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TO: NPA Members  
FROM: Charles Fontenot  
DATE: September 1, 2022  
RE: Department of Health and Human Services proposed rule on Section 1557 of the Affordable Care Act (ACA) (Section 1557), titled, "Nondiscrimination in Health Programs and Activities" [Docket ID: HHS-OS-2022-0012-001].

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On August 4, 2022, the Department of Health and Human Services issued a [proposed rule](#) on Section 1557 of the Affordable Care Act (ACA) (Section 1557), titled, "Nondiscrimination in Health Programs and Activities" [Docket ID: HHS-OS-2022-0012]. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in certain health programs and activities. The Section 1557 Notice of Proposed Rulemaking (NPRM) includes a number of provisions that are particularly relevant for older adults and people with disabilities. The NPRM seeks to restore and strengthen civil rights protections for patients and consumers in certain federally funded health programs and U.S. Department of Health and Human Services (HHS) programs, such as Medicare and Medicaid, after the 2020 version of the rule limited its scope and power to cover fewer programs and services.

The proposed rule also clarifies that the non-discrimination protections of Section 1557 of the ACA apply to all HHS-administered health programs and activities, and outlines requirements for covered entities. It makes clear that **PACE organizations** (POs) would be considered covered entities.

The NPRM seeks to address gaps identified in prior regulations. Specifically, the proposed rule:

- **Reinstates application of Section 1557 to all Department of Health and Human Services' administered health programs and activities.** The proposed rule applies the same nondiscrimination standards to the Department's health programs and activities as are required of federal funds recipients. The 2020 Rule ([85 Fed. Reg. 37160](#) (June 19, 2020)) limited the scope of Section 1557's nondiscrimination requirements to only those programs and activities conducted by the Department under Title I of the ACA. The Department believes that interpreting Section 1557 to cover all of the health programs and activities administered by the Department is the best reading of the statutory language, and the one that provides protection from discrimination to people in more programs. This demonstrates the Department's commitment to ensuring that individuals are not subject to discrimination across the broad range of health programs and activities it conducts, including but not limited to the Indian Health Service, Centers for Medicare & Medicaid Services, and the National Institutes of Health.
- **Clarifies the application of Section 1557 nondiscrimination requirements to health insurance issuers.** The proposed rule, consistent with congressional intent and court precedent, reinstates and strengthens application to health insurance issuers that receive federal financial assistance. Recognizing the significant role health insurance issuers play in the provision of health care, this proposed rule provides clear nondiscrimination standards for the industry.

- **Aligns sex discrimination regulatory requirements with Federal court decisions.** The proposed rule codifies protections against discrimination on the basis of sex as including discrimination on the basis of sexual orientation and gender identity. These protections are consistent with the U.S. Supreme Court’s holding in [Bostock v. Clayton County - PDF](#), 140 S. Ct. 1731 (2020), and the Department’s subsequent [Federal Register Notice](#) (86 Fed. Reg. 27984 (May 10, 2021)) that Section 1557 would be enforced consistent with this decision that sex discrimination includes discrimination on the basis of sexual orientation and gender identity. In addition, the proposed rule clarifies that sex discrimination includes discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; and pregnancy or related conditions including pregnancy termination.
- **Requires covered entities to have Section 1557 policies and staff training.** The proposed rule, for the first time, requires recipients of federal financial assistance, the Department’s health programs and activities, and State Exchanges to implement Section 1557 anti-discrimination policies and procedures to give staff clear guidance on the provision of language assistance services for limited English proficient (LEP) individuals, and effective communication and reasonable modifications to policies and procedures for people with disabilities. Covered entities will also be required to train relevant staff on these policies and procedures. These requirements will help improve compliance and reduce the need for enforcement.
- **Requires covered entities to provide notice of the availability of language assistance services and auxiliary aids and services.** The proposed rule requires covered entities to provide notice of the availability of language assistance services and auxiliary aids and services in English and at least the 15 most common languages spoken by LEP persons of the relevant state or states. These notices must also be provided in alternate formats for individuals with disabilities who require auxiliary aids and services to ensure effective communication. Covered entities would be required to provide these notices on an annual basis, upon request, in prominent physical locations, and in a conspicuous location on their websites. The proposed rule also allows individuals to opt-out of receiving an individualized notice on an annual basis.
- **Puts covered entities on notice of nondiscrimination requirements’ application to use of clinical algorithms.** The proposed rule states that a covered entity must not discriminate against any individual on the basis of race, color, national origin, sex, age, or disability through the use of clinical algorithms in its decision-making. This provision is not intended to hinder the use of clinical algorithms; but to prevent discrimination given the recent increasing reliance on clinical algorithms in health care decision-making.
- **Provides a clear process for raising conscience and religious freedom objections.** The proposed rule provides a clear process by which recipients of federal financial assistance from the Department can notify OCR of their belief that the application of a specific provision or provisions of Section 1557 would violate their rights under federal conscience or religious freedom laws. For the first time, OCR clarifies that when it receives such a notification from a recipient, it shall promptly consider those views in responding to any complaints or otherwise determining whether to proceed with any investigation or enforcement activity regarding that recipient’s compliance with the relevant provisions of the regulation. Any ongoing relevant investigation or other enforcement action regarding the recipient shall be held in abeyance until a determination is made as to whether a recipient is exempt

from compliance with, or entitled to a modification of the application of, a provision of the rule. Additionally, the rule provides that after receiving notice, if there is a sufficiently concrete factual basis for doing so, OCR may at any time make a determination regarding whether a recipient is wholly exempt from or should receive an exemption or modification from certain provisions of the rule.

