

# The State of Play for Immigrants & Language Access in 2019

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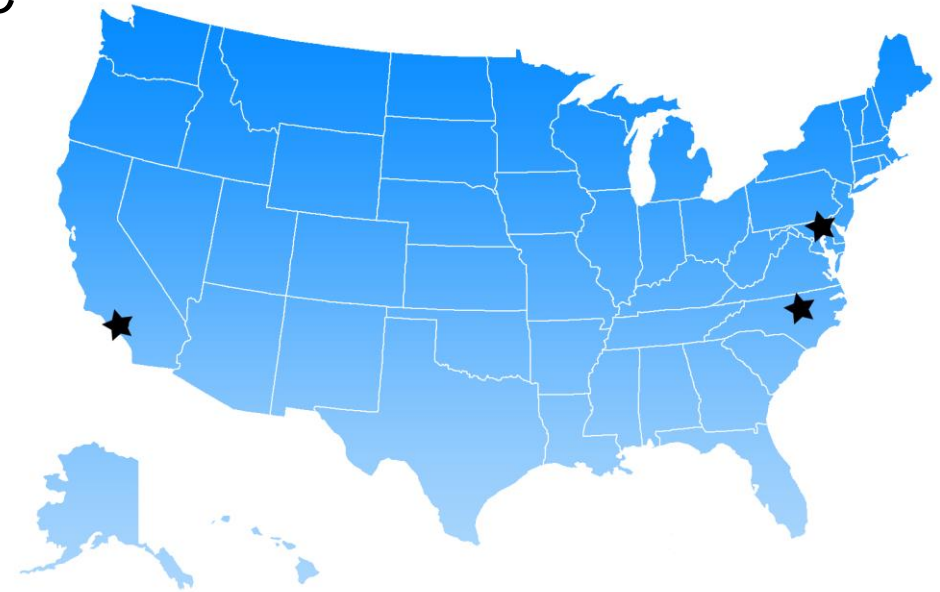
May 31, 2019



# About NHeLP

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- National non-profit law firm committed to improving health care access and quality for underserved individuals and families
- State & Local Partners:
  - Disability rights advocates – 50 states + DC
  - Poverty & legal aid advocates – 50 states + DC
- Offices: CA, DC, NC
- Join our mailing list at [www.healthlaw.org](http://www.healthlaw.org)
- Follow us on Facebook & Twitter  
@nhelp\_org and @marayoudelman



# Roadmap

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- Challenges Facing Immigrants
- Public Charge
- Nondiscrimination/Section 1557
- 2020 and beyond

# Challenges facing immigrants

## Beginning in 2017. . .

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- 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

# Family Separation Policy

- Ramped up with April 6, 2018 “Zero-Tolerance” Announcement
  - HHS Office of Refugee Resettlement in Charge of Kids
- 1997 Flores case prevents long term detention of children
  - June 2018 -- Judge orders reunification



American Academy of Pediatrics: *Highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress - known as toxic stress - can carry lifelong consequences for children.*



# Census Citizenship Question

- Commerce Sec. Wilber Ross announces decision to add a question on citizenship to 2020 Census
  - Has not been a Decennial Census question since 1950
- Fears that the added question will lead to immigrant families refusing to be counted and thus a Census undercount
- Potential impact on grant funding, Medicaid
  - Estimated \$1k lost to states for each uncounted person
- Waiting for decision from the courts

Is this person a citizen of the United States?

☐ Yes, born in the United States

☐ Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas

☐ Yes, born abroad of U.S. citizen parent or parents

☐ Yes, U.S. citizen by naturalization – *Print year of naturalization* ↗

☐ No, not a U.S. citizen

# Ongoing Barriers to Enrollment

- Even when eligible for public benefits, immigrants typically face complex enrollment scenarios
  - Mixed status households, Medicaid ineligible, language barriers
- Marketplace notices are not translated beyond Spanish
- Data matching –
  - Income
  - Citizenship
  - Identity

## STEP 1: Tell us about yourself.

(We need one adult in the family to be the contact person for your application.)

