



The Trump Administration's Proposed Changes to Language Access in the Section 1557 Regulations

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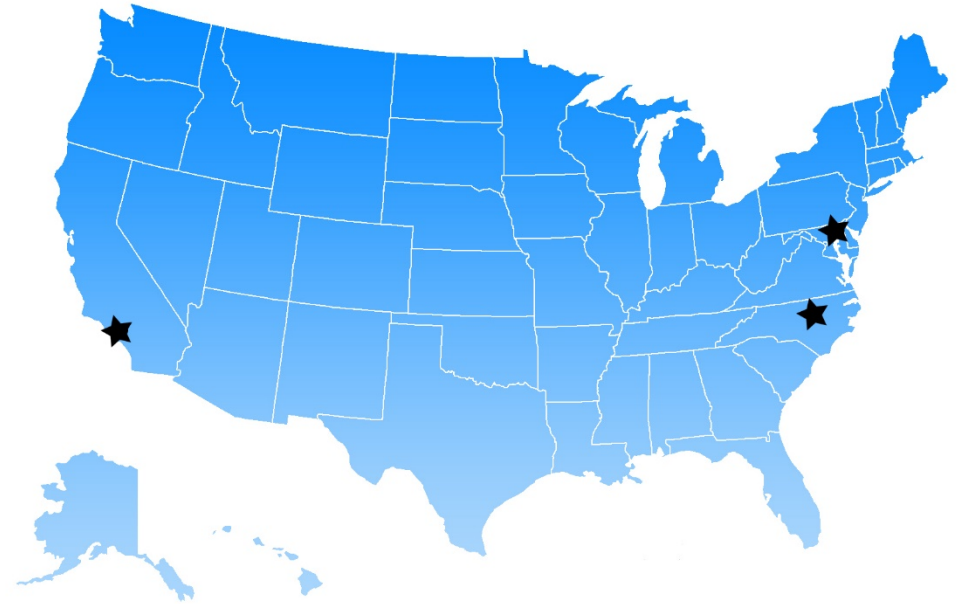
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- Telephone participants need to enter their audio pin
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 - Ask a question in the questions log.
 - Yes, we will make the recording, slides and materials available.



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- State & Local Partners:
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 - Poverty & legal aid advocates – 50 states + DC
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About APIAHF

Based in Oakland, CA and with staff in Washington, DC The Asian & Pacific Islander American Health Forum (APIAHF) **influences policy, mobilizes communities, and strengthens programs and organizations** to improve the health of Asian Americans, Native Hawaiians, and Pacific Islanders.

On Twitter @APIAHF, @APIAHFpolicy, @BenDavanzo



ROADMAP

- Challenges Facing Immigrants
- Nondiscrimination and the Affordable Care Act
- Changes to LEP.gov
- What You Can Do
- 2020 and beyond

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Challenges Facing Immigrants



Beginning in 2017. . .

- Muslim Ban
- Stricter border enforcement & “the wall”
- Reduced refugee admissions to lowest level since 1980
- Interior enforcement & deportation
- Cancelled DACA (though courts reinstated)
- Ended TPS (Temporary Protected Status) for individuals from Sudan, Nicaragua, Haiti, Honduras, Nepal and El Salvador (though court prohibited ending it)
- Family Separation & detention of children
- Desires to move to merit-based admission system, deny asylum application at border
- Census Citizenship question

Source: *Migration Policy Institute, Immigration under Trump: A Review of Policy Shifts in the Year Since the Election*, <https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts>; *TPS status* -- <https://www.uscis.gov/humanitarian/temporary-protected-status>.



Nondiscrimination and the Affordable Care Act

DEMOGRAPHICS

- *Over 66 million people* in the United States speak a language other than English at home, over 21% of the population
- *Over 25 million* (8.5% of the population) speak English less than “very well,” and may be considered LEP
- *8.5 million children* under age 19 live in a household with at least one LEP parent
- About *25% of “marketplace” enrollees* are *LEP*

Source: American Community Survey, 2017; Table S1603, Characteristics of People by Language Spoken at Home, American Community Survey 1-Year Estimates, available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1603&prodType=table; Table S1601, Language Spoken at Home, American Community Survey, 1-Year Estimates, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1601&prodType=table.

