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ATTORNEYS AT LAW

MEMORANDUM

To: ITEM Coalition

From: Peter Thomas, Michael Barnett, and Natalie Keller

Date: June 11, 2024

Re: **Section 504 Final Rule on Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance**

On May 9, 2024, the U.S. Department of Health and Human Services ("HHS"), through the Office of Civil Rights ("OCR") issued a long-awaited final rule, *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance* ("Final Rule")[1], that advances protections for people with disabilities pursuant to Section 504 of the Rehabilitation Act of 1973 ("Section 504"). HHS released a fact sheet summarizing key provisions of the rule, which is lengthy and detailed. 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.[2] 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.

The rule finalizes policies that will improve health equity by addressing equitable access to benefits and services. Throughout the rule, 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 is finalizing new regulations that will:

- 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.

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[2] 88 Fed. Reg. at 63,393 ("No otherwise qualified individual with a disability in the United States, as defined in Section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Post Office (29 U.S.C. 794). The Office for Civil Rights (OCR) in HHS enforces Section 504. Section 504 is separate and distinct from Title II of the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability in, among other areas, all health care and social services programs and activities of State and local government entities (42 U.S.C. 12132).").

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The rule also finalizes as proposed an update to 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").

The ITEM Coalition and Coalition to Preserve Rehabilitation submitted joint comments in response to the proposed rule in November 2023. This memorandum summarizes the key healthcare-related provisions that were finalized in this Final Rule.

I. New Protections for People with Disabilities in HHS Programs and Activities

A. Protections Against Discrimination in Medical Treatment Decisions

- ***Proposed Rule:*** HHS proposed new requirements prohibiting medical practitioners from discriminating against people with disabilities in medical treatment decisions. HHS provided extensive evidence of pervasive discrimination in treatment decisions particularly in organ transplantation, life-sustaining treatment, crisis standards of care, and participation in clinical research. Given the impact of the COVID-19 pandemic on people with disabilities, and the pervasive examples of discriminatory treatment decisions, denial of access to care, and decision-making criteria that served to devalue the lives of people with disabilities, HHS noted that these new provisions are essential protections against disability-based discrimination.

- ***Rehabilitation Stakeholder Comment:*** Commenters were overwhelmingly supportive of this proposal. Stakeholders commented that denying any medical treatment on the basis of disability if the treatment would be provided to a similarly-situated patient without a disability constitutes discrimination on the basis of disability. Stakeholders also noted that the proposed rule and its construction do not intend to intrude on, or otherwise constrain, the exercise of professional medical judgment by providers.[3] The language was clear that treatment professionals are not required to work outside their scope of practice or to provide treatment that is futile in light of the patient's treatment goals. At the same time, as stakeholders noted, the presence of conscious and unconscious bias has been well documented within the medical community, including in studies based on self-reported information from providers.[4] Given the subtle nature of this bias, and its persistence over time, stakeholders encouraged HHS to clearly prohibit discriminatory treatment decisions like those described within the proposed rule.

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- ***Final Rule:*** The Final Rule explicitly prohibits 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.

  HHS is maintaining a recipient's right to exercise professional judgment in treatment. HHS emphasizes that nothing in this Final 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 Final Rule also makes clear that this regulation does not require a recipient to provide medical treatment when the patient or authorized representative does not consent to the treatment. It does, 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 without a disability. The Final Rule clarifies that recipients may not manipulate their scope of practice as a pretext for discrimination against people with disabilities.[5] The Final Rule does 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.[6]

  CMS is finalizing the regulation as proposed with a single addition to the professional judgement section clarifying that circumstances in which the recipient has "a legitimate, nondiscriminatory reason for denying or limiting a service or where the disability renders the individual not qualified for the treatment" and that may include circumstances in which "the recipient typically declines to provide the treatment to any individual, or reasonably determines…" that such treatment is not clinically appropriate.[7]

B. Prohibiting the Discriminatory Use of Value Assessment Methods

- ***Proposed Rule:*** HHS proposed to address discrimination on the basis of disability in the use of value assessment methods, which have historically been used by certain entities to determine whether certain treatments for people living with disabilities would be covered. When the health and lives of people with disabilities are devalued by society, as well as by the medical profession, such rules are necessary to protect individuals' equal access to care. The proposed rule represented an important step in prohibiting discriminatory use of value assessments and in remedying the structural barriers caused by recipients' reliance on

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assessment tools which prevent equal access to care for people with disabilities.