- **Clarifies that nondiscrimination requirements apply to health programs and activities provided through telehealth services.** The proposed rule specifically addresses nondiscrimination in the provision of health programs and activities through telehealth services. Telehealth is a means by which covered entities provide their health programs and activities. This provision clarifies that covered entities have an affirmative duty to not discriminate in their delivery of such services through telehealth. This duty includes ensuring that such services are accessible to individuals with disabilities and providing meaningful program access to LEP individuals. Such services would include 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.
- **Interprets Medicare Part B as federal financial assistance.** The proposed rule announces the Department's position that Medicare Part B is federal financial assistance for the purpose of coverage under the federal civil rights statutes the Department enforces. These include [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](#). Medicare Part B funds meet the definition of federal financial assistance under the law, as provided in the implementing regulations for each of the aforementioned statutes. The Department believes that previous rationales provided for the Medicare Part B exclusion are not the best reading of the civil rights laws given the purpose and operation of the Medicare Part B program.
- **Reinstates protections on the basis of gender identity and sexual orientation in Centers for Medicare & Medicaid Services regulations, including those for PACE.** The 2020 Rule amended ten provisions in the Centers for Medicare and Medicaid Services (CMS) regulations, all of which cover at least some entities that are also subject to Section 1557, to delete language that prohibited discrimination on the basis of sexual orientation and gender identity. These provisions included regulations governing Medicaid and the Children's Health Insurance Program (CHIP); **PACE**; health insurance issuers and their officials, employees, agents, and representatives; States and the Exchanges carrying out Exchange requirements; agents, brokers, or web-brokers that assist with or facilitate enrollment of qualified individuals, qualified employers, or qualified employees; issuers providing essential health benefits (EHB); and qualified health plan (QHP) issuers. CMS proposes to amend these regulations in this Section 1557 proposed rule so that they again identify and recognize discrimination on the basis of sexual orientation and gender identity as prohibited forms of discrimination based on sex. In addition, CMS proposes to amend its own regulations applying these protections in CHIP to also apply to Medicaid fee-for-service programs and managed care programs. These proposals are consistent with those elsewhere in this proposed rule and would promote consistency across HHS programs by prohibiting discrimination based on sexual orientation or gender identity.

### **Regulatory Applicability to PACE**

As mentioned above, to comply with the provisions of this [proposed rule](#), CMS proposes using its authority under section 1557 of the ACA and its authorities under sections [1894\(f\)\(4\)](#) and [1934\(f\)\(4\)](#) of the SSA, to

amend PACE regulations at [42 CFR 460.98\(b\)\(3\)](#) and [460.112\(a\)](#) to explicitly prohibit discrimination on the basis of sexual orientation or gender identity.

Furthermore, revisions to § 460.98(b)(3) would state that POs may not discriminate against any participant in the delivery of required PACE services based on race, ethnicity, national origin, religion, sex (including sexual orientation and gender identity), age, mental or physical disability, or source of payment.

In general, the final rule is consistent with existing, well-established federal civil rights laws and clarifies the standards HHS will apply in implementing Section 1557 of the ACA. Its objective is to educate consumers about their rights and to help covered entities, which include PACE organizations, to understand their legal obligations. The proposed rule would establish a set of legal standards that auditing agencies or individual plaintiffs can point to for administrative or judicial action to pursue claims of noncompliance or discrimination prohibited under Section 1557.

NPA believes that POs largely will be compliant with the nondiscrimination provisions of the rule that are consistent with their requirements under §460.92(a) and §460.112 of the PACE regulation, which addresses the specific rights of PACE participants. These provisions include “the right not to be discriminated against in the delivery of required PACE services based on race, ethnicity, national origin, religion, sex, age, sexual orientation, mental or physical disability, or source of payment.” These rights are extended to care provided to PACE participants by contracted providers under §460.70(b)(1)(iii).

In addition to expanding organizations nondiscrimination notification requirements upon POs, the proposed rule would also implement the requirement that each PO designate at least one individual to be the Section 1557 coordinator (similar in function to the organizations Compliance Officer), develop specific Section 1557 policies and procedures, and to develop and train relevant employees in their health programs and activities on their Section 1557 Policies and Procedures.

### **PACE organization action items**

In light of, and in addition to the above, it is strongly suggested that POs undertake a review, including but not limited to the following: their current participant-facing communications (e.g.; taglines; websites, flyers, etc.), policies and procedures (e.g.; service determination requests (SDRs); grievance/appeals; also includes the development of Section 1557 policies and procedures), marketing materials (e.g.; enrollment/disenrollment), and training curriculums (e.g.; modify existing training and develop new training incorporating the requirements of Section 1557) to ensure they are in alignment with the requirements laid out in the proposed rule.

To assist POs in determining what constitutes “significant” communications with beneficiaries/participants, the [Office of Civil Rights](#) believes covered entities are in the best position to determine, within reason, which of their communications and publications are significant in the context of their own health programs and activities.

Examples of publications and communications that OCR considers to be “significant” include applications to participate in, or receive benefits or services from, a covered entity’s health program or activity, as well as written correspondence related to an individual’s rights, benefits, or services, including correspondence requiring a response.

In contrast, OCR would not generally view all of an entity's outreach, education, and marketing materials to be categorized as "significant." Specifically, OCR has clarified that the following marketing publications and communications are not "significant" for purposes of the posting requirements, such as: radio or television ads; banner and banner like ads; envelopes; or outdoor advertising such as billboard ads.

Specific language related to PACE can be found on page 70 (47893) through 72 (47895) of the published Federal Register /Vol. 87, No. 149 /Thursday, August 4, 2022 / [proposed rule](#).

After reviewing the proposed rule, NPA believes it is consistent with PACE organization's mission and operations. Therefore, we plan to comment in support of the rule without modifications. If after reviewing the proposed, rule you have concerns you would like NPA to address in its comments please let us know by **September 15, 2022** by sending an email to [Charlesf@npaonline.org](mailto:Charlesf@npaonline.org). Additionally, you may submit electronic comments at <https://www.regulations.gov> by searching for the Docket ID number hhs-os-2022-0012-0001 (the Document ID number is case sensitive, be sure to enter as noted). Follow the instructions for submitting electronic comments. **Comments must be submitted on or before October 3, 2022.**

If you are submitting comments electronically, the Department strongly encourages you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), the Department strongly encourages you to convert the PDF to "print-to-PDF" format, or to use some other commonly used searchable text format. Please do not submit the PDF in a scanned format. Using a print-to-PDF format allows the Department to electronically search and copy certain portions of your submissions to assist in the rulemaking process.

If you have questions regarding this information, please contact [Charles Fontenot](#), Senior Director of Health Plan Management and Reimbursement Policy.

#### **FOR FURTHER INFORMATION CONTACT:**

##### **Office for Civil Rights**

Dylan Nicole de Kervor, (202) 240-3110 or (800) 537-7697 (TDD), or via email at [1557@hhs.gov](mailto:1557@hhs.gov) for matters related to Section 1557.

##### **Centers for Medicare & Medicaid Services**

Timothy Roe, (410) 786-2006 for matters related to Programs of All-Inclusive Care for the Elderly (PACE).

#### **Summary of the Proposed Rule**

The following is a brief summary of the provisions set forth in the proposed rule. The objective of the summary is to highlight the numerous provisions impacting regulatory requirements of POs. To assist with this, below we have identified the specific pages in the proposed rule that relate to each of the proposed requirements.

This summary does not, however, substitute for a full reading of the provisions of the August 4, 2022 proposed rule that would apply to PACE, including the preamble language which contributes to a complete understanding of the regulatory intent of HHS.

The citations mentioned below are associated with [45 CFR Part 92](#) entitled "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.”