TREATING LEP PATIENTS

- **80%** of hospitals encounter LEP patients frequently – 63% daily/weekly; 17% monthly
- **81%** of general internal physicians treat LEP patients frequently – 54% at least a few times a week; 27% a few times per month
- **84%** of FQHCs provide clinical services daily to LEP patients – 45% see more than ten patients a day; 39% see from one to 10 LEP patients a day

Source: Reports commissioned by NHeLP from AHA/HRET, ACP, NACHC; available at www.healthlaw.org

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

- “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d
- “National origin” includes individuals with limited English proficiency (LEP)

SECTION 1557 OF THE AFFORDABLE CARE ACT (ACA)

- Broad nondiscrimination protection
- First time healthcare discrimination is prohibited based on:
 - sex;
 - gender identity, including transgender individuals; and
 - sexual stereotyping
- Reinforces longstanding protections for race, ethnicity, national origin, age & disability



Section 1557 – Scope

- any health program or activity any part of which receives federal funding;
- any health program or activity that is administered by an Executive agency; and
- any entity created under Title I of the Affordable Care Act (including health insurance marketplaces)

- This **expands upon** many pre-existing civil rights law such as Title VI/Sec, 504 which only applied to those receiving federal funding or Title IX which only applied in education

WHO IS COVERED BY TITLE VI & 1557?

Title VI & Sec. 1557

- All public and private entities receiving federal financial assistance, including:
 - State, county, and local agencies (inc. Medicaid, CHIP)
 - Hospitals, clinics, and clinicians' offices
 - Refugee resettlement agencies
 - Nursing homes
 - Mental Health Centers
 - All entities receiving federal funds or under contract to those receiving federal funds

Section 1557

- Federally administered programs
 - Medicare
 - Federally Facilitated Marketplace
- Entities created under ACA Title I
 - state marketplaces
 - Qualified Health Plans (also receive federal funds)

GOAL OF 1557

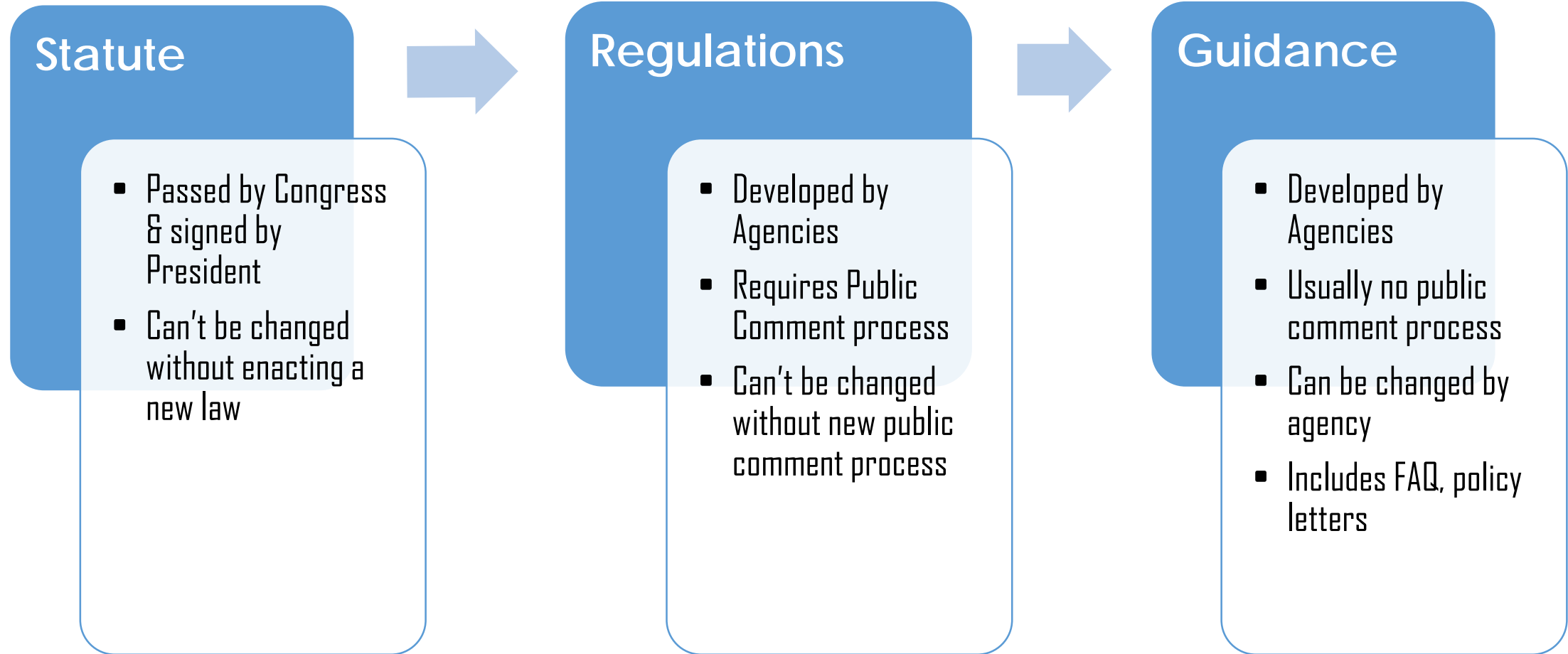
Bring all civil rights protections under 1 provision

