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DEPAR

45 CFR Part 84

RIN: 0945-AA15

Discrimination on the Basis of Disability in Health and Human Service Programs or Activities

AGENCY: Office for Civil Rights (OCR), Office of the Secretary, HHS.

ACTION: Proposed rule.

SUMMARY: The Department of Health and Human Services (HHS or the Department) is committed to protecting the civil rights of individuals with disabilities under section 504 of the Rehabilitation Act of 1973 (section 504). To implement the prohibition of discrimination on the basis of disability, the Department proposes to update and amend its section 504 regulation. The proposed rule would add new provisions that clarify existing requirements under section 504 prohibiting recipients of financial assistance from the Department (recipients) from discriminating on the basis of disability in their programs and activities, including in health care, child welfare, and other human services. The proposed rule includes new requirements prohibiting discrimination in the areas of medical treatment; the use of value assessments; web, mobile, and kiosk accessibility; and requirements for accessible medical equipment, so that persons with disabilities have an opportunity to participate in or benefit from health care programs and activities that is equal to the opportunity afforded others. It also adds a section on child welfare to expand on and clarify the obligation to provide nondiscriminatory child welfare services. The proposed rule would also update the definition of disability and other provisions to ensure consistency with statutory amendments to the Rehabilitation Act, enactment of the Americans with Disabilities Act and the Americans with Disabilities Amendments Act of 2008, the Affordable Care Act, as well as Supreme Court and other significant court cases. It also further clarifies the obligation to provide services in the most integrated setting. Finally, the proposed rule would make other clarifying edits, including updating outdated terminology and

references.

DATES: *Comments*: Submit comments on or before November 13, 2023.

*Meeting***:** Pursuant to Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, the Department of Health and Human Services' Tribal Consultation Policy, and the Department's Plan for Implementing Executive Order 13175, the Office for Civil Rights solicits input by tribal officials as we develop the implementing regulations for section 504 of the Rehabilitation Act of 1973 at 45 CFR part 84. The Tribal consultation meeting will be held on October 6, 2023 from 2 p.m. to 4 p.m. Eastern Time.

ADDRESSES: *Meeting*: To participate in the Tribal consultation, you must register in advance at https://www.zoomgov.com/meeting/register/vJIsceGqpzsjEwi5AQ8pvdIholm7Xp4hwLs.

Comments: You may submit comments to this proposed rule, identified by RIN 0945-AA15, by any of the following methods. Please do not submit duplicate comments.

Federal eRulemaking Portal. You may submit electronic comments at http://www.regulations.gov by searching for the Docket ID number HHS-OCR-2023-0013. Follow the instructions at http://www.regulations.gov online for submitting comments through this method.

Regular, Express, or Overnight Mail: You may mail comments to U.S. Department of Health and Human Services, Office for Civil Rights, Attention: Disability NPRM, RIN 0945-AA15, Hubert H. Humphrey Building, Room 509F, 200 Independence Avenue, SW, Washington, DC 20201.

All comments sent by the methods and received or officially postmarked by the due date specified above will be posted without change to content to http://www.regulations.gov, including any personal information provided, and such posting may occur before or after the closing of the comment period.

We will consider all comments received or officially postmarked by the date and time specified in the "DATES" section above, but, because of the large number of public comments

we normally receive on *Federal Register* documents, we are not able to provide individual acknowledgements of receipt.

Please allow sufficient time for mailed comments to be timely received in the event of delivery or security delays. Electronic comments with attachments should be in Microsoft Word or Portable Document Format (PDF).

Please note that comments submitted by fax or email, and those submitted or postmarked after the comment period, will not be accepted.

Docket: For complete access to background documents or posted comments, go to http://www.regulations.gov and search for Docket ID number HHS-OCR-2023-0013.

FOR FURTHER INFORMATION CONTACT: Molly Burgdorf, Office for Civil Rights, Department of Health and Human Services at (202) 545-4884 or (800) 537–7697 (TDD), or via email at *504@hhs.gov*.

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I. Background

A. Purpose and Relevant Law

Section 504 prohibits discrimination on the basis of disability in programs and activities[1] that receive Federal financial assistance as well as in programs and activities conducted by any Federal agency.[2] Section 504 provides:

> 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.[3]

The Office for Civil Rights (OCR) in HHS enforces section 504 as well as two other statutes that prohibit discrimination on the basis of disability. Title II of the Americans with Disabilities Act (ADA) 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.[4] OCR also enforces section 1557 (section 1557) of the Patient Protection

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[1] The statutory text of section 504 explains that "program or activity" means "all of the operations of" an agency. 29 U.S.C. 794(b)(1)(A). The term "programs and activities" is therefore intended to cover the same types of operations that are covered under title II of the Americans with Disabilities Act (ADA).
[2] 29 U.S.C. 794.
[3] *Id.*
[4] 42 U.S.C. 12132 (". . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public

and Affordable Care Act (ACA),[5] which prohibits discrimination on various bases including disability in any health program or activity, any part of which receives Federal financial assistance, including credits, subsidies, or contract of insurance or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the ACA.[6]

Congress passed the Rehabilitation Act in 1973, and what was then the U.S. Department of Health, Education, and Welfare (HEW) issued regulations to implement section 504 in 1977.[7] In the more than 40 years since, major legislative and judicial developments have shifted the legal landscape of disability discrimination protections under section 504. These developments include multiple statutory amendments to the Rehabilitation Act, the enactment of the ADA and ADA Amendments Act of 2008 (ADAAA), the ACA, and Supreme Court and other significant court cases. It is crucial that section 504 be interpreted consistently with these developments and laws to ensure conformity with current law and to protect against discrimination on the basis of disability. To provide that clarity, the Department proposes amendments to its existing section 504 regulation on nondiscrimination obligations for recipients of Federal financial assistance (part 84).

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entity, or be subjected to discrimination by any such entity"). The ADA regulations generally designate HHS as the agency with responsibility for investigating complaints of discrimination in "programs, services, and regulatory activities relating to the provision of health care and social services." 28 CFR 35.190(b)(3). With respect to employment, the standards contained in title I of the ADA apply to determinations of employment discrimination under section 504. Title I of the ADA provides, "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112. Title II entities are also obligated to fulfill the ADA's title I requirements in their capacity as employers, which are distinct from their obligations under this rule.

[5] 42 U.S.C. 18116.

[6] In its Notice of Proposed Rulemaking on regulations implementing Section 1557 of the Affordable Care Act, 45 CFR pt. 92, the Department has proposed to revise its interpretation that "Federal financial assistance" does not include Medicare Part B, and to make conforming necessary amendments to the appendices of regulations implementing both Title VI of the Civil Rights Act and section 504. 87 FR 47824, 47828 (Aug. 4, 2022). Those proposed changes are not separately addressed in this rule.

[7] In 1980, Congress reorganized HEW into several Federal agencies including the Department of Health and Human Services and the Department of Education. The existing section 504 regulations of HEW continued in place with HHS.

In addition, since section 504 also covers programs and activities conducted by the Department, the Department intends to publish a separate rulemaking to update its existing federally conducted regulation, which has not been amended since it was enacted in 1998 (part 85).[8]

B. Summary of the Proposed Rule

The Department proposes to amend its existing regulation implementing section 504 for federally assisted programs and activities to address the obligations of recipients of Federal financial assistance to comply with section 504 across a variety of contexts. The proposed rule clarifies the application of section 504 to several areas not explicitly addressed through the existing regulation, including medical treatment decisions; the use of value assessments; web, mobile, and kiosk accessibility; and accessible medical equipment. The proposed rule also expands on and clarifies the requirements in the current regulation applicable to federally funded child welfare programs and activities.

In addition, the Department proposes to update pertinent provisions throughout the rule to promote consistency with title II of the ADA and the corresponding U.S. Department of Justice (DOJ) ADA regulations. The proposed rule will add the following new sections to the section 504 regulations that track the ADA regulations: definition of "disability," notice, maintenance of accessible features, retaliation and coercion, personal devices and services, service animals, mobility devices, and communications. The proposed rule also contains the following sections that are similar to the ADA regulations: purpose and broad coverage, definitions, general prohibitions against discrimination, program accessibility, illegal use of drugs, direct threat, and integration. The proposed rule will also provide more detailed standards on the obligation to provide programs and activities in the most integrated setting appropriate and will make non-substantive clarifying edits, including updating outdated terminology and references and omitting obsolete regulatory sections.

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[8] 45 CFR pt. 85.

Section 504 and the ADA are generally understood by courts to impose similar requirements. Moreover, the vast majority of recipients have been covered by either title II of the ADA (State and local government entities) or title III of the ADA (certain private entities) since 1991. Therefore, the rule proposes to adopt ADA language in appropriate circumstances. Doing so will allow for greater public understanding and ease of compliance by regulated entities.

II. Reasons for the Proposed Rulemaking

The Department is issuing this proposed rule to address discrimination on the basis of disability by recipients of HHS financial assistance.[9] The proposed regulation offers clear and specific requirements to help recipients and beneficiaries better understand their rights and responsibilities under section 504. In the years since HEW first promulgated its section 504 regulation, it has rarely been amended, with the most recent amendment occurring in 2005.[10] The proposed rule addresses developments in statutory and case law regarding disability discrimination. To promote voluntary compliance with the law, we provide further clarity and elaboration to the legal standards.

Furthermore, the proposed rule is consistent with the goals and objectives of several recent Executive Orders that address equitable access to benefits and services for underserved populations. As detailed below, people with disabilities have historically been underserved by, denied equitable access to, or excluded from health programs and activities. Executive Order 14035 (Advancing Diversity, Equity, Inclusion, and Accessibility Across the Federal Government) and Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government) explicitly describe people with

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[9] The Department notes that on January 15, 2021, OCR posted on its website a Request for Information (RFI) addressing a number of disability discrimination issues under part 84 of section 504. The RFI was later withdrawn, without being published in the *Federal Register.* OCR subsequently received letters urging HHS to address the issues in the RFI.

[10] Amendments to the section 504 regulations over time have included changes such as addressing the withholding of medical care from infants with disabilities (changes that the Supreme Court invalidated in *Bowen v. Amer. Hosp. Ass'n,* 476 U.S. 610 (1986)); changes to the accessible building standards; and changes to the definition of "program or activity" to conform to the Civil Rights Restoration Act of 1987.

disabilities as an underserved community and priority population for Federal policy intervention. The rulemaking is also consistent with Executive Order 14009 (Strengthening Medicaid and the Affordable Care Act), which requires agencies with authorities and responsibilities related to Medicaid and the ACA to review existing regulations to ensure they promote equitable access to high-quality health care accessible and affordable for every American, including reviewing policies or practices that may undermine protections for people with pre-existing conditions, including complications related to COVID-19, under the ACA. Finally, this rulemaking is consistent with Executive Order 14070 (Continuing to Strengthen Americans' Access to Affordable, Quality Health Coverage), which directs the Department to examine policies or practices that strengthen benefits and improve access to health care providers.

People with disabilities are often excluded from health programs and activities and denied an equal opportunity to participate in and benefit from quality health care.[11] That discrimination contributes to significant health disparities and poorer health outcomes than persons with disabilities would experience absent the discrimination.[12]

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[11] *See, e.g.*, Elizabeth A. Courtney-Long et al., *Socioeconomic Factors at the Intersection of Race and Ethnicity Influencing Health Risks for People with Disabilities*, 4 J. of Racial and Ethnic Health Disparities 213 (2017), https://doi.org/10.1007/s40615-016-0220-5; Susan Havercamp et al., *National Health Surveillance of Adults with Disabilities, Adults with Intellectual and Developmental Disabilities, and Adults with No Disabilities*, 8 Disability & Health J. 165 (2015), https://doi.org/10.1016/j.dhjo.2014.11.002; Lisa I. Iezzoni et al., *Have Almost Fifty Years of Disability Civil Rights Laws Achieved Equitable Care?,* 41 Health Affairs 1371 (2022), https://doi.org/10.1377/hlthaff.2022.00413; Tara Lagu et al., *'I Am Not The Doctor For You': Physicians' Attitudes About Caring For People With Disabilities*, 41 Health Affairs 1387 (2022), https://doi.org/10.1377/hlthaff.2022.00475; Monika Mitra et al., (2022) *Advancing Health Equity and Reducing Health Disparities for People with Disabilities in the United States,* 41 Health Affairs 1379 (2022), https://doi.org/10.1377/hlthaff.2022.00499. Nat'l Council on Disability, Health Equity Framework for People With Disabilities (2022), https://www.ncd.gov/sites/default/files/NCD_Health_Equity_Framework.pdf; Nat'l Council on Disability, The Current State of Health Care for People with Disabilities (2009).

[12] *See, e.g.*, Nat'l Council on Disability, Bioethics and Disability Report Series (2019), https://ncd.gov/publications/2019/bioethics-report-series; Tara Lagu et al., *The Axes of Access – Improving Care Quality for Patients with Disabilities*, 370 New Eng. J. Med. 1847 (May 2014); Tara Lagu et al., *Ensuring Access to Health Care for Patients with Disabilities*, 175 JAMA Internal Med. 157 (Dec. 2014); Tim Gilmer, *Equal Health Care: If Not Now, When*?, New Mobility (July 2013), http://www.newmobility.com/equal-health-care-if-not-now-when; Gloria L. Krahn et al., *Persons with Disabilities as an Unrecognized Health Disparity Population*, 105 Am. J. of Pub. Health (Suppl 2) S198 (S198-S206) (2015); Kristi L. Kirschner et al., *Structural Impairments that Limit Access to Health Care for Patients with Disabilities*, 297 JAMA 1121 (2007).

The National Council on Disability (NCD), an independent Federal agency, has observed that "[o]ne of the hallmarks of societal attitudes toward disabilities has been a tendency of people without disabilities to overestimate the negative aspects and underestimate the positive features of the lives of those who have disabilities."[13] Research in the field of health care supports this assertion.[14] One recent study demonstrates that large proportions of practicing U.S. physicians appear to hold biased or stigmatized perceptions of people with disabilities.[15] The study found that many physicians perceive that people with disabilities experience a lower quality of life because of their disabilities – even though most individuals with disabilities report that they experience an excellent or good quality of life. Furthermore, only 40.7 % of physicians surveyed were confident of their ability to provide the same quality of care to patients with disabilities and only 56.5% strongly agreed that they welcome patients with disabilities into their practices.[16] Flawed perceptions, stereotypes, and biases about individuals with disabilities can lead to prohibited discrimination.[17]

These issues are not limited to health care. For example, the NCD 2012 report, "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children," included research and accounts of parents who had been treated unfairly because of their disabilities, documenting persistent and systemic discrimination against parents with disabilities whose

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[13] Nat'l Council on Disability, Assisted Suicide: A Disability Perspective (Mar. 24, 1997), https://ncd.gov/publications/1997/03241997.

[14] *See, e.g.,* Laura VanPuymbrouck, et al., *Explicit and Implicit Disability Attitudes of Healthcare Providers*, Rehabilitation Psych., 65(2) 2020, at 101-112; Stefanie Ames et al., *Perceived Disability-Based Discrimination in Health Care for Children With Medical Complexity,* Pediatrics, 152(1) 2023, https://doi.org/10.1542/peds.2022-060975.

[15] *See* Tara Lagu et al., *'I Am not the Doctor For You': Physicians' Attitudes about Caring for People with Disabilities*, 41 Health Affairs 1387 (2022), https://doi.org/10.1377/hlthaff.2022.00475; Laura VanPuymbrouck et al., *Explicit and Implicit Disability Attitudes of Healthcare Providers*, Rehabilitation Psych., 65(2) 2020, at 101-112, https://doi.org/10.1037/rep0000317.

[16] Lisa I. Iezzoni et al., *Physicians' Perceptions of People with Disability and their Health Care,* 40 Health Aff. 297 (Feb. 2021), https://pubmed.ncbi.nlm.nih.gov/33523739/ (citing GL Albrecht et al., *The Disability Paradox: High Quality of Life Against All Odds,* 48 Soc. Sci. Med., 977 (1999)).

[17] *See, e.g., Lesley v. Chie*, 250 F.3d 47, 55 (1st Cir. 1985) (Physician's decision could be "discriminatory on its face, because it rested on stereotypes of the disabled rather than an individualized inquiry into the patient's condition").

children were involved with the child welfare system.[18] The Department is issuing this proposed regulation to offer clear and specific requirements to help recipients better understand their obligations under the law and to help individuals with disabilities better understand their rights. The Department believes this added clarity and transparency will support recipients in providing programs and activities free of discrimination on the basis of disability.

This preamble will address first the new provisions being added to the existing section 504 rule (Section III(A) in the Table of Contents above) – medical treatment; value assessment; child welfare; web, mobile, and kiosk accessibility; and accessible medical equipment –and then will address the updated provisions (Section III(B) in the Table of Contents). However, the text of the rule itself does not start with the new provisions but, instead, follows in numerical order. This explanation is being provided so that a reader can understand how the order of this preamble corresponds to the text of the regulation.

Throughout this NPRM, the terms "individual with a disability," "people with disabilities," and "person with a disability" are used interchangeably. No substantive difference is intended.

III. Nondiscrimination in Programs and Activities

A. New Provisions Addressing Discrimination on the Basis of Disability under Section 504

§ 84.56 Medical treatment.

The Department funds a wide array of programs and activities in which recipients make decisions regarding medical treatment. Medical literature, government agency reports, and court decisions demonstrate that individuals with disabilities face discrimination at every stage of the medical treatment process. Biases and stereotypes about the impact of disability affect decisions in different contexts, including diagnoses, day-to-day treatment decisions, emergency care

[18] Nat'l Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children (2012), https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf.

decisions, and the allocation of scarce medical resources in health crises.[19] Recent experiences during the COVID-19 public health emergency further illustrate the harms that discrimination can pose. In March 2020 NCD observed that "discrimination by medical practitioners who, through ignorance of the law or due to the belief that people with disabilities are less valuable, and therefore less deserving of medical care, than those who are not" resulted in "people with chronic illnesses and other disabilities [being] left behind, denied resources to survive, and as a result, suffer[ing] great losses of life."[20]

We propose to clarify the general prohibition on discrimination against qualified individuals with disabilities in the medical treatment context and elaborate on specific prohibitions in this context. "Medical treatment" is used in this section in a generic, nonspecific manner; it is intended to be broad and inclusive. It refers 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 preventive, curative, rehabilitative, or palliative. It includes the use of a wide range of regimens for both physical and mental conditions, interventions, or procedures, such as surgery; the prescribing, dispensing, or management of medications; exercise; physical therapy; rehabilitation services; and the provision of durable medical equipment.

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[19] *See, e.g., Donlon v. Hillsborough Cnty*., No. 18-cv-549-LM, 2019 WL 2062436 (D.N.H. May 9, 2019) (granting Plaintiff's motion under the ADA to amend her complaint alleging that she was denied medical treatment and emergency care because she had been stereotyped based on her mental illness. The court said that "[t]he facts alleged raise a plausible inference of such unreasonable care that would imply pretext for a discriminatory motive."); *Pesce v. Coppinger,* 355 F. Supp. 3d 35, 47 (D. Mass. 2018) (granting Plaintiff's motion under the ADA for a preliminary injunction because the failure of the correctional facility to provide methadone for opioid addiction "is either 'arbitrary or capricious as to imply that it was a pretext for some 'discriminatory motive' or 'discriminatory on its face,'" (citing *Kiman v. N.H. Dep't of Corr.*, 151 F.3d 274, 285 (1st Cir. 2006); *Sumes v. Andres*, 938 F. Supp. 9, 12 (D.D.C. 1996) (finding that there was no bona fide medical reason for a physician's refusal to treat the plaintiff, the court held that the ADA and section 504 had been violated because the denial of treatment was based on deafness); *Howe v. Hull,* 874 F. Supp. 779, 788-89 (N.D. Ohio 1994) (denying Defendant's motion for summary judgment under the ADA because the refusal of the hospital to admit the plaintiff for treatment was based on her HIV status).

[20] Letter from Nat'l Council on Disability to Roger Severino, Dir., U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (March 18, 2020), https://ncd.gov/publications/2020/ncd-covid-19-letter-hhs-ocr.

Throughout this section, the terms "provider" and "medical professional" are sometimes used in place of "recipient," which is defined in § 84.10.

Discrimination against people with disabilities in medical treatment.