## **Subpart A—General Provisions**

### **Purpose and effective date (§ 92.1)(pages 47837 and 47911)**

Proposed § 92.1(a) is to implement Section 1557 of the [Patient Protection and Affordable Care Act \(ACA\) \(42 U.S.C. 18116\)](#), which prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in certain health programs and activities.

Section 1557 provides that, except as otherwise provided in Title I of the ACA, an individual shall not, on the grounds prohibited under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or Section 504 of the Rehabilitation Act of 1973 (see links above), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency, or any entity established under Title I of the ACA.

This part applies to health programs or activities administered by recipients of Federal financial assistance from the Department, Department-administered health programs or activities, and Title I entities that administer health programs or activities.

Section 92.1(b) proposes that the effective date of the Section 1557 implementing regulation shall be 60 days after the publication of a final rule in the Federal Register (August 4, 2022). This section provides an exception to the start date for provisions of this part that require changes to health insurance or group health plan benefit design. Such provisions will have a delayed implementation date of the first day of the first plan year (in the individual market, policy year) beginning on or after the year immediately following the effective date of the Final Rule in the Federal Register.

The Department seeks comments from issuers, employers, and other plan sponsors on how long they anticipate it would take to adjust their plan offerings, and from Exchanges on how long they would need to implement the proposed requirements.

### **Application (§ 92.2) (pages 47838 and 47911)**

The Department (HHS) proposes in § 92.2(a) to apply the rule, except as otherwise provided in this part, to: (1) every health program or activity, any part of which receives Federal financial assistance, directly or indirectly, from the Department; (2) every health program or activity administered by the Department; and (3) every program or activity administered by a Title I entity (Title I entity means any entity established under Title I of the Americans with Disabilities Act of 1990 as amended, including State Exchanges and Federally-facilitated Exchanges).

The Department seeks comments on the effects of the proposed scope of application of the regulation, including the application to programs and activities of the Department and other Executive Agencies;

application of this part to recipients of Federal financial assistance from Executive Agencies other than the Department; and the application to employment.

### **Relationship to Other Laws (§ 92.3) (pages 47841 and 47911)**

Proposed § 92.3 explains the relationship of the proposed regulation to existing laws. Paragraph (a) provides that Section 1557 is not intended to apply lesser standards for the protection of individuals from discrimination than the standards under Title VI, Title IX, Section 504, the Age Act, or the regulations issued pursuant to those laws (please refer to the above-mentioned links for additional information).

### **Definitions (§ 92.4) (pages 47842 and 47911)**

Proposed § 92.4 contains proposed definitions, which is the same approach taken by the Department in the 2016 Rule at former § 92.4. The 2020 Rule does not include a specific definition section, an approach that contributes to uncertainty. The Department reintroduces definitions to help reinstate clarity.

For ease of organization, the definitions are discussed in the proposed rule by topic area, and definitions of particular note are set out in additional detail. These definitions can be found on pages 19-23 and 88-90 of the [proposed rule](#).

### **Assurances Required (§ 92.5) (pages 47846 and 47913)**

This proposed rule would retain the requirement of the 2016 and 2020 Rules for recipients to submit assurances of compliance to the Department. One method that the Federal Government uses to ensure civil rights compliance is to require covered entities to submit assurances of compliance when applying for Federal financial assistance. The assurances and related certification documents remind covered entities of their civil rights obligations and can also assist the Department in pursuing an independent contract claim for enforcement of nondiscrimination requirements.

Examples of HHS programs that provide Federal financial assistance subject to this part include but are not limited to Medicaid and CHIP, Medicare Part A, Medicare Part B (as proposed in this rule), Medicare Part C (Medicare Advantage), Medicare Part D (drug coverage), and HHS grant programs. While PACE organizations do not submit annual Part C bids, assurances related to this part are made (via 460.98 and 460.112) upon submission of an organizations Part D provider application to CMS, as well as with the PACE organizations contract with their respective state, and for all new applicants and existing PACE Organizations seeking to expand a service area with CMS.

### **Remedial Action and Voluntary Action (§ 92.6) (pages 47846 and 47913)**

The Department proposes to include requirements regarding remedial and voluntary action (of covered entities), which would reinstate former § 92.6 in the [2016 Rule](#). The [2020 Rule](#) repealed former § 92.6, stating that it was duplicative and overlapped with existing civil rights laws and regulations, and therefore would cause confusion about the responsibilities of covered entities. The regulations implementing Title IX, Section 504, and the Age Act do require a covered entity to take voluntary action upon a determination that the entity engaged in discriminatory conduct.

For purposes of this proposed rule, remedial actions are those that:

(a) (1) If the Director finds that a recipient or State Exchange has discriminated against an individual on the basis of race, color, national origin, sex, age, or disability, in violation of Section 1557 or this part, such recipient or State Exchange must take such remedial action as the Director may require to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against an individual on the basis of race, color, national origin, sex, age, or disability, in violation of Section 1557 or this part, and where another recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both entities to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of Section 1557 or this part, require a recipient, in its health programs and activities, or State Exchange to take remedial action with respect to:

(i) Persons who are no longer participants in the recipient's or State Exchange's health program or activity but who were participants in the health program or activity when such discrimination occurred;  
or

(ii) Persons who would have been participants in the health program or activity had the discrimination not result or resulted in limited participation in the covered entity's health programs or activities by persons on the basis of race, color, national origin, sex, age, or disability. occurred.

For purposes of this proposed rule, voluntary actions are those that:

(b) A covered entity may take voluntary nondiscriminatory steps, in addition to any action that is required by Section 1557 or this part, to overcome the effects of conditions that result or resulted in limited participation in the covered entity's health programs or activities by persons on the basis of race, color, national origin, sex, age, or disability.

### **Designation and Responsibilities of a Section 1557 Coordinator (§ 92.7) (pages 47846 and 47914)**

Proposed § 92.7(a) requires covered entities with 15 or more employees to designate at least one employee to serve as a Section 1557 coordinator to coordinate the covered entities efforts to comply with and carry out the covered entity's responsibilities under Section 1557 and this part with regard to their health programs and activities.

OCR believes that a designated Section 1557 Coordinator will help ensure covered entities comply with the requirements of Section 1557. Additionally, a designated Section 1557 Coordinator will better allow covered entities to resolve potential grievances as accurately and efficiently as possible, to the benefit of individuals seeking care as well as the covered entity.

