HHS Final Rule: Nondiscrimination on the Basis of Disability in Programs or Activities

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SUMMARY

For the first time in nearly 50 years, the US Department of Health and Human Services (HHS) Office for Civil Rights (OCR) has finalized revisions to regulations implementing Section 504 of the Rehabilitation Act of 1973, which protects against discrimination on the basis of disability as it applies to programs and activities that receive federal financial assistance from HHS (hereinafter recipients). The final rule, Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, will take effect July 8, 2024, and largely incorporates all of the changes in the proposed rule. Here, we provide an overview of the final rule's key points and the requirements that affected parties will need to prepare for.

IN DEPTH

HHS implemented Section 504 into rules applicable to health and human services programs in 1977. Those rules remained largely unchanged over the decades, leading to some inconsistencies with other federal civil rights laws. Recognizing the impact that discrimination has played in denying individuals with a disability an equal opportunity to participate fully in healthcare programs, HHS proposed a sweeping set of rules on September 14, 2023, and finalized them on May 9, 2024.

The historic final rule provides robust civil rights protections for a broad array of people with disabilities who seek services from more than 100 federally funded health and human services programs, thereby affecting hospitals; healthcare providers participating in the Children's Health Insurance Program, Medicare and Medicaid; state and local human or social service agencies; senior services facilities and child placement agencies.

The scope of the final rule's application is potentially quite broad. Going forward, entities whose only source of federal funds is Medicare Part B are likely to also be required to comply with Section 504 in light of new HHS rules finalized pursuant to Section 1557 of the Affordable Care Act. Likely because requirements under Section 504 are similar to requirements under the Americans with Disabilities Act of 1990 (ADA), most of the components of HHS's Notice of Proposed Rulemaking (NPRM) were consistent with what recipients are already doing, leading to only around 5,000 generally positive comments. Accordingly, the final rule closely follows the language of the NPRM.

This *On the Subject* highlights six areas addressed in the final rule that should be given special consideration for their potential impact on recipients' current operations: medical treatment, value assessment methods, child welfare programs and activities, technology-based accessibility, accessible medical equipment and integration.

MEDICAL TREATMENT

HHS observes in the proposed rule that pervasive discrimination on the basis of disability in accessing medical care leads to significant health disparities and poorer health outcomes for individuals with disabilities. The final rule ensures that medical treatment decisions by those that receive HHS funding are not based on stereotypes or preconceived notions about individuals with disabilities, such as quality of life.

The final rule sets forth specific prohibitions on discrimination against those with disabilities by recipients of HHS funding. It expressly prohibits the denial of medical treatment based on bias or stereotypes, including a belief that a person with a disability is a burden on others because of their disability. It also prohibits the denial of treatment for a symptom or condition unrelated to the individual's disability. A recipient may not, on the basis of disability, provide a medical treatment to an individual with a disability where it would not provide the same treatment to an individual without a disability unless the disability has an effect on the treatment.

Additionally, the final rule expounds on prohibitions related to discriminatory medical treatment by explaining circumstances when medical treatment may be withheld, such as when:

- A medical professional denies an individual with a disability a specific treatment for legitimate purposes, such as futility or the disability rendering the individual unqualified
- The provider does not receive consent from the patient or authorized representative to undergo a particular treatment
- The patient received information regarding the implications of different courses of treatment based on current medical knowledge or the best available objective evidence and the patient provides informed consent to forego a procedure.

Although a provider may communicate concerns that a treatment may not improve the quality of life of a patient with a disability or would render their quality of life so low as to not be worth living, the provider may not pressure or coerce the patient or representative or discriminate on the basis of disability in the manner in which the provider seeks authorization to withdraw or scale down treatment. HHS observes that an individual with a disability may take longer to respond to some treatment modalities or may require long-term support but can nevertheless survive and thrive, making a provider's determination of value of life discriminatory in certain circumstances.

VALUE ASSESSMENT METHODS

Under the proposed rule, HHS recommended that a recipient may not use any measure, assessment or tool that discounts the value of extending the life of an individual with a disability as a means to deny or afford an unequal opportunity to access otherwise entitled services. HHS requested comments on when value assessment methods may play a role in determining whether a particular intervention, such as a medicine or treatment, might be appropriate. Commenters observed that value assessments are an increasingly significant tool for cost containment and quality improvement efforts and gave several examples of value assessments that should be allowed or prohibited.

HHS decided not to authorize or prohibit specific types of value assessments in the final rule and instead states that it will continue to allow nondiscriminatory value assessments depending on the circumstances where they are used. If such an assessment devalues extending the life of an individual merely because of a disability, HHS would continue to prohibit that assessment's use in such circumstances.

CHILD WELFARE PROGRAMS AND ACTIVITIES

The final rule discusses the wide range of discriminatory barriers that children, parents, caregivers, foster parents and prospective parents with disabilities may encounter while navigating child welfare systems. These barriers may include failing to provide reasonable modifications, failing to place children in the most integrated setting appropriate for their needs, or stereotypes about whether individuals with disabilities can safely care for a child.

The final rule clarifies that Section 504's nondiscrimination provisions apply to HHS-funded child welfare programs and activities and should be interpreted to protect all individuals with a disability seeking access to such services, including children, biological or adoptive parents, caregivers, guardians, foster parents or prospective parents.