Although section 504 has prohibited discrimination in any program or activity receiving Federal financial assistance since it was enacted, discrimination continues to underpin health inequities faced by people with disabilities.[21] People with disabilities have reduced access to medical treatment, a reality that leads to significant health disparities and poorer health outcomes.[22] People with disabilities are significantly more likely than people without disabilities to have unmet medical, dental, and prescription needs.[23] Unmet health care needs contribute to various indicators of health inequity: for example, individuals with disabilities in the United States have a shorter average life expectancy than people without disabilities and are three times as likely to have heart disease, stroke, diabetes, or cancer than adults without disabilities.[24]

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[21] While this proposed section 504 regulation relates specifically to disability discrimination, other categories of discrimination, including discrimination on the basis of race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity), and age, also impact the health care system. Many of these forms of discrimination intersect with disability discrimination, contributing to and at times exacerbating the nature and extent of the harms people with disabilities experience. In addition, many communities of color experience higher rates of disability and health risks in the U.S. *See, e.g.,* Centers for Disease Control and Prevention, Adults with Disabilities: Ethnicity and Race, https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html (last visited Oct. 1, 2022).

[22] *See, e.g.*, Nat'l Council on Disability, Bioethics and Disability Report Series (2019), https://ncd.gov/publications/2019/bioethics-report-series; Tara Lagu et al., *The Axes of Access – Improving Care Quality for Patients with Disabilities*, 370 N. Engl. J. Med. 1847 (May 2014); Tara Lagu et al., *Ensuring Access to Health Care for Patients with Disabilities*, 175 JAMA Internal Med. 157 (Feb. 2015); Tim Gilmer, *Equal Health Care: If Not Now, When*?, New Mobility (July 1, 2013), http://www.newmobility.com/equal-health-care-if-not-now-when; Gloria L. Krahn et al., *Persons with Disabilities as an Unrecognized Health Disparity Population*, 105 Am. J. of Public Health S198 (2015); Kristi L. Kirschner et al., *Structural Impairments that Limit Access to Health Care for Patients with Disabilities*, 297 JAMA 1121 (Mar. 2007).

[23] *See, e.g.,* Elham Mahmoudi et al., *Disparities in Access to Health Care Among Adults with Physical Disabilities: Analysis of a Representative National Sample for a Ten-Year Period*, 8 Disability& Health J. 182 (Apr. 2015), https://doi.org/10.1016/j.dhjo.2014.08.007; Stephen P. Gulley et al., *Disability in Two Health Care Systems: Access, Quality, Satisfaction, and Physician Contacts among Working-Age Canadians and Americans with Disabilities*, 1 Disability & Health J. 196 (Oct. 2008).

[24] Ctrs. for Disease Control & Prevention, *Disability Inclusion*, https://www.cdc.gov/ncbddd/disabilityandhealth/disability-inclusion.html; Valerie Forman-Hoffman et al., *Disability Status, Mortality, and Leading Causes of Death in the United States Community Population*, 53(4) Medical Care 346 (Apr. 2015), https://pubmed.ncbi. nlm.nih.gov/25719432; Williams, M. et al., *Exploring Health Disparities Among Individuals with Disabilities within the United States*, Am.

People with certain types of serious mental illness have a significantly shorter life expectancy than the general population,[25] and people with mental illness have an increased risk of physical disease, as well as reduced access to adequate health care.[26] Pregnant people with disabilities receive poorer maternity care, experience higher incidents of pregnancy and birth-related complications, and are eleven times more likely to experience maternal death than people without disabilities.[27] People with physical disabilities are less likely to receive mammograms, Pap smears, or other recommended routine preventive screenings.[28] People with disabilities are also more likely to have risk factors associated with cancer than people without disabilities.[29] During the first year of the COVID-19 pandemic, one-third of the individuals who died in the United States were living in congregate settings, often to receive necessary services and supports —the majority of whom were individuals with disabilities.[30] Adults with disabilities were also

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Pub. Health Ass'n. (Oct. 2020), https://apha.confex.com/apha/2020/meetingapp.cgi/Paper/473208; Nat'l Council on Disability, Health Equity Framework for People with Disabilities (2022), https://ncd.gov/sites/default/files/NCD_Health_Equity_Framework.pdf.

[25] *See, e.g.*, Andrea Fiorillo & Norman Sartorius, *Mortality Dap and Physical Comorbidity of People with Severe mental Disorders: The Public Health Scandal* Ann. Gen. Psychiatry 20, 52 (2021). https://doi.org/10.1186/s12991-021-00374-y*;* Steve Brown et al., *Twenty Five Year Mortality of a Community Cohort with Schizophrenia*, Br. J. Psychiatry (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4560167/.

[26] Joseph Firth et al., *The Lancet Psychiatry Commission: A Blueprint for Protecting Physical Health in People with Mental Illness*, The Lancet Psychiatry, Vol. 6, 675-712 (2019), https://doi.org/10.1016/S2215-0366(19)30132-4.

[27] *See, e.g.,* Jessica L. Gleason et al., *Risk of Adverse Maternal Outcomes in Pregnant Women with Disabilities*, JAMA Network Open (2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2787181; Willi Horner-Johnson et al., *Perinatal Health Risks and Outcomes Among US Women with Self-Reported Disability*, 41 Health Aff. 2011 (Sep. 2022), https://doi.org/10.1377/hlthaff.2022.00497.

[28] Lisa Iezzoni et al., *Associations Between Disability and Breast or Cervical Cancers, Accounting for Screening Disparities*, Medical Care 139 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7855335/; *see also*, C. Brook Steele et al., *Prevalence of Cancer Screening Among Adults with Disabilities*, United States, 2013. Preventing Chronic Disease (2017), http://dx.doi.org/10.5888/pcd14.160312.

[29] M.A. Nosek et al., *Breast and Cervical Cancer Screening Among Women with Physical Disabilities*, 78 Archives of Physical Medicine and Rehabilitation, S39 (1997), https://doi.org/10.1016/s0003-9993(97)90220-3; *See also*, Lisa Iezzoni, *Cancer Detection, Diagnosis, and Treatment for Adults with Disabilities,* 23 Lancet E164 (Apr. 2022), https://doi.org/10.1016/S1470-2045(22)00018-3.

[30] Nat'l Council on Disability, The Impact of COVID-19 on People with Disabilities, 87 (2021), https://ncd.gov/sites/default/files/NCD_COVID-19_Progress_Report_508.pdf.

considerably more likely than their peers without disabilities to either delay care or not get needed medical care for health issues other than COVID-19.[31]

Although many factors contribute to these health inequities, discriminatory medical decisions — often driven by stereotypes about disability — are a key factor. The National Academies of Sciences, Engineering, and Medicine report that provider assumptions about people with disabilities limit health and health care for people with disabilities, noting that health care providers assume that people with disabilities "differ in significant, meaningful, and somewhat undefined ways from other people[;] that people with disabilities have a lower level of cognitive ability, independence, and interest in improving and maintaining current function; [and] that the quality of life for a disabled person is severely compromised, [which] limits the type, scope, and aggressiveness of considered treatment options."[32]

These assumptions have been documented in many programs and activities that frequently receive HHS funding. For example, a 2021 study entitled "Physicians' Perceptions of People with Disability and Their Health Care" found that large proportions of practicing U.S. physicians appeared to hold biased or stigmatized perceptions of people with disabilities, such as perceiving worse quality of life for people with disabilities.[33] The study showed that, for example, 82% of doctors thought people with disabilities had a lower quality of life than people without disabilities,[34] only 40% felt confident in their ability to provide the same level to care to patients with disabilities as those without disabilities,[35] and only 56% strongly agreed that they welcomed patients with disabilities into their practice.[36] A related study released in January 2022 also made clear that many physicians are uncertain about their legal responsibilities resulting

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[31] Akobirshoev et al., *Delayed Medical Care and Unmet Care Needs Due to the COVID-19 Pandemic among Adults with Disabilities in the US,* 41 Health Aff. 1505 (Oct. 2022), https://doi.org/10.1377/hlthaff.2022.00509.
[32] Nat'l Acad. of Sciences, Engineering, & Med., *People Living with Disabilities: Health Equity, Health Disparities, and Health Literacy: Proceedings of a Workshop* (2018), https://doi.org/10.17226/24741.
[33] Lisa I. Iezzoni et al., *Physicians' Perceptions of People with Disability and Their Health Care,* 40 Health Aff. 297 (Feb. 2021), https://pubmed.ncbi.nlm.nih.gov/33523739/.
[34] *Id.* at 300.
[35] *Id.*
[36] *Id.* at 301.

from laws prohibiting discrimination on the basis of disability or how to ensure the provision of equitable care to patients with disabilities.[37] For example, more than 71% of physicians surveyed provided incorrect answers about who makes decisions about reasonable accommodations for patients with a disability.[38] Another study published in October 2022 found that some providers seek ways to avoid treating patients with disabilities and to discharge them from their practice.[39] These medical provider attitudes do not reflect the high quality of life reported by many people with disabilities. In 2019, NCD observed, "most report a high quality of life and level of happiness, especially when they have access to the health care services and supports that they need to equally participate in and contribute to their communities."[40] Most individuals with disabilities report an excellent or good quality of life.[41] As NCD noted previously, "[…] negative predictions of life quality have little to do with the actual life experiences of people with disabilities. People with disabilities commonly report more satisfaction with their lives than others might have expected. Though they commonly encounter obstacles, prejudice, and discrimination, most people with disabilities manage to derive satisfaction and pleasure from their lives."[42]

Stereotypes about the value and quality of the lives of people with disabilities have led to discriminatory medical decisions in both the provision and denial of medical treatment.[43] The

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[37] Lisa I. Iezzoni et al., *US Physicians' Knowledge about the Americans with Disabilities Act and Accommodation of Patients with Disability*, 41 Health Aff. 96 (Jan. 2022), https://pubmed.ncbi.nlm.nih.gov/34982624/.
[38] *Id.* at 100-101.
[39] Tara Lagu et al., *'I Am Not the Doctor For You': Physicians' Attitudes about Caring for People with Disabilities*, 41 Health Aff. 96 (Jan. 2022), https://doi.org/10.1377/hlthaff.2022.00475.
[40] Nat'l Council on Disability, Medical Futility and Disability Bias (2019), https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf; *see also*, Mary Crossley, *Ending-Life Decisions: Some Disability Perspectives*, 33 Ga. St. U. L. Rev. 900 (2017).
[41] Lisa I. Iezzoni et al., *Physicians' Perceptions of People with Disability and their Health Care,* 40 Health Aff. 297 (Feb. 2021), https://pubmed.ncbi.nlm.nih.gov/33523739/ (citing GL Albrecht et al, *The Disability Paradox: High Quality of life against all odds*, 48 Soc. Sci. Med. 977 (1999)).
[42] Nat'l Council on Disability, Assisted Suicide: A Disability Perspective (1997), https://ncd.gov/publications/1997/03241997.
[43] *See, e.g.*, Tara Lagu et al., '*I am Not the Doctor For You:' Physicians' Attitudes About Caring for People with Disabilities, supra* note 39 ("Many physicians also expressed explicit bias toward people with disabilities and described strategies for discharging them from their practices. Physicians raised

general pattern of discrimination against people with disabilities in medical treatment decisions extends across the array of contexts in which recipients make those decisions.

Below is a discussion of several of the most significant contexts in which this pattern of discrimination has come to the Department's attention, including in the areas of organ transplantation, denial of life-sustaining care, crisis standards of care, participation in clinical research, and other forms of medical treatment for people with disabilities, including forced sterilization. Following that is a subsection-by-subsection analysis of this proposed section.

Organ transplantation.

The Department plays a significant role in organ transplantation in the U.S. Within the Department, the Health Resources & Services Administration (HRSA) exercises oversight of solid organ transplantation according to a statutory and regulatory framework. The National Organ Transplant Act of 1984, as amended (NOTA) authorized the establishment of the Organ Procurement and Transplantation Network (OPTN) to allocate donor organs to individuals waiting for an organ transplant.[44] Under NOTA, the Secretary of Health and Human Services (Secretary) contracts with a non-profit entity to operate the OPTN, which currently is the United Network for Organ Sharing (UNOS). Additionally, the Centers for Medicare & Medicaid Services (CMS) makes payment for organ procurement costs under the Medicare and Medicaid programs to organ procurement organizations (OPOs) that meet safety requirements. Under Federal law, CMS is charged with certifying OPOs that must meet the OPO Conditions for Coverage in the regulations at 42 CFR 486.301 through 486.360, which include outcome and process measures.[45] OPOs are non-profit organizations responsible for the procurement of organs

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concerns about the expense of providing physical and communication accommodations, including insufficient reimbursement for physicians' efforts and competing demands for staff time and other practice resources. Many participants described caring for very few patients who need accommodations, with little acknowledgment that the barriers to obtaining care and inability to track or respond to accommodation needs could lead to an underidentification of the number of people with disabilities who seek care.").

[44] Sec. 372, Pub. L. 98-507; 42 U.S.C. 274.

[45] 42 U.S.C. 1320b–8; sec. 371(b)(3)(C) and sec. 1138(b) of the Public Health Service Act (42 U.S.C. 273(b)(3)(C)).

for transplantation. CMS also certifies that transplant programs, located within hospitals with Medicare provider agreements, perform transplantation procedures from living and deceased donors. Transplant programs must comply with the Medicare transplant program conditions of participation (CoPs) regulations at 42 CFR 482.68 through 482.104, and with the hospital CoPs at §§ 482.1 through 482.58.

NCD published a 2019 report, "Organ Transplant Discrimination Against People with Disabilities," describing how people with disabilities who are otherwise qualified candidates for an organ transplant are excluded at many phases of the transplant process because of health care providers' inaccurate assumptions about quality of life, lifespan, and post-transplant compliance.[46] In February 2022, NCD issued a "Health Equity Framework for People with Disabilities" and recommended that HHS regulate this area.[47] The NCD organ transplant report states that discrimination occurs even though disabilities unrelated to a person's need for an organ transplant generally have little or no impact on the likelihood that the transplant will be successful, and that, if a person with a disability receives adequate support, their disability should have very limited impact on their ability to adhere to a post-transplant care regimen.[48]

OCR's investigative experience confirms ongoing concerns about discrimination at various points in the transplant process. Medical providers and transplant programs continue to refuse to evaluate patients with disabilities who are otherwise qualified for transplant eligibility and fail to place qualified patients on transplant waiting lists because of exclusions and limitations for certain disabilities that are not supported by objective evidence or that do not take into account reasonable modifications in assessing an individual's ability to manage

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[46] Nat'l Council on Disability, Organ Transplants Discrimination against People with Disabilities: Part of the Bioethics and Disability Series (2019), https://ncd.gov/sites/default/files/NCD_Organ_Transplant_508.pdf.
[47] Nat'l Council on Disability, Health Equity Framework for People with Disabilities (2022), https://ncd.gov/sites/default/files/NCD_Health_Equity_Framework.pdf.
[48] Nat'l Council on Disability, Organ Transplants Discrimination against People with Disabilities: Part of the Bioethics and Disability Series, 38-40 (2019), https://ncd.gov/sites/default/files/NCD_Organ_Transplant_508.pdf.

postoperative care needs and other aspects of transplantation.[49] For example, in 2019, OCR resolved a case alleging discrimination against an individual with autism spectrum disorder, in which the complainant alleged the University of North Carolina Medical Center deemed the patient ineligible to be considered for evaluation for placement on a heart transplant wait list because of the individual's diagnosis of Autism Spectrum Disorder and anticipated difficulties managing postoperative care. OCR worked directly with the recipient to enter a voluntary resolution agreement and the medical facility agreed to reevaluate the individual's eligibility for placement on the waiting list and consider the services and supports the individual could access to manage postoperative care.[50]

The Department has heard from a number of stakeholders urging action on this issue. On May 6, 2019, 17 major organizations that serve and advocate for individuals with disabilities sent a letter asking OCR to issue a regulation and guidance that addresses discriminatory practices in organ transplantation.[51] On October 12, 2016, a bipartisan group of 30 members of Congress sent a letter to OCR urging it to issue guidance on discrimination against individuals with disabilities, particularly individuals with intellectual and developmental disabilities, in organ transplantation.[52] The letter cited data documenting consideration of disability status in organ transplantation. The Department agrees that action remains needed. Moreover, while 34 states have passed State laws protecting the rights of people with disabilities to access organ

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[49] *See, e.g.*, *Bussoletti v. Univ. of Pitt. Med. Ctr.* (07-068765); *Walker v. Univ. Cal. San Diego Med. Ctr.* (08-80649); *Parsons v. Cnty of Santa Clara, Santa Clara Valley Med. Ctr.* (07-69439); *Paladino v. Union City Renal Ctr.* (06-44878); *Beaton v. Sutter Mem'l Hosp.* (03-11505); *Eggemeyer v. Ill. Dep't of Human Serv. Randolph Cnty. Office* (03-004371); *HIV/AIDS Legal Servs Alliance v. Health Plan P of Cal.* (09-02-3296); *Lewis v. Willis Knighton Med. Ctr.* (03-12129), on file with OCR. In at least one of the above complaints, OCR recommended that the covered entity evaluate its transplant listing policies after discovering that the covered entity's policy listed "severe mental retardation" as a contraindication for transplant.

[50] *See Disability Rts. of N.C. v. Univ. of N.C. Hosp.*, (19-318735), https://www.hhs.gov/about/news/2019/02/12/ocr-resolves-disability-complaint-individual-who-was-denied-opportunity-heart-transplant-list.html (No violation was found but a voluntary resolution agreement was entered into with the facility).

[51] Letter from Matt Valliere et al., to Roger Severino, Dir., U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (May 6, 2019). The letter is on file with OCR.

[52] Letter from Thirty (30) Members of Congress to Jocelyn Samuels, former Dir., U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (Oct. 12, 2016), on file with OCR.

transplantation, 16 States and the District of Columbia lack legislation addressing this issue.[53] And even where State laws do address this issue, it is unclear whether those laws are adequately enforced. Additionally, according to a 2019 NCD report, transplant centers in states that have passed antidiscrimination legislation continue to publicly post discriminatory criteria for organ transplantation, suggesting that some State law requirements are not well-known or enforced.[54]

Research has documented the persistence of organ transplantation policies that discriminate against individuals with disabilities, particularly against individuals with intellectual and developmental disabilities, psychiatric disabilities, and HIV.[55] A 2009 study reported that 85% of pediatric transplant centers considered neurodevelopmental status in evaluation, and 71% considered subnormal IQ a relative or absolute contraindication to transplant.[56] Programs continue to list these conditions as reasons for denying transplants, despite evidence that, for example, individuals with intellectual or developmental disabilities who have received organ transplants have rates of successful outcomes and medical adherence comparable to those of the general population.[57] A literature review published in "Pediatric Transplantation" found scant

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[53] Nat'l Down Syndrome Soc'y, *Nondiscrimination in Organ Transplantation Laws & Toolkit* (2022), https://www.ndss.org/programs/ndss-legislative-agenda/healthcare-research/nondiscrimination-in-organ-transplantation-laws-toolkit/.

[54] Nat'l Council on Disability, Organ Transplant Discrimination Against People With Disabilities 53-54 (2019), https://ncd.gov/sites/default/files/NCD_Organ_Transplant_508.pdf; *See also* Isabella Newburg, Note, *The Heart of the Discrimination Problem: Insufficient State Protection for People with Intellectual and Developmental Disabilities in the Organ Transplant Process*, 107 Ia. L. Rev. 877, 894 (2022).

[55] Nat'l Council on Disability, Organ Transplant Discrimination Against People With Disabilities, 30 (2019), https://ncd.gov/sites/default/files/NCD_Organ_Transplant_508.pdf ("Disability discrimination persists in the evaluation process because, in spite of evidence to the contrary, many physicians still view HIV and AIDS, as well as intellectual, developmental, or psychiatric disabilities, as relative or absolute contraindications to transplant.").

[56] Aaron Wightman et al., *Consideration of Children with Intellectual Disability as Candidates for Solid Organ Transplantation—A Practice in Evolution*, Pediatric Transplantation 22, no. 1 (Feb. 2018), citing Richards CT et al., *Use of Neurodevelopmental Delay in Pediatric Solid Organ Transplant Listing Decisions: Inconsistencies in Standards across Major Pediatric Transplant Centers*. Pediatric Transplantation no. 13, 843-85 (2009).