Proposed responsibilities include, at a minimum, that the covered entity ensure that the Section 1557 Coordinator:

- (1) receives, reviews, and processes grievances filed under the grievance procedure as set forth in proposed § 92.8(c);
- (2) coordinates the covered entity's recordkeeping requirements as set forth in proposed § 92.8(c);
- (3) coordinates effective implementation of the covered entity's language access procedures as set forth in proposed § 92.8(d);
- (4) coordinates effective implementation of the covered entity's effective communication procedures as set forth in proposed § 92.8(e);
- (5) coordinates the covered entity's procedures for providing reasonable modifications for individuals with disabilities in accordance with proposed § 92.8(f); and
- (6) coordinates training of relevant employees as set forth in proposed § 92.9, including maintaining the required documentation.

### **Policies and Procedures (§ 92.8) (pages 47847 and 47914)**

Proposed § 92.8 would require covered entities to develop and implement written policies and procedures that are designed to facilitate compliance with the requirements of this part.

This proposed section would require each covered entity, in its health programs and activities, to adopt and implement a nondiscrimination policy, grievance procedures (for covered entities employing 15 or more persons), language access procedures, auxiliary aids and services procedures, and procedures for reasonable modifications for individuals with disabilities (collectively, "Section 1557 Policies and Procedures").

The Department recognizes that covered entities vary significantly in size, nature of business, and location and accordingly recognize that each covered entity's Section 1557 Policies and Procedures may vary. As OCR is committed to supporting covered entities as they develop policies and procedures it is planning to provide sample documents on the Department's [website](#).

Through the implementation of Section 1557 Policies and Procedures, a covered entity's employees will be better equipped to provide services in a nondiscriminatory manner.

The Department notes that many health care providers have adopted policies and procedures required under OCR's existing civil rights authorities and therefore, would only need to review and update such policies and procedures rather than creating them anew.

Under this proposed provision, covered entities may need to revise any pre-existing policies and procedures to ensure they, at minimum, include the proposed required content.

However, the Department's enforcement and compliance assistance experience demonstrates that interventions such as implementing policies and procedures can result in covered entities employee providing services in a discriminatory manner. Thus, OCR is proposing the Section 1557 Policies and Procedures requirement because they believe that the lack of such a requirement leaves individuals more susceptible to discrimination and covered entities more susceptible to violations.

Specifically, as noted above, the Department believes that such a proactive measure will more effectively increase covered entities' employees' knowledge of their responsibilities under Section 1557.

The policies and procedures must include an effective date and be reasonably designed, taking into account the size, complexity, and the type of health programs or activities undertaken by a covered entity, to ensure compliance with this part.

Specifically, proposed paragraph (b) requires each covered entity to implement a written nondiscrimination policy that, at minimum, provides the contact information for the Section 1557 Coordinator (if applicable) and states that the covered entity in its health programs and activities: does not unlawfully discriminate on the basis of race, color, national origin (including limited English proficiency and primary language), sex (including pregnancy, sexual orientation, gender identity, and sex characteristics), age, or disability; and provides language assistance services and appropriate auxiliary aids and services free of charge, when necessary for compliance with Section 1557 or this part.

Proposed paragraph (c) addresses the requirements for covered entities with 15 or more employees with regard to grievance procedures and recordkeeping in their health programs and activities, including ensuring that the grievance procedure is accessible to LEP individuals and individuals with disabilities.

In proposed paragraph (c)(1), OCR is proposing to require that covered entities with more than 15 employees establish written civil rights grievance procedures.

At paragraph (c)(2), OCR proposes that a covered entity must retain records related to grievances filed with it that allege discrimination on the basis of race, color, national origin, sex, age, or disability in its health programs and activities for no less than three (3) years from the date of the filing of the grievance.

The records must include the grievance; the name and contact information of the complainant (if provided by the complainant); the alleged discriminatory action and alleged basis (or bases) of discrimination; the date the grievance was filed; the grievance resolution; and any other pertinent information. Pertinent information includes, to the extent relevant to a particular complaint, information related to the complainant's national origin (including limited English proficiency and primary language), sex (including pregnancy, sexual orientation, gender identity, or sex characteristics), etc.

Proposed paragraph (c)(3) requires that a covered entity keep confidential the identity of an individual who has filed a grievance, except as required by law or to the extent necessary to carry out the purposes of this proposed regulation, including the conduct of any investigation.

Proposed paragraph (d) requires covered entities to develop and implement written language access procedures to support compliance with requirements to take reasonable steps to provide meaningful access to LEP individuals in their health programs and activities.

OCR proposes that, at a minimum, a covered entity's language access procedures must include information detailing the contact information for the Section 1557 Coordinator (if applicable); how an employee identifies whether an individual is LEP; how an employee obtains the services of qualified interpreters and translators the covered entity uses to communicate with LEP individuals; the names of any qualified bilingual or multilingual staff members; and a list and the location of any electronic and written translated materials the covered entity has, the languages they are translated into, and the publication date.

OCR notes that covered entities have a duty to translate that extends beyond those documents that have already been translated at the time this list is made, and the list should be updated periodically.

Proposed paragraph (e) requires covered entities to develop and implement written effective communication procedures to support compliance with requirements to take appropriate steps to ensure that communications in their health programs and activities with individuals with disabilities are as effective as communications with individuals without disabilities

OCR proposes that, at a minimum, a covered entity's effective communication procedures must include the contact information for the Section 1557 Coordinator (if applicable); how an employee obtains the services of qualified interpreters the covered entity uses to communicate with individuals with disabilities; the names of any qualified interpreter staff members; and how to access appropriate auxiliary aids and services that are necessary for effective communication.

Proposed paragraph (f) requires covered entities to develop and implement written procedures for making reasonable modifications to their policies, practices, or procedures that allow individuals with disabilities equal opportunity to participate in their health programs and activities as required under proposed § 92.205.

As proposed, a covered entity's reasonable modification procedures must, at a minimum, include contact information for the covered entity's Section 1557 Coordinator (if applicable); describe the covered entity's process for responding to requests from individuals with disabilities for changes, exceptions, or adjustments to a rule, policy, practice, or service of the covered entity; and the process for determining whether making the modification would fundamentally alter the nature of the service, program, or activity, including identifying an alternative modification that does not result in a fundamental alteration to ensure the individual with a disability receives the benefits or services in question.

Proposed paragraph (g) provides that a covered entity may combine the content of the policies and procedures required by this provision with any policies and procedures pursuant to other civil rights statutory protections if they clearly comply with Section 1557 and the provisions in this part.

### **Training (§ 92.9) (pages 47850 and 47915)**

To ensure that covered entities implement Section 1557 Policies and Procedures in accordance with proposed § 92.8, proposed § 92.9 requires covered entities to train relevant employees in their health programs and activities on their Section 1557 Policies and Procedures.

