



PG Bulletin

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Preventing and Responding to Sex Discrimination in Health Care—Ensuring Compliance with Section 1557 of the Affordable Care Act

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The criminal convictions, and subsequent sentencings, of Lawrence “Larry” Nassar marked the end of a chapter but not the end of the story for Michigan State University (MSU). In August 2019, MSU, the MSU HealthTeam, and MSU Health Care, Inc. entered into a public, voluntary resolution agreement with the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR).¹

In that resolution agreement, HHS explains, “Based on the criminal investigation of Mr. Nassar for the sexual abuse of his patients and others, OCR initiated an investigation of MSU to determine if its doctors’ offices and clinics violated Title IX of the Education Amendments of 1972 and Section 1557 of the Affordable Care Act.”² Notably, among the possible ramifications of violating either of these statutes is the withdrawal of all federal funding that the entity receives.³

Under Section 1557 of the Affordable Care Act (Section 1557), which has been in effect since 2010, health programs and activities that receive federal financial assistance cannot discriminate on the basis of race, color, national origin, sex, disability, or age.⁴ The statute itself explicitly stitches together the protections offered under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 (Title IX), the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973.⁵

The prohibition against sex discrimination under Section 1557 flows from its reference to Title IX, a federal civil rights law that prohibits sex discrimination in federally funded education programs or activities.⁶ Discrimination on the basis of sex encompasses sexual harassment, sexual assault, and other forms of sexual misconduct.

Section 1557 is the first federal civil rights law to prohibit sex discrimination against patients in federally funded health care programs and activities. Captured within its prohibition against sex

discrimination, Section 1557 includes a specific provision requiring that qualified entities “treat individuals consistent with their gender identity.”⁷

For a medical center affiliated with a university, as in this case of MSU, patients participating in the university’s federally funded health programs or activities are protected from discrimination on the basis of sex under both Title IX and Section 1557.

In recent years, Title IX has enjoyed robust media coverage and national discussion, but the same cannot be said for its counterpart in the realm of health programs and activities, Section 1557. This lack of publicity, however, does not signal a lack of enforcement—and anyone affiliated with a health program or activity that receives federal funds should be aware of their organization’s responsibilities under Section 1557.⁸

Given the prevalence of conversations about Title IX enforcement, and given the fact that HHS has almost uniformly adopted the Title IX playbook for its enforcement of Section 1557, most academic medical centers have the benefit knowing what they need to do and how they need to do it to comply with these statutes. Medical centers that receive federal funding but are not affiliated with an education program or activity (and so are not subject to Title IX), however, may not be as aware of their responsibilities under Section 1557.

What exactly does Section 1557 require? To ensure compliance, qualified medical centers should review the specific provisions outlined in the statute, including:

- *Providing Accessible Public Notice of Nondiscrimination.* Qualified entities must notify those who interact with their programs—and members of the public—of their commitment to nondiscrimination under Section 1557.⁹ This includes telling people where they can turn if they want to report discrimination, what the grievance procedures involve, and how to file a complaint with OCR.¹⁰ Entities must adhere to specific requirements for where and how to distribute this information to make sure that they provide adequate notice under Section 1557. Entities should also note the specific provisions outlining their obligation to make this information accessible to people with limited English proficiency and those living with disabilities.¹¹
- *Designating a “Responsible Employee” and Adopting Grievance Procedures.* Qualified entities with 15 or more employees must designate an employee who is responsible for coordinating their compliance with Section 1557.¹² That person must ensure that the entity appropriately responds to and investigates allegations of noncompliance with Section 1557. The entity must publish that person’s name and contact information.¹³ Such entities must also ensure that they have procedures in place to promptly and equitably resolve reports of discrimination under Section 1557.¹⁴
- *Providing Assurance of Compliance.* Any time that a qualified entity applies to HHS for federal financial assistance, it must provide assurance of its compliance with Section 1557.¹⁵ Medical centers interested in what could happen if HHS investigates their organization should review the public resolution agreement that HHS entered into with MSU.¹⁶ Qualified health care entities should consider undertaking a comprehensive review of their policies, procedures, and practices to ensure compliance with Section 1557. Given the parallels already discussed between Title IX and Section 1557, it stands

to reason that we could see more and more medical centers subject to investigations in this area.¹⁷