HHS observes that child welfare agencies and providers are obligated by law to ensure the safety and wellbeing of children in the welfare system; however, the decision of whether a caregiver can provide for a child's safety and wellbeing should be based on facts applicable to the individual rather than stereotypes about individuals with disabilities. To that end, the final rule clarifies that it does not narrow or limit recipients' existing and long-standing obligations under other civil rights statutes, including the ADA. Rather, the Section 504 final rule sets forth additional prohibitions specific to child welfare programs and services that are often used to:

- Deny a qualified parent with a disability custody, control or visitation to a child
- Deny a qualified parent with a disability the opportunity to benefit from services provided by a child welfare agency
- Terminate parental rights or legal guardianship of a qualified individual with a disability
- Deny a qualified caregiver, foster parent, companion or prospective parent with a disability the opportunity to participate or benefit from child welfare programs based on discriminatory criteria, including IQ tests or

algorithms
- Require children, on the basis of disability, to be placed outside the family home through custody relinquishment, voluntary placement or other forfeiture of parental rights in order to receive necessary services.

HHS observes that this is not an exhaustive list, and all HHS-funded child welfare recipients are prohibited from discriminating on the basis of disability in all of their programs and activities.

TECHNOLOGY-BASED ACCESSIBILITY

As technology continues to provide new ways to deliver health and human services programs and activities, HHS considers it vital to ensure that those methods are readily accessible to and usable by individuals with disabilities. Recognizing that the use of algorithms, automated decision-making and artificial intelligence is a growing technology that may have unintended disability discrimination consequences, HHS requests comments on whether OCR should issue guidance or consider future rulemaking in addition to the protections established through final rules implementing Section 1557.

For other more established technologies, such as websites and mobile applications, the final rule requires recipients who use such technologies to comply with the Web Content Accessibility Guidelines (WCAG) 2.1 AA technical standards if accessing these technologies is necessary for a qualified individual with a disability to fully participate in the recipient's programs and services.

Specifically, the final rule requires that beginning May 11, 2026, recipients with 15 or more employees must ensure that the web content and mobile applications they provide or make available to patients comply with Level A and Level AA requirements specified in WCAG 2.1. There is a safe harbor for compliance if a recipient can demonstrate that compliance would result in a fundamental alteration to the program or activity or an undue financial, administrative or legal burden.

Additionally, recipients may use conforming alternate versions of web content only where it is not possible to make web content directly accessible because of technical or legal limitations.

The following are exempt from the final rule's accessibility requirements:

- Archived web content
- Preexisting conventional electronic documents
- Content posted by a third party because of contractual, licensing or other arrangements with the recipient
- Individualized password-protected documents or otherwise secured conventional electronic documents

- Preexisting social media posts that were posted before the recipient was obligated to comply with the final rule

Additionally, a recipient may make alternate versions of web content that meet WCAG 2.1 standards when it's not possible to make the original web content directly accessible because of technical or legal limitations.

ACCESSIBLE MEDICAL EQUIPMENT

Perhaps the most impactful changes finalized by HHS are aimed at overcoming the barriers experienced by individuals with disabilities because of inaccessible medical equipment. Exam tables that are not height adjustable, mammography machines that require a person to stand, and weight scales that do not accommodate wheelchairs all result in inequities and exclusion from basic health services for individuals with disabilities, exacerbating the risk for poorer health outcomes.

The final rule implements standards for all newly purchased, leased or otherwise acquired medical diagnostic equipment (MDE), requiring all newly acquired equipment to meet the US Access Board's Standards for Accessible MDE (effective 60 days after the final rule's publication date). Additionally, the final rule provides scoping requirements for various programs or activities. Recipients using MDE in physician offices, clinics, emergency rooms, hospitals, outpatient facilities and multiuse facilities must have at least 10% of the total number of units – but no fewer than one unit – of each type of equipment in use meet the Standards for Accessible MDE. Facilities that specialize in the treatment of conditions that affect mobility must have at least 20% – but no fewer than one unit – of each type of equipment in use meet the Standards for Accessible MDE. Facilities with multiple departments that utilize MDE must disperse the equipment in a manner that is proportionate by department, clinic or specialty.

Furthermore, the final rule establishes that recipients must acquire at least one accessible exam table and one accessible scale within two years of the date that is 60 days after the final rule is published. This provision of the final rule does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in a program or activity or undue financial and administrative burdens.

Lastly, HHS sets standards for existing MDE, stating that the final rule does not necessarily require a recipient to make each of its existing pieces of MDE usable by individuals with disabilities if other methods are effective in achieving compliance with Section 504. However, in such a circumstance, the recipient must reassign services to alternate accessible locations, establish home visits, purchase or acquire accessible MDE, or enact other methods that would make its programs and activities readily accessible and usable by individuals with disabilities.

INTEGRATION

The existing Section 504 rules require programs and activities to be administered in the most integrated setting appropriate to the needs of a person with a disability. Within the final rule, HHS clarifies that integration should be interpreted as the setting that provides individuals with disabilities the opportunity to fully interact with non-disabled persons. These settings empower individuals to live, work and receive services in the greater community – like individuals without disabilities.

CONCLUSION

Although this is not a comprehensive list of all the updates and requirements set forth in the final rule, this article demonstrates the major steps HHS has taken to further equity in healthcare for individuals with disabilities. Reflecting over 50 years of advocacy by the disability community, the final rule advances the promise of the Rehabilitation Act and helps to protect people with disabilities from being subjected to discrimination in any program or activity receiving HHS funding.

Most provisions of the final rule require compliance by July 8, 2024, except (i) the obligation to acquire accessible examination tables and weight scales, which is required by July 8, 2026, and (ii) converting websites and mobile applications to WCAG 2.1 standards by May 11, 2026, for recipients with more than 15 employees and by May 10, 2027, for recipients with less than 15 employees.

For more information, we recommend reviewing our previously published deep dive into the NPRM or contacting either the authors or your regular McDermott lawyer.

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