This proposed section, coupled with § 92.8, is designed to help covered entities and their employees take measures to prevent discrimination by ensuring that staff are knowledgeable about the nondiscrimination policy, grievance procedures, and processes by which to obtain language assistance services for LEP individuals and to ensure effective communication with and provide reasonable modifications for individuals with disabilities.

Proposed paragraph (a) provides a general requirement that covered entities train relevant employees of their health programs and activities on the Section 1557 Policies and Procedures required by proposed § 92.8.

Proposed paragraph (b) specifies when covered entities must train relevant employees on their Section 1557 Policies and Procedures.

OCR considers relevant employees to be those who directly encounter or interact with individuals such as patients, clients, and members of the public. Employees are also considered relevant when they make decisions regarding the services individuals seek from a covered entity's health programs and activities. Under paragraph (b)(1) covered entities would be required to train existing relevant employees on their Section 1557 Policies and Procedures as soon as practicable, but no later than one (1) year after the effective date of the Final Rule.

Proposed paragraph (b)(2) proposes that covered entities train new relevant employees within a reasonable period of time after they join a covered entity's workforce.

In paragraph (b)(3), OCR proposes to require covered entities to train relevant employees whose roles are affected by material changes to the covered entity's Section 1557 Policies and Procedures. Examples of material changes may include new contact information for a covered entity's Section 1557 Coordinator (if applicable), changing from one qualified interpreter service provider to another, acquiring or discontinuing the use of certain auxiliary aids and services, such as in response to changing technology, or substantive changes to the covered entity's process for ensuring effective communication or for providing language assistance services. Similar to paragraph (b)(2), paragraph (b)(3) would require covered entities to train employees within a reasonable time after a material change has been made.

Nothing in the proposed provision prohibits covered entities from training their employees on Section 1557 Policies and Procedures more frequently.

Proposed paragraph (c) requires covered entities to contemporaneously document their employees' completion of the training required by this section in written or electronic form and maintain said documentation for no less than three (3) calendar years.

#### **Notice of Nondiscrimination (§ 92.10) (pages 47852 and 47915)**

Proposed § 92.10 requires each covered entity to provide a notice of nondiscrimination, relating to its health programs and activities, to participants, beneficiaries, enrollees, and applicants of its health programs and activities, and members of the public. Notice can be provided through written translations or in-language recorded audio or video clips.

Proposed § 92.10(a) requires covered entities to provide a notice of nondiscrimination, relating to their health programs and activities, to participants, beneficiaries, enrollees, and applicants of their health programs and activities, and to members of the public.

Proposed paragraph (a)(1) provides the required contents of the notice of nondiscrimination, including that:

- (i) the covered entity does not discriminate on the basis of race, color, national origin (including limited English proficiency and primary language), sex (including pregnancy, sexual orientation, gender identity, or sex characteristics), age, or disability in its health programs or activities;
- (ii) the covered entity provides reasonable modifications for individuals with disabilities, and appropriate auxiliary aids and services, including qualified interpreters, for individuals with disabilities and information in alternate formats, such as braille or large print, free of charge and in a timely

manner, when such modifications or aids and services are necessary to ensure accessibility and equal opportunity to participate to individuals with disabilities;

(iii) the covered entity provides language assistance services, including electronic and written translated documents and oral interpretation free of charge and in a timely manner, when such services are necessary to provide meaningful access to a limited English proficient individual;

(iv) how to obtain from the covered entity the reasonable modifications, auxiliary aids and services, and language assistance services in paragraphs (a)(1)(ii) and (iii) of this section;

(v) the contact information for the covered entity's Section 1557 Coordinator designated pursuant to § 92.7 of this part (if applicable);

(vi) the availability of the covered entity's grievance procedure pursuant to § 92.8(c) of this part and how to file a grievance (if applicable);

(vii) details on how to file a discrimination complaint with HHS' Office for Civil Rights; and

(viii) how to access the covered entity's website, if it has one, that provides the information required under paragraph (a)(1) of this section. OCR is proposing to require a parenthetical for national origin discrimination, to include limited English proficiency and primary language, to clarify for the public that these are prohibited forms of discrimination. For the same reason, a parenthetical would be required for sex discrimination, to include pregnancy, sexual orientation, gender identity, or sex characteristics.

Proposed § 92.10(a)(2) would provide specific information on when and where covered entities must provide the notice of nondiscrimination. Rather than requiring entities to include the notice in "significant" communications, OCR propose that covered entities provide the notice on an annual basis and upon request.

Paragraph (b) proposes that a covered entity may combine the content of the notice required by paragraph (a) of this section with the notices required by Title VI, Section 504, Title IX, and the Age Act (found respectively at 45 CFR 80.6(d) (Title VI); § 84.8 (Section 504, federally assisted); § 85.12 (federally conducted); § 86.9 (Title IX); § 91.32 (Age Act)) implementing regulations if the combined notice clearly informs individuals of their civil rights under Section 1557 and this part and meets the requirements outlined in proposed paragraph (a)(1).

#### **Notice of Availability of Language Assistance Services and Auxiliary Aids and Services (§92.11) (pages 47853 and 47915)**

Proposed § 92.11 requires covered entities to notify the public of the availability of language assistance services and auxiliary aids and services for their health programs and activities ("Notice of Availability"). This provision is similar to the "tagline" requirement found at former § 92.8 in the 2016 Rule, but with additional information required to be included in the notice.

The 2016 Rule required covered entities to provide "taglines," short statements written in non-English languages that indicate the availability of language assistance services free of charge, in a variety of languages and communications. The Department has opted not to use the term "tagline" in this rule because this provision also now requires a notice of the availability of auxiliary aids and services.

The 2016 Rule required covered entities to include “taglines” in at least the top 15 languages spoken by LEP individuals in the relevant state or states in significant publications and communications and at various locations. To reduce the administrative burden on covered entities, OCR translated these statements into 64 languages and made the translated statements available to covered entities.

Proposed paragraph (a) requires a covered entity to provide a notice that, at minimum, states that the covered entity provides language assistance services and appropriate auxiliary aids and services free of charge in its health programs and activities, when necessary for compliance with Section 1557 or this part. This notice must be provided to participants, beneficiaries, enrollees, and applicants of the covered entity’s health program or activity, and members of the public. Notice can be provided through written translations or recorded audio or video clips.

Proposed paragraph (b) requires the Notice of Availability to be provided in English and at least the 15 most common languages spoken by LEP individuals of the relevant state or states, and in alternate formats for individuals with disabilities who request auxiliary aids and services to ensure effective communications. This standard ensures that a significant proportion of each state’s particular LEP population is receiving key information in the appropriate language.

