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## MEMORANDUM

TO: Access Ready

DATE: October 3, 2023

SUBJECT: **HHS Proposed Rule Updating  
Section 504 Regulations: *Discrimination  
on the Basis of Disability in Health and  
Human Service Programs or Activities*;  
45 CFR Part 84; RIN: 0945-AA15**

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### I. Introduction

On September 14, 2023, the Department of Health and Human Services (“HHS”) published a landmark proposed rule, *Discrimination on the Basis of Disability in Health and Human Service Programs or Activities* (“proposed rule” or “proposal”),<sup>1</sup> that would advance protections for people with disabilities pursuant to Section 504

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of the Rehabilitation Act of 1973 (“Section 504”). Section 504 prohibits discrimination on the basis of disability in programs and activities that receive Federal financial assistance, as well as in programs and activities conducted by any Federal agency.<sup>2</sup> Accordingly, the proposed rule applies to all recipients of HHS funding and financial assistance (“recipients”) including hospitals and physicians that accept Medicare or Medicaid payments. This lengthy memorandum summarizes this massive, proposed rule, which totals over 400 pages in length and covers an expansive scope of programs and activities.

The proposed rule seeks to improve health equity by addressing equitable access to benefits and services. Throughout the proposal, HHS sets forth an exhaustive body of research and individual stories to underscore the harmful impacts of discrimination against people with disabilities, which leads to health disparities. To mitigate these health disparities, HHS proposes

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new regulations that would:

- Prohibit discrimination in medical treatment decisions;
- Prohibit the discriminatory use of value assessments;
- Clarify accessibility standards for web, mobile application, and kiosk accessibility; and
- Establish enforceable standards for accessible medical diagnostic equipment.

The proposed rule would also update the definition of “disability” and outdated terminology identifying people with disabilities to ensure consistency with statutory amendments to the Rehabilitation Act, enactment of the Americans with Disabilities Act (“ADA”), the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”), and the Affordable Care Act (“ACA”).

This memorandum summarizes sections in the proposed rule relating to health and health care

delivery. Although the proposed rule also includes sections focused on child welfare and education, this memorandum does not summarize those proposals.

Comments on this proposed rule are due by **November 13, 2023** and may be submitted [here](#).<sup>3</sup>

## **II. New Protections for People with Disabilities in HHS Programs and Activities**

### **A. Protections Against Discrimination in Medical Treatment Decisions**

The proposed rule would implement new requirements prohibiting medical practitioners from discriminating against people with disabilities in medical treatment decisions. HHS provides extensive evidence of pervasive discrimination in treatment decisions particularly in organ transplantation, life-sustaining treatment, crisis standards of care, and participation in clinical research. In

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particular, people with disabilities experienced discrimination during the COVID-19 pandemic when medical practitioners made treatment decisions based on discriminatory beliefs about people with disabilities. HHS notes that a common example of such discrimination is a provider's decision that a medically indicated treatment should not be provided based on a judgement by the provider, and not by the patient or their authorized representative, that the care the patient would need following the treatment would be an unfair burden.

HHS's stated intention is to ensure that medical treatment decisions by recipients are not based on biases or stereotypes about people with disabilities, judgements that an individual will be a burden on others, or beliefs that the life of an individual with a disability has less value than the life of an individual without a disability. Throughout the proposal, HHS explores medical situations that lend themselves to discrimination to demonstrate the impact of this regulation on medical treatment decisions.

**Denying or Limiting Treatment.** The proposed rule would explicitly prohibit a recipient from denying or limiting treatment to a qualified individual with a disability when that decision is based on any of the following:

- Bias or stereotype about a patient's disability,
- Judgments that an individual will be a burden on others due to their disability, or
- A belief that the life of a person with a disability has a lesser value than that of a person without a disability.