- ***Rehabilitation Stakeholder Comment:*** Commenters fully supported the proposal to prohibit value assessment methods that place a lower value on life extension for a group of individuals based on disability bias, 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.

- ***Final Rule:*** HHS is finalizing this proposal in the Final Rule without modification.

C. Accessibility Standards for Websites, Mobile Applications, and Kiosks

- ***Proposed Rule:*** HHS proposed to add new accessibility requirements for web, mobile, and kiosk accessibility that establish clear technical standards with which all recipients are required to comply. HHS proposed 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 access.

  Under the proposed rule, 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 available on a given social media platform.

  HHS proposed for certain compliance exceptions to be allowed for extenuating circumstances and previously uploaded content. For example, if it is determined that compliance would constitute an undue financial or 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, compliance with the proposed technical standards would not be required under the proposed rule for the following situations:

  1. Archived web content;
  2. 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;
  3. Web content posted by a third party;
  4. Linked third-party content;
  5. Individualized, password-protected documents; and
  6. Course content for schools

Each of the exceptions were accompanied by limitations. If a limitation applied, the public entity would have had to comply with the WCAG 2.1 Level AA accessibility standards.

- ***Rehabilitation Stakeholder Comment:*** While overall supportive of this proposal, in order to create a strong, up-to-date standard, stakeholders urged HHS to adopt the most recently adopted WCAG standard (WCAG 2.2, Level AA) for all content, including mobile apps, without exception and for all recipients, regardless of size, to maximize access for all people with disabilities and ensure that recipients meet standards that account for changes in typical web and software development practices. Stakeholders further encouraged HHS to update the rule regularly as new standards emerge.

  Stakeholders noted in their comments that staggering compliance dates based on the size of the recipient is largely arbitrary, and that the size of a recipient is not a reliable measure of its ability to incorporate accessibility standards. Stakeholders also commented that WCAG 2.1 Level AA was designed to be achievable without regard to the size of the recipient, and that recipients do not need years to come into compliance with the proposed technical standards. Stakeholders noted that accessibility tools and services already exist that can assist recipients in complying with the proposed standards in a faster timeframe and urged HHS to not delay the required implementation of WCAG 2.1 Level AA based on the size of the recipient.

  Stakeholders also expressed concern regarding the numerous exceptions that were originally proposed. Some expressed the belief that the various exceptions to comply with the accessibility standards would ultimately hinder meaningful and timely access to web- and mobile app-based services, activities, and programs.

- ***Final Rule:*** HHS is finalizing the rule as proposed, adopting the WCAG 2.1 Level AA as the standard to which recipients must comply for purposes of web content and mobile app accessibility. This approach aligns with the standards recently finalized by the Department of Justice under Title II of the Americans with Disabilities Act. The Final Rule clarifies that recipients have an "ongoing obligation, not a one-time obligation, to make their web content and mobile apps accessible…" and that a recipient's "website" includes those hosted by the recipient and operated on behalf of a recipient by a third party.[8]

  HHS is also finalizing as proposed staggered compliance deadlines based on the size of the recipient such that recipients with fifteen employees or more must comply with WCAG 2.1 Level AA within two years after the publication of a Final Rule. Recipients with fewer than 15 employees will have three years to implement WCAG 2.1 Level AA.

  HHS has finalized five specific exceptions to the finalized WCAG 2.1 Level AA standard. If one of the five exceptions applies – without limitation – then the recipient's web or mobile app content would not need to comply with the accessibility standards finalized in this rule. These finalized exceptions include:

[8] 98 Fed. Reg. at 40,136.

1. Archived web content;
2. Preexisting conventional electronic documents;
3. Content posted by a third party - 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;
4. Individualized, password-protected or otherwise secured documents; and
5. Preexisting social media posts.