Proposed § 92.11(c) requires the notice be provided on an annual basis to participants, beneficiaries, enrollees (including late and special enrollees), and applicants, and upon request at any time. Similar to the notice of nondiscrimination requirement in proposed § 92.10, the Notice of Availability would also be required to be provided at a conspicuous location on the covered entity’s health program or activity website, if it has one, and in clear and prominent physical locations where it is reasonable to expect individuals seeking service from the health program or activity to be able to read or hear the notice. This notice must also be accessible to individuals with disabilities who require auxiliary aids and services.

OCR proposes to require the Notice of Availability to accompany the following documents:

- (i) the notice of nondiscrimination required by proposed § 92.10 of this part;
- (ii) the notice of privacy practices required by the implementing regulations for the Health Insurance Portability and Accountability Act of 1996 318 (HIPAA) at 45 CFR 164.520;
- (iii) application and intake forms;
- (iv) notices of denial or termination of eligibility, benefits, or services, including Explanations of Benefits (EOBs), and notices of appeal and grievance rights;
- (v) communications related to a person’s rights, eligibility, benefits, or services that require or request a response from a participant, beneficiary, enrollee, or applicant;
- (vi) communications related to a public health emergency;
- (vii) consent forms and instructions related to medical procedures or operations, medical power of attorney, or living will (with an option of providing only one notice for all documents bundled together);

- (viii) discharge papers;
- (ix) complaint forms; and
- (x) patient and member handbooks.

Proposed § 92.11(d) would deem a in compliance with this section with respect to an individual if it exercises the option to:

- (1) On an annual basis, provide the individual with the option to opt out of receipt of the notice required by this section in their primary language and through any appropriate auxiliary aids and services, and:
  - (i) Does not condition the receipt of any aid or benefit on the individual's decision to opt out;
  - (ii) Informs the individual that they have a right to receive the notice upon request in their primary language and through the appropriate auxiliary aids and services;
  - (iii) Informs the individual that opting out of receiving the notice is not a waiver of their right to receive language assistance services and any appropriate auxiliary aids and services as required by this part;
  - (iv) Documents, on an annual basis, that the individual has opted out of receiving the notice required by this section for that year; and
  - (v) Does not treat a non-response from an individual as a decision to opt out; or
- (2) Document the individual's primary language and any appropriate auxiliary aids and services and:
  - (i) Provides all materials and communications in that individual's primary language and through any appropriate auxiliary aids and services; or
  - (ii) Provides the notice required by paragraph (a) of this section in that individual's primary language and through any appropriate auxiliary aids and services in all communications that are identified in paragraph (c)(5) of this section.

### **Subpart B—Nondiscrimination Provisions**

Subpart B of the proposed rule generally adopts certain regulatory provisions regarding specific discriminatory actions prohibited by the implementing civil rights statutes referenced in Section 1557(a): Title VI, Section 504, Title IX, and the Age Act.

### **Discrimination Prohibited (§ 92.101) (pages 47857 and 47916)**

Proposed § 92.101(a) provides a general prohibition of discrimination on the basis of race, color, national origin, sex, age, or disability under any health program or activity to which Section 1557 or this part applies and provides additional detail regarding what constitutes discrimination on the basis of sex. Proposed paragraph (b) identifies some specific forms of prohibited discrimination.

Proposed paragraph (a)(1) provides the general prohibitions on discrimination under Section 1557 by restating the core objective of Section 1557: ensuring that covered entities do not discriminate on the basis of race, color, national origin, sex, age, or disability against any individual seeking to participate in or receive the benefits of the covered entity's health program or activity. Consistent with Federal case law and existing Federal civil rights enforcement, the Department's proposed nondiscrimination protections prohibit discrimination based upon a person's actual or perceived race, color, national origin, sex, age, or disability.

Proposed paragraph (a)(2) clarifies that discrimination on the basis of sex includes discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity.

Proposed paragraph (b) identifies several specific forms of prohibited discrimination under Section 1557. It does so by incorporating by reference the specific prohibitions on discrimination in the regulations implementing each civil rights statute referenced in Section 1557's statutory text. Even though Section 1557 provides an independent basis for the regulation of discrimination in covered programs and activities, this proposed section expressly adopts the specific prohibitions on discrimination found in the implementing regulations of the referenced antidiscrimination statutes.

OCR believes this approach is appropriate in light of Section 1557's express adoption of the same language used in the four referenced statutes to describe the nature of the prohibited conduct— namely, causing an individual to “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under” a specified program or activity.

### **Subpart C—Specific Applications to Health Programs and Activities**

Subpart C provides additional specificity regarding nondiscrimination requirements in this setting. The provisions in this subpart are responsive to the nature and importance of health care, health insurance, and related decision-making as it impacts individuals and communities protected by Section 1557's prohibition of discrimination. These provisions are intended to provide clear instruction to covered entities and are informed by OCR's stakeholder outreach and experience in both enforcement and in providing technical assistance.

### **Meaningful Access for Limited English Proficient Individuals (§ 92.201) (pages 47860 and 47916)**

Proposed § 92.201 effectuates Section 1557's prohibition on national origin discrimination as it is applied to LEP individuals in covered health programs and activities.

Proposed paragraph (a) provides that covered entities “must take reasonable steps to provide meaningful access to each limited English proficient individual eligible to be served or likely to be directly affected by its health programs and activities.”

Proposed paragraph (b) states that language assistance services required under paragraph (a) must be provided free of charge, be accurate and timely, and protect the privacy and independent decision-making ability of an LEP individual.

Proposed paragraph (c) provides specific requirements for interpreter and translation services.

Proposed paragraph (c)(1) states that when interpreter services are required under this part, a covered entity must offer a qualified interpreter.

Proposed paragraph (c)(2) provides that when translation services are required under this part, a covered entity must use a qualified translator. These terms are defined in the definitions section at proposed § 92.4.

Proposed paragraph (c)(3) addresses the use of machine translation by covered entities. Machine translation, which can involve speech-based machine translation to facilitate patient-provider communication as well as text-based machine translation to develop multilingual health materials, is increasingly being used as a method to assist communication in the health care setting and increase access to in language health resources.

Proposed paragraph (d) addresses how the Director will evaluate compliance with this section. In evaluating whether a covered entity has met its obligation under paragraph (a) of this section, the Director shall:

- (1) Evaluate, and give substantial weight to, the nature and importance of the health program or activity and the particular communication at issue, to the limited English proficient individual; and
- (2) Take into account other relevant factors, including the effectiveness of the covered entity's written language access procedures for its health programs and activities, that the covered entity has implemented pursuant to § 92.8(d).