[57] *See, e.g.*, E. Samuel-Jones et al., *Cardiac Transplantation in Adult Patients with Mental Retardation: Do Outcomes Support Consensus Guidelines*, 53 Psychomatics 133 (2012) (concluding people with intellectual disabilities can receive long-term benefit from heart transplantation when they have the support necessary to ensure adherence to post-transplant regimens); Marilee Martens et al., *Organ Transplantation, Organ Donation and Mental Retardation*, Pediatric Transplantation. 2006 Sept.;10(6):658-64 (reviewed the literature on accessibility and outcomes of organ transplantation in individuals with intellectual disability and on the prevalence of organ donation in this population. The one- and three-year patient survival rates were 100% and 90%, respectively).

scientific data to support the idea that having an intellectual or developmental disability would pose a heightened risk of poorer outcomes following a transplant.[58]

In a policy statement, the American Society of Transplant Surgeons recommends "that no patient will be discriminated against or precluded from transplant listing solely due to the presence of a disability or handicap, whether physical or psychological … This [transplant] decision would be made due to the clinical risk benefit analysis for the specific patient, and not on any external factors." The Society further indicates support for "efforts to identify and eliminate any Transplant Center processes or practices that allow discrimination."[59]

Media reports have also documented denials of organ transplants based on disability.[60] For example, in 2013, the news widely covered the initial denial of a kidney transplant to a three-year-old girl by Children's Hospital of Philadelphia because she had Wolf-Hirschhorn syndrome, which delays growth and causes intellectual and developmental disabilities.[61] In 2006, Oklahoma University Medical Center denied a young woman placement on a waiting list for a kidney transplant based on her diagnosis of Mild Intellectual Disability.[62] In February 2022, CBS News covered families' allegations that hospitals denied transplant eligibility for children with Down

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[58] Marilee A. Martens et al., *Organ Transplantation, Organ Donation, and Mental Retardation*, 10 Pediatric Transplantation 658 (2006).
[59] Am. Soc'y of Transplant Surgeons, *Statement Concerning Eligibility for Solid Organ Transplant Candidacy* (Feb. 12, 2021), https://asts.org/about-asts/position-statements#.Ysxi0LfMKUk.
[60] *See, e.g.,* Sara Reardon, *Push Is On for States to Ban Organ Transplant Discrimination,* Kaiser Health News (Mar. 8, 2021), https://khn.org/news/article/organ-transplant-discrimination-disabilities-state-legislation/; Sunshine Bodey, *My Son Has Autism. Discrimination Almost Cost Him His Life,* Wash. Post (Aug. 30, 2017), https://www.washingtonpost.com/opinions/my-son-has-autism-discrimination-almost-cost-him-his-life/2017/08/30/b899dc58-88e8-11e7-961d-2f373b3977ee_story.html; Lenny Berstein, *People with Autism, Intellectual Disabilities Fight Bias in Transplants,* Wash. Post (Mar. 4, 2017), https://www.washingtonpost.com/national/health-science/people-with-autism-intellectual-disabilities-fight-bias-in-transplants/2017/03/04/756ff5b8-feb2-11e6-8f41-ea6ed597e4ca_story.html?utm_term=.144fbd126817.
[61] Kim Painter, *Disabled NJ Girl Thrives, Inspires After Transplant*, USA Today (Oct. 5, 2013), https://www.usatoday.com/story/news/nation/2013/10/05/disabled-transplant-amelia-rivera/2917989/.
[62] David Shapiro, *Disabled Woman Dies While Awaiting Second Chance at Transplant*, NPR (June 13, 2012), https://www.npr.org/sections/health-shots/2012/06/13/154914089/disabled-woman-dies-while-awaiting-second-chance-at-kidney-transplant.

syndrome and other developmental disabilities.[63] In addition, the general obligation to make reasonable modifications for qualified individuals with disabilities under proposed § 84.68(b)(7) applies to organ transplantation. For example, transplant programs receiving Federal financial assistance must allow individuals to meet the requirement that they can manage postoperative care needs with a reasonable modification, such as the assistance of a formal or informal support system. These types of supports may include, for example, support from family or friends, paid services, long-term services and supports, and other forms of assistance.

The continuing evidence of discrimination against individuals with disabilities in organ transplantation demonstrates the need for a rule specifically discussing the application of section 504's requirements in the medical treatment context.

Life-sustaining treatment.

People with disabilities face significant discrimination in access to life-sustaining care. These discriminatory judgments arise when clinicians seek to end the continued provision of life-sustaining care that is still actively sought by a person with a disability or their authorized representative. This proposed rule uses the term "life-sustaining care" here broadly, to encompass both critical care treatment and life-saving or life-extending care provided outside the context of an acute medical crisis. Discrimination is particularly salient in the context of medical futility determinations, when hospitals and providers decide to discontinue or deny medical treatment based on the judgment that the treatment would do little or nothing to benefit the patient.[64] Section 504 does not prohibit giving medical providers discretion to make medical futility judgments; it does require that medical futility judgments be made on a nondiscriminatory basis. There is ample evidence that perceptions about patients with disabilities' quality of life often affects judgments related to patient benefit and leads to the

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[63] Michael Roppolo, *They Say Their Children Are Being Denied Transplants Because of Their Disabilities. A New Federal Law May Help Change That.*, CBS News, (Feb. 28, 2022), https://www.cbsnews.com/news/organ-transplants-discrimination-disability-rights.

[64] Medical futility sometimes goes under other names such as "nonbeneficial treatment."

discriminatory denial of life-sustaining care. The result can be premature death for patients with disabilities.

NCD published a report in 2019 examining the issue of medical futility determinations and disability bias, discussing decisions by health care providers to withhold or withdraw life-sustaining care for individuals with disabilities that are driven by subjective quality of life judgments.[65] Clinical literature documents how futility determinations can be used to deny care to people with disabilities based on their use of assistive technology, ongoing support needs, and other factors that do not prevent a treatment from being effective in saving or extending life.[66] As discussed above, recent research has documented that a large proportion of practicing physicians in the United States hold biased perceptions of people with disabilities, in particular perceiving people with disabilities as having worse quality of life (in contrast to the self-perception of many people with disabilities themselves).[67] Such perceptions of the quality of life of people with disabilities can play a role in the discriminatory use of futility determinations to deny medically effective care.

Of particular concern are determinations by providers that an intervention should not be provided if it "fails to return or sustain an acceptable quality of life" for a patient in the judgment of the provider, even if the patient or their authorized representative would consider such an outcome acceptable.[68] For example, the idea that if treatment "cannot end dependence on intensive medical care, the treatment should be considered futile,"[69] may discriminate against

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[65] Nat'l Council on Disability, Medical Futility and Disability Bias: Part of the Bioethics and Disability Series (Nov. 2019), https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf.
[66] *See* LJ Schneiderman et al., *Medical Futility: Its Meaning and Ethical Implications*, 112 Ann. Intern. Med. 949 (1990) (indicating the use of assistive technology, ongoing support needs, etc. in futility determinations). *See also* Maryam Aghabaray et al., *Medical Futility and its Challenges: a Review Study,* 9 J. Med. Ethics & History of Med. 11 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5203684/ (clarifying the continued use of these standards in the present day).
[67] Lisa I. Iezzoni et al., *Physicians' Perceptions of People with Disability and Their Health Care,* 40 Health Aff. 297 (Feb. 2021), https://pubmed.ncbi.nlm.nih.gov/33523739/, citing GL Albrecht et al., *The Disability Paradox: High Quality of Life Against All Odds,* 48 Soc. Sci. Med. 977 (1999).
[68] L. Morata, *An Evolutionary Concept Analysis of Futility in Health Care,* 74 J. Advanced Nursing 1289 (June 2018).
[69] *Id.*

people whose disabilities create continuing support needs. Similarly, some sources have defined futility in terms of an inability to exit a hospital or institutional long-term care setting[70] or a patient's reliance on others for activities of daily living.[71] When these definitions are used to deny care to people with disabilities, they are likely to be discriminatory.

Physicians discriminate on the basis of disability when they act based on judgments that a patient's life is not worth living because they have a disability that substantially limits their major life activities and bodily functions, e.g., they may need assistance with the activities of daily living. Denying a medical treatment on that basis if the treatment would be provided to a similarly situated patient without a disability is discrimination on the basis of disability. As discussed earlier in this section, people with disabilities frequently report having a good quality of life notwithstanding their need for assistance in many of the areas cited in the literature as a basis for a futility determination, such as mechanical ventilation, the use of assistive technology, the need for ongoing physical assistance with activities of daily living, mobility impairments, cognitive disability, and other similar factors.[72]

One study of the application of medical futility determinations found that mobility status, and particularly a patient's immobility (defined as being "bed-bound or only able to move from bed to chair"), played a significant role in providers' determinations of qualitative futility — that is, determinations that an intervention will not return or sustain an acceptable quality of life — suggesting that physicians may be more likely to determine that a patient's likely outcome is unacceptably poor and should thus be considered medically futile if the patient has a mobility

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[70] L.J. Schneiderman et al., *Medical Futility*, 118 Handbook of Clinical Neurology 167 (Jan. 2013); *Morata L., supra* note 68.

[71] R. Sibbald, et al., *Perceptions of "Futile Care" Among Caregivers in Intensive Care Units*, 177 CMAJ 1201 (Nov. 2007); Müller R, Kaiser S. et al., *Perceptions of Medical Futility in Clinical Practice–a Qualitative Systematic Review*, 48 J. Critical Care 78 (Dec. 2018).

[72] Gary Albrecht et al., *The Disability Paradox: High Quality of Life Against All Odds*, 48 Soc. Sci. Med. 977 (Apr. 1999); Sonia Frick et al., *Medical Futility: Predicting Outcome of Intensive Care Unit Patients by Nurses and Doctors—a Prospective Comparative Study*, 456 Critical Care Med. (Feb. 2003); Lisbeth Ørtenblad et al., *Users' Experiences With Home Mechanical Ventilation: A Review of Qualitative Studies*, Respiratory Care 1157 (Sep. 2019); Peter A. Ubel et al., *Whose Quality of Life? A Commentary Exploring Discrepancies Between Health State Evaluations of Patients and the General Public*, Quality of Life Research, 599 (Sept. 2003).

impairment.[73] In the same study, one-third of the determinations of futility based on perceptions of a patient's quality of life were made without a discussion with the patient about their perception of their quality of life, a significant problem given that patients frequently report substantially different perceptions of their own quality of life than their physicians assume.[74] A 2016 review found that futility determinations continue to be used by physicians and that such judgments often take into account clinician perceptions of patient quality of life, including dependence on life-sustaining equipment, devices, and medications.[75] This clinical literature supports the view that qualitative futility judgments are used to deny access to life-sustaining care against the wishes of the patient or their authorized representative based on clinician judgments that the life of a given patient with a disability is not worth living.[76]

In a 2015 policy statement from the American Thoracic Society, the American Association for Critical Care Nurses, the American College of Chest Physicians, the European Society for Intensive Care Medicine, and the Society of Critical Care Medicine entitled "Responding to Requests for Potentially Inappropriate Treatments in Intensive Care Units," the term medical futility was defined more narrowly, referring only to "treatments that have no chance of achieving the intended physiologic goal." The policy statement contrasts this narrow definition of futility with broader definitions that include futility based on quality-of-life judgments, stating that "broader definitions of futility are problematic because they often hinge

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[73] J.R. Curtis et al., *Use of the Medical Futility Rationale in Do-Not-Attempt-Resuscitation Orders,* 273 JAMA 124, 125 (1995).
[74] *Id. See also* Gary Albrecht et al., *The Disability Paradox: High Quality of Life Against All Odds*, 48 Soc Sci Med. 977 (Apr. 1999).
[75] Maryam Aghabaray et al., *Medical Futility and its Challenges: A Review Study,* 9 J. of Med. Ethics and History of Med. 11 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5203684/.
[76] Nat'l Council on Disability, Medical Futility and Disability Bias, Part of the Bioethics and Disability Series (2019), https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf; Maryam Aghabaray et al., *Medical Futility and its Challenges: A Review Study,* 9 J. Med. Ethics & History of Med. 11 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5203684/; Dominic J. Wilkinson et al., *Knowing When to Stop: Futility in the Intensive Care Unit*, 2 Current Op. in Anesthesiology 24 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3252683/ (recognizing that judgments concerning qualitative futility led to cessation of care in intensive care units).

on controversial value judgments about quality of life or require a degree of prognostic certainty that is often not attainable."[77]

Disability and civil rights organizations have expressed serious concern regarding disability discrimination in medical futility decisions and other areas regarding denial of life-sustaining care. In a July 10, 2018, letter from 22 disability organizations to OCR and to HHS' Administration for Community Living (ACL), the writers noted that sometimes medical determinations of futility are motivated by inappropriate consideration of cost or value judgments regarding the quality of life of individuals with disabilities seeking life-saving medical treatment rather than an assessment of the individual's ability to benefit from treatment.[78]

On May 6, 2019, a coalition of 17 leading organizations that advocate for or serve individuals with disabilities wrote to OCR, raising selected disability discrimination issues.[79] They pointed to "so-called 'futile care' laws and policies, which allow doctors to deny life-sustaining treatment to individuals with disabilities who want and need it." On September 3, 2019, the American Civil Liberties Union wrote a letter to OCR highlighting that medical futility determinations are an area of concern for discrimination against individuals with disabilities.[80] OCR has also heard from stakeholders that discrimination in medical futility determinations and biased provider counseling remain sources of concern for people with disabilities and may result in the denial of medically effective life-sustaining treatment against the wishes of patients with disabilities and their authorized representatives.[81]

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[77] G.T. Bosslet et al., *An official ATS/AACN/ACCP/ESICM/SCCM Policy Statement: Responding to Requests for Potentially Inappropriate Treatments in Intensive Care Units*, 191 Am. J. Respiratory & Critical Care Med. 1318 (June 2015).
[78] Letter from 22 organizations to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts and Admin. for Cmty. Living (July 10, 2018), on file with OCR.
[79] Letter from Matt Valliere et al., on behalf of 17 organizations, to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts (May 6, 2019), on file with OCR.
[80] *See* Memorandum from Ronald Newman et al., American Civil Liberties Union, to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. (Sep. 3, 2019), on file with OCR.
[81] *See, e.g.* Letter from Nat'l Council on Disability to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (Dec. 11, 2019) (HHS on assisted suicide, medical futility and QALYs reports),

Crisis standards of care.

When an emergency or crisis has a substantial effect on usual health care operations and the level of care that is possible to deliver, hospitals and health systems may adopt crisis standards of care. These policies may authorize or recommend prioritization of scarce resources through means not used outside of crisis conditions. OCR received numerous complaints against states alleging disability discrimination relating to crisis standards of care during the early months of the COVID-19 public health emergency. Federal agencies, advocates, the media, members of the public, and other stakeholders also raised general concerns about the potential for discrimination on the basis of disability in the application of these standards.[82]

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https://ncd.gov/publications/2019/ncd-letter-hhs-3-bioethics-reports; Letter from Nat'l Council on Disability to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (Mar. 18, 2020) (addressing COVID-19, https://ncd.gov/publications/2020/ncd-covid-19-letter-hhs-ocr; Letter from Consortium of Citizens with Disabilities to Sec'y Azar, U.S. Dep't of Health & Hum. Servs. & Roger Severino, Director, OCR,, (Mar. 20, 2020) (addressing COVID-19 and disability discrimination), https://www.c-c-d.org/fichiers/Letter-re-COVID-19-and-Disability-Discrimination-final.pdf; Letter from 27 Members of the House and five Senators to Alex Azar, Sec'y, U.S. Dep't of Health & Hum. Servs. & Bill Barr, Att'y Gen., U.S. Dep't of Justice, (Mar. 25, 2020) (urging HHS, AG to Protect Disability Community), https://chrissmith.house.gov/uploadedfiles/2020-03-25_bipartisan_bicameral_letter_to_hhs_and_doj_-_covid-19_and_disability_discrimination.pdf; Letter from eight senators to Sec'y. Azar, Admin. Verma, and Dir. Severino U.S. Dep't of Health & Hum. Servs (Apr. 10, 2020) (related to Rationing of Care) https://www.warren.senate.gov/imo/media/doc/2020.04.09%20Letter%20to%20HHS%20OCR%20re%20Rationing%20of%20Care.pdf; Letter from eight senators to Sec'y. Azar, Admin. Verma, and Dir. Severino U.S. Dep't of Health & Hum. Servs (Apr. 10, 2020) (related to Rationing of Care) https://www.warren.senate.gov/imo/media/doc/2020.04.09%20Letter%20to%20HHS%20OCR%20re%20Rationing%20of%20Care.pdf; Press Release, Am. Assoc. People with Disabilities, *Over 400 Organizations Urge Department of Health and Human Services to Issue Guidance to Prohibit Discrimination during Medical Rationi*ng (Apr. 17, 2020), https://www.aapd.com/press-releases/civil-rights-letter-covid-medical-rationing/?fbclid=IwAR0uKHogSaq8zknb--gVKL9-oplHXyX1a1lGpyx306WHpr0ZQWoxSk2C1oM; Letter from Autistic Self Advocacy Network, DREDF, Epilepsy Foundation, Justice in Aging and The Arc of the United State to Melanie Fontes Rainer, Acting Dir., OCR and Samuel Bagenstos, General Counsel, U.S. Dep't of Health & Hum. Servs. (Aug. 18, 2022), on file with OCR. *Over 400 Organizations Urge Department of Health and Human Services to Issue Guidance to Prohibit Discrimination during Medical Rationi*ng (Apr. 17, 2020), https://www.aapd.com/press-releases/civil-rights-letter-covid-medical-rationing/?fbclid=IwAR0uKHogSaq8zknb--gVKL9-oplHXyX1a1lGpyx306WHpr0ZQWoxSk2C1oM; Letter from Autistic Self Advocacy Network, DREDF, Epilepsy Foundation, Justice in Aging & The Arc of the United State to Melanie Fontes Rainer, Acting Dir., OCR & Samuel Bagenstos, Gen. Counsel, U.S. Dep't of Health & Hum. Servs. (Aug. 18, 2022), on file with OCR.

[82] On March 25, 2020, a bipartisan bicameral Congressional coalition sent then-Secretary Azar and then-Attorney General Barr a letter asking HHS to notify states of their civil rights obligations as they review and develop their crisis standards of care. *Lankford, Gillibrand Lead Bipartisan, Bicameral Call to Protect Civil Rights for People with Disabilities Amidst COVID-19 Pandemic,* lankford.senate.gov (Mar. 25, 2020). This call followed an earlier letter to OCR by the National Council on Disability asking for

OCR resolved a number of civil rights complaints and provided technical assistance to recipients, including complaints against Tennessee,[83] Utah,[84] North Carolina,[85] several regional consortia of hospital systems within Texas,[86] and Arizona,[87] among others, regarding application of their triage and ventilator allocation guidelines to individuals with disabilities. In February 2022, OCR released a guidance document entitled "Frequently Asked Questions for Providers during the COVID-19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under Section 504 and Section 1557." The document includes a section on crisis standards of care.[88] The guidance was intended to assist states and providers seeking to comply with applicable civil rights laws during the COVID-19 public health emergency. That guidance was specific to the circumstances of the COVID-19 pandemic. The Department proposes to address in this proposed regulation the application of section 504 to the allocation of scarce medical treatments or other resources more generally.

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similar guidance. Letter from Nat'l Council on Disability to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. (Mar. 18, 2020), https://www.ncd.gov/publications/2020/ncd-covid-19-letter-hhs-ocr. Since the NCD letter, a variety of national organizations representing broad-based constituents have reached out to OCR with similar requests, including the Consortium on Citizens with Disabilities, Cystic Fibrosis Research, Inc., the Disability Rights Education and Defense Fund, the National Disability Rights Network, National Right to Life, and others.

[83] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. OCR Resolves Complaint with Tennessee After it Revises its Triage Plans to Protect Against Disability Discrimination (Jun. 26, 2020), https://www.hhs.gov/about/news/2020/06/26/ocr-resolves-complaint-tennessee-after-it-revises-its-triage-plans-protect-against-disability.html.

[84] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., OCR Resolves Complaint with Utah After it Revised Crisis Standards of Care to Protect Against Age and Disability Discrimination (Aug. 20, 2020), https://www.hhs.gov/about/news/2020/08/20/ocr-resolves-complaint-with-utah-after-revised-crisis-standards-of-care-to-protect-against-age-disability-discrimination.html.