- Title VI (discrimination on the basis of race/color/national origin)
- Title IX (discrimination on the basis of sex)
- Sec. 504 (discrimination on the basis of disability)
- Age Discrimination

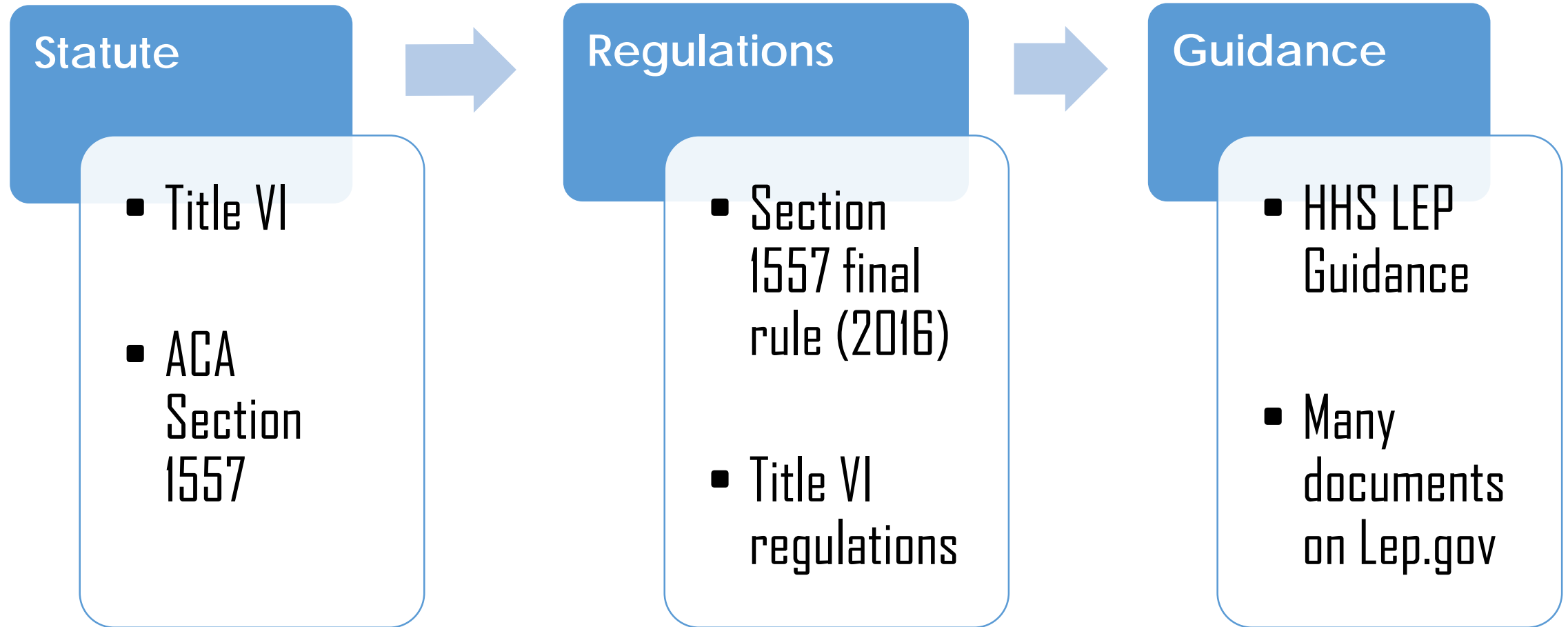
Why?