The proposal draws a distinction between circumstances where individuals are seeking treatment for the underlying disability and those in which individuals are seeking treatment for a separately diagnosable, but not entirely unrelated condition or symptom. The intent of this distinction is to address circumstances where "the condition for which medical treatment is sought is sufficiently distinct from

the underlying disability such that the person with the disability can be considered similarly situated to a person without the disability.”<sup>4</sup>

**Professional Judgment and Consent.** The proposed rule would maintain a recipient’s right to exercise professional judgement in treatment. Nothing in this proposed rule requires the provision of medical treatment where the recipient has a legitimate, nondiscriminatory reason for denying or limiting that service or where the disability renders the individual not qualified for the treatment. The proposed rule also makes clear that this regulation would not require a recipient to provide medical treatment when the patient or authorized representative does not consent to the treatment. It would, however, bar recipients from obtaining consent in a discriminatory manner such as conditioning access to treatment with an agreement to consent to an advanced planning decision if it is not a practice required for a similarly situated patient

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without a disability. The proposed rule would not prevent a recipient from providing an individual with a disability or their authorized representative with information regarding the implications of different courses of treatment based on current medical knowledge and practice.

**Scope of Proposed Rule.** The proposed rule, in clarifying its applicability to medical settings, defines “medical treatment” broadly as “referring to the management and care of a patient to identify, address, treat, or ameliorate a physical or mental health condition, injury, disorder, or symptom, whether or not the condition constitutes a disability and whether the medical approach is preventative, curative, rehabilitative, or palliative.”<sup>5</sup> Moreover, the proposed rule further clarifies that the definition also includes a “wide range of regimens for both physical and mental conditions, interventions, or procedures, such as surgery; the prescribing, dispensing, or management of

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medications; exercise; physical therapy; rehabilitation services, and the provision of durable medical equipment.”<sup>6</sup>

### **A. Prohibiting the Discriminatory Use of Value Assessment Methods**

The proposed rule would also address discrimination on the basis of disability in the use of value assessment methods, which have been used by certain entities to determine whether certain treatments for people living with disabilities would be covered. HHS cites instances of recipients using value assessment methods such as Quality Adjusted Life Years (“QALYs”) to discriminate against people with disabilities. According to the proposed rule, recipients are using these value assessment methods in cost assessment and cost benefit analyses that discount the life of a person with disabilities and impacts the provision of benefits. This type of usage values the life of a person with a disability less than an individual without a disability and would constitute a

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discriminatory usage of value assessment methods.

The proposed rule would prohibit value assessment methods that place a lower value on life extension for a group of individuals based on disability, and where such methods are then used to deny or afford an unequal opportunity to qualified individuals with disabilities with respect to the eligibility or referral for, or provision or withdrawal of an aid, benefit, or service. Importantly, the proposed rule also clarifies that not all methods of value assessment or their uses are discriminatory and thus not prohibited in this new regulation.

## **B. Accessibility Standards for Websites, Mobile Applications, and Kiosks**

Website and mobile application accessibility is a critical issue for access to health care information, services, and treatment. Despite legal enforcement, people with disabilities continue to face barriers to accessing websites,

mobile applications, and kiosks run by recipients.

It is vital to ensure that web content and mobile applications are usable and accessible for people with disabilities, particularly electronic health records and telehealth platforms. HHS acknowledges that voluntary compliance with technical standards for web accessibility has been insufficient in providing access. The proposed rule discusses previous rule making, regulation, and Executive Orders aimed at achieving accessibility for people with disabilities, as well as legal enforcement through Federal agencies.

**Proposed Technical Standards.** The proposed rule adds new regulations for web, mobile, and kiosk accessibility that establish clear technical standards with which all recipients are required to comply. HHS is proposing to adopt the Website Content Accessibility Guidelines (“WGAC”) 2.1 Level AA, which the World Wide Web Consortium developed to provide standards for web content accessibility.