[85] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts.,, OCR Provides Technical Assistance to Ensure Crisis Standards of Care Protect Against Age and Disability Discrimination (Jan. 14, 2021), https://www.hhs.gov/about/news/2021/01/14/ocr-provides-technical-assistance-ensure-crisis-standards-of-care-protect-against-age-disability-discrimination.html.

[86] *See id.*

[87] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., OCR Provides Technical Assistance to the State of Arizona to Ensure Crisis Standards of Care Protect Against Age and Disability Discrimination (May 25, 2021), https://www.hhs.gov/about/news/2021/05/25/ocr-provides-technical-assistance-state-arizona-ensure-crisis-standards-care-protect-against-age-disability-discrimination.html.

[88] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID-19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.

The COVID-19 public health emergency has illustrated the importance of regulating in this area, including within the context of crisis standards of care. For example, many crisis standards of care protocols issued prior to and during the COVID-19 public health emergency included categorical exclusions of people with disabilities from access to critical care despite their possessing the potential to benefit from treatment. Recipients may not categorically exclude individuals with disabilities or groups of individuals with disabilities from critical care provided that treatment is not futile for said individuals. Judgments of futility may not be based on criteria otherwise prohibited in this section or elsewhere in section 504.[89] Similarly, many crisis standards of care protocols included other forms of discrimination on the basis of disability that did not involve categorical exclusions, such as prioritizing resources on the basis of patients' anticipated life-expectancy long after their acute care episode. OCR has previously clarified that a patient's likelihood of survival long after hospital discharge is unlikely to be related to the need to make allocation decisions about scarce resources on a temporary basis or the effectiveness of the medical interventions being allocated, and thus should not be used as a prioritization criterion in crisis standards of care protocols.[90]

Participation in clinical research.

Clinical research participation can offer considerable benefit to both the individuals participating within it and society at large. In addition to the intangible benefits of advancing scientific discovery and contributing to the development of potential medical interventions, those participating in clinical research are often able to obtain access to diagnostic, preventative, or therapeutic interventions and treatments that would not otherwise be available to them. Longstanding literature, including a recent report from the National Academies of Science,

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[89] Ari Ne'eman et al., *The Treatment of Disability under Crisis Standards of Care: an Empirical and Normative Analysis of Change over Time during COVID-19*, 45 J. Health Polit. Policy Law 831 (2021), https://doi.org/10.1215/03616878-9156005.

[90] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID-19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.

Engineering and Medicine, has highlighted the problem of the systemic exclusion of women, people of color, and other marginalized groups from clinical research.[91] Such exclusions harm those who are denied the direct benefits of research participation. They also threaten the generalizability of research findings and potentially the reach of subsequent medical innovations for those groups who are excluded.

Recent research has documented that people with disabilities also face systemic and unnecessary exclusion from clinical research.[92] Although study exclusions can be justifiable based on the nature of the clinical research being conducted, exclusions can also be the result of a failure to take into account the availability of reasonable modifications to a study protocol that might permit the participation of people with disabilities. They also may be the result of overly broad exclusion criteria rooted in stereotypes, bias, or misunderstandings of the capabilities of people with specific disabilities. Investigators may have valid reasons for excluding people whose disabilities are medically incompatible with the study being conducted. When evaluating potential study participants on an individualized basis, clinical judgment may be necessary on the part of the investigator to assess the appropriateness of study participation. However, it is important that study exclusion criteria be written in a way that does not unnecessarily screen out people with disabilities whose research participation would not alter the intended purpose of the program of clinical research being undertaken.

Similarly, overly broad exclusion criteria may be motivated by concerns regarding the ability of potential study participants with disabilities to perform research-related tasks that can be reasonably modified, such as filling out tests or responding to instructions from research

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[91] Nat'l Acad. of Science, Engineering & Med., *Improving Representation in Clinical Trials and Research: Building Research Equity for Women and Underrepresented Groups*, The Nat'l Acad. Press (2022), https://doi.org/10.17226/26479.

[92] Willyanne DeCormier Plosky et al., *Excluding People with Disabilities from Clinical Research: Eligibility Criteria Lack Clarity and Justification,*41 Health Aff. 10 (Jan. 2022). https://doi.org/10.1377/hlthaff.2022.00520; Katie McDonald et al., *Eligibility criteria in NIH-funded Clinical Trials: Can Adults with Intellectual Disability Get In?* 15 Disability & Health (2022), https://doi.org/10.1016/j.dhjo.2022.101368.

personnel, or by the failure to take into account the recipient's obligation to provide for effective communication with persons who are deaf, have vision loss, or otherwise need alternative forms of communication.

Nondiscriminatory criteria.

Section 84.4(b)(4), while being revised in the amendment segment of this proposed rule, results in the text being redesignated as § 84.68(b)(3), prohibits the use of discriminatory methods of administration, criteria, and protocols, including discrimination in the allocation of scarce resources. Resources necessary for medical treatment are sometimes scarce for a variety of reasons. A therapeutic agent or vaccine may be newly developed, and production may not yet have caught up to the level of demand for it. More generally, supply chain issues may prevent drugs, devices, and equipment from getting to places where they are needed. And, as was evidenced in the response to COVID-19, medical emergencies may overtax hospitals and the larger health care system. In circumstances like these, recipients may find it necessary to create a protocol or methodology for allocating those treatments and resources.

This section does not require hospitals or the broader health care system to allocate resources in any specific way; it just prohibits them from using criteria that subject individuals with disabilities to discrimination on the basis of disability. For example, as OCR has previously indicated in guidance,[93] practices or protocols in which recipients deny medical resources based on the projected length or scope of resources needed, and thus deny care to certain individuals with a disability because they are concerned that treating a patient with a disability may require more of a particular resource than treating individuals without a disability, may discriminate against persons with disabilities. Similarly, if recipients deny a patient with disabilities access to resources because of forecasts that the person may not live as long as an individual without a

[93] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID-19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.

disability after treatment, this may also discriminate against persons with disabilities.[94] The further in the future a provider looks to establish a patient survival prediction, the less likely that prediction will be related to the medical effectiveness of the resources being rationed during the temporary shortage, and doing so may screen out people with disabilities without being necessary to operate a program of critical care.[95]

Certain criteria for allocating scarce medical treatments may discriminate against people with disabilities even if they rely on predictions of short-term mortality. For example, throughout the COVID-19 pandemic, many states and hospitals indicated they planned to make use of the Sequential Organ Failure Assessment (SOFA) to make judgments about short-term life expectancy in the event that crisis standards of care were activated. The SOFA is a composite instrument, incorporating scores from multiple other instruments into a composite score that has been used within crisis standards of care allocation to predict short-term life expectancy. Among the component instruments of the SOFA is the Glasgow Coma Scale (GCS). Application of the GCS, a tool designed to measure the severity of acute brain injuries, may not yield a valid result (i.e., it may not correspond to actual mortality risk) when applied to patients with underlying disabilities that impact speech or motor movement issues. The GCS assigns a more severe score to patients who cannot articulate intelligible words or who cannot obey commands for movement. However, many disabilities result in these same attributes – such as autism and cerebral palsy – but do not contribute to short-term mortality. As a result, the use of the SOFA with patients with such underlying disabilities may lead to an unduly pessimistic prediction of short-term survival, giving such patients lower priority in accessing scarce critical care resources.

As the American Academy of Developmental Medicine and Dentistry (AADMD) notes, "in the field of developmental medicine, there are patients who, at their natural baseline often cannot hear a command, move their limbs or communicate verbally. Given the combination of

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[94] *See id.* at Question 7.
[95] *Id.*

characteristics inherent in the population of people with intellectual and developmental disabilities, it would be possible to use 'objective' data surrounding the SOFA score to predict a significantly higher mortality risk than is really the case."[96] Similar impacts may exist for other types of disabilities and other prognostic scoring tools, measures, diagnostic instruments, and methodologies for assessment or the allocation of scarce medical resources.

The general requirement that recipients must provide reasonable modifications when necessary to avoid discrimination that appears in proposed § 84.68(b)(7) applies in circumstances of scarce resources, just as it does elsewhere. Section 504 might, for example, require reasonable modifications in the administration of assessment tools such as the SOFA and the GCS (which may be used within a larger scoring rubric for the allocation of scarce resources) to ensure that the tools measure accurately what they are intended to measure in people with disabilities. For example, a scoring tool may assess the inability of a person with cerebral palsy to articulate words, but it would be discriminatory to use that determination to indicate an actual mortality risk that is not implied by that disability. Similarly, some crisis standards of care protocol have used "therapeutic trials" involving the provision of mechanical ventilation for a set period of time to evaluate the effectiveness of ventilator treatment for a particular patient. However, patients with particular types of disabilities may take longer to respond to treatment, and the test period may need to be longer to accurately evaluate the effectiveness of mechanical ventilation for these patients. In this situation, a recipient may need to allow an individual with a disability some additional time on a ventilator to assess likely clinical improvement, unless doing so would constitute a fundamental alteration of the ventilator trial.[97]

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[96] Am. Acad. of Dev. Med. & Dentistry, People with Intellectual and Developmental Disabilities and the Allocation of Ventilators During the COVID-19 Pandemic (Apr. 2020), https://static1.squarespace.com/static/5cf7d27396d7760001307a44/t/5ecfb6fff13530766aeae51a/1590671105171/Ventilator+-+Policy+Statement+w+Addendum.pdf.

[97] U.S. Dep't of Health & Human Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID-19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.

§ 84.56(a) Discrimination prohibited.

Proposed § 84.56(a) confirms the basic requirement that no qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in medical treatment under any program or activity that receives Federal financial assistance, including in the allocation or withdrawal of any good, benefit, or service. Section 84.56(a) makes specific the general prohibition of disability-based discrimination proposed in § 84.68(a), as well as the general prohibition that applies to health, welfare, and other social services in § 84.52(a), and underscores that those prohibitions broadly apply to medical treatment decisions made by recipients.

For example, a patient with HIV seeks surgery for an orthopedic condition. A recipient refuses to provide treatment because of a belief that individuals with HIV are responsible for their condition and should thus not receive costly medical resources. This rationale is discriminatory on the basis of disability in this context.[98] Similarly, this paragraph would cover situations where a recipient declines to treat a person with certain disabilities, including psychiatric, intellectual, and developmental disabilities because the treating professional is uncomfortable providing care based on stereotypical beliefs about persons with that disability, or where the recipient declines to treat persons with a substance use disorder based on a belief that these persons are less likely to comply with treatment protocols.

Scope of discrimination prohibited.

The text of section 504 is clear and broad. Section 504 prohibits discrimination on the basis of disability in programs or activities receiving Federal financial assistance. Section 504's "program or activity" language provides no basis for excluding *some* activities in which

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[98] *See Bragdon v. Abbott,* 524 U.S. 624 (1998). HIV is contained in the list of physical or mental impairments in the ADA regulations and it substantially limits major life activities because it affects the immune system and the reproductive system. 35 CFR 35.108. Similarly, under the section 504 regulations that mirror the ADA language, HIV will virtually always be found to be an impairment that substantially limits a major life activity. HIV infection typically leads to a determination of disability. In addition, the patient in this example would be protected under the "regarded as" provision based on the recipient's action and justification.

recipients engage — such as medical treatment — from the statute's facially broad coverage. A recipient's failure to provide treatment to an individual with disabilities who meets all qualifications for the medical treatment results in a denial of health care to a person with disabilities and, barring any applicable limitation, constitutes discrimination in violation of section 504.

The intended breadth of section 504 is reflected in the Civil Rights Restoration Act (CRRA), which made clear that section 504 applies to "all the operations of an entity that receives Federal financial assistance."[99] As amended by the CRRA, section 504's "program or activity" language provides no basis for excluding some actions in which recipients engage – such as medical treatment – from the statute's facially broad coverage. In addition, in interpreting the ADA, which is modeled on section 504—the Supreme Court has recognized the law's broad coverage in accordance with its language. In particular, in *Pennsylvania Department of Corrections v. Yeskey*, the Supreme Court refused to carve prison conditions cases out of title II's coverage.[100] When the state argued that prison conditions were significantly different than the circumstances that Congress sought to address in the statute, the Court responded, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[101]

Indeed, the Supreme Court has itself applied both section 504 and the ADA to medical treatment decisions. In *Bowen v. American Hospital Association*, seven justices considered on the merits the argument that section 504 prohibited the withholding of medical care; the plurality found no violation of section 504 on the particular facts of that case because the lack of consent for treatment made the infants at issue not "otherwise qualified."[102] And in *Bragdon v. Abbott*, the Court held that title III of the ADA applied to a dentist's refusal to fill the cavity of a patient

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[99] 29 U.S.C. 794(b).
[100] 524 U.S. 206 (1998).
[101] *Id.* at 212 (internal quotation marks omitted).
[102] 476 U.S. 610, 624 (1986).

with HIV, and that the dentist could defeat the lawsuit only if he could show that treating the patient presented "significant health and safety risks" based "on medical or other objective evidence."[103]

Some lower Federal courts have questioned the manner and reach of section 504 as applied to medical treatment decisions. In *United States v. University Hospital,* the Second Circuit considered the application of section 504 to infants born with multiple birth defects.[104] The court stated that the law's term "otherwise qualified" could not ordinarily be applied "in the comparatively fluid context of medical treatment decisions without distorting its plain meaning."[105] Some courts have read this language as broadly suggesting that section 504 does not apply to medical treatment decisions. [106] But that is not the fairest reading of *University Hospital*. The Second Circuit there principally relied on the argument that it will often be difficult to identify discrimination when an individual challenges a covered entity's treatment of the underlying disability itself.[107] The lower court cases following *University Hospital* seem to draw the same line.[108]

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[103] 524 U.S. 624, 649 (1998).
[104] 729 F.2d 144 (2d Cir. 1984).
[105] *Id.* at 156. The lower court cases following *University Hospital* have relied on *University Hospital*'s reasoning: "Where the handicapping condition is related to the conditions to be treated, it will rarely, if ever, be possible to say . . . that a particular decision was 'discriminatory.'" *Univ. Hosp.*at 157. In *Johnson v. Thompson,* one of *University Hospital*'s progeny, the court, addressing potential medical interventions for a newborn infant with Spina Bifida, noted that situations exist where individuals with disabilities could be considered "otherwise qualified" even under *University Hospital'*s view of "otherwise qualified." *Johnson v. Thompson*, 971 F.2d 1487,1493 (10th Cir. 1992).
[106] *See, e.g.*, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1294 (11th Cir. 2005) ("The Rehab Act, like the ADA, was never intended to apply to decisions involving … medical treatment.").
[107] *United States v. Univ. Hosp.*, 729 F.3d at 157 ("Where the [disabling] condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory'.").
[108] *See Cushing v. Moore*, 970 F.2d 1103, 1109 (2d Cir. 1992) ("[A]s we have observed in the past, we must be careful in applying § 504's 'otherwise qualified' language to programs where a patient's [disability] gives rise to the need for the services in question."); *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1494 n. 3 (10th Cir. 1992) (following *University Hospital* but recognizing that section 504 might be violated where "the [disability] that forms the basis of the section 504 discrimination bears no relation to the medical treatment sought but denied"); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1294 (11th Cir. 2005) (following *University Hospital* and *Johnson* based on the conclusion that the plaintiff sought treatment to alleviate the very condition that constituted a disability).

Consistent with what we believe to be the correct reading of the statute and the case law, we propose in this rule to draw 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 condition or symptom. Compare proposed § 84.56(b)(1) (providing specific, albeit non-exhaustive, circumstances in which forbidden discrimination exists whether or not the individual seeks treatment for a condition or symptom that is separately diagnosable from the underlying disability) with proposed § 84.56(b)(2) (providing a broader general rule of nondiscrimination for cases in which a recipient uses the underlying disability as the basis for discriminating against an individual who seeks treatment for a separately diagnosable symptom or medical condition).

As discussed below, with respect to separately diagnosable conditions, the proposed rule does not require that the condition be entirely unrelated to the underlying disability; it is instead intended to reach circumstances in which 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 for treatment purposes. That a separately diagnosable heart condition is related to an underlying disability in some manner is irrelevant under the proposed rule if the underlying disability makes no difference to the "clinically appropriate treatment" for the heart condition. This approach is consistent with the mandate that persons with disabilities be accorded equal treatment under section 504.

In circumstances in which an individual is seeking treatment for a condition that is not "separately diagnosable" under proposed § 84.56(b)(2), the rule's application is relatively narrow but nonetheless is critical to prevent prohibited discrimination. Consistent with proposed § 84.56(c)(1)(ii), the rule would not apply if the refusal to treat is in circumstances in which the "recipient typically declines to provide the treatment to any individual, or reasonably determines based on current medical knowledge or the best available objective evidence that such medical treatment is not clinically appropriate for a particular individual." The rule, however, specifies in

proposed § 84.56(c)(1)(ii) that providers do not make legitimate medical judgments when they base decisions on the criteria contained in § 84.56(b)(1)(i)-(iii): "[b]ias or stereotypes about a patient's disability," "[j]udgments that the individual will be a burden on others," or "[a] belief that the life of a person with a disability has lesser value than the life of a person without a disability, or that life with a disability is not worth living."

The recognition of the need to defer to reasonable medical judgment but to prohibit biased decision-making is consistent with *University Hospital* and other lower court cases. Even assuming those cases were correctly decided on their facts, none of them suggest that bias is permissible under section 504 simply because there is a relationship between a sought-after medical treatment and an underlying disability.[109] In such circumstances, the rule ensures that medical judgment is in fact being exercised with respect to the person with a disability's qualification for that treatment. Lower courts have applied section 504 to medical treatment decisions consistent with this approach.[110]

Proposed § 84.56(b) elaborates on the basic requirement in § 84.56(a) by providing a non-exhaustive set of examples of conduct that would violate that requirement.

§ 84.56(b)(1) Denial of medical treatment.

Proposed § 84.56(b)(1) addresses denial of treatment. It makes explicit that a recipient is prohibited from denying or limiting medical treatment to a qualified individual with a disability when the denial is based on (i) bias or stereotypes about a patient's disability; (ii) judgments that an individual will be a burden on others due to their disability, including, but not limited to, caregivers, family, or society; 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. This paragraph reflects a straightforward application of the prohibition on discriminating against

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[109] *See, e.g.*, *Lesley v. Chie,* 250 F. 3d 47, 55 (1st Cir. 2001) (finding that, for example, "a plaintiff may argue that her physician's decision was so unreasonable — in the sense of being arbitrary and capricious — as to imply that it was pretext for some discriminatory motive…").

[110] *Id.*; *see also Glanz v. Vernick*, 756 F. Supp. 632, 638 (D. Mass. 1991) ("A strict rule of deference would enable doctors to offer merely pretextual medical opinions to cover up discriminatory decisions.").

qualified individuals with disabilities on the basis of a disability. Denying, limiting, or withholding treatment for any of the prohibited reasons is discrimination on the basis of disability because the decision is driven by the recipient's perception of disability rather than by consideration of effectiveness of the treatment or other legitimate reasons.

As defined in the proposed rule at § 84.10, a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a recipient." Proposed § 84.56(b)(1) clarifies that bias, stereotypes, judgments about burden on others, and beliefs that disabled lives have lesser value or worth or are not worth living are not permissible "essential" eligibility requirements for medical treatment. As noted by the Supreme Court in *Alexander v. Choate*, to treat such discriminatory factors as "qualifications" under section 504 would impermissibly allow the "benefit" at issue to "be defined in a way that effectively denies qualified individuals [with disabilities] the meaningful access to which they are entitled."[111]

In *School Board of Nassau County v. Arline*, the Supreme Court said that in section 504, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as [disabling] as are the physical limitations that flow from actual impairment."[112] The impermissible factors set forth in the proposed rule exemplify the harmful impact of the myths, fears, and stereotypes that Congress targeted in the statute. As discussed above, there is significant evidence that assessments of the impact of a disability on quality of life may lead a provider to make medical decisions that reflect myths, fears, and stereotypes, and tend to screen out individuals with disabilities or classes of individuals with disabilities from fully and equally enjoying the benefits of medical treatment.

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[111] 469 U.S. 287, 301 (1985).
[112] 480 U.S. 273, 284 (1987).

Proposed paragraph 84.56(b)(1)(i) confirms the prohibition against denying or limiting medical treatment based on bias or stereotypes. For example, refusing to provide a person with an Opioid Use Disorder (OUD) a referral for Medications for Opioid Use Disorder (MOUD) due to a provider's belief that persons with OUD will not adhere to treatment protocols would be prohibited under this paragraph.