- Intersectionality
- Differing remedies under each civil rights law
- Expand protections against sex discrimination into health care

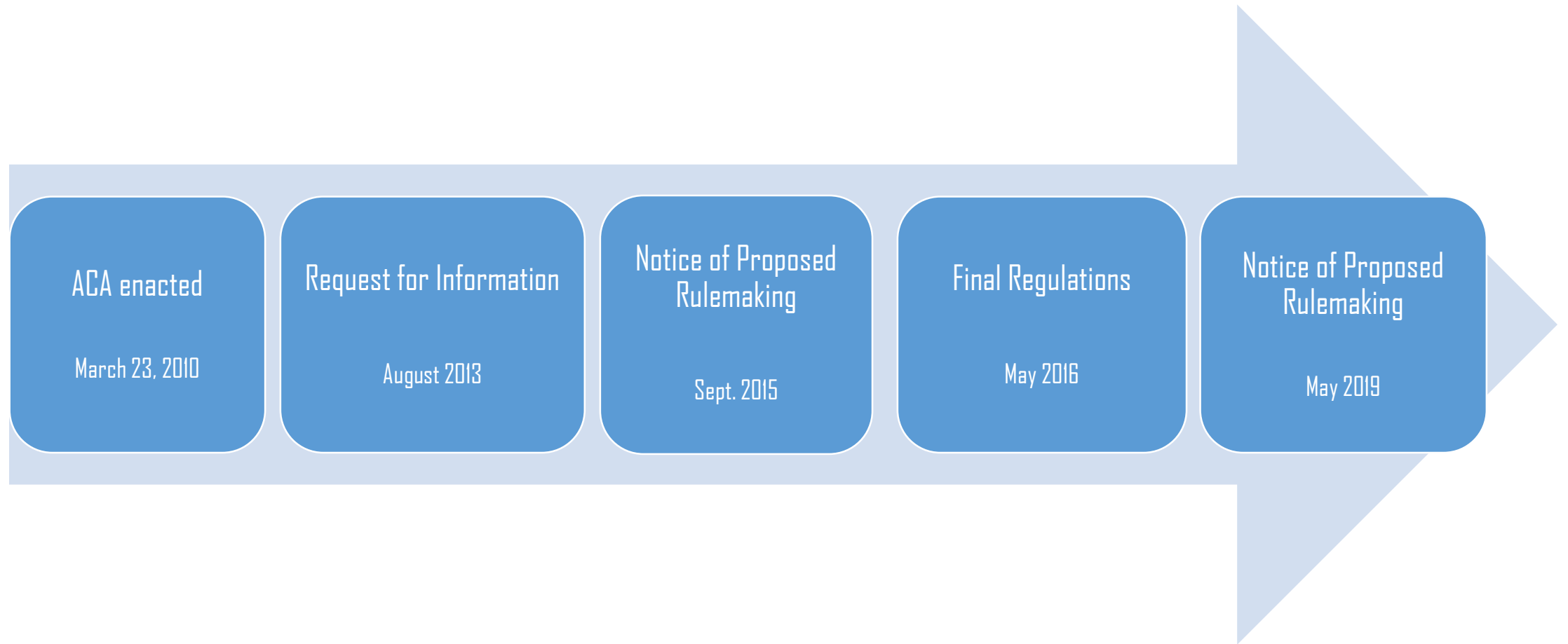
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HISTORY OF SEC. 1557



2019 NOTICE OF PROPOSED RULEMAKING (NPRM)

- Seeks to change 2016 final rule implementing 1557
- Significant changes outside of language access:
 - Rollback of protections against discrimination based on gender identity, sex stereotypes and termination of pregnancy
 - Eliminates definition section
 - Eliminates requirements to have a compliance coordinator and written grievance procedures
 - Repeals enforcement-related provisions & changes remedies
 - Changes other regulations to eliminate explicit nondiscrimination protections based on sexual orientation and gender identity

Source: *Proposed Rule: Nondiscrimination in Health and Health Education Programs or Activities*; <https://www.hhs.gov/sites/default/files/1557-nprm-hhs.pdf>; see also, Katie Keith, *Health Affairs Blog: HHS Proposes To Strip Gender Identity, Language Access Protections From ACA Anti-Discrimination Rule*, <https://www.healthaffairs.org/doi/10.1377/hblog20190525.831858/full/>.