1. First name		Middle name		Last name		Suffix	
<input type="text"/>							
2. Home address (Leave blank if you don't have one.)						3. Apartment or suite number	
<input type="text"/>						<input type="text"/>	
4. City			5. State	6. ZIP code		7. County, parish, or township	
<input type="text"/>			<input type="text"/>	<input type="text"/>		<input type="text"/>	
8. Mailing address (if different from home address)						9. Apartment or suite number	
<input type="text"/>						<input type="text"/>	
10. City			11. State	12. ZIP code		13. County, parish, or township	
<input type="text"/>			<input type="text"/>	<input type="text"/>		<input type="text"/>	
14. Daytime phone number				15. Evening phone number			
<input type="text"/>				<input type="text"/>			
16. Do you want to get information about this application by email? ..... <input type="radio"/> Yes <input type="radio"/> No							
Email address: <input type="text"/>							
17. What's your preferred spoken language? What's your preferred written language?							



# PUBLIC CHARGE

## Also beginning in 2017. . .

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- Public Charge
  - Foreign Affairs Manual changes for admissibility (Jan. 3, 2018)
  - NPRM on admissibility (Oct. 10, 2018)
  - NPRM on HUD housing (Oct. 10, 2019)
  - NPRM on deportability (expected 2019)

# Public Charge Proposal

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- “**Public Charge**” is a term used in immigration law to refer to a person who is likely to become dependent on the government for financial and material support.
- An immigrant who is deemed **likely to become a “public charge”** may be denied admission to the U.S. or lawful permanent resident status.
- A public charge assessment is made:
  - When a person **applies** to enter the U.S. or
  - **Applies to adjust status** to become a Lawful Permanent Resident (LPR), Applies to enter the U.S.
  - A green card holder leaves the U.S. for more than 180 consecutive days (6 months) and reenters
  - **NOTE:** *It does not apply when someone applies to become a U.S. citizen.)*

# Longstanding public charge test

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## Definition

A person who is considered “likely to become **primarily dependent** on the government for subsistence.”

## Benefits Considered

Only two types of benefits considered:

1. **Cash assistance** for income maintenance
2. Institutionalization for **long-term care** at government expense

# Current public charge test *in the U.S.*

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## Totality of Circumstances

- Age
- Health
- Family status
- Financial status
- Education and skills
- Affidavit of support



The public charge assessment is forward looking

Is the person likely to rely on cash or long- term care in the future?

- No one factor (including past use of cash benefits) can alone determine whether or not someone is a “public charge”
- Positive factors can be weighed against negative factors

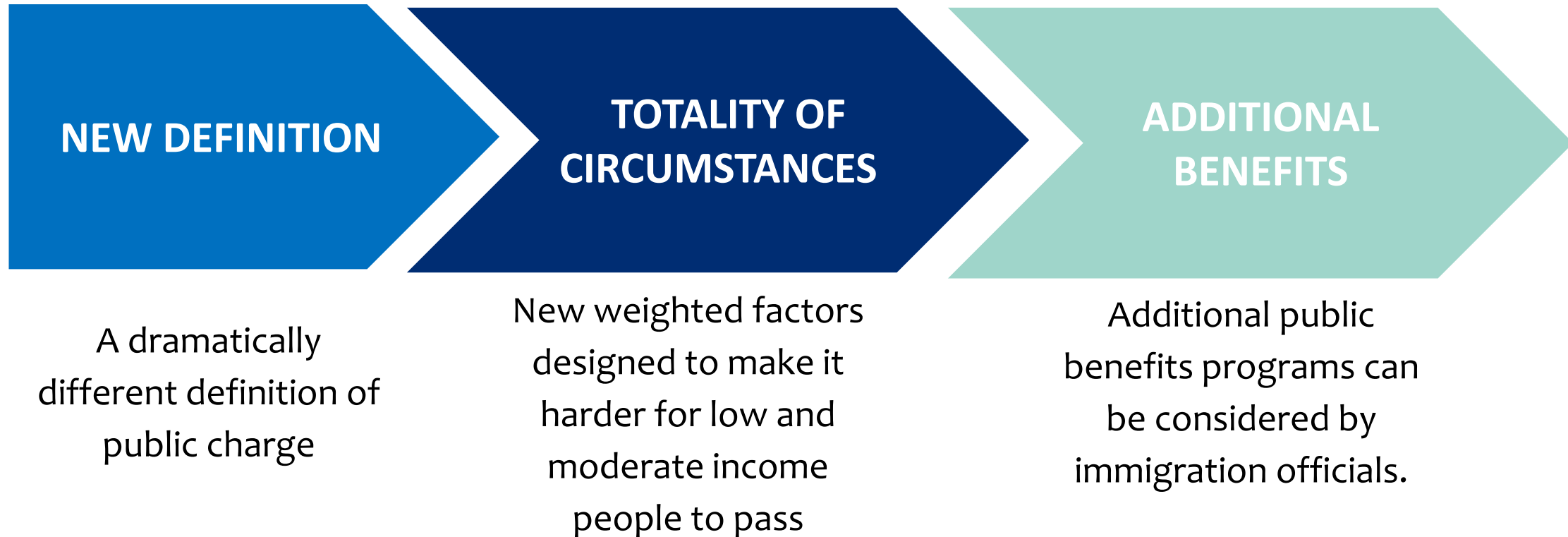
## Does this test apply to everyone?