Compliance with WCAG 2.1 Level AA requires a website to have important accessibility features especially for people with low vision, manual dexterity disabilities, and cognitive and learning disabilities. These success criteria would include accessibility features such as text formatted so that it is easier to read when magnified. This proposal would establish the same technical standards that the Department of Justice is also in the process of proposing through rulemaking.<sup>7</sup>

**Timeline for Compliance.** Larger recipients, defined as organizations with fifteen or more employees, would have two years following this proposal's finalization to meet Level AA success criteria requirements specified in WCAG 2.1. Small recipients, defined as organizations with less than fifteen employees, would have three years to meet these requirements. The proposed rule also applies to social media content that recipients offer the public to the extent that accessible features are

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available on a given social media platform.

### **Exceptions to Accessibility Requirements.**

Certain exceptions are allowed under the proposed rule for extenuating circumstances and previously uploaded content. For example, if it is determined that compliance would constitute an undue financial and administrative burden for the recipient, they may take other actions to increase accessibility and would need to ensure, to the maximum extent possible, that individuals with disabilities receive the benefits or services provided by the recipient. Additionally, the proposed technical standards would not be required for the following situations:

- Archived web content;
- Preexisting electronic documents— unless such documents are currently used by members of the public to apply for, gain access to, or participate in a recipient's programs or activities;
- Web content posted by a third party;

- Linked third-party content;
- Individualized, password-protected documents; and
- Course content for schools.<sup>8</sup>

## **B. New Standards for Accessible Medical Diagnostic Equipment**

People with disabilities experience barriers to accessing medical care due to inaccessible medical diagnostic equipment (“MDE”). The proposed rule cites numerous studies and data on the barriers created by inaccessible MDE and the health disparities resulting from a recipient’s inability to provide a person with disabilities equal access to health care programs and activities. Particularly, the proposal notes the harm from lack of access to routine and preventative services. The proposed rule would establish standards for accessible MDE to help ensure that vital health care programs and activities are equally available to individuals with disabilities.

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The proposed rule would establish standards and requirements for MDE, the purchasing or acquiring of new MDE, adapting existing MDE, and requirements for staff. The proposed rule adopts the U.S. Access Board's Standards for Accessible MDE ("MDE Standards") and sets general accessibility requirements for programs and activities that recipients provide through or with the use of MDE. A recipient cannot deny services that it would otherwise provide to a patient with a disability because the recipient lacks accessible MDE.

**Requirements for Accessible MDE.** The general requirement is that physician offices, clinics, emergency rooms, hospitals, outpatient facilities, multi-use facilities, and other medical programs that do not specialize in conditions that affect mobility must ensure that at least 10% of MDE, but no fewer than one unit of each type of equipment, are compliant with the MDE Standards. Newly purchased, leased, or otherwise acquired MDE after the effective date of this rule must be accessible until this

requirement is satisfied. Additionally, the proposed rule includes a “dispersion” requirement, meaning that the 10% of MDE standard must be dispersed proportionally across the entity. For facilities that specialize in treating conditions that affect mobility, at least 20% of each type of MDE used, but no fewer than one unit of each type of MDE, must comply with MDE Standards.

**Examination Tables and Weight Scales.** The proposed rule requires examination tables and weight scales to meet MDE Standards within two years after rule finalization. The proposed rule also includes a requirement for recipients to ensure that their staff are able to operate accessible MDE, assist with transfers and positioning of individuals with disabilities, and ensure access for existing MDE. This provision would prevent a recipient from requiring a person accompanying a patient to assist with transfers.

**Alternative MDE.** The proposed rule would not



prevent the use of designs, products, or technologies as alternatives to those prescribed by MDE Standards, provided they result in substantially equivalent or greater accessibility and usability of the program or activity. The responsibility for demonstrating equivalent facilitation rests with the recipient.

### **III. Ensuring Consistency with Other Legal Authority Governing Accessibility**

In addition to adding new sections, a key purpose of the proposed rule is to ensure consistency between Section 504 and other leading legal authorities on disability rights, namely, the ADA, ADAAA, the ACA, as well as Supreme Court precedent. The proposed rule would achieve this aim by updating outdated terminology, revising existing sections of the Rehabilitation Act, and adding new sections to reflect current, lawful interpretations and practice.