GENERAL REQUIREMENTS

- Changes focus from individual to entity
 - 2016 -- a covered entity shall take reasonable steps to provide meaningful access to each LEP individual eligible to be served or likely to be encountered
 - 2019 (proposed) – any entity operating or administering a health program or activity shall take reasonable steps to ensure meaningful access to such programs/activities by LEP individuals
- When language services must be provided, they must be:
 - Free of charge
 - Be accurate and timely
 - Protect the privacy and independence of the individual with LEP

EVALUATION OF COMPLIANCE

- Changes focus from individual to entity
 - 2016 – 2 factor test
 - Evaluate and give substantial weight to the nature/importance of the health program/activity and the particular communication at issue
 - Take into account other relevant factors including whether an entity has developed/implemented a language access plan
 - 2019 (proposed) – eliminates 2 factor test; uses 4 factor test (from 2003 LEP Guidance) which deemphasizes nature of the communication at issue
 - 4 factors – number/proportion of LEP eligible/likely to be served; frequency of contact; nature/importance of program/activity; resources & costs
- The proposed change likely will mean DCR will focus less on an individual's needs in evaluating compliance

INTERPRETER (FOREIGN) & TRANSLATOR

- Deletes "qualified" as part of definition as well as "above average familiarity with"
- An individual who adheres to generally accepted interpreter ethics principles includes client confidentiality
- Interprets (translates) effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary
- Demonstrates proficiency in speaking or understanding, both spoken English and at least one other spoken (written) language
- **NOTE**: Due to this definition, implicit recognition that not all interpreters can translate and vice versa

USE OF FAMILY MEMBERS/MINORS

- Similar to current regulations
 - Prohibits use of minors except in emergencies
 - Prohibits use of accompanying adults except in emergencies or upon patient request
 - Prohibits reliance on staff other than qualified bilingual/multilingual staff to communicate with individuals who are LEP

NOTE: Some entities may want to have their own interpreter present even if a patient wants to use a family member/friend



REMOTE INTERPRETING SERVICES

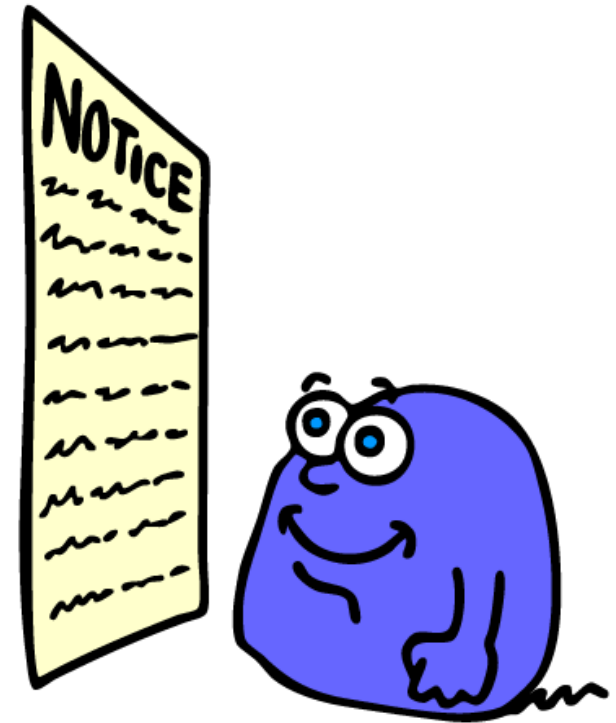
- Deletes requirement for real-time video for foreign language interpreters
 - 2016 – requires a “sharply delineated image that is large enough to display the interpreter’s face. . .”
 - 2019 (proposed) -- “Real-time, audio over a dedicated high-speed, wide bandwidth video connection or wireless connection that delivers high-quality audio without lags or irregular pauses in communication
- 2016 & 2019 (proposed) both require:
 - a clear, audible transmission of voices; and
 - adequate training to quickly and efficiently set up and operate the remote interpreting service

TAGLINES

- 2016 – taglines on all “significant” documents and notices in top 15 languages in a state
- 2019 (proposed) – no taglines required on any documents
 - Trump Administration says this saves \$3.1B
 - Complaints by insurers and pharmacy benefit managers that “significant” documents was too broad and they were including taglines with every document (EOB, notice, etc.)
- Tagline requirements may still exist in other federal regulations – e.g. Medicare Part D (Rx program)

NOTICES

- 2016 -- Employers with at least 15 employees must
 - provide notices about its nondiscrimination policies
 - designate at least one employee to carry out the responsibilities under Section 1557
 - adopt grievance procedures with appropriate due process standards to resolve actions prohibited under Section 1557
 - Must include taglines in top 15 languages in each state
- 2019 (proposed) – no notices



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TRANSLATION OF WRITTEN MATERIALS

- No specific thresholds for when to translate documents in statutes or regulations
- HHS LEP Guidance (2003) recommended translating “vital” documents & includes safe harbor
- Proposed rule deletes requirements for taglines in “significant” publications & communications