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- Public charge does NOT apply to everyone.
- Examples of whom public charge does NOT apply to:
  - Lawful Permanent Residents (Green card holders)
  - Immigrants applying for citizenship
  - Refugees and Asylees
  - VAWA self-petitioners
  - Survivors of Domestic Violence, Trafficking, or other Serious Crimes (Applicants/ recipients of U or T visa)
  - Special Immigrant Juveniles
  - Certain Parolees, and several other categories of non-citizens

# Changes in proposed regulation

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# Public benefits included in NPRM

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**\*Cash Support for Income Maintenance**

**\*Long Term Institutional Care at Government Expense**

**\*\*Most Medicaid Programs**

**Supplemental Nutrition Assistance Program (SNAP or Food Stamps)**

**Medicare Part D Low Income Subsidy**

**Housing Assistance (Public Housing or Section 8 Housing Vouchers and Rental Assistance)**

\* Included under current policy as well

\*\* Exceptions for emergency Medicaid & certain disability services offered in school. DHS asked for input on inclusion of CHIP, but the program was not included in the regulatory text

# Public benefits not included in the proposal

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- Benefits received by immigrant's family members
- Disaster relief
- Emergency medical assistance
- Entirely state, local or tribal programs (other than cash assistance)
- CHIP\* (*DHS requested input on inclusion of CHIP during the comment period in 2018, but CHIP was not included in regulatory text*)
- Special Supplemental Nutrition for Women Infants and Children (WIC)
- School Breakfast and Lunch
- Energy Assistance (LIHEAP)
- Transportation vouchers or non cash transportation services
- Non-cash TANF benefits
- Federal Earned Income Tax Credit and Child Tax Credit
- Student Loans
- *Any benefit not specifically listed in the regulation* will not be considered

# The Chilling Effect

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- The rule may deter (and already has deterred) legal immigrants and mixed-status families from using public benefits they are eligible to receive due to:
  - Confusion over what benefits are covered
  - The complexity of the rule's structure
  - Discretionary application of the rule

*After 1996 eligibility changes, there was a 25% decrease in use of Medicaid by children of foreign-born residents, the majority of these children were still eligible.<sup>1</sup>*

In a 2018 survey at public health clinics in CA:<sup>2</sup>

- Two-thirds of health providers reported an increase in parents' fear about enrolling kids in Medicaid, WIC
- Nearly half of providers reported an increase in no shows at public health clinics.

# The Chilling Effect: The Big Picture

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As many as 26 million people in families with immigrants might be chilled from participating in programs that make their families healthier and stronger.

**1 in 4 children have an immigrant parent**



# Hurts All of Us

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*We are all worse off when people do not have access to key health care, nutrition, and housing supports.*

- Proposed rule is grounded in the false claim that receiving benefits means that you're not contributing.
- The vast majority (91%) of those who would be newly affected are working but being paid low-wages.\*
- Investments in key supports pay off in the long run and lead to improved health and better economic outcomes.