The above-listed exceptions differ in some respects from those that were discussed in the proposed rule. Notably, the Final Rule does not include exceptions for linked third-party content because, according to HHS, that proposed exception would have been redundant and could have caused confusion. HHS has also decided not to include in the Final Rule the proposed exception for certain password-protected class or course content of public elementary, secondary, and postsecondary institutions. Accordingly, password-protected course content will be treated like any other content and public educational institutions will generally need to ensure that content complies with WCAG 2.1 Level AA starting two or three years after the publication of this Final Rule. Further, HHS discussed the possibility of including an exception for public entities' preexisting social media posts but did not go so far as to include it in the proposed list. The Final Rule includes such an exception in the regulatory text. Overall, HHS made some additional technical tweaks and clarifications to the proposed exceptions and narrowed the proposed seven exceptions down to five in total.

D. Standards for Accessible Medical Diagnostic Equipment

- ***Proposed Rule:*** HHS proposed to establish standards for accessible medical diagnostic equipment ("MDE") to help ensure that vital health care programs and activities are equally available to individuals with disabilities. More specifically, HHS proposed to establish standards and requirements for MDE, the purchasing or acquiring of new MDE, adapting existing MDE, and requirements for medical staff. HHS proposed to adopt the U.S. Access Board's Standards for Accessible MDE ("MDE Standards") published in 2017 and to set general accessibility requirements for programs and activities that recipients provide through or with the use of MDE. In other words, a recipient cannot deny services that it would otherwise provide to a patient with a disability because the recipient lacks accessible MDE.

  HHS also proposed to require 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, HHS proposed a dispersion requirement, which stated that 10% of MDE meeting the standards must be dispersed proportionally across the entity. The proposed rule also addressed facilities that specialize in treating persons with conditions that affect mobility and requires that at least 20% of each type of MDE used, but no fewer than one unit of each type of MDE, must be in place to comply with

MDE Standards.

- ***Rehabilitation Stakeholder Comment:*** Commenters supported this proposal. Stakeholders noted in their comments that millions of Americans with disabilities encounter serious barriers to accessing medical care when equipment, especially diagnostic equipment, is not accessible to them. In particular, items such as examination tables and chairs, weight scales, mammography machines, MRI machines, and imaging equipment, are often unusable by people with certain disabilities. Oftentimes, patients with disabilities are refused treatment or are unable to undergo necessary parts of their examination due to inaccessibility and the failure to provide reasonable accommodations, such as a safe transfer or the concurrent use of a ventilator, to ensure these patients can access the care they need.

  Stakeholders urged HHS to ensure that the Section 504 regulations consider the full range of medical equipment that must be made accessible, including at-home diagnostic tools, telehealth equipment, and other equipment frequently used in the health care setting. Stakeholders noted that the development of such additional standards should not delay the adoption of the existing Access Board standards, which have been widely available for years and now must be made enforceable to ensure meaningful access to health programs and activities covered under Section 504.

  Stakeholders supported HHS' requirements for accessible MDE. Commenters noted that while it would be preferred for these requirements to be 100%, the dispersion requirement constitutes a low bar for compliance and is more than reasonable to avoid undue burden.

- ***Final Rule:*** HHS is finalizing this proposal with one modification clarifying that lease renewals will trigger the new requirements. The Final Rule adopts the U.S. Access Board's standards for accessible MDE. The Final Rule also requires that, within two years of the effective date, recipients using examination tables and/or weight scales have at least one accessible version of the equipment.

II. Enforcement of Section 504

- ***Proposed Rule:*** HHS opined in the proposed rule that civil rights standards apply independently to all situations where people with disabilities receive or are eligible for healthcare, including circumstances in which a covered entity is providing healthcare in accordance with Medicaid.

- ***Rehabilitation Stakeholder Comment:*** Commenters strongly supported HHS' assessment in the proposed rule that that Section 504's civil rights standards apply equally to Medicare and any other federal or state program or activity that involves federal financial assistance to healthcare entities. Stakeholders noted that federal agency officials, state Medicaid representatives, and entities such as hospitals and Medicare Advantage plans may have a wide range of expertise in various interrelated topics such as the administration and delivery of healthcare services, eligibility and enrollment of specific populations, coverage practices,

and treatment standards, they do not necessarily have expertise in the civil rights that accrue to enrolled and eligible beneficiaries.

Stakeholders urged HHS to explicitly mention the full spectrum of entities that receive federal financial assistance in healthcare, including Medicare program providers, in the final rule so that they can clearly understand that they are independently responsible for adherence to the final Section 504 nondiscrimination rule and to encourage them to refresh or maintain such basic operations as disability non-discrimination training for employees.