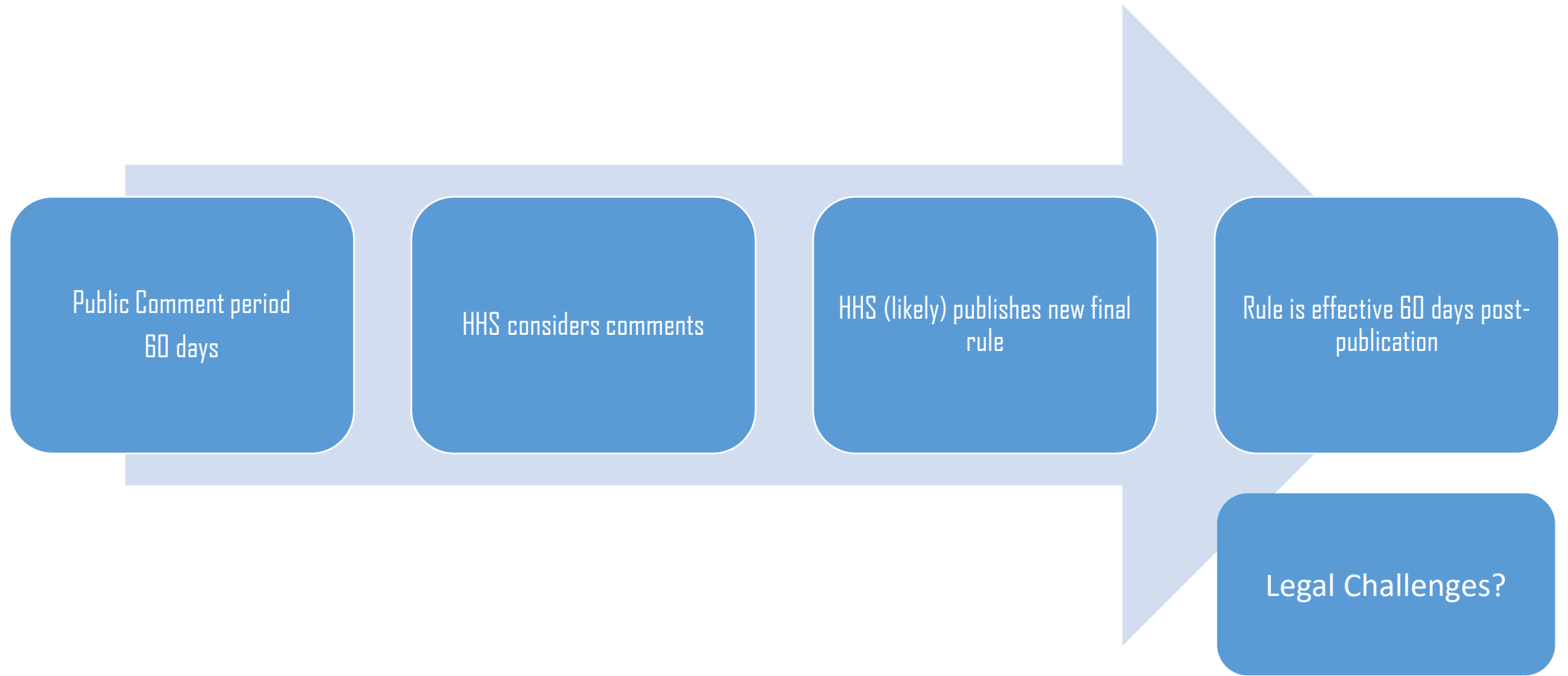
SUMMARY

“Vital” documents should be translated
Taglines can be used but are not required

WHAT'S AT STAKE IN 2019 RE: 1557?

- Current legal challenges to 2016 rule – may be resolved with NPRM
- Concerns of issuers and pharmacy benefit managers about requirements regarding taglines and notices
- NRPM – comment period is 60 days
 - **NOTHING** changes immediately! This is a proposed rule
 - Need to weigh in strongly on the changes
 - After comment period closes, HHS will consider comments and then issue a final rule
 - Likely will be legal challenges when rule is finalized

OUTLOOK FOR 2019



NEXT STEPS

- Title VI and Section 1557 still remain the law
- Even if the proposed rule is finalized, it won't be effective until 60 days after publication and likely will be subject to court challenges
- Even with no specific requirements for translation or taglines, you can still use them
- Comment, comment, comment!