Proposed paragraph (b)(1)(ii) prohibits denying or limiting medical treatment based on judgments that an individual will be a burden on others due to their disability, including but not limited to caregivers, family, or society. For example, § 84.56(b)(1)(ii) would be violated if an individual with a disability needed a medically indicated surgical procedure but it was denied because of a recipient's judgment that the postoperative care the patient would need after the surgery because of the patient's disability would be an unfair burden on the individual's caregivers, family, or society.

Proposed paragraph (b)(1)(iii) prohibits denying or limiting medical treatment based on the provider's belief that the life of a person with a disability has a lesser value than a person without a disability, or that life with a disability is not worth living. For example, determinations that an individual with a disability's life is not worth living because of dependence on others for support or need for mechanical ventilation, intensive care nursing, tracheotomy, or other ongoing medical care rest on judgments that do not properly relate to the individual's "qualification" for medical treatment under section 504. Qualification for the service of life-sustaining treatment must be based on whether the treatment would be effective for the medical condition it would be treating, not broader societal judgments as to the relative value of a person's life due to their disability or whether life with a disability is worth living.

Many people with disabilities require these kinds of supports, often on a long-term basis, to survive and thrive. With such supports, individuals with disabilities can and do live many years, enjoying meaningful social, family, and professional relationships. By denying patients with disabilities the opportunity to make their own decisions regarding whether to receive or

continue medically effective life-sustaining care, recipients override patient autonomy in favor of their own beliefs regarding the value of the lives of individuals with disabilities who are dependent on others.

For example, a patient with Alzheimer's disease covered as a disability under section 504 has developed pneumonia and is in need of a ventilator to provide assistance breathing. His husband has requested that physicians start the patient on a ventilator, consistent with what the patient's husband believes would be his spouse's wishes. The attending physician, who is a recipient of Federal financial assistance from HHS and works in a hospital that is also a recipient, tells the patient and his husband that the patient should not receive such support, given the poor quality of life the physician believes the patient experiences, because the latter has Alzheimer's disease. This situation occurs even though the attending physician normally would start ventilator support for a patient with pneumonia who needs assistance breathing. The physician believes that the patient's Alzheimer's disease renders the continuation of the patient's life to have no benefit, and therefore the physician declines to put the patient on the ventilator. The physician has denied life-sustaining care for the patient based on judgments that the patient's quality of life renders continued life with a disability not worth living and has failed to provide care that he would have provided to an individual without a disability. In denying access to ventilator support, the doctor has violated proposed § 84.56(b)(1)(iii). If the physician also denied the ventilator support because of a perception that it would be a burden for his husband to care for the patient, the physician would also have violated § 84.56(b)(1)(ii).

As another example, a teenage boy with intellectual and developmental disabilities develops periodic treatable respiratory infections and pneumonia due to a chronic condition. Judging his quality of life to be poor due to cognitive and communication disabilities, his provider decides to withhold antibiotics and other medical care when the boy becomes ill. Instead, his provider – who is a recipient of Federal financial assistance – refers the boy to hospice care and declines to provide life-sustaining treatment. The provider makes this decision

not because she anticipates that care would be ineffective, but because she determines that such care would be effective at prolonging the patient's life and that the patient's life would not be worth living on the basis of the patient's disability. Because the provider has withheld life-sustaining care based on the judgment that the patient's life as an individual with a disability is not worth living, the boy is a qualified individual who has experienced discrimination on the basis of disability in violation of § 84.56(b)(1)(iii).

The Department notes that this provision does not require clinicians or other health care providers to offer medical treatment that is outside their scope of practice. That a treatment is outside the typical scope of practice of a given provider is a legitimate nondiscriminatory reason for the denial or limitation of treatment. However, if the provider would typically provide a referral to another provider for whom a given treatment is within their scope of practice, a refusal to provide such a referral on the basis of disability would likely constitute a violation of this paragraph.

§ 84.56(b)(2) Denial of treatment for a separate symptom or condition.

Proposed § 84.56(b)(2) addresses situations where a person with a disability seeks or consents to treatment for a separately diagnosable symptom or medical condition, whether or not the symptom or condition is itself a disability or is causally connected to the disability that is the basis for coverage under section 504. (In this proposed rule, we use the phrase "underlying disability" to refer to a disability that triggers coverage under section 504 and that is different than the separately diagnosable symptom or medical condition for which the patient seeks treatment.) Often individuals with a disability will seek treatment for a separately diagnosable symptom or medical condition. For example, a person with Down syndrome might seek a heart transplant to address a heart condition; a person with spinal muscular atrophy might seek treatment for a severe case of COVID-19; or a person with a spinal cord injury might seek treatment for depression with suicidal ideation. The section makes clear that a recipient may not deny or limit clinically appropriate treatment if it would be offered to a similarly situated

individual without an underlying disability, including based on predictions about the long-term impact of the underlying disability on the individual's life expectancy.

Violations of § 84.56(b)(1)(iii) may also violate § 84.56(b)(2). For example, as described above in the discussion of § 84.56(b)(1)(iii), a recipient who denies a ventilator to a patient with severe Alzheimer's disease who has pneumonia because of a belief that the patient's life is not worth living based on their disability has violated § 84.56(b)(1)(iii) if the ventilator would have been offered to a similarly situated individual without an underlying disability, in this case, Alzheimer's disease. In addition, the recipient has also violated § 84.56(b)(2) because of the denial of treatment of a separate condition.

As another example described above in the discussion of § 84.56(b)(1)(iii), a recipient who withholds antibiotics and other medical care from a teenage boy with intellectual and developmental disabilities because of a belief that the boy's life has a lesser value than the life of a person without a disability violates § 84.56(b)(1)(iii) when the antibiotics and medical care would have been offered to a similarly situated individual without an underlying disability. In this situation, § 84.56(b)(2) has also been violated because of the failure to treat a separate condition.

For purposes of proposed paragraph (b)(2), it does not matter whether the symptom or condition for which the individual is seeking treatment is also a disability under section 504. Heart conditions, COVID-19, and depression could all meet the statute's definition of disability in appropriate circumstances, but people who experience discriminatory treatment for these conditions based on an underlying disability are entitled to the protections of this paragraph. Nor does it matter for these purposes whether the condition for which the individual is seeking treatment is in some sense causally related to the underlying disability if the decision to refuse treatment would not be made as to similarly situated individuals without the disability. Individuals with Down syndrome are more likely to experience heart conditions, and a spinal cord injury may be the event that triggers an individual's depression. But a refusal to treat a heart

condition because of a judgment regarding the disability of Down syndrome, or a refusal to treat depression because of a patient's underlying spinal cord injury, will violate this paragraph if it is made on the basis of the prohibited grounds.

- *Medical Treatment Question 1: We recognize that the line between disabilities may in some cases be more difficult to draw than in these examples, and we welcome comment on the best way of articulating the relevant distinctions.*

Similarly, a symptom or condition that arises from a common underlying biological mechanism as a patient's underlying disability, such as Kaposi's sarcoma in a person with AIDS, is a separately diagnosable symptom or condition for the purposes of this section. The crucial point is that where a qualified individual or their authorized representative seeks or consents to treatment for a separately diagnosable symptom or condition, a recipient may not deny or limit that treatment if it would offer that treatment to a similarly situated person without the underlying disability. In each of these cases, the recipient will have discriminated against a qualified individual with a disability on the basis of disability in violation of proposed §84.56(b)(2).

These obligations must be interpreted in light of the rule of construction in proposed §84.56(c) on professional medical judgment, which indicates that nothing in this section 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. For example, under this rule of construction, a recipient may take into account a patient's underlying disability to deny a medical treatment based on their judgment that the treatment would not be effective at accomplishing its intended effect or because an alternative course of treatment to the one that would typically be provided to patients without disabilities would be more likely to be successful in light of a patient's disability.

§ 84.56 (b)(3) Provision of medical treatment.

Proposed § 84.56(b)(3) addresses the discriminatory provision of medical treatment. It states that if a medical professional provides an individual with a disability different treatment than the professional would provide an individual without a disability seeking assistance with the same condition — and there is nothing about the disability that impairs the effectiveness, or ease of administration of the treatment itself or has a medical effect on the condition to which the treatment is directed — proposed § 84.56(b)(3) has been violated. For example, if a woman with an intellectual disability seeks a prescription for contraception but her provider, due to a belief that any children she may have are likely to have an intellectual disability, offers only surgical sterilization, the recipient has violated proposed § 84.56(b)(3) if the provider prescribes contraception for her other patients without disabilities. However, proposed § 84.56(b)(3) does not prohibit a recipient from providing services or equipment to an individual with an underlying disability that are different than that provided to others with the same condition when necessary to provide an effective service or treatment to the individual with a disability. Where, for example, an individual recovering from a foot or leg injury or surgery has an anatomical loss of an arm and is unable to use crutches as a result, it would not violate § 84.56(b)(3) to recommend or prescribe a knee scooter to the patient even though the recipient recommends crutches to most patients in this situation.

Where an underlying disability would interfere with the efficacy of a particular treatment, a recipient could provide a person with that disability a different treatment than it would provide to similarly situated nondisabled individuals. For example, an underlying health condition that itself is a disability might require an individual to take a medication that is contraindicated with a particularly effective antiviral drug. If that individual contracts COVID-19, it would not violate this section for a recipient to offer a different treatment than the contraindicated antiviral drug, even if it is generally less effective. Because the underlying disability would directly inhibit the utility of the generally more effective drug, the individual would not be qualified for that treatment under this part.

The Department proposes this provision in part to address discriminatory conduct based on the belief that persons with disabilities are entitled to less bodily autonomy than nondisabled persons— a belief that underpins the history of forced sterilization provided as "medical treatment" for individuals with intellectual, mental health, and developmental disabilities. In the twentieth century, over thirty states allowed and funded involuntary sterilization of disabled women and men with disabilities. In 1927, the Supreme Court sanctioned such sterilization programs in *Buck v. Bell*, ruling that "society can prevent those who are manifestly unfit from continuing their kind ... Three generations of imbeciles are enough."[113] States continued to use Federal funds for forced sterilizations of institutionalized individuals until 1978, when HEW published regulations requiring the "institutionalized" individual's informed consent to the procedure.

Yet, many individuals who were subjected to such involuntary sterilizations experienced and continue to experience trauma and grief because of these State-sanctioned practices. In June 2022, the *New York Times* ran a story about the lingering trauma for three Black sisters with disabilities who were sterilized in 1973 without their or their parents' informed consent because clinic workers judged them "intellectually inferior."[114] Three states – Virginia, North Carolina, and California – offer compensation to victims of State-sanctioned programs.[115]

While State-run sterilization programs have ended, involuntary sterilization continues today. According to a 2021 report, fourteen states allow a judge to order the sterilization of a person with a disability who is not under guardianship.[116] Although specific cases are difficult to identify due to the secrecy surrounding the procedure, the Department believes that this is an

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[113] *Buck v. Bell,* 274 U.S. 200, 207 (1927).
[114] Linda Villarosa, "*The Long Shadow of Eugenics in America,*" N.Y. Times (Jun. 8, 2022).
[115] *Id.*
[116] Nat'l Women Law Ctr., *Forced Sterilization of Disabled People in the United States*, 56 (Jan. 2022), https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2021.pdf and the related Appendix, https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2022_Appendix.pdf (referencing laws and court decisions in California, Connecticut, Delaware, Georgia, Idaho, Indiana, Maine, Maryland, New Jersey, New York, North Dakota, South Carolina, and Vermont).

important area in which to regulate in order to protect the rights of persons with disabilities.[117] The proposed rule would bar recipients from performing sterilization on the basis of disability to an individual with a disability where they would not provide the same treatment to an individual without a disability, unless it has a medical effect on the condition to which the treatment is directed.[118]

- *Medical Treatment Question 2: The Department seeks comment on other examples of the discriminatory provision of medical treatment to people with disabilities.*

§ 84.56(c) Construction.

Proposed §84.56(c) sets forth a series of principles guiding how § 84.56 should be interpreted.

§ 84.56(c)(1) Professional judgment in treatment.

Proposed § 84.56(c)(1) specifically addresses professional judgment in treatment and its relationship to the proposed nondiscrimination provisions regarding medical treatment. Paragraph (c)(1)(i) provides that nothing in this section 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. For example, it would not violate § 84.56(c)(1)(i) if a recipient declines to provide chemotherapy to a patient with a disability based on a judgment that it would not extend the patient's life or mitigate the symptoms of the patient's cancer. Similarly, a provider who refuses to perform cardiopulmonary resuscitation on a patient with signs of irreversible death or a clinician who refuses to administer antifungals as a treatment for a heart attack would not be in violation of this section where such interventions would not accomplish the intended goal of treatment. Nor would a recipient be in violation of this section if it determined that a patient with a disability

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[117] *Id.* at 32.

[118] This provision would not prohibit medical treatment where a person with a disability seeks or consents to sterilization.

would be exceedingly unlikely to survive cardiac surgery and thus judged that it would not be medically appropriate to provide such treatment.

Similarly, a recipient would not be in violation of this section if it determined that an alternative course of treatment to the one that would typically be provided to patients without disabilities would be more likely to be successful in light of a patient's disability. For example, should a recipient determine that the use of an older medication has a lower risk of side effects because of interactions with a patient's disability as compared to a newer medication that is now commonly prescribed, using the older medication would not constitute an impermissible limitation on access to medical treatment. These examples, which are based on individualized, fact-specific inquiries, are legitimate nondiscriminatory reasons for denying or limiting treatment and remain within the appropriate province of medical judgment.

We note that proposed §84.68(b)(8) permits the imposition of eligibility criteria that screen out people with disabilities from receiving the benefit of medical care only when they are shown to be necessary for the provision of this aid, benefit, or service. The rule does nothing to disturb the ability of physicians to exercise their professional judgment based on the current medical knowledge or the best available objective evidence that a treatment is or is not clinically appropriate.

Paragraph (c)(1)(ii) states that circumstances in which the denial of treatment is permitted include those in which the recipient typically declines to provide the treatment to any individual, and those in which the recipient reasonably determines based on current medical knowledge or the best available objective evidence that such medical treatment is not clinically appropriate for a particular individual. The regulatory text makes clear that the criteria prohibited in paragraphs (b)(1)(i)-(iii) are not legitimate nondiscriminatory reasons for denying or limiting medical treatment and may not be a basis for a determination that an individual is not qualified for the treatment or that a treatment is not clinically appropriate for a particular individual. Recipients may not judge clinical appropriateness based on bias or stereotypes about a patient's disability;

judgments that the individual will be a burden on others due to their disability, including, but not limited to, caregivers, family, or society; or a provider's belief that the life of a person with a disability has lesser value than the life of a person without a disability, or that life with a disability is not worth living.

A provider might also decline to provide a service to any individual if it is outside their scope of practice. For example, an orthopedic surgeon might decline to provide a treatment to children, including children with disabilities, if pediatric surgery is not within her scope of service. However, the provider could not refuse to offer pediatric referrals for children with disabilities when it typically refers children without disabilities to appropriate care.

As another example, assume that a recipient decides to deny a person with an intellectual disability who uses mechanical ventilation access to sought-after life-saving care on the grounds that they believe the presence of a cognitive disability and a need for breathing support together render the patient's quality of life so poor as to render continued life of no benefit to them and not worth living (despite the patient themself or their authorized representative seeking life-saving treatment). This is not a permissible basis for determining that a disability has rendered an individual with a disability unqualified for treatment. Nor is this a legitimate nondiscriminatory reason for denying or limiting a health service on the basis of disability, as the denial is motivated by the provider's belief that a person with a disability has lesser value than a person without a disability and that life with a disability is not worth living, both of which are prohibited under paragraph (b)(1)(iii).

In contrast, a recipient could deny medical treatment to a person with a disability on the grounds that it is not clinically appropriate if it poses substantial added risk to the patient that cannot be ameliorated. For example, for a person with a disability at much higher risk of death from a potential surgery, a recipient's decision not to provide such a surgical intervention in light of that heightened mortality risk would be a legitimate, nondiscriminatory reason to deny the surgery in question even if it was sought by a patient with a disability.

Similarly, if a recipient declines to provide a treatment on the grounds that existing evidence only supports its medical effectiveness for a particular subpopulation that the patient with a disability seeking treatment is not a part of, this might be a legitimate nondiscriminatory reason for denying access to the treatment under some circumstances, provided the recipient generally denies such or similar treatments to patient populations for whom the evidentiary basis is similarly lacking or inconclusive. However, if a recipient generally provides such or similar treatments even in the presence of a similar evidentiary record for their effectiveness (or lack of effectiveness), denying such treatments to a patient with a disability on those grounds may not be a legitimate nondiscriminatory reason.

The Department notes that many types of treatment, such as pharmacological interventions, are often studied on populations that are not completely representative of the general patient population, but these treatments nonetheless are routinely prescribed to patient populations with conditions excluded from participation in the clinical trial without further research. In those circumstances, it would not necessarily be a legitimate nondiscriminatory reason to deny a patient with a disability access to a broadly prescribed heart medication simply because patients with her disability were excluded from the clinical trial that established the medication's effectiveness. However, should a recipient believe based on current medical knowledge or the best available objective evidence that the heart medication is likely to be ineffective, have dangerous side effects, or otherwise be harmful to patients with that disability, this would constitute a legitimate nondiscriminatory reason to deny access. Physicians have substantial discretion to assess mixed or inconclusive evidence regarding effectiveness according to their own judgment.

- *Medical Treatment Question 3: The Department seeks comment, including from health care professionals and people with disabilities, on the examples described in this section, whether additional examples are needed, and on the appropriate balance between prohibiting discriminatory conduct and ensuring legitimate professional judgments.*

§ 84.56(c)(2) Consent.

Proposed § 84.56(c)(2) addresses consent. Section 84.56(c)(2)(i) makes clear that this section does not require a recipient to provide medical treatment to an individual where the individual, or the person legally authorized to make medical decisions on behalf of that individual, does not consent to that treatment. This subsection thus adopts the plurality's holding in *Bowen v. American Hospital Association* that the denial of treatment to an individual because of a lack of consent to treatment "cannot violate § 504."[119] (The Department conceded that point during the *Bowen* litigation.[120]) In such a case, the *Bowen* plurality said, the lack of consent means that the individual is not "qualified" for treatment — because treatment without consent violates deep-rooted common-law principles endorsed in every State — and the denial of treatment would be based on the lack of consent, not on disability.[121]

Another issue arising from the *Bowen* litigation is the extent to which the Department is able to issue regulations concerning newborn infants. The district court in *Bowen* had "declared invalid and enjoined '[a]ny other actions' of the Secretary 'to regulate treatment involving impaired newborn infants taken under authority of Section 504, including currently pending investigation and other enforcement actions.'"[122] But the *Bowen* plurality specifically rejected any reading of that injunction as barring "all possible regulatory and investigative activity that might involve the provision of health care to handicapped infants."[123] Instead, the four-justice plurality read the injunction as limited to cases in which the Department sought to require medical treatment despite a lack of parental consent.[124] Indeed, the plurality specifically concluded "that 'handicapped individual' as used in § 504 includes an infant who is born with a congenital defect," and that the statute protects qualified infants against disability-based

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[119] 476 U.S. 610, 630 (1986).
[120] *Id.*
[121] *See id.*
[122] *Id.* at 626 n.11 (plurality opinion) (quoting the district court's injunction).
[123] *Id.*
[124] *See id.*

discrimination in medical services.[125] The three *Bowen* dissenters rejected the plurality's narrow reading of the injunction; they believed that the district court did in fact bar the Department from "issu[ing] any regulations whatsoever that dealt with infants' medical care."[126] But they concluded that such a broad injunction was not consistent with the law.[127] In short, of the seven justices who addressed the issue in *Bowen*, not one endorsed an injunction that would entirely bar the Secretary from regulating medical discrimination against disabled newborns.[128] Accordingly, the Department does not believe that the *Bowen* injunction, as affirmed by the Supreme Court, requires us to carve newborns out of this rule. The Department does, however, follow the *Bowen* plurality in declining to require a recipient to provide medical treatment to an individual where the individual, or the person legally authorized to make medical decisions on behalf of that individual, does not consent to that treatment in situations where consent would typically be required regardless of whether the individual had a covered disability.