# The Protecting Immigrant Families (PIF) Website



Source: NILC & CLASP, Protecting Immigrant Families  
Advancing Our Future Campaign: Public Charge 101 PowerPoint presentation



# PIF Community Education Resources

**COMMUNITY RESOURCES**

**ANALYSIS & RESEARCH**

**TAKE ACTION**

**EVENTS**

SHARE



## Community Resources

In 2019, the Protecting Immigrant Families (PIF) Campaign is dedicated to providing more community-facing materials on public charge to help better equip immigrants with what they need to know to make the best decision for themselves and for their families.

### For People Working with Immigrant Families:

**Updated in April\*** [How to Talk About Public Charge with Immigrants and Their Families](#)  
(PIF Campaign)

[Frequently Asked Questions on Public Charge for Immigrant Families](#)  
(MomsRising and PIF Campaign)

**NEW\*** [Immigrant Self Sufficiency Fact Sheet: How Benefits Can Help](#)  
(Massachusetts Law Reform Institute)



# How to Get Involved with PIF

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## Join our Email List

Stay up-to-date on news, developments, and other threats that impact immigrant families and join our email list. Every Monday, we provide the state of play, advocacy opportunities, and new resources. To join go to: <http://bit.ly/PIFCampaign>

## Become an Active Member

Join the hundreds of organizations working to protect immigrant families. There are no fees or work requirements to join as an Active Member, and you can participate in one of our many working groups and subcommittees. To join go <http://bit.ly/PIFActivemember>

## Share Your Story

Everyone's voice matters in this fight - please share your lived experience. Go to <http://bit.ly/PIFstory> and we will follow up to have a more in-depth conversation. Your information will never be shared without your permission.

## Take Action!

Be sure to check out our [Events](#) page for more opportunities to learn and take action to support immigrant families

# Nondiscrimination and the affordable care act

# Demographics

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- Over 66 million people speak a language other than English at home, over 21% of the population
  - Over 522,000 in Indiana, about 8.3% of population
- Over 25 million (8.5% of the population) speak English less than “very well,” and may be considered LEP
  - 3.2% LEP in Indiana, over 200,000 individuals
- 8.5 million children under age 19 live in a household with at least one LEP parent
- About 25% of “marketplace” enrollees are LEP

SOURCES: 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](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](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1601&prodType=table).

# Treating LEP Patients

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- 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

## Title VI of the Civil Rights Act of 1964

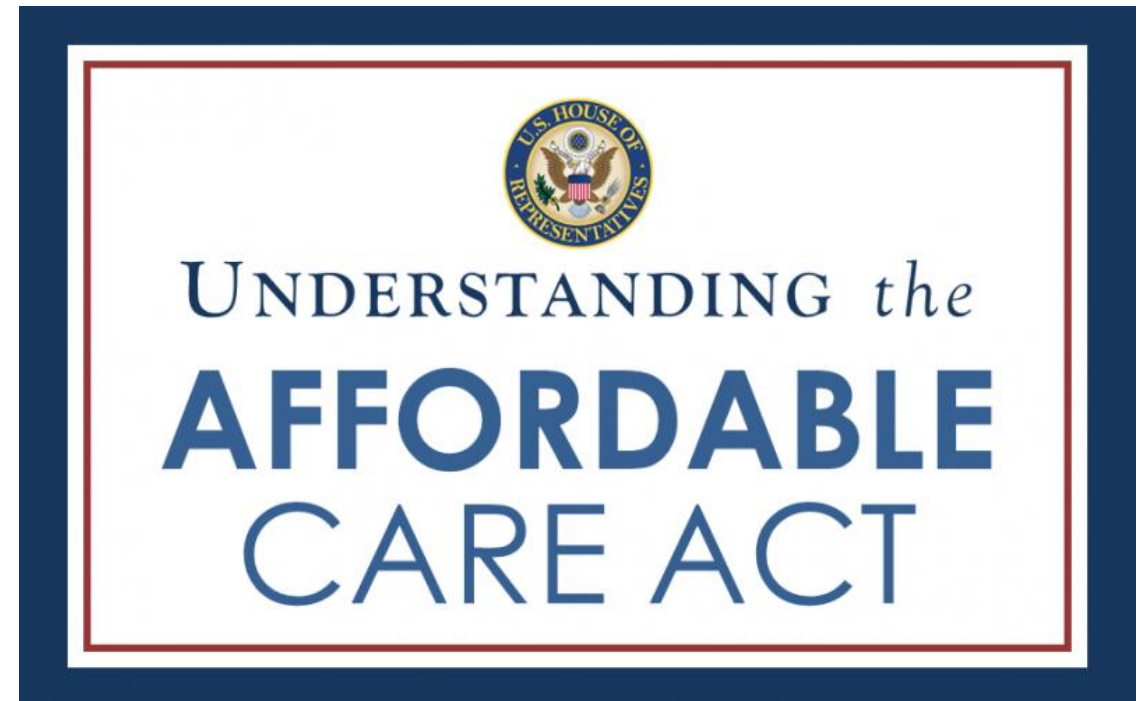
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- “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”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

