AMERICAN ACADEMY OF FAMILY PHYSICIANS

November 9, 2023

The Honorable Xavier Becerra
Secretary
The Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

RE: RIN: 0945-AA15 Discrimination on the Basis of Disability in Health and Human Service Programs or Activities

Dear Secretary Becerra:

On behalf of the American Academy of Family Physicians, representing 129,600 family physicians and medical students across the country, I write in response to the proposed rule "Discrimination on the Basis of Disability in Health and Human Service Programs or Activities" as published in the September 14, 2023 edition of the Federal Register.

The AAFP shares the Department of Health and Human Services' (HHS') commitment to advancing health equity and ensuring all individuals, especially those belonging to historically underserved groups, receive accessible, respectful, and comprehensive health care. Family physicians provide comprehensive primary care that is focused on the whole person, individualized to the diverse needs of each patient, and provided longitudinally across a patient's lifespan. As such, family physicians are uniquely suited to identify shortcomings within our current health care system that result in inequitable access to care for individuals with disabilities.

The AAFP has detailed policy opposing patient discrimination in any form, including but not limited to, on the basis of actual or perceived age, disability, economic status, or body habitus, as well as policy opposing employer and health plan discrimination based on a patient's personal characteristic, including disability. As such, the AAFP applauds HHS for prioritizing updates to section 504 of the Rehabilitation Act of 1973 (section 504) in this proposed rule. Section 504, along with the Title II of the Americans with Disabilities Act (ADA), section 508 of the Rehabilitation Act (section 508), and section 1557 of the Affordable Care Act (section 1557) are all vital regulations that help ensure accessibility and high-quality care for individuals with disabilities.

Overall, the AAFP appreciates HHS' efforts to align these regulations, but we remain concerned about outstanding discordance between the above regulations. While many provisions in this proposed rule are aligned with the ADA, HHS specifically notes that this proposed rule differs from standards required under section 508 and does not *ensure* compliance with the ADA, which is currently under rulemaking as well. The AAFP agrees that stricter standards for disability non-discrimination are needed but strongly urges HHS to continue clear coordination with the Department of Justice (DOJ) and other relevant agencies. Lack of interagency coordination places a significant burden on practices to understand and comply with overlapping regulations when many are already

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overburdened by administrative work. With this overarching recommendation in mind, the AAFP is pleased to offer the following comments for consideration.

Medical Treatment

HHS proposes to clarify that individuals may not be denied or limited medical treatment on the basis of disability, including "when the denial is based on:

(i) bias or stereotypes about a patient's disability (e.g. refusing to provide a person with an OUD a referral for Medications for OUD believing that person will not adhere to treatment)
(ii) judgments that an individual will be a burden on others due to their disability; or
(iii) a belief that the life of a person with a disability has a lesser value than that of a person without a disability, or that life with a disability is not worth living."

HHS clarifies a number of provisions, including the extension of non-discrimination regulations to the child welfare system and that individuals with substance or alcohol use disorder (SUD) are protected individuals with a disability if their impairment substantially limits one of their major life activities. The latter is consistent with the longstanding definitions under the ADA and interpretation of Section 508.

The AAFP fully agrees that HHS' proposed clarification of denials of care is important and necessary, and we applaud HHS for ensuring the rights of individuals with disabilities are protected. The evidence presented in the proposed rule clearly demonstrates that individuals with disabilities continue to face discrimination in a variety of settings. The AAFP agrees that people with disabilities can live meaningful and fulfilling lives and that the status of their disability should not interfere with their ability to receive high-quality, medically appropriate care. HHS also takes a nuanced approach, ensuring physicians can make care decisions with their patients that are based on current medical standards and the best available objective evidence, including providing an alternative course of treatment than what would typically be provided because it would be more successful in light of a patient's disability. **The AAFP supports this approach as it allows for shared decision making between a patient and physician and for physicians to exercise their clinical judgement effectively**.

HHS also proposes to amend the list of physical/mental impairment to include long-COVID. The AAFP appreciates HHS' work to address concerns of long-COVID. Data from 2022 showed that two-thirds of individuals with long-COVID were treated in the primary care setting, including 25.5% treated by family physicians.[i] While the AAFP continues to develop clinical and educational materials to assist our members in treating long-COVID, more research and resources are needed to support patients who continue to face physical and mental impairments from long-COVID and the clinicians caring for them.

Web, mobile, and kiosk accessibility

HHS proposes to require specific standards for accessible recipient web content and mobile applications (apps), as well as general accessibility for kiosks used in recipients' programs and activities.

Primary care practices use websites and applications to share patient health records, capture patient history, communicate between patient and practice, and complete administrative tasks like online scheduling. HHS also correctly notes that "the ability to access telehealth through a variety of devices, including laptops, smart phones, and tablets, wherever a high-speed internet connection is

available, has expanded health care opportunities for rural communities, individuals at increased risk of negative outcomes from infectious diseases, individuals without reliable forms of transportation, and individuals needing to access specialists in rare diseases, among others…" but that individuals with disabilities require specific accessibility functions for an effective telehealth visit.