Denial of treatment is not the only way a recipient can discriminate on the basis of disability in its covered programs or activities. When it enacted the Civil Rights Restoration Act two years after *Bowen*, Congress explicitly provided that section 504 applies to "all of the operations of" a covered program or activity.[129] The operations of covered health care providers are not typically limited to providing treatments. They also include the provision of advice and the process of providing information to comply with informed-consent requirements established by state law and otherwise. Proposed paragraph (c)(2)(ii) makes clear that discrimination in obtaining informed consent is prohibited independently of whether that discrimination is followed by a decision to withhold treatment — or whether such a subsequent decision to

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[125] *Id.* at 624.
[126] *Id.* at 650 (White, J., dissenting).
[127] *See id.* at 656 ("Where a decision regarding medical treatment for a handicapped newborn properly falls within the statutory provision, it should be subject to the constraints set forth in § 504. Consequently, I would reverse the judgment below.").
[128] Chief Justice Burger concurred in the result without opinion, and therefore expressed no view on the issue, and Justice Rehnquist took no part in the decision.
[129] 29 U.S.C. 794(b).

withhold treatment is itself discriminatory. For example, a covered hospital may not repeatedly request that a patient with a disability (or the patient's legally authorized representative) consent to a do-not-resuscitate order, where it would not make such repeated requests of a similarly situated nondisabled patient. In addition, a recipient may not condition access to treatment on a patient with a disability or their authorized representative agreeing to a particular advanced care planning decision when they would not implement or enforce such a requirement on a similarly situated nondisabled patient.

Numerous reports have demonstrated the existence of this sort of biased treatment. The case of Sarah McSweeney, documented as part of a National Public Radio (NPR) investigation into multiple reports of individuals with disabilities pressured to agree to the withdrawing or withholding of life-sustaining care, offers one example of potential discrimination in access to life-sustaining care.[130] Ms. McSweeney was a 45-year-old woman with multiple disabilities who was admitted to the hospital due to concerns that she may have contracted COVID-19. Shortly after arriving, her guardian received a call from the hospital questioning why her Physician Orders for Life-Sustaining Treatment (POLST) form indicated that Ms. McSweeney should receive life-sustaining treatment if she required it. Over the next several weeks, media reports indicate that hospital personnel pressured Ms. McSweeney's guardian to consent to the withdrawal or withholding of life-sustaining care, often expressing skepticism that a person whose disabilities precluded mobility and speech could be considered to have quality of life. Ultimately, Ms. McSweeney died of sepsis due to aspiration pneumonia, a typically treatable condition, although her guardians repeatedly pushed for full care measures that the doctors declined to administer.[131]

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[130] Joseph Shapiro, "As Hospitals Fear Being Overwhelmed by COVID-19, Do the Disabled Get the Same Access?", Nat'l Pub. Radio (Dec. 14, 2020) https://www.npr.org/2020/12/14/945056176/as-hospitals-fear-being-overwhelmed-by-covid-19-do-the-disabled-get-the-same-acc.

[131] *Id.*

In some cases, patients with disabilities with routine illnesses or their authorized representatives are pressured by their physicians to agree to not be resuscitated, against their desires and wishes,[132] with potentially deadly consequences. For example, a 2012 report from the National Disability Rights Network documented instances of providers steering individuals with disabilities or their family members to agree to decline life-sustaining care or consent to the withdrawal of life-sustaining care.[133] In one instance, family members reported that the patient's doctor informed them that their relative – a 72-year-old patient with a developmental disability – would have poor quality of life based on their disability and, as a result, life-sustaining treatment should no longer be used. [134] Though they initially consented to the withdrawal of treatment, the family eventually withdrew that consent, though they experienced pressure from the clinician when attempting to restore treatment and nutrition.

In its report, *Medical Futility and Disability Bias*, NCD discusses the example of Terrie Lincoln who, at age 19, was in an automobile accident that severed her spinal cord and caused her to become quadriplegic.[135] The report describes that when Terrie "was in the hospital just following her accident, Terrie's doctors repeatedly tried to influence her family to 'pull the plug,' stating that Terrie was a 'vegetable' and, even if she were to regain consciousness, would have no quality of life."[136] When Terrie did regain consciousness, she was pressured by her doctors to forego additional medical treatment that would extend her life due to judgments that life with the disability of quadriplegia was not worth living. This would be a violation of the proposed regulation under both 84.56(b)(1) and (c)(2)(ii). Terrie persisted, later coming off the ventilator, earning degrees in social work and public administration, and becoming a disability rights

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[132] Lauren Drake, *New Oregon Law Bars Discrimination Against People with Disabilities During Pandemic*, Or. Pub. Broadcasting (Jul. 11, 2020), https://www.opb.org/news/article/law-bars-disability-discrimination-covid-19/.
[133] Nat'l Disability Rts. Network, *Devaluing People with Disabilities: Medical Procedures that Violate Civil Rights* (May 2012), https://www.ndrn.org/wp-content/uploads/2012/05/Devaluing-People-with-Disabilities.pdf.
[134] *Id.* at 17.
[135] Nat'l Council on Disability, Medical Futility and Disability Bias, 27 (Nov. 20, 2019), https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf.
[136] *Id.*

advocate and mother. It is the Department's intent for the proposed § 84.56(c)(2)(ii) to apply both to instances in which a recipient seeks consent to withdraw care in situations where the withdrawal of care would not be sought from a person without a disability (such as to deny routine care for a treatable medical condition for which the patient has given no indication that they wish to decline treatment) and situations where the manner in which consent is sought is discriminatory in nature (such as by pressuring patients with a disability or their authorized representatives to agree to provide consent to decline or withdraw treatment or to agree to a particular advanced care planning decision authorizing such declining or withdrawal in the future).

§ 84.56(c)(3) Providing information.

Proposed § 84.56(c)(3) addresses the information exchange between the recipient and the patient with a disability concerning the provision of information and potential courses of treatment and their implications, including the option of foregoing treatment. This provision indicates that nothing in this section precludes a provider 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 or the best available objective evidence.[137] The ability of a person with a disability or their authorized representative to understand the available options and to make an informed decision about the medical treatment depends in part on the expertise and candor of the treating professionals. However, as proposed § 84.56(c)(2)(ii) indicates, the recipient is prohibited from discriminating on the basis of disability in seeking consent for the decision to treat or to forego treatment by, for example, unduly pressuring a person with a disability or their authorized representative to conform to the treating

[137] This requirement with regard to the provision of information is not a new standard and is consistent with similar requirements in the medical ethics context. *See, e.g.*, Am. Med. Ass'n., Code of Med. Ethics, *Chap. 2: Opp. on Consent, Communication and Decision Making* (2019), https://www.ama-assn.org/system/files/2019-06/code-of-medical-ethics-chapter-2.pdf.

professional's position or by relying on the prohibited factors listed in proposed § 84.56(b)(1)(i)-(iii).

The Department realizes that providing regulatory requirements concerning medical treatment requires careful consideration.

- *Medical Treatment Question 4: The Department seeks comment from all stakeholders on the risks and benefits of the proposed regulatory choices that the Department has put forth in this section.*
- *Medical Treatment Question 5: The Department also seeks comment on whether the term "medical treatment" adequately encompasses the range of services that should be covered under this nondiscrimination provision.*

§ 84.57 Value assessment methods.

The proposed rule seeks to address discrimination on the basis of disability in the use of value assessment methods. The Department has been aware of potential disability discrimination in value assessment for some time. For example, in 1992, the Department declined to authorize a demonstration program in Oregon that relied on the use of the Quality Adjusted Life Year (QALY), one specific methodology of value assessment whose application in Oregon (and common application elsewhere in the present day) discounted the value of life extension on the basis of disability, to determine whether certain treatments for people living with certain disabilities would be covered. The Department cited concerns of discrimination in value assessment methods in its response, stating that "Oregon's plan in substantial part values the life of an individual with a disability less than the life of an individual without a disability. This premise is discriminatory and inconsistent with the Americans with Disabilities Act."[138] The Department further noted that this discrimination and inconsistency stemmed, in part, from the

[138] Letter from Louis Sullivan, Sec'y, U.S. Dep't of Health and Human Servs., to Barbara Roberts, Governor, State of Or. (Aug. 3,1992), reprinted in 1992 CCH Medicare-Medicaid Guide New Devs. 40,406A, HHS Papers Explaining Rejection of Oregon Medicaid Waiver, HHS News Release, Secretarial Letter, and Analysis (Aug. 3, 1992) (the waiver was later approved after significant modification).

approach that "quantifies stereotypic assumptions about persons with disabilities."[139] In 2010, Congress prohibited the use of the QALY in Medicare[140] and within the Patient Centered Outcomes Research Institute created by the ACA.[141] Many disability rights advocates have expressed concerns about disability discrimination in value assessment methods.[142]

Despite this prior history, value assessment methods have been increasingly used by recipients to determine the cost-effectiveness of goods and services. These determinations can inform price negotiations, value-based purchasing arrangements that link provider payment to performance and outcomes, and other things that affect the degree to which individuals can access aids, benefits, or services, as well as the terms or conditions under which they can access them.

Not all methods of value assessment or their uses are discriminatory. Many value assessment methods can play an important role in cost containment and quality improvement efforts. However, the Department is concerned that some value assessment frameworks that have

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[139] *Id.*

[140] 42 U.S.C. 1320e-1(c)(1). In addition, recent legislation has been introduced in the House of Representatives to ban the use of QALYs outright in federally funded health programs. *See* Protecting Health Care for All Patients Act of 2023, H.R. 485, 118th Congress (2023) (Report No. 118-65, Part I).

[141] 42 U.S.C. 1320e-1(e).

[142] *See NCIL Resolution Opposing the Use of QALYs (Quality-Adjusted Life Years)*, Not Dead Yet,http://notdeadyet.org/ncil-resolution-opposing-the-use-of-qalys-quality-adjusted-life-years (last visited May 22, 2023) (Not Dead Yet and the Autistic Self-Advocacy Network joined in the resolution); *see also* Not Dead Yet, NCIL Membership Adopts Resolution Opposing Health Insurers' Use of QALYs (2020), https://notdeadyet.org/2020/08/ncil-membership-adopts-resolution-opposing-health-insurers-use-of-qalys.html; Disability Rts. Educ. and Def. Fund (DREDF), Pharmaceutical Analyses Based on the QALY Violate Disability Nondiscrimination Law (Sept. 21, 2021), https://dredf.org/2021/09/23/pharmaceutical-analyses-based-on-the-qaly-violate-disability-nondiscrimination-law/ ("[T]he QALY relies on a set of discriminatory assumptions that devalue life with a disability, disadvantaging people with disabilities seeking to access care based on subjective assessments of quality of life."); *Lives Worth Living: Addressing the Fentanyl Crisis, Protecting Critical Lifelines, and Combatting Discrimination Against Those with Disabilities: Hearing on H.R. 467, H.R. 498, H.R. 501, and H.R. 485 Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 118th Cong. (2023) (statement of Kandi Pickard, President & CEO, Nat'l Down Syndrome Society), https://d1dth6e84htgma.cloudfront.net/Witness_Testimony_Pickard_HE_02_01_2023_065c903370.pdf?updated_at=2023-01-30T21:38:38.787Z (speaking on her support of Protecting Health Care for All Patients Act, H.R. 485, 118th Cong. (2023)). As discussed elsewhere in this preamble section, value assessment methods that may be discriminatory when used to determine people with disabilities' access to goods and services may not be discriminatory in another context (i.e., their use purely for academic research). Some general statements about QALY, such as the one quoted in this footnote, do not distinguish between various types of QALY calculations or uses of the concept.

been adopted by recipients may discriminate on the basis of disability, in violation of existing prohibitions against such discrimination in health services.[143] In this rulemaking, the Department seeks to explicitly apply these obligations to the use of value assessment methods and provide relevant information for recipients on their application. The Department has focused on methods that discount the value of life extension for people with disabilities in this proposed rule, as the vast majority of documentation of disability discrimination concerns in value assessment have focused on the discounting of life extension.[144]

Where value assessments use methods for calculating value 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, a recipient using such value assessment methods for these purposes is in violation of section 504. For example, a recipient that uses a value assessment method that assigns a greater value to extending the life of people without disabilities than to extending the life of people with disabilities to determine whether a particular drug will be subject to additional utilization management controls or placed on a higher tier of a formulary would likely violate section 504. The recipient is using a value assessment that assigns a greater value to extending the life of people without disabilities with respect to the eligibility or referral for, or provision or withdrawal of an aid, benefit, or service – in this instance, to determine the terms or conditions under which they are made available.

An analysis from the Institute for Clinical and Economic Review (ICER) — whose work is often used to inform decision-making by recipients — valued a year of life of a person with multiple sclerosis with a score of eight on the Expanded Disability Status Scale (describing an

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[143] *See* 45 CFR 84.52(a).

[144] *See, e.g.*, Disability Rts. Educ. & Def. Fund (DREDF), Pharmaceutical Analyses Based on the QALY Violate Disability Nondiscrimination Law (2021), https://dredf.org/wp-content/uploads/2021/09/ICER-Analyses-Based-on-the-QALY-Violate-Disability-Nondiscrimination-Law-9-17-2021.pdf.

individual who relies entirely on a wheelchair for mobility but is nonetheless able to be out of bed for much of the day[145]) at 0.0211, representing approximately a 98% reduction in value relative to a year of life for a healthy, nondisabled person.[146] Similarly, another report from ICER valued a year of life with cystic fibrosis with a ppFEV1 (percent predicted forced expiratory volume in one second, an established measure of lung function for cystic fibrosis) between 20-29% at 0.653, representing a 34.7% reduction in value relative to a year of life for a healthy, nondisabled individual.[147] When a recipient uses these life extension valuations with respect to determining eligibility or referral for, or provision or withdrawal of any aid, benefit, or service, including the terms or conditions under which they are made available, it ascribes a lower value to extending the lives of people with specific disabilities relative to extending those without disabilities or with other disabilities.

This remains the case even if the value of extending the lives of people with disabilities is compared to a less discounted population rather than a hypothetical non-disabled, healthy adult. For example, a value assessment calculation using a general population average utility of 0.816 for life extension for persons without cystic fibrosis and a utility of 0.653 for life extension for persons with cystic fibrosis would still assign lower value to extending the lives of persons with cystic fibrosis relative to persons without. The outcome remains the same even if the general population was also receiving a less severe discount to the value of life extension.

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[145] *Kurtzke Expanded Disability Status Scale (EDSS)*, Nat'l Multiple Sclerosis Soc'y, http://www.nationalmssociety.org/nationalmssociety/media/msnationalfiles/brochures/10-2-3-29-edss_form.pdf (last visited May 22, 2023).

[146] Inst. for Clinical & Econ. Rev., Siponimod for the Treatment of Secondary Progressive Multiple Sclerosis: Effectiveness and Value, Final Evidence Report, p. 52 (2019), https://icer.org/wp-content/uploads/2020/10/ICER_MS_Final_Evidence_Report_062019.pdf (citing Annie Hawton & Colin Green, *Health Utilities for Multiple Sclerosis*, 19 Value Health 460-468 (2016)).

[147] Michael S. Schechter et al., *Inhaled Aztreonam Versus Inhaled Tobramycin in Cystic Fibrosis: An Economic Valuation.* 12 Annals of the Am. Thoracic Soc'y 1030-38 (2015); Inst. for Clinical & Econ. Rev., Modular Treatments for Cystic Fibrosis: Effectiveness and Value: Final Evidence Report and Meeting Summary, p. 66 (2020), https://icer.org/wp-content/uploads/2020/08/ICER_CF_Final_Report_092320.pdf.

Recipients often rely on value assessments to make decisions regarding coverage, cost, and other decisions with serious implications for access for individuals with disabilities. Relying on a measure that discounts the value of extending the lives of people with disabilities relative to people without disabilities raises serious concerns in light of the consequences for access for individuals with disabilities. It is important that recipients do not engage in discriminatory uses of value assessment methods.

In its report, "Quality-Adjusted Life Years and the Devaluation of Life with Disability," NCD discussed the way that the QALY places a lower value on extending the lives of individuals with disabilities and chronic illnesses.[148] NCD notes that a variety of alternative nondiscriminatory methods exist, and provided examples. The Department declines to endorse any specific method in this rulemaking. NCD noted that many payers, including those who receive Federal financial assistance such as State Medicaid agencies, have made use of or planned to make use of value assessments in a discriminatory fashion in order to evaluate particular health care interventions.[149] For example, in April 2018, one State's Medicaid Drug Utilization Review Board made use of a $150,000 per QALY threshold for valuing a treatment for cystic fibrosis, calculated based on an analysis that assigned a lower value to extending the lives of persons with cystic fibrosis than persons without cystic fibrosis.[150]

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[148] Nat'l Council on Disability, Quality-Adjusted Life Years and the Devaluation of Life with Disability, p. 39 (2019), https://ncd.gov/sites/default/files/NCD_Quality_Adjusted_Life_Report_508.pdf. The NCD Report stated: "By favoring those with no functional impairments, the protocols implicitly endorse the belief that the lives of individuals without disabilities are more valuable than that of their unfortunate counterparts" (citing Wendy Hensel et al., *Playing God: The Legality of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies*, 63 Fla. L. Rev. 755 (2011)). Note that the discussion of QALY in the NCD report applies to uses of QALY associated with life extension, not to other uses of value assessment that assess effects of a health care intervention on quality of life without discounting the value of life-extension. The concern articulated in the report does not apply to the latter use case.

[149] Nat'l Council on Disability, Quality-Adjusted Life Years and the Devaluation of Life with Disability, 13-14 (2019), https://ncd.gov/sites/default/files/NCD_Quality_Adjusted_Life_Report_508.pdf.

[150] N.Y. State Dep't of Health, N.Y. State Medicaid Drug Utilization Review (DUR) Board Meeting Summary (Apr. 26, 2018), https://www.health.ny.gov/health_care/medicaid/program/dur/meetings/2018/04/summary_durb.pdf.

For the reasons discussed above, the Department proposes to add § 84.57 on value assessment methods, indicating that a recipient shall not, directly or through contractual, licensing, or other arrangements, use any measure, assessment, or tool that discounts the value of life extension on the basis of disability 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 any aid, benefit, or service, including the terms or conditions under which they are made available. The proposed provision does not identify the use of any specific method of value assessment but instead prohibits measures that discount the value of life extension on the basis of disability when used to deny or provide an unequal opportunity for a qualified person with a disability to participate in or benefit from an aid, benefit, or service.

We note that the discriminatory *use* of a measure by a recipient constitutes a violation of this provision, not necessarily that the measure itself does. The use of such a measure in a discriminatory fashion could come about through a variety of mechanisms, including, but not limited to: (1) the use of a threshold that uses such a measure (such as a cost-per-QALY threshold) for purposes of determining coverage or the imposition of additional terms or conditions for availability of a intervention, (2) the use of such a measure for ranking interventions relative to each other within or between disease categories, or (3) otherwise making use of such analyses to inform reimbursement or utilization management decisions even if they are not by themselves dispositive. In contrast, the proposed provision would permit the use of such measures that were not 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; for example, in academic research. Accordingly, the use of a methodology that is discriminatory when applied to determine eligibility, referral for, or provision or withdrawal of an aid, benefit, or service would not be discriminatory if used in academic research to assess the relative contribution of different policy changes or medical innovations on national or global population health. However, a recipient who makes use of such

academic research for purposes of determining eligibility, referral for, or provision or withdrawal of an aid, benefit, or service may still violate section 504 if the use of the methodology employed within the research product is discriminatory when applied in the new context.

Similarly, elements of value assessment methods that are discriminatory in some contexts – such as for valuing life extension – may not be discriminatory in other contexts. For example, the use of utility weights for valuing quality of life improvements can be used in a way that is not discriminatory, even if the use of the same utility weights to discount life extension would be discriminatory, if used to restrict or limit access by people with disabilities. For example, if recipients use a measure of value that does not discount the value of life extension on the basis of disability but does use utility weights for valuing quality of life improvements from a treatment in a way that is not discriminatory, such use of utility weights for assessing quality of life improvements likely would not violate this provision. However, using a measure that does discount life-extension to restrict or limit access could violate the proposed provision.

- *Value Assessment Methods Question 1: The Department seeks comment on how value assessment tools and methods may provide unequal opportunities to individuals with disabilities.*
- *Value Assessment Methods Question 2: The Department seeks comment on other types of disability discrimination in value assessment not already specifically addressed within the proposed rulemaking.*
- *Value Assessment Methods Question 3: The proposed value assessment provision applies specifically to contexts in which eligibility, referral for, or provision or withdrawal of an aid, benefit, or service is being determined. The preamble discussion of the provision clarifies that the provision would not apply to academic research alone. However, the Department seeks comment on the extent to which, despite this intended specificity, the provision would have a chilling effect on academic research.*

§ 84.60 Children, parents, caregivers, foster parents, and prospective parents with disabilities in the child welfare system.