Many of these revisions are similar to—if not

track directly with—language in the ADA Title II and/or III regulations. The following subsections detail the key revised or new language from the proposed rule aimed at ensuring consistency with other legal authorities governing disability and accessibility.

### **A. General Terminology Changes**

To aid ongoing efforts in modernizing the implementation of the Rehabilitation Act, the proposed rule updates language and terminology used throughout the regulations. In 1992, the Rehabilitation Act Amendment changed the term “handicapped person” to “individual with a disability.” To reflect this change, the proposed rule adopts this terminology and, in addition, uses the phrase “qualified individual with a disability” in place of “qualified handicapped person.” The proposed rule also exchanges the term “alcoholic” for “individual with an alcohol use disorder” and substitutes “drug addict” for “individual with a substance use disorder.” These changes are

not meant to change the substantive interpretation of Section 504 or the implementing regulation.

## **B. Revisions to the Regulation's Scope**

Several revisions impact various parts of the regulation that concern its scope—for instance, it includes sections on the purpose and broad coverage, application, definition of disability, and notice requirements. The following paragraphs summarize these changes.

The proposed rule would state that the definition of “disability” is to be construed broadly. This statement is similar to current ADA regulations and is consistent with the purpose of the ADAAA, which is to ensure a “broad scope of protection” under the ADA and Rehabilitation Act. The view that the ADAAA adopted—and this regulation now officially proposes to adopt—stems from the Supreme Court’s stated view of disability.<sup>9</sup>  
In furtherance of its goal to ensuring the

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broadest coverage allowable under Section 504, the proposed rule updates the definition of Disability. With respect to an individual, HHS construes disability to mean “(i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment as described in paragraph (f) of this section.”<sup>10</sup> Mirroring current ADA regulations, the proposed rule’s definition of disability articulates three methods, or prongs, of determining whether an individual has a disability: 1) the “actual disability” prong, 2) the “record of disability” prong, or 3) the “regarded as being disabled” prong. The proposed rule once more clarifies that each of these prongs should be interpreted broadly and in favor of expansive coverage. Additionally, the proposed rule specifically adds so-called “Long COVID” to the list of physical and mental impairments and clarifies that homosexuality and bisexuality are not considered disabilities.

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## **A. Revisions Related to Discrimination in the Employment Context**

The proposed rule implements the requirement from the Rehabilitation Act Amendments to apply the ADA Title I employment standards to Section 504 employment discrimination. In implementing this requirement, the proposed rule will clarify that the standards governing Title I of the ADA will govern the new proposed section under Section 504. This statement responds to the reality that significant jurisdictional overlap exists for regulation of employment discrimination practices. Note that the term “reasonable accommodations” is used in the employment context while “reasonable modifications” is used in references to situations outside the employment context.

## **B. Revisions Related to Program Accessibility Standards**

The proposed rule adds requirements to the Section 504 regulations—similar to those already in place under ADA regulations—that would define the scope of required accessibility in existing facilities, as well new construction and alterations. These requirements apply to public entities as defined in the ADA Title II regulations. The proposed rule makes explicit that the determination of compliance with these regulations should mirror the process for determining compliance with the ADA Title II regulations. Conformance with the 2010 Standards for Accessible Design is sufficient for compliance with the proposed rule.

Subject to certain limitations, the existing facilities' recipients of federal financial assistance must not, in relation to individuals with disabilities: 1) subject individuals to discrimination, 2) exclude individuals from participation in, or 3) render their facilities

inaccessible or usable. There are exceptions, however, when acting would necessitate a fundamental alteration of the program or activity or subject the entity to undue administrative and financial burdens.

Nonetheless, the facility must still take any *other* steps necessary to ensure that individuals with disabilities receive the benefits or services that the recipient provides. Additionally, the proposed rule makes clear that a finding of undue burden on finances or administrative functions should be rare.