Stakeholders shared that to facilitate enforcement of the ADA, and in many situations under section 504, Project Civil Access has become a tool for compelling compliance. This is primarily accomplished through settlement agreements with the DOJ and is necessary for enforcement of section 504. **To successfully facilitate compliance with HHS obligations under section 504, stakeholders shared that an effort similar to Project Civil Access must be developed, funded, adequately staffed, and fully implemented.**

- ***Final Rule:*** HHS appreciated commenters' concerns and understands the importance of providing technical assistance and guidance to support compliance with this rule. HHS will continue the practice of providing educational materials, guidance, and technical assistance documents on the HHS website. Commenters' requests for providing increased training on the rule will be taken into consideration. HHS stated that it cannot provide financial assistance to recipients to ensure compliance with this part.

III. Update to Definition of "Disability"

- ***Proposed Rule:*** HHS stated in the proposed rule 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.[9]

  In furtherance of its goal to ensuring the broadest coverage allowable under Section 504, HHS proposed updates to the definition of the term, "disability." With respect to an individual, HHS construed 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."[10] Mirroring current ADAAA regulations, HHS' proposed definition of disability articulated 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" prong. Additionally, HHS proposed to add Long COVID to the list of physical and mental impairments explicitly considered a disability.

[9] *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (holding that the definition of disability under Section 504 is to be viewed expansively).
[10] 88 Fed. Reg. at 63,459.

- ***Rehabilitation Stakeholder Comment:*** Commenters were grateful HHS clarified once more in the proposed rule that each of these prongs should be interpreted broadly and in favor of expansive coverage. Stakeholders were also very supportive of adding Long COVID to the list of physical and mental impairments.

- ***Final Rule:*** HHS is finalizing the approach and language included in the proposed rule without modification. HHS is also retaining the inclusion of Long COVID as a physical or mental impairment.

IV. Guidance on the Phrase "Solely by Reason of His or Her Disability"

- ***Proposed Rule:*** To ensure consistency with the statute, HHS proposed to insert the word "solely" into the regulation's general prohibition against discrimination. Under this proposal, the updated regulation would read that discrimination "*solely* on the basis of disability" is prohibited rather than discrimination being prohibited "on the basis of disability." The proposed rule clarified 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.

- ***Rehabilitation Stakeholder Comment:*** Commenters were mixed in their responses to HHS' proposal to update the phrase "solely by reason of his or her disability." While some were supportive, others noted that additional clarity defining the language was still needed. Because of this lack of clarity, stakeholders requested that HHS provide additional regulatory language and guidance on the phrase "solely by reason of his or her disability" that reflects case law, statutory purpose, and Congressional action. For example, the ITEM and CPR Coalitions suggested that the regulations could include text such as:

> "Solely on the basis of disability" means that there is a demonstrable causal relationship between the discrimination alleged and the disability.
>
> As used in this part, "solely on the basis of disability" is consistent with, and does not exclude, the forms of discrimination delineated herein, including discrimination that results from thoughtlessness, indifference, and benign neglect, practices that have the effect of discrimination, and unintentional disparate-impact discrimination.
>
> "Solely on the basis of disability" shall not be construed to lead to or require anomalous results, such as excluding claims where nondiscrimination requires the expenditure of funds, as such expenditure was clearly contemplated by the statute, or where the cited basis for discrimination cannot be extricated from the disability itself.

Stakeholders stressed that it is critical that HHS provide some additional regulatory language in the final rule, such as the suggestions listed above, that explicitly defines and clarifies the statutory phrase in favor of broad coverage, as Congress intended. Without further clarification, stakeholders feared that a loophole might be perceived to be created where none was intended.

- ***Final Rule:*** HHS is not moving forward with finalizing this proposal. Given the potential for limiting prohibited conduct to intentional discrimination only, HHS believes it is unnecessary to make any changes in the regulatory text. HHS notes in the Final Rule that making this change without including language in the regulatory text itself invites confusion and possible misinterpretation. HHS wants to ensure the addition of the word ‘‘solely’’ does not alter the Department’s 46-year history of interpretation of the reach of its section 504 rule.