Children, parents, caregivers, foster parents, and prospective parents with disabilities may encounter a wide range of discriminatory barriers when accessing critical child welfare programs and services that are designed to protect children and strengthen families. These barriers arise in a variety of contexts, including parent-child reunification services; policies or practices that discourage and/or prohibit parents from receiving assistance with childcare responsibilities from professional and natural supports; and safety and risk assessment policies that conflate disability with parental unfitness.

Federally funded child welfare programs and activities are covered social service programs under section 504. As such, the children with disabilities served by the child welfare system, as well as parents, caregivers, foster parents, and prospective parents with disabilities, are within the class of individuals with disabilities to whom section 504 protections extend. The Department proposes to add a new § 84.60 to the section 504 regulation that will more clearly apply the nondiscrimination requirements of section 504, which are consistent with and reflect the requirements of the ADA, to child welfare programs and activities. Additionally, the proposed section adds specific regulatory provisions that illustrate the types of child welfare actions that are prohibited discrimination under section 504.

A 2012 NCD report, "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children,"[151] found that parents with disabilities involved in the child welfare system have experienced disproportionately higher rates of child removals than nondisabled parents[152] and are often presumed to be unfit because of their disabilities.[153] Parents with disabilities have also been inappropriately referred to "one size fits all" reunification

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[151] Nat'l Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children (Sept. 27, 2012), www.ncd.gov/publications/2012/Sep272012/.
[152] *Id*. at 77-78.
[153] *Id*. at 94.

services.[154] Some jurisdictions, where State law has explicitly allowed courts to consider whether the presence of a disability makes a parent unable to discharge their responsibilities, have denied disabled parents access to reunification services. For example, as of 2015, 33 states' statutes expressly included a parent's disability as an aggravated circumstance[155] that allows a court to bypass the reunification process by deeming that the disability makes the parent unlikely to benefit from reunification services .[156] While most State laws do not allow for an automatic disqualification based on disability, the inclusion of disability as an aggravating circumstance invites unfounded presumptions by the courts and administering State agencies that disability in and of itself, can be disqualifying.

NCD's report provided case studies where children were removed from parents based on the presumption of unfitness due to parental disability. The report includes ten case studies of parents with disabilities with firsthand experience with the child welfare system. The studies provide examples of discriminatory barriers and bias parents with disabilities encounter at key decision points in the child welfare system, including reporting for abuse and neglect, safety and risk assessments, case opening, and permanency decision. One study described the experience of a couple who were presumed to be unfit to care for their two-day-old daughter because both parents were blind. The concerns centered on the parents' visual impairments, the mother's unsuccessful first attempts at breastfeeding, and the parents' lack of specialized parenting training. The infant was held in state custody for 57 days until a court dismissed the child protective action against the parents.[157]

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[154] *Id.* at 89.
[155] *See* 42 U.S.C. 671(a)(15)(D)(i). States are not required to provide assistance or services to prevent removal or reunify children when the parent has subjected a child to aggravated circumstances as defined by State law.
[156] Nat'l Council on Disability, *supra* note 152 at 91. *See also* Traci LaLiberte et al., *Child Protection Services and Parents with Intellectual and Developmental Disabilities,* 30 J. Appl. Res Intellectual Disability, 30: 521-532 (2017), https://pubmed.ncbi.nlm.nih.gov/28000335/.
[157] *Id.* at 94.

Another case study described the experience of a mother with intellectual disabilities who lived in supported housing with her five-year-old daughter and received ongoing parent-child intervention services. As a result of Intelligence Quotient (IQ) testing, social workers convinced the mother to allow visits between her daughter and her estranged nondisabled father, despite the mother's reluctance.[158] Social workers insisted that visits with the father continue even after the mother reported that her daughter was afraid of the father and had suddenly started wetting herself. The visits terminated after a police investigation and medical examination substantiated allegations of sexual abuse by the father, though the social workers still questioned the mother's parenting ability.[159] The experience of this mother and daughter is an example of how negative assumptions about IQ as an indicator of parenting skills served as a basis to question the mother's ability to safely care for and protect her daughter.

In examining the use of IQ scores to determine a parent's capacity or fitness to safely care for a child, NCD found that, particularly for parents with intellectual disabilities, reliance on the tests results in high rates of removal and loss of child custody. These tests continue to be administered for the purpose of child custody planning despite the research evidence demonstrating that parental IQ is a poor predictor of parenting competence.[160] When norm-referenced assessments are used, (e.g., measures or assessments that compare a person's knowledge or skills to the knowledge or skills of a group considered to be normal), the parenting practices and behaviors of parents with intellectual disability are "judged subnormal and inadequate rather than simply different."[161] IQ tests are some of the best-known examples of such norm-referenced assessments. NCD also found that "sole reliance on the IQ, resulting in diagnosis of intellectual disability, leads to states having 'bypass' statutes,'" where child removals may occur simply on a categorical or diagnostic basis, without any individualized

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[158] *Id.* at 97.
[159] *Id.* at 97.
[160] *Id.* at 132 (citing David McConnell et al., *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. Soc. Welfare & Fam. L. 3, 297 (2002)).
[161] *Id.*

assessment or observation of parenting.[162] Similar to the NCD report, a 2017 review of appellate court cases that culminated in termination of parental rights where parents had intellectual and developmental disabilities found a continued uncritical reliance on parental IQ to assess parental fitness. The study found:

> [In] a majority of US cases involving a parent with intellectual and developmental disabilities, appealing a termination of their parental rights, parental IQ or intellectual functioning range often was considered and relied upon by the court in upholding the decision. The rate of reversal was far lower than the dependency and general civil bench trial rates of reversal. It is worrying that while every decision was reasoned differently, and all cases had multiple issues, the courts consistently considered parental IQ, rarely reviewed evaluation methods and results and frequently made statements that reflected a view of parental IQ as static, fixed and necessarily undermining of parenting capacity and ability to learn.[163]

Support for protecting the rights of parents, caregivers, foster parents, and prospective parents with disabilities involved in the child welfare system continues to gain momentum. In 2017, the American Bar Association adopted a resolution urging Federal, State, territorial, and tribal governments to enact legislation and implement policies limiting the circumstances when a parent's disability could be a basis for the denial of parental access to their child or termination of parental rights, or when a prospective parent's disability could be a bar in adoption and foster

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[162] *Id.* at 133 (citing Teresa Ostler, *Assessment of Parenting Competency in Mothers with Mental Illness*, Univ. of Chicago (2008)).

[163] Ella Callow et al., *Judicial Reliance on Parental IQ in Appellate-Level Child Welfare Cases Involving Parents with Intellectual and Developmental Disabilities*, 30 J. Appl. Res. Intellectual Disabilities 553, 555-56 (2017).

care.[164] Seventeen states have enacted laws prohibiting the use of parental disability as a basis for denial or restriction of parenting responsibilities.[165]

OCR has received over 300 complaints alleging disability discrimination in child welfare services and activities within the last six years. The complaints allege discrimination in a wide range of child welfare services that are subject to nondiscrimination requirements including: child protection investigations; child and family assessments; case plan development; parent-child visitation; child placement decision-making; provision of community-based services; foster and adoptive parent assessments; and determinations to terminate parent-child reunification efforts. OCR's investigations have revealed that some child welfare entities have implemented policies, practices, and procedures that contribute to unnecessary removals of children from parents with disabilities and create barriers to parent-child reunification, permanency planning, and other critical child welfare services. Additionally, as discussed later in this section, OCR has investigated complaints of discrimination against children with disabilities in the child welfare system. As a result of these investigations, child welfare entities and OCR have worked together to establish Voluntary Resolution Agreements (VRA), some of which are discussed in greater detail below, required child welfare agencies to create, revise, establish, and implement policies, practices, and procedures to prohibit discrimination against parents with disabilities and ensure that the full range of agency programs are accessible to parents with physical and mental

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[164] "RESOLVED, That the American Bar Association urges all federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights be terminated, based on a parent's disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications…FURTHER RESOLVED, That the American Bar Association urges all federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that a prospective parent's disability shall not be a bar to adoption or foster care when the adoption or foster care placement is determined to be in the best interest of the child." Am. Bar Ass'n, *ABA Policy Resolution 114: Disabled Parents and Custody, Visitation, and Termination of Parental Rights*, (Feb. 6, 2017), https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/114.pdf.

[165] Heller Sch. for Soc. Pol'y and Mgmt., Brandeis U., NRCPD, *Map of Current State Legislation Supporting Parents with Disabilities*, https://heller.brandeis.edu/parents-with-disabilities/map/index.html (last updated (Oct. 9, 2020).), https://heller.brandeis.edu/parents-with-disabilities/map/index.html).

disabilities as required by section 504 and title II. These complaints and VRAs are consistent with the 2012 NCD report finding that the "child welfare system is ill-equipped to support parents with disabilities and their families."[166]

According to data submitted to the Administration for Children and Families (ACF) through its Adoption and Foster Care Analysis and Reporting System (AFCARS) as reported in November 2021, more than 216,838 children entered the U.S. foster care system due at least in part to safety concerns related to parental fitness during 2020.[167] Thirteen percent, or 28,771 children, were removed from a parent or caregiver based, in part, on "Caretaker Inability to Cope Due to Illness or Other Reasons" as one of the circumstances associated with child's removal. The AFCARS regulation defines "caretaker inability to cope due to illness or other reasons" as a "a physical or emotional illness, or disabling condition adversely affecting the caretaker's ability to care for the child." AFCARS submissions in 2020 on the "Caretaker Inability to Cope" out-of-home case data element demonstrate that a caretaker's physical illness, emotional illness, or disabling condition continues to be a factor in child removals. Reporting on this data element from 2015-2020 shows that title IV-E agencies removed fourteen percent of children who entered the U.S. foster care system due in part to safety concerns related to a caretaker's physical illness, emotional illness, or disabling condition, i.e., concerns labeled "Caretaker Inability to Cope."

As noted by research published in Children and Youth Services Review, in the 2012 AFCARS data, parental disability was the only parental characteristic based on a parent's physical or mental attributes categorized in State child welfare policies or in Federal data collection tools as a consideration when determining whether to remove a child from their home

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[166] Nat'l Council on Disability, *supra* note 152 at 18.

[167] The Adoption and Foster Care Analysis and Reporting System (AFCARS) collects case-level information on all children in foster care and those who have been adopted with Title IV-E agency involvement. *See* U.S. Dep't of Health & Hum. Servs., Admin. for Children & Families, AFCARS Report # 28 (Nov. 19, 2021), https://www.acf.hhs.gov/cb/report/afcars-report-28.

or to terminate parental rights.[168] In the AFCARS data, "caretaker inability to cope is the only removal reason that is a parental characteristic based on a physical or mental condition rather than a changeable behavior."[169] The data elements reviewed remained in place through 2020.

The University of Minnesota, Center for Advanced Studies in Child Welfare noted in its child welfare policy brief on the use of parental disability as a consideration in removing children and termination of parental rights (TPR), that having parental disability listed as a removal reason or as grounds for TPR "can lead those involved in the system to believe that parental disabilities lead to abuse, rather than focusing on how to appropriately provide services."[170]

In 2015, in response to increased disability-related child welfare complaints and calls from entities such as NCD for the Federal Government to take immediate action to protect the rights of individuals with disabilities, OCR, ACF, and DOJ jointly published *"*Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act."[171] The technical assistance document provides important information to assist child welfare agencies and courts in meeting their obligations under Federal disability rights laws to provide equal access to child welfare services and activities in a nondiscriminatory manner. HHS also published an online video training series to educate child welfare practitioners about the application of Federal disability rights laws to child welfare programs and activities. The series provides an overview of Federal disability rights laws, discusses protections that apply to some individuals in recovery, and promotes awareness

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[168] Sharon DeZelar et al., *Use of Parent Disability as a Removal Reason for Children in Foster Care in the U.S.*, 86 Children & Youth Services Rev. 128-134 (2018).
[169]E. Lightfoot, et al., *Child well-being in Minnesota—Policy strategies for Improving Child Welfare Services for Parents With Disabilities and their Children (Child Welfare Policy Brief No. 10)*, Ctr. for Advanced Studies in Child Welfare, Univ. Minn. (Winter 2016).
[170] *Id.*
[171] U.S.Dep't Health & Hum. Servs., U.S. Dep't of Justice*,* Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act (2015), https://www.hhs.gov/sites/default/files/disability.pdf (last visited Aug. 17, 2022).

of Medication Assisted Treatment and Medications for Opioid Use Disorder (MOUD) as an effective approach to the treatment of substance use disorders.[172]

Despite HHS efforts to raise awareness of Federal disability rights protections, OCR continues to receive new complaints about discrimination against individuals with disabilities in the child welfare system. These cases involve, for example, the removal of children from parents with intellectual disabilities. In the section that follows, we discuss complaints where child welfare agencies allegedly made custody decisions based on stereotypes of disability, failed to offer reasonable modifications in the parental evaluation process, and failed to recognize the need for modifications on the basis of disability as required by section 504. The creation of revised policies and procedures by each of these agencies shows that the many child welfare agencies' current policies do not reflect the longstanding antidiscrimination requirements of section 504. This rulemaking seeks to clarify child welfare agency obligations and alleviate the need to correct agency policies through enforcement actions.

Reasonable modifications for parents with disabilities in the child welfare system.

In a recent case, OCR investigated allegations involving a State child welfare agency's removal of two infant children from a mother and father with intellectual disabilities. The parents alleged that the State agency acted based in significant part on their IQ scores. OCR's investigation raised concerns that the agency subjected parents with intellectual disabilities to unlawful treatment when it removed the children from their custody, refused to reunify them with their children, limited their visitation rights, and failed to provide them with appropriate reunification services. In response to that investigation, the state agency agreed to update those policies to clarify that it will not make decisions about whether a participant with a disability represents a threat to the safety of a child on the basis of stereotypes or generalizations about persons with disabilities, or on a participant's diagnosis or intelligence measure (e.g., IQ score)

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[172] *See* U.S. Dep't of Health & Hum. Servs., Opioid Use Disorder and Civil Rights Video and Webinar Series, https://ncsacw.samhsa.gov/topics/medication-assisted-treatment.aspx (last visited June 22, 2022).

alone. The agency also agreed that, as part of its assessment process, participants with actual or suspected disabilities can be referred to appropriate medical, mental health, or other professionals to obtain specific necessary information (such as reasonable modifications).[173]

In another case, an OCR investigation revealed that a State denied a prospective parent with chronic fatigue syndrome and other disabilities the opportunity to become a foster parent. OCR determined that the child welfare agency failed to make an individualized assessment of the applicant's ability to be a foster/adoptive parent and improperly used disability as a criterion to make placement decisions.[174] OCR also found that the agency failed to consider whether support services offered to other foster/adoptive parents would have allowed the applicant to participate in the program if they were made available.[175] In response to OCR's findings, the State agency agreed to develop and implement standard operating procedures for documenting and assessing foster care and adoption program applicants and participants with disabilities. The agency also agreed to implement a process for maintaining a record of administration and results of assessments and to provide annual training to staff involved in assessing and/or supporting foster care and adoption program applicants and participants.[176]

OCR also investigated a complaint filed by an aunt and uncle who alleged that a State child welfare agency denied their request for emergency custody and placement of their young niece and nephew based on the uncle's being in recovery from Opioid Use Disorder (OUD), and his long-term use of physician-prescribed Suboxone as a medication for opioid use disorder (MOUD). The investigation indicated that the uncle had not tested positive for illegal use of

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[173] *See* U.S. Dep't of Health & Hum. Servs., Voluntary Resolution Agreement between the U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. and Oregon Dep't of Human Serv. (Nov. 20, 2019), https://www.hhs.gov/sites/default/files/odhs-vra.pdf.
[174] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Georgia Enters into Agreement to Ensure Equal Access for Individuals with Disabilities to Foster and Adoption Programs and Services (Jan. 11, 2016), https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/georgia-dcfs-bulletin/index.html.
[175] *Id.*
[176] *See* U.S. Dep't of Health & Hum. Servs., Settlement Agreement between the U.S. Dep't of Health & Hum. Servs., Off. for Civil Rtss and the GA Dep't of Human Res. (Dec. 15, 2015), https://www.hhs.gov/sites/default/files/dfcs-revised-settlement-agreement.pdf.

drugs during his treatment and the aunt expected to be the children's primary caregiver as her husband worked full-time. OCR's investigation identified systemic deficiencies regarding the agency's implementation of its policies, practices, and procedures to ensure the civil rights of individuals with disabilities, including individuals in recovery from OUD, in the State child welfare system. To address these concerns, the State agency agreed to update its policies to clarify that section 504 and title II of the ADA protect qualified individuals with substance use disorder from unlawful discrimination. The updated policies reflect that MOUD is not the illegal use of drugs and that an individual's prescribed use of MOUD does not mean that the individual is substituting one addiction for another. The agency also agreed to develop and provide mandatory annual training for its staff on the requirements of Federal civil rights laws and working with people with disabilities, including individuals in recovery from substance use disorder.[177]

After a joint investigation, OCR and DOJ found that a State child welfare agency seeking to terminate parental rights of a mother with a developmental disability violated title II of the ADA and section 504 by denying the mother supports and services provided to nondisabled parents and denying the mother reasonable modifications to accommodate her disability.[178] The mother and her infant were reunified two years after the infant's removal from the hospital. HHS and DOJ reached an agreement with the State agency to take specific actions to resolve violations of section 504 and title II. Among other actions, the agency agreed to revise its child welfare policies that cite disability or any specific disability, impairment, medical condition, intelligence measure (e.g., IQ score), or diagnosis to remove from the policies the mere fact of such disability, impairment, condition, intelligence measure, or diagnosis as a basis

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[177] *See* U.S. Dep't of Health & Hum. Servs., Voluntary Resolution Agreement between the U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. and the W.V. Dep't of Health & Hum. Servs, Bureau for Child. & Families (Apr. 22, 2020), https://www.hhs.gov/sites/default/files/ocr-agreement-with-wv-dhhr.pdf.
[178] U.S. Dep't of Health & Hum. Servs., U.S. Dept of Justice, Letter from the U.S. Dep't of Justice, Civil Rts. Division and U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. to the M.A. Dep't of Children and Families (Jan. 29, 2015), https://www.hhs.gov/sites/default/files/mass_lof.pdf.

for removal of custody (legal, physical, or otherwise). The agency agreed the new policies would reflect key requirements under the ADA and section 504 – that individuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence and that they may not be treated on the basis of generalizations or stereotypes. The agency agreed to provide notice to individuals involved in the child welfare system of the process to make a request for reasonable modifications and auxiliary aids and services.[179]

Similarly, OCR investigated a complaint alleging a State agency failed to provide modified support services and modifications necessary for a young mother with an intellectual disability to have an effective and meaningful opportunity to reunite with her young child. The investigation led to significant technical assistance to the agency. The State agency revised its nondiscrimination policies, issued an administrative order committing the agency to inclusivity and reasonable modifications in the provision of child welfare services, and implemented new disability rights training for agency staff.[180]

A recent settlement of a Federal lawsuit brought against a State agency which alleged violations of the ADA and section 504 demonstrates the agency's failure to provide required modifications. The plaintiff, a mother with physical disabilities, alleged her newborn son was removed from the hospital, four days after his birth, based on discriminatory assumptions about the parenting abilities of people with disabilities. The State agency and the parent entered into a settlement agreement, which requires that the State agency implement policy changes to protect the rights of people with disabilities from discrimination, to ensure (1) that an individual assessment of a parent's disability is obtained prior to referring the family for services; (2) that

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[179] *See* U.S. Dep't of Health & Hum. Servs., U.S. Dep't of Justice, Settlement between the U.S. Departments of Justice and U.S. Dep't of Health & Hum. Servs. and Massachusetts Department of Children and Families (Nov. 19, 2020), 19, 2020), https://archive.ada.gov/mdcf_sa.html.