# Section 1557 of the Affordable Care Act

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- 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

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- 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 is **broader** than Title VI which only applied to those receiving federal funding



# Who Is Covered by Title VI & 1557?

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## **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)

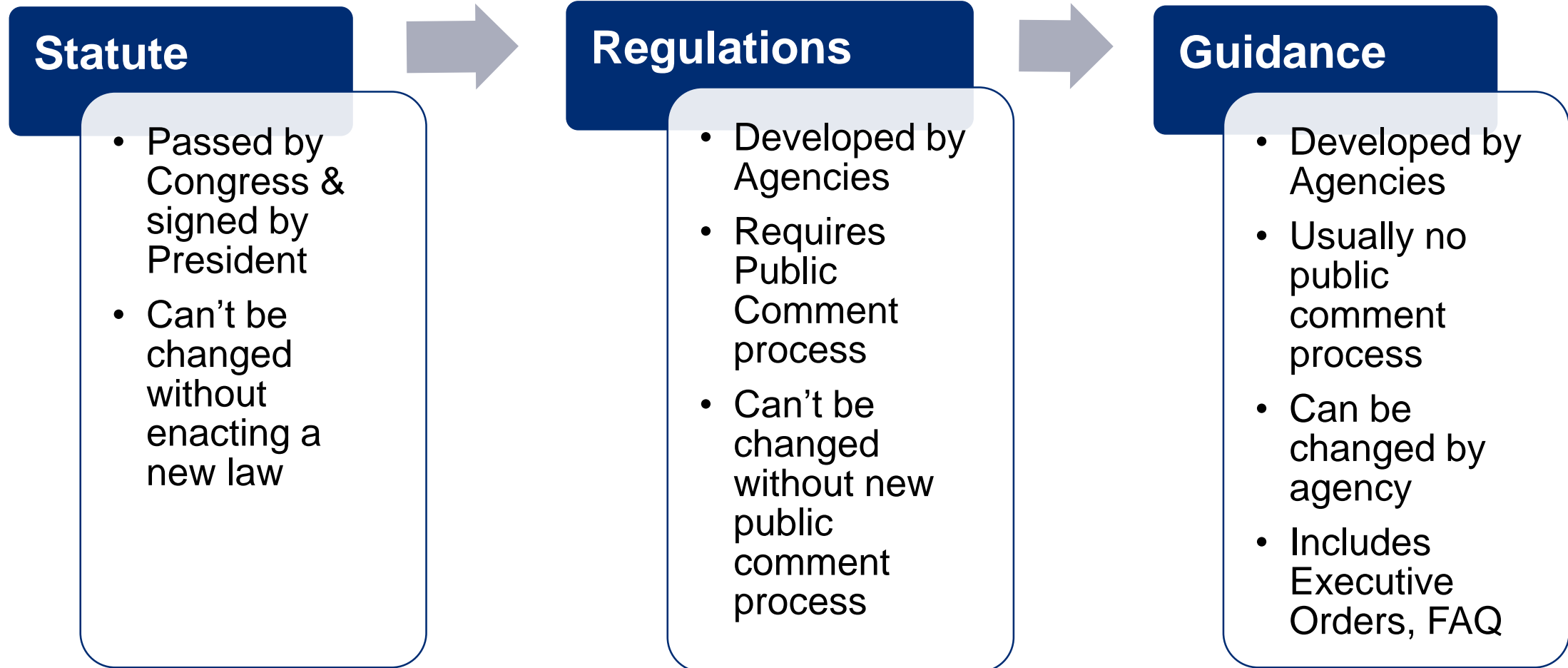
## Goal of 1557

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- 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