The AAFP strongly supports policies that improve patients' access to their health data and virtual visits with their primary care physician when applicable. The AAFP has expressed support for ensuring health data is readily accessible by patients via patient portals and third party applications. To ensure patients with disabilities can benefit from this improved access, additional regulations are likely needed to address gaps in web accessibility, virtual visits, and other audio-visual components of care.

Other regulations like the ADA and section 1557 have not previously required technical standards for web and mobile app accessibility, but this proposed rule would adopt the Web Content Accessibility Guidelines (WCAG) 2.1 as the technical standard for web and mobile app accessibility. **While the AAFP agrees that a clear technical standard may be useful for many practices in complying with IT requirements by establishing actionable metrics for compliance, we are concerned about the application for small recipients—those with fewer than fifteen employees, which would include most small or solo physician practices. In finalizing this rule for all recipients, the AAFP urges HHS to:**

- **Allow adoption of WCAG 2.0 or greater,**
- **Provide financial support and resources to come into compliance,**
- **Adopt conformance levels for small recipients, and**
- **Conduct real-world testing.**

As mentioned in the rule, WCAG 2.0 is harmonized with existing regulation, section 508, and is more widely adopted across most states. The AAFP believes requiring adoption of WCAG 2.0 or greater will provide a clear technical standard for practices while allowing additional flexibilities for smaller practices to come into compliance and allow larger systems to adopt higher levels of compliance when feasible. Absent this change, the AAFP urges HHS to work with the Architectural and Transportation Barriers Compliance Board to finalize changes to section 508 to ensure it is aligned with this final rule and both regulations are updated simultaneously moving forward.

Small and solo physician practices are also dependent on a website supplier, electronic health records (EHR) system, and patient portal vendor to comply with accessibility requirements and may face significant costs to upgrade to a compliant version or reduce web offerings to all patients. These technology vendors must update the technology then make these updates available to physician practices. The vendors charge physician practices for each upgrade, even if the upgrade is required to come into compliance with new regulations.

While the AAFP agrees that accessibility across websites is important for individuals with disabilities, we are concerned that the financial impact of meeting growing health IT and other regulatory requirements is contributing to the financial peril of small and solo physician practices. These new requirements are being implemented as Medicare and Medicaid physician payment rates are becoming increasingly insufficient: payments are being reduced annually as inflation and practice costs rise. These converging policies are accelerating the closure and acquisition of independent primary care practices, which in turn results in unaffordable health care prices and worsening access to care for patients. Accessibility for individuals with disability includes not only appropriate web and

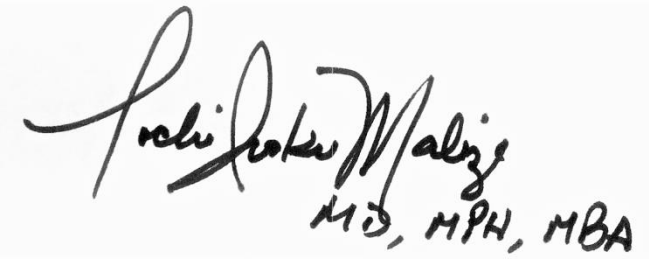
app design, but also access to person-centered care in their communities—the latter of which is only achievable if small and solo physician practices are able to keep their doors open

As such, the AAFP recommends HHS provide financial support to small and solo physician practices to come into compliance with this proposed rule, or otherwise work with website suppliers, EHR systems, and patient portal vendors to ensure any costs are not passed on to small practices. While HHS does allow for hardship exceptions, the burden of proving hardship is on the recipient and lacks clear guidelines on the threshold to meet such exceptions. Providing support to practices or working with vendors to limit costs is a more proactive approach to addressing concerns from small or solo practices.

Additionally, **the AAFP recommends adopting a different conformance level, or standard to be considered compliant, for small recipients to ensure small and solo physician practices are able to come into compliance with this rule**. Such conformance levels should focus balancing the advancement of conformance with the reality of resource constraints within this group. Absent these changes and additional support, the AAFP is concerned that small and solo practices may be forced to limit web content in order to remain compliant with this proposal. The AAFP does not support the adoption of performance standards for web accessibility, and we agree with HHS' recognition that such standards would be too vague, difficult to test, and subjective.

The AAFP supports compliance with accessibility standards, so long as HHS conducts real-world testing with successful results across relevant patient populations and in a variety of physician office environments before mandating compliance with accessibility standards. Real-world testing must be conducted across a variety of physician practice types, sizes, geographical areas, and patient populations, including patients with different abilities. Leveraging the input of physicians and their support staff throughout the standards development and implementation process can better support the needs of both physicians and their patients and determine how compliance can best be met. This real-world testing should inform when new technology standards are ready for broad adoption, which version or level of compliance should be required, and the timeline for moving forward. HHS should not mandate the adoption of standards that have not performed successfully in real-world testing.

Thank you for the opportunity to provide these comments. The AAFP looks forward to opportunities to work with your agency to advance accessible health care for all. For additional questions, please contact Morgan Bailie, Senior Regulatory Specialist, at mbailie@aafp.org.



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American Academy of Family Physicians, Board Chair

[i] Morning Consult. “Most Long COVID Patients Are Seeking Help From Their Primary Care Doctor.” April 18, 2022. Accessed at: https://pro.morningconsult.com/trend-setters/long-covid-medical-data-providers