Commentary

The final rule is a major milestone in implementation of regulatory requirements that help operationalize health equity for people with disabilities. Together with new final regulations on the general non-discrimination provisions of the Affordable Care Act (i.e., Section 1557) and the Department of Justice’s recent regulations enforcing website and information technology accessibility, these new requirements help lock-in real improvements in our health care system that will have major positive implications on people with disabilities for years to come.

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  HHS proposed for certain compliance exceptions to be allowed for extenuating circumstances and previously uploaded content. For example, if it is determined that compliance would constitute an undue financial or 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, compliance with the proposed technical standards would not be required under the proposed rule for the following situations:

  1. Archived web content;
  2. 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;
  3. Web content posted by a third party;
  4. Linked third-party content;
  5. Individualized, password-protected documents; and
  6. Course content for schools

Each of the exceptions were accompanied by limitations. If a limitation applied, the public entity would have had to comply with the WCAG 2.1 Level AA accessibility standards.

- ***Rehabilitation Stakeholder Comment:*** While overall supportive of this proposal, in order to create a strong, up-to-date standard, stakeholders urged HHS to adopt the most recently adopted WCAG standard (WCAG 2.2, Level AA) for all content, including mobile apps, without exception and for all recipients, regardless of size, to maximize access for all people with disabilities and ensure that recipients meet standards that account for changes in typical web and software development practices. Stakeholders further encouraged HHS to update the rule regularly as new standards emerge.

  Stakeholders noted in their comments that staggering compliance dates based on the size of the recipient is largely arbitrary, and that the size of a recipient is not a reliable measure of its ability to incorporate accessibility standards. Stakeholders also commented that WCAG 2.1 Level AA was designed to be achievable without regard to the size of the recipient, and that recipients do not need years to come into compliance with the proposed technical standards. Stakeholders noted that accessibility tools and services already exist that can assist recipients in complying with the proposed standards in a faster timeframe and urged HHS to not delay the required implementation of WCAG 2.1 Level AA based on the size of the recipient.

  Stakeholders also expressed concern regarding the numerous exceptions that were originally proposed. Some expressed the belief that the various exceptions to comply with the accessibility standards would ultimately hinder meaningful and timely access to web- and mobile app-based services, activities, and programs.

- ***Final Rule:*** HHS is finalizing the rule as proposed, adopting the WCAG 2.1 Level AA as the standard to which recipients must comply for purposes of web content and mobile app accessibility. This approach aligns with the standards recently finalized by the Department of Justice under Title II of the Americans with Disabilities Act. The Final Rule clarifies that recipients have an "ongoing obligation, not a one-time obligation, to make their web content and mobile apps accessible…" and that a recipient's "website" includes those hosted by the recipient and operated on behalf of a recipient by a third party.[8]

  HHS is also finalizing as proposed staggered compliance deadlines based on the size of the recipient such that recipients with fifteen employees or more must comply with WCAG 2.1 Level AA within two years after the publication of a Final Rule. Recipients with fewer than 15 employees will have three years to implement WCAG 2.1 Level AA.

  HHS has finalized five specific exceptions to the finalized WCAG 2.1 Level AA standard. If one of the five exceptions applies – without limitation – then the recipient's web or mobile app content would not need to comply with the accessibility standards finalized in this rule. These finalized exceptions include:

[8] 98 Fed. Reg. at 40,136.

1. Archived web content;
2. Preexisting conventional electronic documents;
3. Content posted by a third party - 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;
4. Individualized, password-protected or otherwise secured documents; and
5. Preexisting social media posts.

The above-listed exceptions differ in some respects from those that were discussed in the proposed rule. Notably, the Final Rule does not include exceptions for linked third-party content because, according to HHS, that proposed exception would have been redundant and could have caused confusion. HHS has also decided not to include in the Final Rule the proposed exception for certain password-protected class or course content of public elementary, secondary, and postsecondary institutions. Accordingly, password-protected course content will be treated like any other content and public educational institutions will generally need to ensure that content complies with WCAG 2.1 Level AA starting two or three years after the publication of this Final Rule. Further, HHS discussed the possibility of including an exception for public entities' preexisting social media posts but did not go so far as to include it in the proposed list. The Final Rule includes such an exception in the regulatory text. Overall, HHS made some additional technical tweaks and clarifications to the proposed exceptions and narrowed the proposed seven exceptions down to five in total.

