or other practitioner under Part B.

In the Proposed Rule, HHS explains that in enacting Section 1557, Congress made clear that "contracts of insurance" can constitute federal financial assistance. In addition, at present, the majority of providers enrolled in Part B are participating providers who bill and are paid directly by Medicare for services provided to Part B beneficiaries. Accordingly, the prior rationales for excluding Part B funds are no longer applicable because they do not reflect the current operation of the program. In the Proposed Rule, HHS also notes its view that even non-participating providers under Medicare Part B are recipients of federal financial assistance because the services they provide to Part B beneficiaries are subsidized by the program. HHS believes that both participating and nonparticipating providers have a choice as to whether to certify compliance with civil rights laws as a condition of receiving federal funds.

Proposal to Add a Provision to Prohibit Discrimination in the Provision of Telehealth

HHS notes that while there are benefits to be gained from telehealth for individuals with disabilities (e.g., lower cost of care, access to specialists, and lower exposure to communicable diseases), there are still some barriers to access for this population.

To address this, HHS proposes adding a provision that explicitly prohibits covered entities from discriminating in the delivery of its health programs and activities through telehealth services on any of the bases protected by Section 1557—race, color, national origin, age, disability, or sex. "Telehealth" is defined in the Proposed Rule as "the use of electronic information and telecommunications technologies to support long-distance clinical health care, patient and professional health-related education, public health, and health administration."

HHS provides that Section 1557 encompasses "communications about the availability of telehealth services, the process for scheduling telehealth appointments, (including the process for accessing on-demand unscheduled telehealth calls), and the telehealth appointment itself."

HHS specifically notes that the duty not to discriminate includes "ensuring that such services are accessible to individuals with disabilities and provide meaningful program access to [Limited English Proficient (LEP)] individuals." This duty also includes accessibility to platforms, providing effective communication for individuals with disabilities through appropriate communication aids and services, and language assistance services for LEP individuals.

HHS is seeking comment on this approach and whether covered entities and others would benefit from a specific provision addressing accessibility in telehealth services for individuals with disabilities and LEP individuals, as well as what such a provisions should include.

Enforcement Provisions

HHS proposes adding a provision that Section 1557's enforcement mechanism is consistent with the mechanisms provided under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, and that private individuals may sue to enforce their rights under Section 1557.

Conclusion

The Guidance and Proposed Rule hold telehealth providers accountable for ensuring that telehealth services are delivered in a manner that does not discriminate against individuals with disabilities or LEP persons. Compliance will require further examination of telehealth platforms and workflows to make sure that appointments and services are accessible to all patients.

The deadline for comments on the Proposed Rule is 11:59 p.m. ET on October 3, 2022. With a limited exception for provisions of the Proposed Rule that require changes to health insurance or group health benefit design, the provisions that are finalized are proposed to take effect sixty days after the Final Rule is published in the Federal Register.

If you have questions or need assistance with implementing the Guidance or responding to the Proposed Rule, please contact [Allison Cohen](#), [Alex Lewis](#), or any member of Baker Donelson's [Telehealth Group](#).