The proposed rule's provisions for new construction and alterations are more stringent than the standard the proposed rule sets for existing facilities. If construction for a facility commenced after June 3, 1977, the design and construction of the new facility must allow for the use of the facility—or part of the facility—by individuals with disabilities. The same standard applies to alterations that commence after June 3, 1977.

## **A. Updates Related to Health, Welfare, and Social Services**

### **Request for Comment on Substance Use**

**Disorder and Medical Treatment.** The proposed rule states that when an individual is experiencing a medical condition due to substance use disorder, a recipient that operates an outpatient facility or general hospital may not discriminate in the admission or treatment of that individual based on the individual's substance use disorder. HHS specifically seeks comment on whether it should apply this requirement to settings beyond hospitals—which includes inpatient, long-term hospitals, and psychiatric hospitals—and outpatient facilities.

**New Provisions on “Communications.”** The proposed rule expands on previous sections governing communication in the disability context. For instance, the previous rule indicated that the obligation to provide auxiliary aids is only mandatory for recipients with



fifteen employees or more. For recipients with fewer than fifteen employees, this requirement for auxiliary aids only applied when it would not “significantly impair” the employer’s ability to provide its services or benefits. The proposed rule removes this exception. Other topics that the new subpart addresses include telecommunications, telephone emergency services, and information and signage. A recipient must, for instance, ensure that any automated-attendant system it uses provides real-time communication for individuals using auxiliary aids. Likewise, 911 services must provide direct access for individuals using computer modems and TTY’s. The proposed rule explicitly states that recipients must use appropriate signage that is effective in both communicating the fact that accessible activities, services, and facilities exist and where an individual can find them. However, the proposed rule also provides that a recipient does not need to act if it would result in a fundamental alteration or cause undue administrative and financial burdens.

HHS seeks comments addressing the importance of whether to provide information for individuals with developmental, intellectual, cognitive, or neurological disabilities in “plain language.” Additionally, HHS is seeking information on whether plain language is considered a reasonable modification, or if it can be considered an auxiliary aid or service. If the plain language requirement is classified as a reasonable modification, the individual would explicitly have to request it.

## **A. New General Requirements**

**“Solely” on the Basis of Disability.** To ensure consistency with the statute, the proposed rule would insert the word “solely” into the regulation’s general prohibition against discrimination. The updated regulation would now read that discrimination “*solely* on the basis of disability” is prohibited rather than discrimination being prohibited “on the basis of disability.” The proposed rule clarifies that this

change is merely technical and does not alter the department's reach, nor its interpretation of the statute's general nondiscrimination statement. Additionally, insertion of the word "solely" is not meant to be exclusive, meaning that the department does not intend for it to detract from the other specific nondiscrimination provisions in the proposed rule.

**Illegal Use of Drugs.** Similar to the ADA regulations, this new proposed regulation would specify that nondiscrimination provisions do not generally protect an individual's current illegal use of drugs. The proposed rule acknowledges a distinct difference between "the use of substances and the status of being addicted to that substance." However, if the individual is entitled to services provided under the Rehabilitation Act subchapters I (Vocational Rehabilitation Services), II (Research and Training), and III (Professional Development and Special Projects and Demonstrations), then an individual cannot be excluded from receiving

those services on the basis of current illegal use of drugs.

**Maintenance of Accessible Features.** While many facilities may technically provide accessible features, many do not take adequate steps to maintain the functionality of those features. Tracking the ADA regulations, this proposed update would clarify that a facility's failure to consistently and reasonably maintain accessible features renders it non-compliant with Section 504. While temporary obstructions—such as a piece of machinery being “out-of-order”—are not considered violations of this section, the facility must take reasonable steps to mitigate the obstruction.

**Protection from Retaliation or Coercion.** To align this standard with the current ADA regulations, the proposed rule would protect individuals from retaliation if they make a complaint or object to a practice that is unlawful under Section 504. This protection extends to individuals who support the person

alleging a Section 504 violation.