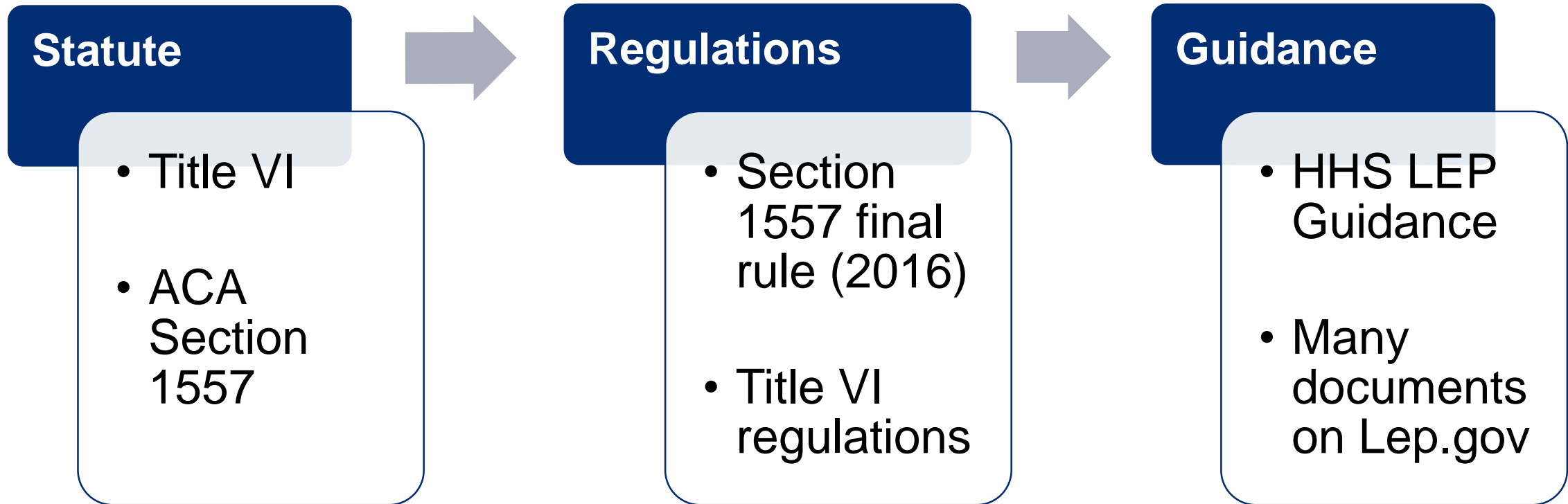
# Hierarchy of Law

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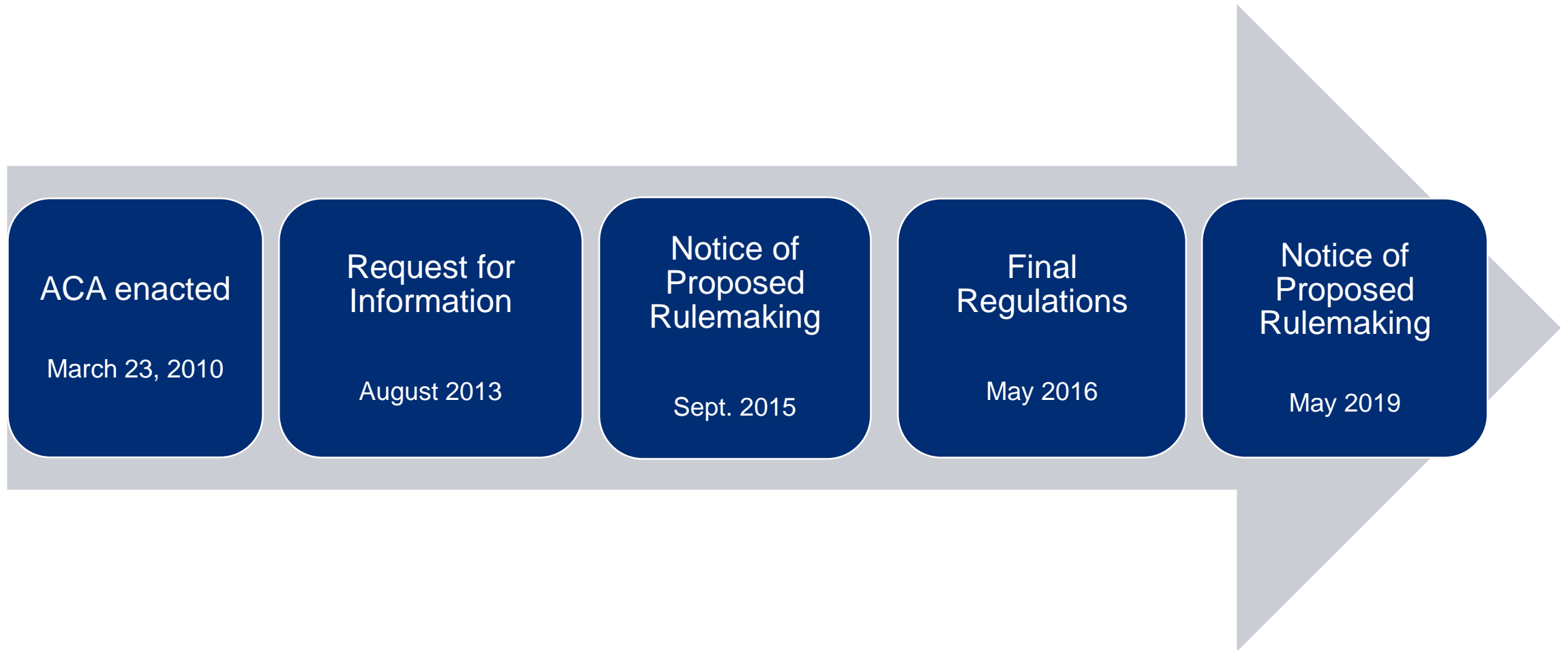
# Hierarchy of Law

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# History of Sec. 1557

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## Proposed 1557 NPRM (2019)

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- Seeks to change 2016 final rule implementing 1557
  - NHeLP press release -- <https://healthlaw.org/news/administration-announces-proposed-regulation-change-to-subvert-acas-civil-rights-protections/>
- 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 follow these and eliminate explicit nondiscrimination protections based on sexual orientation and gender identity

## One good thing in NPRM

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- Puts the “4 factor test” into regulations
- In evaluating compliance with ensuring meaningful access, OCR may assess how an entity balances:
  - Number/proportion of LEP individuals eligible to be served or likely to be encountered in the eligible service population;
  - Frequency with which LEP individuals come into contact with the entity’s health program, activity or service;
  - Nature and importance of the entity’s health program, activity or service; and
  - Resources available to the entity and costs.



# Who's Covered?

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- 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

## Interpreter (foreign) & Translator

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- 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

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- 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 with 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

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- 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

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- 2016 – taglines on all “significant” documents and notices in top 15 languages in a state
- 2019 – no taglines required on any documents
  - 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

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- 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



# Translation of Written Materials

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- 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?