Proposed paragraph (e) identifies restrictions on the use of certain persons to provide language assistance services for LEP individuals. A covered entity must not, in its health programs and activities:

- (1) Require a limited English proficient individual to provide their own interpreter, or to pay the cost of their own interpreter;
- (2) Rely on an adult, not qualified as an interpreter, accompanying a limited English proficient individual to interpret or facilitate communication, except:
  - (i) As a temporary measure, while finding a qualified interpreter in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no qualified interpreter for the limited English proficient individual immediately available and the qualified interpreter that arrives confirms or supplements the initial communications with the accompanying adult; or
  - (ii) Where the limited English proficient individual specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, the request and agreement by the accompanying adult is documented, and reliance on that adult for such assistance is appropriate under the circumstances.

- (3) Rely on a minor child to interpret or facilitate communication, except as a temporary measure while finding a qualified interpreter in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no qualified interpreter for the limited English proficient individual immediately available and the qualified interpreter that arrives confirms or supplements the initial communications with the minor child; or

- (4) Rely on staff other than qualified interpreters, qualified translators, or qualified bilingual/multilingual staff to communicate directly with limited English proficient individuals.

Proposed paragraph (f) addresses standards for video remote interpreting (VRI). A covered entity that provides a qualified interpreter for a limited English proficient individual through video remote interpreting services in the covered entity's health programs and activities must provide:

- (1) 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;
- (2) A sharply delineated image that is large enough to display the interpreter's face and the participating person's face regardless of the person's body position;
- (3) A clear, audible transmission of voices; and
- (4) Adequate training to users of the technology and other involved persons so that they may quickly and efficiently set up and operate the video remote interpreting.

Proposed paragraph (g) sets forth standards for audio remote interpreting services. A covered entity that provides a qualified interpreter for a limited English proficient individual through audio remote interpreting services in the covered entity's health programs and activities must provide:

- (1) Real-time audio over a dedicated high-speed, wide-bandwidth connection or communication;
- (2) A clear, audible transmission of voices; and
- (3) Adequate training to users of the technology and other involved persons so that they may quickly and efficiently set up and operate the remote interpreting services.

Proposed paragraph (h) states that acceptance of language assistance services is not required. Nothing in this section shall be construed to require a limited English proficient individual to accept language assistance services.

### **Effective Communication for Individuals With Disabilities (§ 92.202) (pages 47863 and 47917)**

Proposed § 92.202 addresses requirements related to providing effective communication for individuals with disabilities.

In proposed paragraph (a), OCR requires that a covered entity must take appropriate steps to ensure that communications with individuals with disabilities (including companions with disabilities), are as effective as communications with non-disabled individuals in its health programs and activities, in accordance with the standards found at 28 CFR 35.130 and 28 CFR 35.160 through 35.164. Where the regulatory provisions referenced in this section use the term "public entity," the term "covered entity" shall apply in its place.

In proposed paragraph (b), a covered entity must provide appropriate auxiliary aids and services to individuals with impaired sensory, manual, or speaking skills, where necessary to afford such individuals an equal opportunity to benefit from the service in question.

OCR proposes in paragraph (b) to explicitly require covered entities to provide appropriate auxiliary aids and services to individuals with impaired sensory, manual, or speaking skills, where necessary to afford such individuals an equal opportunity to benefit from the service in question.

#### **Accessibility for Buildings and Facilities (§ 92.203) (pages 47864 and 47917)**

Proposed § 92.203 adds a general provision establishing that no qualified individual with a disability shall, because a covered entity's facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any health program or activity to which this part applies, consistent with the Department's Section 504 regulation covering federally assisted and federally conducted programs and activities.

The proposed § 92.203 incorporates the identical language found in the [2020 Rule](#) at § 92.103 (page 37247), except that the definitions for "1991 Standards," "2010 Standards," and "UFAS" are now located in proposed § 92.4.

#### **Accessibility of Information and Communication Technology for Individuals With Disabilities (§ 92.204) (pages 47864 and 47917)**

Proposed § 92.204 addresses the accessibility of information and communication technology (ICT) for individuals with disabilities. This proposed section is substantially the same as § 92.104(a)–(b) of the 2020 Rule (page 37247) and former § 92.204 of the 2016 Rule (page 31471).

The 2020 Rule also defines "information and communication technology" at § 92.104(c), which OCR proposes to define at proposed § 92.4.

#### **Requirement To Make Reasonable Modifications (§ 92.205) (pages 47865 and 47917)**

Proposed § 92.205 requires covered entities to make reasonable modifications to policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the covered entity can demonstrate that making the modifications would fundamentally alter the nature of the health program or activity. This provision is the same as § 92.105 of the 2020 Rule (pages 37216 and 37247) and former § 92.205 of the 2016 Rule (pages 31427 and 31471).

#### **Equal Program Access on the Basis of Sex (§ 92.206) (pages 47865 and 47918)**

The Department proposes to include a section clarifying covered entities' obligation to ensure equal access to their health programs and activities without discrimination on the basis of sex, including pregnancy, sexual orientation, gender identity, and sex characteristics.

This provision primarily relates to covered entities that are directly engaged in the provision of health care services, such as hospitals, physical and mental health care providers, and pharmacies.

Proposed § 92.206(a) describes a covered entity's general obligation to provide individuals equal access to the covered entity's health programs or activities without discrimination on the basis of sex.

The Department proposes paragraphs (b)(1)–(4) to clarify certain types of discriminatory actions that would be prohibited for a covered entity in its provision of access to health programs or activities.

Proposed paragraph (b)(1) provides a general prohibition on the denial or limitation of health services, including those that are offered exclusively to individuals of one sex, to an individual based on the individual's sex assigned at birth, gender identity, or gender otherwise recorded.

Proposed paragraph (b)(2) prohibits covered entities from denying or limiting a health care professional's ability to provide health services on the basis of a patient's sex assigned at birth, gender identity, or gender otherwise recorded.

Proposed paragraph (b)(3) would prohibit a covered entity from applying any policy or practice of treating individuals differently or separating them on the basis of sex in a manner that subjects any individual to more than de minimis harm.

Proposed paragraph (b)(4) prohibits a covered entity from denying or limiting health services sought for the purpose of gender-affirming care that the covered entity would provide to a person for other purposes if the denial or limitation is based on a patient's sex assigned at birth, gender identity, or gender otherwise recorded.

Proposed paragraph (c) provides that nothing in this section requires the provision of any health service where the covered entity has a legitimate, nondiscriminatory reason for denying or limiting that service, including where the covered entity reasonably determines that such health service is not clinically appropriate for that particular individual.