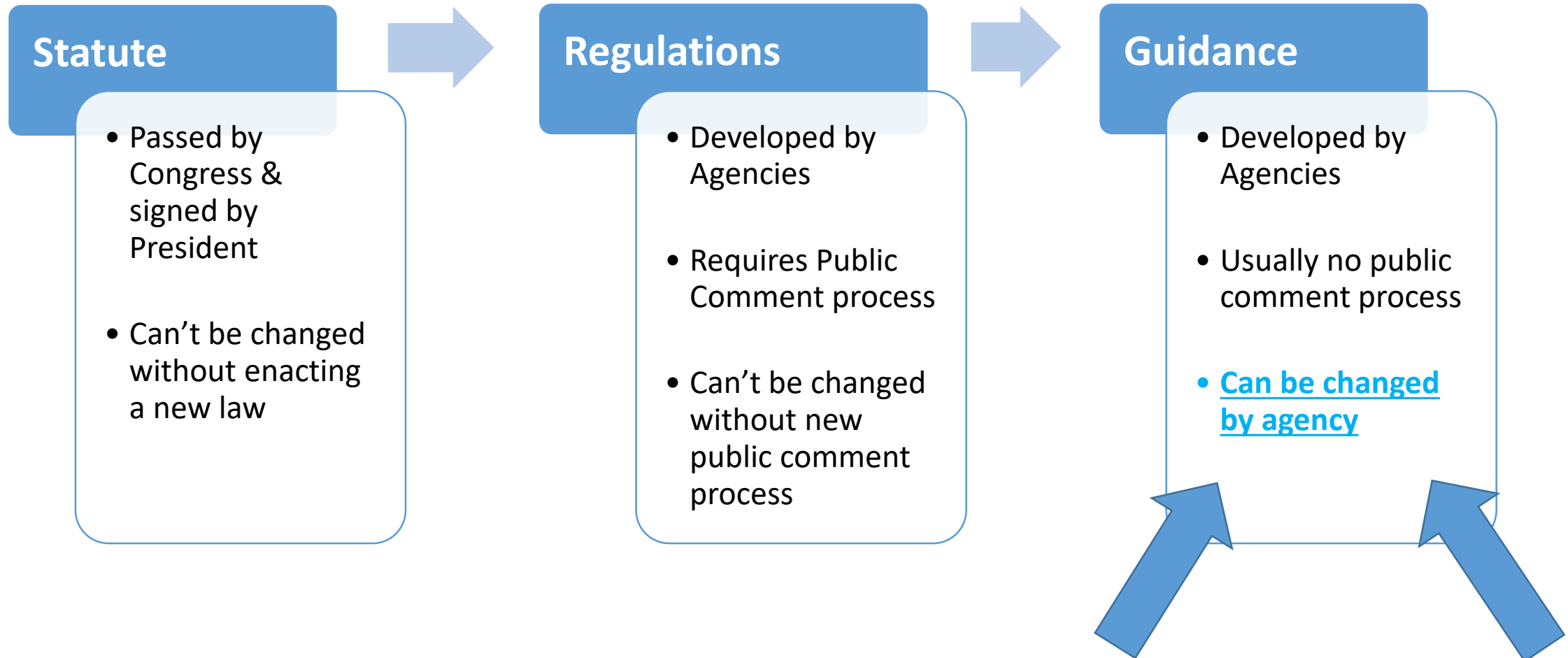
CHANGES TO LEP.GOV



LEP.GOV – NEW POP-UP TEXT

..The Department of Justice-issued guidance documents on this website provide informal **non-binding guidance** to assist you in understanding the language access requirements of the Act, the Department's regulations, and Executive Order 13166. The **guidance documents are not intended to be a final agency action, have no legally binding effect, and have no force or effect of law. The documents may be rescinded or modified in the Department's complete discretion, in accordance with applicable laws.** The Department's guidance documents do not establish legally enforceable responsibilities beyond what is required by the terms of the applicable statutes, regulations, or binding judicial precedent...

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SO WHAT'S THE IMPACT OF LEP.GOV?

- It's the optics – Administration is more explicit about limits of LEP guidance
- Enforcement of 2003 LEP Guidance has always ebbed and flowed in different administrations
- Executive Orders can always be rescinded by the President
- May be further revisions to HHS documents if a new final rule on 1557 is released or further NPRMs



WHAT CAN YOU DO?



COMMENT, COMMENT, COMMENT!