D. Standards for Accessible Medical Diagnostic Equipment

- ***Proposed Rule:*** HHS proposed to establish standards for accessible medical diagnostic equipment ("MDE") to help ensure that vital health care programs and activities are equally available to individuals with disabilities. More specifically, HHS proposed to establish standards and requirements for MDE, the purchasing or acquiring of new MDE, adapting existing MDE, and requirements for medical staff. HHS proposed to adopt the U.S. Access Board's Standards for Accessible MDE ("MDE Standards") published in 2017 and to set general accessibility requirements for programs and activities that recipients provide through or with the use of MDE. In other words, a recipient cannot deny services that it would otherwise provide to a patient with a disability because the recipient lacks accessible MDE.

  HHS also proposed to require 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, HHS proposed a dispersion requirement, which stated that 10% of MDE meeting the standards must be dispersed proportionally across the entity. The proposed rule also addressed facilities that specialize in treating persons with conditions that affect mobility and requires that at least 20% of each type of MDE used, but no fewer than one unit of each type of MDE, must be in place to comply with

MDE Standards.

- ***Rehabilitation Stakeholder Comment:*** Commenters supported this proposal. Stakeholders noted in their comments that millions of Americans with disabilities encounter serious barriers to accessing medical care when equipment, especially diagnostic equipment, is not accessible to them. In particular, items such as examination tables and chairs, weight scales, mammography machines, MRI machines, and imaging equipment, are often unusable by people with certain disabilities. Oftentimes, patients with disabilities are refused treatment or are unable to undergo necessary parts of their examination due to inaccessibility and the failure to provide reasonable accommodations, such as a safe transfer or the concurrent use of a ventilator, to ensure these patients can access the care they need.

  Stakeholders urged HHS to ensure that the Section 504 regulations consider the full range of medical equipment that must be made accessible, including at-home diagnostic tools, telehealth equipment, and other equipment frequently used in the health care setting. Stakeholders noted that the development of such additional standards should not delay the adoption of the existing Access Board standards, which have been widely available for years and now must be made enforceable to ensure meaningful access to health programs and activities covered under Section 504.

  Stakeholders supported HHS' requirements for accessible MDE. Commenters noted that while it would be preferred for these requirements to be 100%, the dispersion requirement constitutes a low bar for compliance and is more than reasonable to avoid undue burden.

- ***Final Rule:*** HHS is finalizing this proposal with one modification clarifying that lease renewals will trigger the new requirements. The Final Rule adopts the U.S. Access Board's standards for accessible MDE. The Final Rule also requires that, within two years of the effective date, recipients using examination tables and/or weight scales have at least one accessible version of the equipment.

II. Enforcement of Section 504

- ***Proposed Rule:*** HHS opined in the proposed rule that civil rights standards apply independently to all situations where people with disabilities receive or are eligible for healthcare, including circumstances in which a covered entity is providing healthcare in accordance with Medicaid.

- ***Rehabilitation Stakeholder Comment:*** Commenters strongly supported HHS' assessment in the proposed rule that that Section 504's civil rights standards apply equally to Medicare and any other federal or state program or activity that involves federal financial assistance to healthcare entities. Stakeholders noted that federal agency officials, state Medicaid representatives, and entities such as hospitals and Medicare Advantage plans may have a wide range of expertise in various interrelated topics such as the administration and delivery of healthcare services, eligibility and enrollment of specific populations, coverage practices,

and treatment standards, they do not necessarily have expertise in the civil rights that accrue to enrolled and eligible beneficiaries.

Stakeholders urged HHS to explicitly mention the full spectrum of entities that receive federal financial assistance in healthcare, including Medicare program providers, in the final rule so that they can clearly understand that they are independently responsible for adherence to the final Section 504 nondiscrimination rule and to encourage them to refresh or maintain such basic operations as disability non-discrimination training for employees.