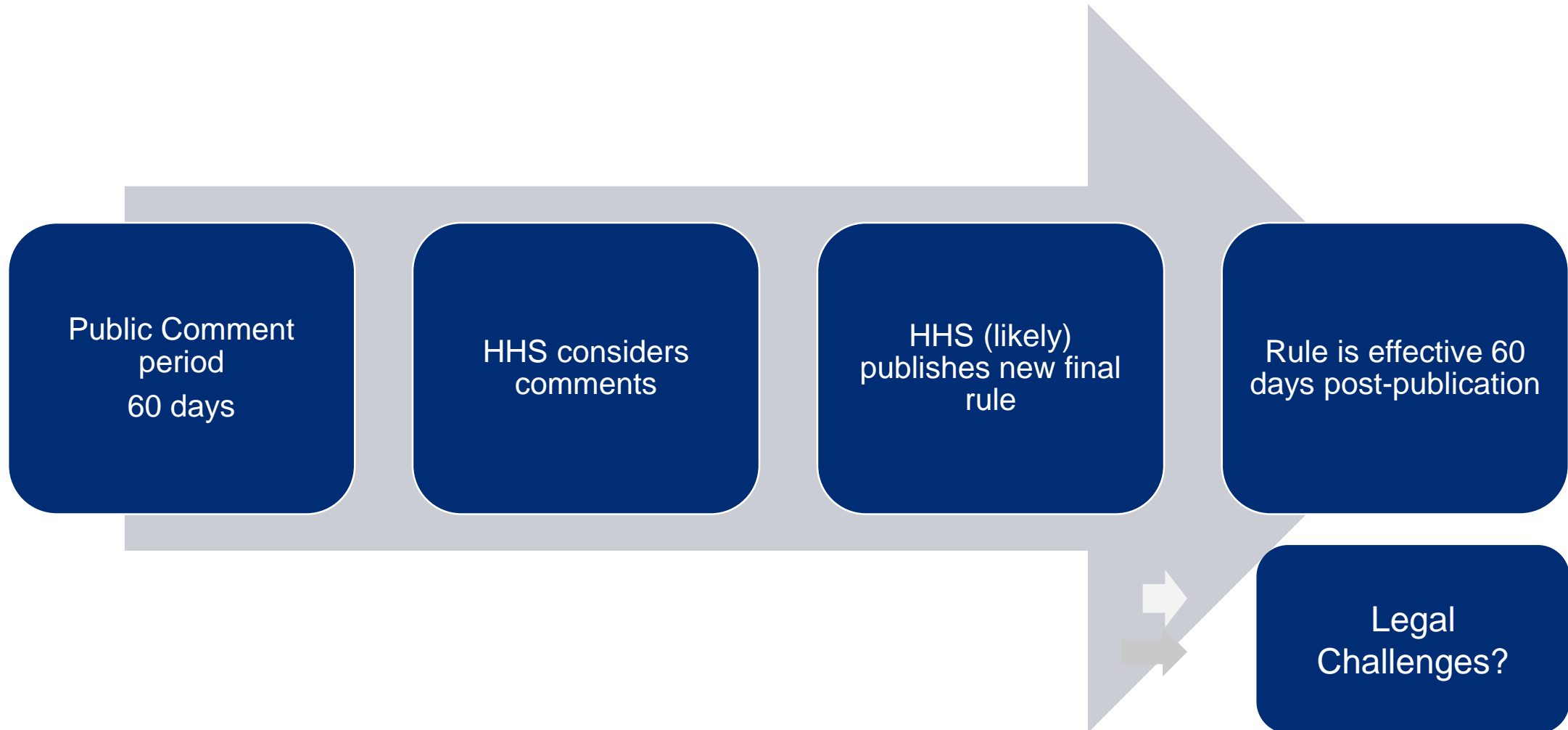
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- Current legal challenges to 2016 rule – may be resolved with NPRM
- Concerns of issuers and pharmacy benefit managers about requirements regarding taglines and notices
- NRPM – comment period is 60 days
  - **NOTHING** changes immediately! This is 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

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## LEP.gov – new pop-up text

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...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...

# Hierarchy of Law

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## Statute

- Passed by Congress & signed by President
- Can't be changed without enacting a new law

## Regulations

- Developed by Agencies
- Requires Public Comment process
- Can't be changed without new public comment process

## Guidance

- Developed by Agencies
- Usually no public comment process
- Can be changed by agency

## So what's the impact of LEP.gov?

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- 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

## Next Steps

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- Title VI and Section 1557 still remain the law
- Even if NPRM 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!

# Beyond 2019

2020

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

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

## Resources

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- **NEW!!!!** – [Summary of State Law Requirements Addressing Language Needs in Health Care](#) (2019 update)
- **Coming soon**
  - analysis of Sec. 1557 NPRM
  - template comments
- NHeLP's Civil Rights & Health Equity Page -- <https://healthlaw.org/our-work/policy/civil-rights-and-health-equity/>



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