- HHS accepting public comments through August 13, 2019
 - Submit through organizations' "micro-sites" including through APIAHF's
 - Also can submit through regulations.gov -- <https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0001> and click on "Comment Now" on the right side of the screen; you can submit comments in the box or upload a document

COMMENT, COMMENT, COMMENT! (PART 2)

- Comments should include as much detail as possible
 - Quantitative – include citations to studies, statistics, etc.
 - Qualitative – stories of those impacted
- Comments are different than Congressional advocacy. Agency policy change is dictated by the Administrative Procedures Act. Failure to fully justify a policy, based on the comments, can bring it down

COMMENT, COMMENT, COMMENT! (PART 3)

- Consider including comments on other issues in the rule in addition to language access
 - Include concerns with eliminating discrimination on the basis of gender identity & termination of pregnancy
 - Address why notices are important to inform individuals about their rights and highlight the commitment of entities to nondiscrimination
- If there are legal challenges after a rule is finalized, the courts will evaluate the “administrative record”
 - all the comments submitted and how HHS responds to them

COMMENTS FROM LANGUAGE COMPANIES

- Why language access and civil rights are important
 - Noting the impact that access to language services has on outcomes and people's lives, why you provide these services
- Impact of the proposed rule on their organizations
 - Both potential costs (changing policies and procedures, lost revenue) and new challenges (new burdens if people are not accessing language services or avoiding health care)
- Impact of the proposed rule on clients
 - Helpful, if possible, to cite specific examples of individuals who could be harmed as well as demographic data

COMMENTS FROM INTERPRETERS & TRANSLATORS

- Impact on yourself as an interpreter/translator
 - Include information on the importance of defining knowledge, skills and abilities needed by interpreters/translators
- Impact on the patients/clients they work with including:
 - Concerns or fears individuals may have when accessing health care or language services, how quality interpretation/translation can overcome those fears
 - Stories about how language services improves access to care and outcomes
 - Stories about how lack of language services has hindered access or resulted in delayed care, errors, misdiagnosis, etc.

COMMENTS FROM HEALTH CARE PROVIDERS

- Impact of the proposed rule on their practices & facilities
 - Why providing language access services improves the quality of your care
- Impact of the proposed rule on their patients
 - What would being unaware of their health care rights mean to their health?
- Why providing notice about an entities' procedures is useful/important
- Costs of changing policies & procedures

COMMENTS FROM PATIENTS, CAREGIVERS, FAMILY & FRIENDS

- Personal impact of the proposed rule
 - Share any stories of discrimination or denial of services due to language
 - Stories of how language can be a barrier to health
- Why having public notices and taglines is useful/important
 - Why someone would need to know where to turn for help in their language when receiving a health care-related document
 - Discussing how many people are unaware of their rights unless informed of them

ADVOCATES

- Help educate your community to engage & submit comments
 - Educate health care providers
 - Connect with local health, civil rights & immigrant advocacy organizations
 - Talk with LGBT & reproductive justice/rights, women's organizations
- Reach out media to highlight your concerns
- Encourage policymakers to engage as well



BEYOND 2019



2020

- Finalization of 1557 rule (if not before)
- Further xenophobic policies of this Administration
- Elections
- Health Reform 2.0?

The outlook for language access and health reform greatly depend on the election results

NHeLP Resources

- [Summary of State Law Requirements Addressing Language Needs in Health Care \(2019 update\)](#)
- Press release -- <https://healthlaw.org/news/administration-announces-proposed-regulation-change-to-subvert-acas-civil-rights-protections/>
- Blog Post -- <https://healthlaw.org/administrations-proposed-regulation-change-to-acas-nondiscrimination-provision-would-rollback-civil-and-health-rights-progress/>
- Q&A -- <https://9kqpw4dcaw9ls37kozm5jxl7-wpengine.netdna-ssl.com/wp-content/uploads/2019/06/1557-Reg-Revision-QA-update-6.6.2019.pdf>
- NHeLP's Civil Rights & Health Equity Page -- <https://healthlaw.org/our-work/policy/civil-rights-and-health-equity>

APIAHF Resources

- NHeLP + APIAHF Fact sheet - <https://www.apiahf.org/resource/proposed-changes-to-the-health-care-rights-law-and-language-access/>
- Press Release - <https://www.apiahf.org/press-release/trump-administration-rolls-back-health-care-rights-puts-protections-for-language-access-women-and-lgbt-persons-at-risk/>
- Health Affairs blog on language access - <https://www.healthaffairs.org/doi/10.1377/hblog20160722.055907/full/>



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