### **Nondiscrimination in Health Insurance Coverage and Other Health-Related Coverage (§ 92.207) (pages 47868 and 47918)**

Proposed § 92.207 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in the provision or administration of health insurance coverage and other health-related coverage.

This proposed section would apply to all covered entities that provide or administer health insurance coverage or other health-related coverage that receive Federal financial assistance, and the Department in the administration of its health-related coverage programs.

Proposed paragraph (a) provides a general nondiscrimination requirement that a covered entity must not, in providing or administering health insurance coverage or other health related coverage, discriminate on the basis of race, color, national origin, sex, age, or disability.

Proposed paragraph (b) provides specific examples of prohibited actions that a covered entity must not, in providing or administering health insurance coverage or other health related coverage:

- (1) Deny, cancel, limit, or refuse to issue or renew health insurance coverage or other health-coverage, or deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, on the basis of race, color, national origin, sex, age, or disability;

- (2) Have or implement marketing practices or benefit designs that discriminate on the basis of race, color, national origin, sex, age, or disability in health insurance coverage or other health-related coverage;
- (3) Deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, to an individual based upon the individual's sex at birth, gender identity, or gender otherwise recorded;
- (4) Have or implement a categorical coverage exclusion or limitation for all health services related to gender transition or other gender-affirming care;
- (5) Otherwise deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for specific health services related to gender transition or other gender affirming care if such denial, limitation, or restriction results in discrimination on the basis of sex; or
- (6) Have or implement benefit designs that do not provide or administer health insurance coverage or other health related coverage in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(c) Nothing in this section requires coverage of any health service where the covered entity has a legitimate, nondiscriminatory reason for determining that such health service fails to meet applicable coverage requirements, such as medical necessity requirements, in an individual case.

(d) The enumeration of specific forms of discrimination in paragraph (b) of this section does not limit the general applicability of the prohibition in paragraph (a) of this section.

### **Prohibition on Sex Discrimination Related to Marital, Parental, or Family Status (§ 92.208) (pages 47878 and 47918)**

The Department proposes in § 92.208 to provide that covered entities are prohibited from discriminating on the basis of sex in their health programs and activities with respect to an individual's marital, parental, or family status.

In determining whether an individual satisfies any policy or criterion regarding access to its health programs or activities, a covered entity must not take an individual's sex into account in applying any rule concerning an individual's current, perceived, potential, or past marital, parental, or family status.

### **Nondiscrimination on the Basis of Association (§ 92.209) (pages 47880 and 47918)**

Proposed § 92.209 prohibits discrimination against an individual on the basis of the race, color, national origin, sex, age, or disability of an individual with whom the individual is known to have a relationship or association.

A covered entity must not exclude from participation in, deny the benefits of, or otherwise discriminate against an individual in its health programs and activities on the basis of the respective race, color, national origin, sex, age, or disability of the individual and another person with whom the individual has a relationship or association.

### **Use of Clinical Algorithms in Decision- Making (§ 92.210) (pages 47880 and 47918)**

Proposed § 92.210 states that a covered entity must not discriminate against any individual on the basis of race, color, national origin, sex, age, or disability through the use of clinical algorithms in its decision-making.

### **Nondiscrimination in the Delivery of Health Programs and Activities Through Telehealth Services (§ 92.211) (pages 47884 and 47918)**

Proposed § 92.211 specifically addresses nondiscrimination in the delivery of health programs and activities through telehealth services.

A covered entity must not, in delivery of its health programs and activities through telehealth services, discriminate on the basis of race, color, national origin, sex, age, or disability.

### **Subpart D—Procedures**

#### **Enforcement Mechanisms (§ 92.301) (pages 47885 and 47918)**

Proposed § 92.301 provides that the enforcement mechanisms available for and 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 shall apply for purposes of Section 1557 as implemented by this part.

#### **Notification of Views Regarding Application of Federal Conscience and Religious Freedom Laws (§ 92.302) (pages 47885 and 47919)**

In proposed § 92.302, the Department specifically addresses the application of Federal conscience and religious freedom laws.

Proposed paragraph (a) provides that a recipient may raise with the Department its belief that the application of a specific provision or provisions of this regulation as applied to it would violate Federal conscience or religious freedom laws.

Proposed paragraph (b) provides that once OCR receives a notification pursuant to proposed paragraph (a), OCR shall promptly consider those views in responding to any complaints or otherwise determining whether to proceed with any investigation or enforcement activity regarding that recipient's compliance with the relevant provisions of this regulation.

Proposed paragraph (c) makes clear OCR's discretion to determine at any time whether a recipient is wholly exempt from or entitled to a modification of the application of certain provisions of this part, or whether modified application of the provision is required under a Federal conscience or religious freedom law.

Proposed paragraph (d) provides that if OCR determines that a recipient is entitled to an exemption or modification of the application of certain provisions of this rule based on the application of such laws, that determination does not otherwise limit the application as to any other provision of this part to the recipient.

**Procedures for Health Programs and Activities Conducted by Recipients and State Exchanges (§ 92.303) (pages 47886 and 47919)**

Proposed § 92.303 provides for the enforcement procedures related to health programs and activities conducted by recipients and State Exchanges.

Proposed paragraph (a) applies the procedural provisions in the Title VI regulation with respect to administrative enforcement actions concerning discrimination on the basis of race, color, national origin, sex, and disability under Section 1557.

Proposed paragraph (b) applies Age Act procedures to enforce Section 1557 with respect to age discrimination complaints against recipients and State Exchanges.

Proposed paragraph (c) provides that when a recipient fails to provide OCR with requested information in a timely, complete, and accurate manner, OCR may, after attempting to reach a voluntary resolution, find noncompliance with Section 1557 and initiate the appropriate enforcement procedures.

**Procedures for Health Programs and Activities Administered by the Department (§ 92.304) (pages 47887 and 47919)**

Proposed § 92.304 addresses procedures for all claims of discrimination against the Department under Section 1557 or this part.

Proposed paragraph (a) applies to discrimination on the basis of race, color, national origin, sex, age, or disability in health programs and activities administered by the Department, including the Federally facilitated Exchanges.

Proposed paragraph (b) makes the existing procedures under the [Section 504](#) federally conducted regulation at [45 CFR 85.61](#) through [85.62](#) applicable to all such claims under [Section 1557](#) for all protected bases (i.e., race, color, national origin, sex, age, and disability).

Proposed paragraph (c) requires the Department to provide OCR access to information relevant to determining compliance with Section 1557 or this part.

Proposed paragraph (d) prohibits the Department from retaliating against an individual or entity for the purpose of interfering with any right secured by Section 1557 or this part, or because such individual or entity has participated in an investigation, proceeding, or hearing under Section 1557 or this part.