Stakeholders shared that to facilitate enforcement of the ADA, and in many situations under section 504, Project Civil Access has become a tool for compelling compliance. This is primarily accomplished through settlement agreements with the DOJ and is necessary for enforcement of section 504. **To successfully facilitate compliance with HHS obligations under section 504, stakeholders shared that an effort similar to Project Civil Access must be developed, funded, adequately staffed, and fully implemented.**

- ***Final Rule:*** HHS appreciated commenters' concerns and understands the importance of providing technical assistance and guidance to support compliance with this rule. HHS will continue the practice of providing educational materials, guidance, and technical assistance documents on the HHS website. Commenters' requests for providing increased training on the rule will be taken into consideration. HHS stated that it cannot provide financial assistance to recipients to ensure compliance with this part.

III. Update to Definition of "Disability"

- ***Proposed Rule:*** HHS stated in the proposed rule 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.[9]

  In furtherance of its goal to ensuring the broadest coverage allowable under Section 504, HHS proposed updates to the definition of the term, "disability." With respect to an individual, HHS construed 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."[10] Mirroring current ADAAA regulations, HHS' proposed definition of disability articulated 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" prong. Additionally, HHS proposed to add Long COVID to the list of physical and mental impairments explicitly considered a disability.

[9] *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (holding that the definition of disability under Section 504 is to be viewed expansively).
[10] 88 Fed. Reg. at 63,459.

- ***Rehabilitation Stakeholder Comment:*** Commenters were grateful HHS clarified once more in the proposed rule that each of these prongs should be interpreted broadly and in favor of expansive coverage. Stakeholders were also very supportive of adding Long COVID to the list of physical and mental impairments.

- ***Final Rule:*** HHS is finalizing the approach and language included in the proposed rule without modification. HHS is also retaining the inclusion of Long COVID as a physical or mental impairment.

IV. Guidance on the Phrase "Solely by Reason of His or Her Disability"

- ***Proposed Rule:*** To ensure consistency with the statute, HHS proposed to insert the word "solely" into the regulation's general prohibition against discrimination. Under this proposal, the updated regulation would read that discrimination "*solely* on the basis of disability" is prohibited rather than discrimination being prohibited "on the basis of disability." The proposed rule clarified 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.

- ***Rehabilitation Stakeholder Comment:*** Commenters were mixed in their responses to HHS' proposal to update the phrase "solely by reason of his or her disability." While some were supportive, others noted that additional clarity defining the language was still needed. Because of this lack of clarity, stakeholders requested that HHS provide additional regulatory language and guidance on the phrase "solely by reason of his or her disability" that reflects case law, statutory purpose, and Congressional action. For example, the ITEM and CPR Coalitions suggested that the regulations could include text such as:

> "Solely on the basis of disability" means that there is a demonstrable causal relationship between the discrimination alleged and the disability.
>
> As used in this part, "solely on the basis of disability" is consistent with, and does not exclude, the forms of discrimination delineated herein, including discrimination that results from thoughtlessness, indifference, and benign neglect, practices that have the effect of discrimination, and unintentional disparate-impact discrimination.
>
> "Solely on the basis of disability" shall not be construed to lead to or require anomalous results, such as excluding claims where nondiscrimination requires the expenditure of funds, as such expenditure was clearly contemplated by the statute, or where the cited basis for discrimination cannot be extricated from the disability itself.

Stakeholders stressed that it is critical that HHS provide some additional regulatory language in the final rule, such as the suggestions listed above, that explicitly defines and clarifies the statutory phrase in favor of broad coverage, as Congress intended. Without further clarification, stakeholders feared that a loophole might be perceived to be created where none was intended.

- ***Final Rule:*** HHS is not moving forward with finalizing this proposal. Given the potential for limiting prohibited conduct to intentional discrimination only, HHS believes it is unnecessary to make any changes in the regulatory text. HHS notes in the Final Rule that making this change without including language in the regulatory text itself invites confusion and possible misinterpretation. HHS wants to ensure the addition of the word ‘‘solely’’ does not alter the Department’s 46-year history of interpretation of the reach of its section 504 rule.

Commentary

The final rule is a major milestone in implementation of regulatory requirements that help operationalize health equity for people with disabilities. Together with new final regulations on the general non-discrimination provisions of the Affordable Care Act (i.e., Section 1557) and the Department of Justice’s recent regulations enforcing website and information technology accessibility, these new requirements help lock-in real improvements in our health care system that will have major positive implications on people with disabilities for years to come.