**Personal Services and Devices**. Unless they are otherwise generally provided to individuals without disabilities as part of the federal recipient's programs or activities, Section 504 does not require recipients to provide personal devices and services to individuals with disabilities. This addition is in alignment with current ADA regulations.

**Services Animals**. Recipients must allow the use of service dogs that are properly trained to perform tasks that benefit the individual with a disability. The term "service animal" is limited to dogs and does not include dogs that are used solely for emotional support or wellbeing. Exceptions to this rule are permitted under two circumstances: 1) if the service animal is out of control and the handler does not take effective actions to control it; and 2) the service animal is not housebroken. The proposed service animal provision applies in the same manner as the ADA regulations on service animals applies.

**Mobility Devices.** The proposed rule aligns these regulations with current ADA regulations by clarifying that recipients must permit manually powered mobility devices in any place that pedestrians are permitted. The proposed rule also recognizes that as technology has advanced, the use of power-driven mobility devices has become increasingly common. This provision thus deems it necessary for recipients to also accommodate power-driven mobility devices unless there is a legitimate safety risk associated with a particular type of device. The proposed rule lists several factors that recipients must consider in determining whether to permit power-driven mobility devices on their premises. Some of these factors include the size, weight, and speed of the device, and the volume of pedestrians.

**No Requirement to Accommodate Individuals Posing a Direct Threat.** Similar to current ADA regulations, this subsection clarifies that recipients do not need to accommodate

individuals in programs or activities if the individual in question poses a direct threat. An assessment of whether a person poses a direct threat must be based individually on “reasonable judgment,” and reliant on either 1) currently accepted medical knowledge, or 2) the best objective evidence available. These standards should be used to determine the “nature, duration, and severity of the risk; the probability that a potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.”<sup>11</sup> The rule defines direct threat as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”<sup>12</sup> Note that in the employment context, an alternate definition of direct threat applies.

**Integration.** Current Section 504 regulations require programs and activities to be administered in the most integrated setting

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appropriate to serving the needs of the person with a disability. The proposed rule incorporates language reflecting principles established through Supreme Court precedent, which clarifies the right of individuals with disabilities to participate in activities and programs under the most integrated setting appropriate and mandates that community-based services must be provided to individuals under certain circumstances.<sup>13</sup> This occurs when 1) the services are appropriate, 2) the affected individuals do not oppose community-based treatment, and 3) the placement in a community setting can be reasonably accommodated.

#### **IV. Conclusion**

In this proposed rule, HHS articulates its overarching goal to ensure that people with disabilities have an equal opportunity to participate in, and benefit from, quality health care to advance health equity for people with

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disabilities. In pursuit of accomplishing that goal, HHS is proposing to take long overdue steps toward facilitating equal opportunity for people with disabilities of all ages. The proposed rule demonstrates a commitment by HHS to respond to the tangible issues that individuals with disabilities currently face when participating in activities and programs that recipients offer, in some instances, despite decades of legislative and regulatory requirements.

This is considered a landmark proposed rule by the disability community. It provides a meaningful opportunity for stakeholders to provide input through public comment to ensure that the finalized regulation serves to strengthen accessibility standards to the furthest extent possible while accommodating the legitimate concerns of entities to which it applies. This rule, when finalized, will apply to recipients of Federal financial assistance including Medicare and Medicaid reimbursement for services which the vast

majority of health care providers accept. It is particularly critical for organizations in the disability and health care space to weigh-in on this proposal since this could significantly advance health equity for people with disabilities by bringing Section 504 protections into the modern era of health care and health information dissemination.

Interested parties and stakeholders across the broad spectrum of disability and health care advocacy should consider commenting on one or multiple aspects of the proposed rule. Comments on this proposed rule are due by November 13, 2023 and can be submitted [here](#). Powers will continue to closely monitor the proposed rule and is happy to discuss with clients, coalitions, and friends the preparation of written comments. In the meantime, please feel free to reach out to our team at any point if you have any specific questions.