POWERS

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ATTORNEYS AT LAW

MEMORANDUM

To: CPR

From: Peter Thomas and Michael Barnett

Date: August 23, 2024

Re: **DOJ Final Rule Updating Title II Regulations for Accessible MDE**

Executive Summary

On August 9th, the Civil Rights Division of the Department of Justice ("Department") published to the Federal Register the final rule updating standards and requirements under Title II of the Americans with Disabilities Act ("ADA") to improve access to medical diagnostic equipment ("MDE") for people with disabilities[1] ("Final Rule"). Title II of the ADA protects individuals with disabilities from discrimination based on disability in services and activities provided by state and local government entities. This Final Rule is a complimentary, but separate set of regulations on MDE that applies to state and local government entities. The previously finalized Section 504 regulations on MDE apply at the federal level. While the ADA requires public entities to provide accessible equipment and furniture to comply with Title II's reasonable modification provision, the Department has never specified the technical standards of accessible MDE until now.

The Final Rule, which was signed by U.S. Attorney General Merrick Garland on July 26th to coincide with the 34th anniversary of the ADA, clarifies how public entities that use MDE, such as hospitals and health care clinics operated by state or local governments, can meet their obligations to ensure accessibility under the ADA. The primary objective of this Final Rule is to ensure that individuals with disabilities have equal access to healthcare services, programs, and activities offered by public entities. This access is facilitated using MDE, which includes a wide range of equipment such as examination tables, dental chairs, weight scales, and radiological equipment. The rule finalizes specific technical standards and scoping requirements for different types of MDE. These standards are designed to address the barriers faced by individuals with disabilities when accessing MDE, thereby promoting inclusivity and equality in healthcare services.

As you'll recall, the ITEM Coalition submitted joint comments with the Coalition to Preserve Rehabilitation ("CPR") on this proposed rule earlier this year in February (see attached). This memorandum provides an overview of the key highlights that were finalized in this rule.

This rule is effective as of October 8, 2024.

[1] Nondiscrimination on the Basis of Disability; Accessibility of Medical Diagnostic Equipment of State and Local Government Entities, 28 CFR 35 (August 9, 2024) https://www.ada.gov/assets/pdfs/mde-rule.pdf

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Finalized Standards for Accessible MDE

- **Proposed Rule:** The Department proposed to establish standards and requirements for MDE, the purchasing or acquiring of new MDE, adapting existing MDE, and training requirements for medical staff. Specifically, the Department 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 State and local entities provide through or with the use of MDE.

- **Rehabilitation Stakeholder Comment:** Stakeholders expressed their appreciation to the Department for including this issue in the proposed rule and committing to enforce these accessibility standards. Commenters noted that millions of Americans with disabilities encounter serious barriers to accessing medical care when equipment, especially diagnostic equipment, is not accessible to them. Commenters noted 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.

  Commenters stressed that the enforcement of these existing standards is a key first step to ensuring that State and local entities do not discriminate in the provision of their health programs and activities with regards to accessible medical equipment. Making these standards enforceable would meaningfully decrease barriers to access for individuals with mobility, balance, strength, and respiratory impairments. However, to truly ensure nondiscrimination, equipment must be made accessible across the disability population. Stakeholders urged the Department to consider additional medical equipment accessibility standards to account for the needs of individuals with visual, sensory, and other functional limitations. Finally, stakeholders noted that the Access Board standards are limited (by legislative design) to a relatively narrow category of diagnostic equipment used primarily in physician's offices or hospitals.

  Stakeholders urged the Department to ensure that the title II 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. 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 title II.

- **Final Rule:** The Department is finalizing without modification its proposal to adopt the 2017 standards for accessible MDE issued by the Access Board.

Requirements for Accessible MDE

- **Proposed Rule:** The Department 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, the proposed rule included 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:** Stakeholders expressed general support for this proposal. Commenters noted that while the preference would be that these requirements be as high as 100%, this dispersion requirement constituted a low bar for compliance and was more than reasonable to avoid undue burden.

- **Final Rule:** The Department is finalizing these proposals without modification. Beginning on October 8, 2024, all MDE that state and local government entities purchase, lease, or otherwise acquire must be accessible, until the entities have the amount of accessible MDE that the rule requires. By August 9, 2026, state and local government entities that use examination tables must have at least one examination table and at least one weight scale that meets the MDE standards.

Exceptions and Defenses

- **Proposed Rule:** The Department proposed various exceptions and defenses in cases where compliance with the Access Board's requirements for accessible MDE would result in a fundamental alteration, undue burden, or alteration of diagnostically required characteristics of the equipment.

- **Rehabilitation Stakeholder Comment:** Many commenters wrote in support of the fundamental alteration and undue burdens limitations, with some noting that the approach strikes a thoughtful balance that will promote equal access to MDE for people with disabilities while mitigating the challenges and costs of implementation for public entities. A few commenters wrote that it is unlikely that an entity will reasonably be able to rely on these limitations at all. Some commenters wrote that people with disabilities historically have been forced to carry the burden, and the provisions should consider the burden on people with disabilities in terms of factors like wait times, extra costs, and the availability of accessible providers. Regarding the exception for alteration of diagnostically required characteristics of the equipment, comments were mixed. Some supported the approach, describing it as "thoughtful" and "balanced." Others disagreed with this exception and recommended that the Department remove or amend it, stating that the exception is unnecessary, that it will be an "overused loophole," or that it will stifle innovation.

- **Final Rule:** The Department is finalizing these exceptions as proposed without modification. The Department acknowledged commenters' concerns in the Final Rule that the fundamental alteration and undue burdens limitations will undermine access for people with disabilities. However, as the Department states, "these limitations fall within the well-established title II framework, and it is important for these limitations on obligations to remain consistent." Regarding the exception for alteration of diagnostically required characteristics of the equipment, the Department noted its appreciation for commenters' opinions and concerns and stated that it recognizes the importance of providing accessible MDE to people with disabilities. However, the Department continues to believe that this exception is sometimes needed to preserve the functionality of MDE.

Staff Training

- **Proposed Rule:** The Department proposed to require public entities to ensure that their staff are trained and qualified to operate accessible MDE and assist with transfers and positioning of individuals with disabilities.

- **Rehabilitation Stakeholder Comment:** The Department received comments on this issue from a range of stakeholders, including individuals with disabilities, disability advocacy organizations, and health care providers. In response to the Department's request for comments on the effectiveness of programs used to ensure that staff are qualified, several commenters noted that even when a health care provider has accessible MDE, staff are sometimes unable to operate it. Many stakeholders also described interactions with staff who were not able to provide assistance with transfers or did not provide program access in other ways.

- **Final Rule:** The Department is finalizing this requirement as proposed without modification. According to the Department, the accounts described above fully support the need for this staff training requirement, which explicitly requires public entities to ensure that their staff members are able to successfully operate accessible MDE, assist with transfers, and ensure program access. The Department declined to impose more specific requirements, as some commenters suggested. The Department believes it is important to provide public entities with flexibility to determine how they will comply with the qualified staff requirement, noting that appropriate methods for meeting this requirement may differ for small health care providers as opposed to large hospital systems. Therefore, the Department has decided not to mandate one specific process of curriculum that all public entities must follow to remain in compliance with this new rule.

With this rule, the federal government has completed it's rulemaking on accessible medical diagnostic equipment. It will be up to impacted health care providers and practitioners to educate themselves on these requirements and implement compliance efforts in the near term to satisfy the federal regulations. For additional information on implementation and compliance with the accessible MDE requirements, please contact Peter Thomas and Michael Barnett at Powers Law.