The Future of Section 1557

In May 2019, HHS proposed changes to Section 1557 that would eliminate some of the aforementioned requirements.¹⁸ For one, HHS seeks to limit the contours of “sex discrimination” to exclude discrimination on the basis of gender identity.¹⁹ This proposed change lingers as the Supreme Court stands poised to issue a decision as to whether Title VII’s prohibition against sex discrimination includes discrimination on the basis of gender identity and sexual orientation.²⁰ That decision could be determinative as to what happens with this proposed change to Section 1557.

The proposed changes would also eliminate some of the specific requirements related to making information available to those with limited English proficiency—namely the requirement that certain notices be distributed in at least 15 languages.²¹ Moreover, the proposed changes would adjust the scope Section 1557 as it applies to entities that are not primarily engaged in providing health care services—capturing such entities within Section 1557 only insofar as HHS funds them.²² The changes also include provisions for certain religious exceptions—as well as other proposed changes not listed here.²³

At least while these changes are pending, qualified entities should continue to ensure compliance with the requirements as they exist today.

¹ Voluntary Resolution Agreement Between the U.S. Department of Health and Human Services Office for Civil Rights and The Board of Trustees of Michigan State University, d/b/a Michigan State University and MSU HealthTeam, and MSU Health Care, Inc., Aug. 2019, <https://www.hhs.gov/sites/default/files/vra-between-msu-and-ocr.pdf> (accessed Nov. 1, 2019).

² *Id.*

³ Enforcement Mechanisms, 45 C.F.R. § 92.301 (2016); Federal Administrative Enforcement; Report to Congressional Committees, 20 U.S.C.A. § 1682 (1972).

⁴ Discrimination Prohibited, 45 C.F.R. § 92.101 (2016).

⁵ *Id.*

⁶ Sex, 20 U.S.C.A. § 1681 (1972).

⁷ Equal Program Access on the Basis of Sex, 45 C.F.R. § 92.206 (2016).

⁸ HHS, OCR Enforcement under Section 1557 of the Affordable Care Act Sex Discrimination Cases, <https://www.hhs.gov/civil-rights/for-individuals/section-1557/ocr-enforcement-section-1557-aca-sex-discrimination/index.html> (accessed Nov. 1, 2019).

⁹ Notice Requirement, 45 C.F.R. § 92.8.

¹⁰ *Id.*

¹¹ *Id.*

¹² Designation of Responsible Employee and Adoption of Grievance Procedures, 45 C.F.R. § 92.7.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Assurances Required, 45 C.F.R. § 92.5.

¹⁶ Voluntary Resolution Agreement, *supra* note 1.

¹⁷ *Title IX: Tracking Sexual Assault Investigations*, The Chronicle of Higher Education, <http://projects.chronicle.com/titleix/> (accessed Nov. 1, 2019).

¹⁸ HHS, Press Release, HHS Proposes to Revises ACA Section 1557 Rule to Enforce Civil Rights in Healthcare, Conform to Law, and Eliminate Billions in Unnecessary, <https://www.hhs.gov/about/news/2019/05/24/hhs-proposes-to-revise-aca-section-1557-rule.html> (accessed Nov. 1, 2019).

¹⁹ *Id.*

²⁰ Adam Liptak and Jeremy W. Peters, *Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers*, N.Y. Times, Oct. 8, 2019, <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html> (accessed Nov. 1, 2019).

²¹ HHS Proposes to Revises ACA Section 1557, *supra* note 18.

²² *Id.*

²³ *Id.*