[180] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., HHS OCR Provides Technical Assistance to Ensure New Jersey Department of Children and Families Protect Parents with Disabilities from Discrimination (Nov. 13, 2020), https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/about/news/2020/11/13/hhs-ocr-provides-technical-assistance-ensure-new-jersey-department-children-families-protect-parents-disabilities-from-discrimination.html.

the provision of any "reasonable modification" needed by a parent with a disability is made in order that the disabled parent can participate in recommended programs and/or services, and (3) that the agency will develop and implement training to address stereotypes about people with disabilities.[181]

The Department's enforcement actions related to disability discrimination, as well as Federal litigation involving child welfare entities under section 504, demonstrate the need for rulemaking to clarify child welfare entities' nondiscrimination obligations under the Rehabilitation Act. The numerous and diverse range of issues raised in complaints received by OCR show that covered child welfare entities need specific articulation of their longstanding obligations under section 504.

Most integrated settings in foster care.

Child welfare agencies must place qualified individuals with disabilities in the most integrated setting appropriate to the needs of the child, consistent with the requirements of existing § 84.4(b)(2) and proposed § 84.68(d), which is identical to 28 CFR 35.130(d) in the ADA title II regulations, and proposed § 84.76. The integration mandate is discussed in depth in the preamble discussion of § 84.76. Pursuant to these requirements, a recipient may not engage in the unnecessary or unjustified segregation of children with disabilities, such as default placement in institutional or other congregate care, and it must work to facilitate family foster home placements consistent with this requirement.

Title IV-E agencies accept billions of dollars from HHS to provide safe foster care placements for children and youth who cannot remain in their homes. As a condition of receiving these funds, child welfare entities must comply with Federal child welfare law and disability rights laws that require agencies to place foster children and youth in the least restrictive and most family-like setting appropriate to their needs. Congregate care should never be considered the most appropriate long-term placement for children, regardless of their level of disability. This

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[181] *Cesaire ex rel. E.B. v. Tony*, No. 20-CV-61169 (S.D. Fla. Feb. 1, 2021).

stance is reflected in the Federal enforcement of the integration mandate. After investigating one children's mental health system, DOJ found that "[w]ith access to timely and appropriate services, even children with intensive behavioral health needs and a history of congregate facility placement are able to return to or remain in family homes where they are more likely to have improved clinical and functional outcomes, better school attendance and performance, and increased behavioral and emotional strengths compared to children receiving care in institutions."[182] This DOJ finding cited, and is consistent with, research in the field.[183] Yet, despite the recognition that congregate care should not be a default placement for children,[184] many children and older foster care youth continue to face potentially discriminatory barriers to placements in family-like foster home settings that can meet their needs. For example, class action lawsuits have been filed in several jurisdictions challenging the practice of denying foster children, including those with disabilities, placement in the most integrated setting appropriate to children's needs and of placing them in inappropriate settings such as hotels and refurbished juvenile detention centers. In these cases, other State entities, such as Medicaid agencies and other human service or health agencies, may also provide support services to ensure children can be adequately supported in a family foster care home. To meet the integration mandate for foster children's services, State agencies must often coordinate different supports and services to support community placements.

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182 U.S. Dep't of Justice, Investigation of the State of Alaska's Behavioral Health System for Children (Dec. 15, 2022) https://www.justice.gov/opa/press-release/file/1558151/download.

183 Carrie W. Rishel, et al., *Preventing the Residential Placement of Young Children: A Multidisciplinary Investigation of Challenges and Opportunities in a Rural State*, 37 W. Va. Univ. Children & Youth Servs. Rev. 9 (2014), http://dx.doi.org/10.1016/j.childyouth.2013.11.027.

184 Based on research finding that family homes improve outcomes for children in foster care, Federal funding policy recognizes that that congregate care placements should be used only when the child's care needs cannot be adequately addressed in a less restrictive environment. *See* Bipartisan Budget Act of 2018, Pub. L. No.115-123, Sec. 50742. Federal funding for congregate care, as a placement setting, may be used only under limited circumstances, when a qualified professional determines that the needs of the child cannot currently be met in a family foster home, and that a residential treatment program offers the appropriate level of care for the child in the least restrictive environment The Family First Prevention Services Act (FFPSA), part of the Bipartisan Budget Act of 2018, imposed restrictions, implemented in October 2019, on the use of title IV-E reimbursement for congregate care placements experienced by children and older youth.

In 2015, a class action was brought on behalf of children under the care and custody of the Arizona Department of Child Safety that alleged the State agency failed, in part, to ensure that foster children with disabilities receive behavioral health services and placements in family-like foster homes. The February 2021 Settlement Agreement requires that the State agency make considerable improvements in providing behavioral health and other necessary services to children in foster care.[185]

In a recent case in Maine, DOJ found that the State of Maine violated the title II integration mandate by unnecessarily segregating children with mental health and developmental disabilities in psychiatric hospitals, residential treatment facilities, and a State-operated juvenile detention facility.[186] The State failed to provide services in community-based settings appropriate to children's needs, in part due to lengthy service waitlists, provider shortages, and under-resourced crisis centers. DOJ also issued a Letter of Findings to West Virginia in 2015, notifying the state that it violated the integration mandate by segregating children with mental health conditions in residential treatment facilities.[187] A settlement agreement was reached in 2019 to expand and improve in-home and community-based mental health services throughout the state to better meet children's needs.[188]

In other lawsuits, plaintiffs' claims have not yet been fully adjudicated. However, the allegations supporting the claims suggest that there may be a need for regulation in this area. For example, there have been other lawsuits relating to the treatment of children with disabilities

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[185] *See B.K v. Faust, et al*., No.1 cv-15-00185 (D. Az. Oct.13, 2020), https://www.childrensrights.org/wp-content/uploads/2020/10/District-of-Arizona-Court-Order-101320.pdf and *Tinsley v. Faust*, No.1 cv-15-00185 Final Approval Order, (D. Az. Feb. 12, 2021).
[186] U.S. Dep't of Justice, Justice Department Finds Maine in Violation of ADA For Over-Institutionalization of Children with Disabilities (June 22, 2022), https://www.justice.gov/opa/pr/justice-department-finds-maine-violation-ada-over-institutionalization-children-disabilities.
[187] U.S. Dep't of Justice, Letter of Findings re: United States' Investigation of the West Virginia Children's Mental Health System Pursuant to the Americans with Disabilities Act (June 1, 2015) https://www.justice.gov/sites/default/files/crt/legacy/2015/06/01/wv-ada_findings_6-1-15.pdf.
[188] U.S. Dep't of Justice, Department of Justice Reaches Agreement to Resolve Americans With Disabilities Act Investigation of West Virginia's Children's Mental Health System (May 14, 2019), https://www.justice.gov/opa/pr/department-justice-reaches-agreement-resolve-americans-disabilities-act-investigation-west.

under State care. In Illinois, the Cook County Public Guardian was sued on behalf of children with disabilities under the care and custody of the Illinois Department of Children and Family Services.[189] The lawsuit alleges that, between 2015 and 2017, more than 800 foster children with disabilities were unnecessarily held in psychiatric hospitals. According to the lawsuit, eighty percent of the more than 800 children were held for ten days or more beyond the time they should have been discharged. More than 40% were confined for a month or longer; 15% had to wait two months or longer. The lawsuit further alleges that the Illinois child welfare agency is aware of the problems yet has failed to ensure that these children are discharged to family-like foster homes or other community-based therapeutic settings. In March 2021, the court ruled that the plaintiffs had pled actionable discrimination under section 504 and the ADA.[190]

In Oregon, two separate class actions were filed on behalf of children with disabilities under the care and custody of Oregon Department of Human Services. The first lawsuit alleged the State agency systematically placed foster children with mental health disabilities in hotel rooms or offices and denied children with disabilities family foster homes and other community-based therapeutic placements. The lawsuit also alleged the children are disproportionately denied, by reason of their disability, the opportunity to benefit from a State program to provide safe, nurturing homes for children and from the mental health services offered by the child welfare agency.[191] A second lawsuit was filed in 2019 alleging children in Oregon's foster care system, including a sub-class of children who have emotional, intellectual, psychological, and physical disabilities, were denied appropriate family home and therapeutic placements.[192] Children with disabilities represent 50% of children currently in Oregon's foster care system. The lawsuit alleges Oregon sends foster children to out-of-state congregate care and other restrictive institutions including repurposed juvenile detention facilities, instead of placing them

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[189] *Golbert v. Walker,* No. 18 C 8176 (N.D. Ill. Dec. 13, 2018).
[190] *Golbert v. Walker*, No. 18 C 8176, 24, Order Denying Motion to Dismiss (N.D. Ill. Mar. 18, 2021).
[191] *A.R. v. State of Or.,* No. 3:16-cv-01895, Amended Complaint (D. Or. Sept. 30, 2016).
[192] *Wyatt B. v. Brown,* 6:19-cv-00556, Complaint (D. Or. Apr. 16, 2019).

in family foster homes and therapeutic community-based settings within the State. The suit further alleges that foster children with disabilities are also denied community-based placements and services to ensure access to the least restrictive settings. Similar to the first lawsuit, this class action alleges children are placed in homeless shelters and minimally refurbished juvenile delinquent institutions, and it alleges children are held in hospitals beyond the time when hospitalization is medically necessary. In September 2021, the district court ruled the plaintiffs' allegations sufficient to state a claim for disability discrimination under the integration mandate.[193]

In 2021, lawsuits were filed by advocates on behalf of foster children and youth with disabilities in the custody of the Washington State Department of Children, Youth and Families (DCYF) and the Alabama Department of Human Resources. The Washington complaint alleges that the State agency denies foster children with behavioral and developmental disabilities appropriate services, supports, and stable placements in family-like settings. The action further alleges that foster children with disabilities experience multiple, short-term emergency placements in motels, one-night stay foster care homes, and DCYF offices. It also alleges that some foster children are segregated with other youth with behavioral and developmental disabilities in congregate care settings or are sent to out-of-state institutions away from their families and communities.[194]

The Alabama lawsuit alleges that the State child welfare agency discriminates against youth with mental impairments by unnecessarily segregating them in restrictive, institutional psychiatric facilities. The complaint alleges that a foster youth with a "mental impairment" was held unnecessarily in a psychiatric residential treatment facility because the State agency failed to locate a community-based placement with appropriate supports and services. Though the State

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[193] *Wyatt B. v. Brown,* 6:19-cv-00556 (D. Or. Sept. 27, 2021) (denying in part Defendants' motion to dismiss).
[194] *D.S. v. Wash. Dep't of Children, Youth & Families,* No. 2:21-cv-00113 (W.D. Wash. Apr. 12, 2021); *AA v. Buckner*, No. 2:21CV367 (M.D. Ala Oct. 29, 2021).

child welfare agency determined the foster youth was eligible for community-based placement, according to the complaint, she remained in a restricted and segregated placement for more than a year due to the agency's failure to develop an adequate system of community support and recruit and train foster families. The complaint asserts that children placed in institutional settings are less likely to achieve permanency, experience poor child welfare outcomes, and are more likely to age out of foster care without appropriate community-based care to facilitate a successful transition to adulthood.

In 2022, a class action complaint was filed by advocates on behalf of foster children with disabilities in the custody of the North Carolina Department of Health and Human Services (DHHS). The complaint alleges DHHS unnecessarily segregates foster children with disabilities from their home communities and routinely isolates them in restrictive, and often clinically inappropriate, institutional settings, such as psychiatric residential treatment facilities (PRTF).[195] The complaint further alleges that the children of color disproportionately bear the burden of unnecessary and segregated confinement in PRTFs. According to the complaint, some of the named plaintiffs receive heavy cocktails of mind-altering psychotropic medications, are subject to physical restraints, and have suffered bullying by PRTF staff.

- *Child Welfare Question 1: The Department seeks comment on additional examples of the application of the most integrated setting requirement to child welfare programs and welcomes comments on any additional points for consideration regarding integration of children with disabilities in child welfare contexts.*

Discrimination prohibited in child welfare services.

Proposed § 84.60(a) states that no qualified individual with a disability may be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any child welfare program or activity. This section is consistent with the general

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[195] *Timothy B. v. N.C. Dep't of Health and Human Srvs.,* Complaint, No. 1:22-cv1046 (M.D. N.C. Dec. 6, 2022).

nondiscrimination provisions contained at § 84.68(a), as well as the general nondiscrimination provisions applicable to health, welfare, and social services programs at § 84.52(a), and applies them directly to child welfare entities who are recipients of Federal funding. This proposed provision does not enlarge the existing protections of section 504, but the foregoing discussion, as well as OCR's own outreach initiatives to child welfare advocates and recipients, strongly indicate that child welfare entities who are recipients of Federal funding are not all aware of their responsibilities under the statute. This section is meant to ensure that individuals with disabilities served by child welfare programs are afforded full and equal opportunities to access and benefit from child welfare programs and activities as required by section 504.

Proposed § 84.60(a)(2)(i) states that discrimination includes decisions based on speculation, stereotypes, or generalizations about a parent, caregiver, foster parent, or prospective parent. Section 84.60(a)(2)(ii) prohibits such discriminatory decisions about a child with a disability.

The term "parents" is defined in proposed § 84.10 as biological or adoptive parents or legal guardians, as determined by applicable State law. The definition is consistent with 42 U.S.C. 675(2) in title IV-E of the Social Security Act, the statute governing Federal payments for foster care, adoption assistance, and prevention services. The term "caregivers" as used in this section includes relatives and other kinship caregivers who provide for the physical, emotional, and social needs of the child. The term "foster parents" means individuals who provide a temporary home and support for children in foster care as defined in 45 CFR 1355.20. This category may include relatives or nonrelatives that are licensed or approved to provide care for foster children. The term "companion" as defined in § 84.10 means a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate. The term "prospective parents" as defined in § 84.10 means individuals who are seeking to become foster or adoptive parents.

The term “qualified person with a disability” or “qualified individual with a disability” means a person with a disability who meets the essential eligibility requirements of the child welfare program or activity, with or without the provision of reasonable modifications, the provision of appropriate auxiliary aids and services, or the removal of architectural, communication, or transportation barriers. "Program or activity,” as defined in § 84.10, means all of the operations of any entity, any part of which is extended Federal financial assistance. In the context of child welfare, “all operations” includes but is not limited to, child protective services investigations and child removals; safety and risk assessments; in-home skill-based services; case planning and service planning; community-based services including mental health and substance use disorder programs; visitation; reunification; out of home placements and agency placement decisions (e.g., foster care, kinship care, and adoption); services to help current and former foster care youths transition into adulthood and achieve self-sufficiency; and guardianship. A child welfare entity’s participation in dependency hearings, child placements, and agency placement decisions and proceedings to terminate parental rights are also “operations” within the definition of program or activity in § 84.10.

Proposed paragraph (b) of § 84.60 articulates prohibitions included under paragraph (a) and outlines the types of child welfare actions that are prohibited when they occur based on the fact that a qualified individual who is a parent, caregiver, foster parent, or prospective parent has a disability, including the denial of custody, control, or visitation related to a child; termination of parental rights; and the denial of access to adoption or foster care services;. This list is not exhaustive, but rather, illustrative.

- *Child Welfare Question 2: The Department invites comment on this list of prohibited activities in the child welfare context, especially on whether commenters believe it is complete.*

Proposed paragraph (b)(1) of § 84.60 addresses the denial of custody or control of children from qualified parents with disabilities. This paragraph prohibits child welfare programs

from petitioning for the removal of a child from a parent because of speculation, stereotypes, or generalizations about a parent's disability.

Proposed paragraph (b)(2) of § 84.60 requires that recipients ensure that qualified parents with disabilities are not denied the opportunity to preserve their families that is equal to the opportunity that recipients offer to parents without disabilities. Child welfare programs or activities may not limit access to reunification services for parents with disabilities or provide reunification services to parents with disabilities that are inaccessible.

Proposed paragraph (b)(3) of § 84.60 addresses the termination of parental rights or legal guardianship of a qualified parent or legal guardian with a disability. Much like paragraph (b)(1), it means that a child welfare entity may not file a petition to terminate a parent's legal rights over a child because of speculation, stereotypes, or generalizations surrounding the parent's disability.

Proposed paragraph (b)(4) of § 84.60 affirms the right of a qualified caregiver, foster parent, companion, or prospective parent with a disability to be given an opportunity to participate in or benefit from child welfare programs and activities. Child welfare programs must ensure that they provide equal opportunities for caregivers, foster parents, companions, or prospective parents with disabilities to benefit from those programs, including by providing auxiliary aids and services and reasonable modifications.

Pressuring a qualified individual with a disability not to seek, apply, or participate in Federally funded child welfare aids, benefits, or services may also result in a denial of the opportunity to participate in or benefit from child welfare programs and activities under proposed paragraph (b)(4) of § 84.60. For example, child welfare entities may not inappropriately pressure parents with disabilities towards voluntary relinquishment of parental rights or improperly influence a parent's decision to participate in visitation and reunification activities on the basis of the parent's disability. Another example of prohibited conduct under paragraph (b)(4) is using criteria that discriminate on the basis of disability. This includes the use of discriminatory screening processes or requirements for service.

Proposed paragraph (c) of § 84.60 requires recipients to establish procedures for referring qualified parents who, because of disability, need or are believed to need modified or adaptive services (e.g., individualized parenting training) or reasonable modifications and to ensure that tests, assessments, and other evaluation materials are tailored to assess specific areas of disability-related needs. For purposes of this paragraph, the term "service provider" refers to individual providers or agencies who evaluate families to determine their need for behavioral health, parenting skills, and other services to address safety concerns and strengthen a parent's protective capacity. This paragraph requires that when referring a parent with an actual or suspected disability for parent evaluations, recipients ensure that service providers use tests and assessment materials that are tailored and adapted to assess parenting capability and functioning. For example, service providers may assess a parent, caregiver, foster parent, or prospective parent's capabilities, functioning, and ability to care for a child by potentially drawing from a wealth of sources. When assessing parenting capabilities, the service provider should use methods that are adapted where necessary to address the parent's disability and that broadly evaluate an individual's strengths, needs, and abilities based on objective evidence, including direct observation, interviews, and medical and social history. For example, this requirement would prevent the use of a single general IQ score to evaluate the parenting capabilities of an individual with an intellectual disability.

- *Child Welfare Question 3: The Department seeks comment on how agencies would implement these referral procedures, ensure that service providers use the methods described, and prohibit the use of IQ alone as the basis for a parenting assessment.*

Section 504 requires that these assessments consider the strengths and needs of a parent, caregiver, foster parent, or prospective parent with a disability and not base decisions on preconceived notions resulting from generalizations and stereotypes about individuals with disabilities. It prohibits child welfare agencies from making decisions about foster parents and prospective foster parents that are based on assumptions or generalizations about people with

disabilities. Disabilities rarely manifest in the exact same way from person to person, and decisions about a parent, caregiver, foster parent, or prospective parent's ability to care for a child, must be based on facts regarding each individual.[196]

In some circumstances, the risk of harm to a child may warrant removal, denial of reunification, denial of visitation, or termination of parental rights. Risk of harm to a child may be analyzed through section 504's provision addressing "direct threat." Proposed § 84.75 states that recipients are not required to provide benefits or services to individuals with disabilities if those individuals pose a direct threat to others. In determining whether an individual poses a direct threat, a recipient must make an individualized assessment based on reasonable judgment from current medical knowledge or the best available objective evidence to ascertain the nature, duration, and severity of the risk to the child; the probability that the potential injury to the child will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. Where a parent with a disability poses a significant risk to the child's health and safety, recipients would be permitted to delay or deny reunification or delay or deny visitation with a parent.

The Department believes that the proposed regulation furthers the best interests of the children involved in child-welfare matters governed by this section. Basing decisions to remove children from their parents or caretakers, to terminate their parents' rights, or to limit visitation on stereotypes, assumptions, and unsubstantiated beliefs is not in children's best interests. We therefore believe that the proposed rule both implements the plain requirements of section 504 and advances the best interests of children and their caretakers.

Subpart I – Web, mobile, and kiosk accessibility.

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[196] *See* U.S. Dep't of Health & Hum. Servs., U.S. Dep't of Justice, Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act (Aug. 2015). https://www.ada.gov/doj_hhs_ta/child_welfare_tahttps://www.hhs.gov/sites/default/files/disability.pdf.

Introduction.

Web content and mobile applications provide increasingly crucial gateways to health and human service programs and activities. Inaccessible technology can cause severe harm, from denials of cancer screenings to limitations in reunification services for parents and children. Current Federal laws and regulations require the accessibility of all programs and activities of recipients of Federal financial assistance, including those provided through web content, mobile applications, and kiosks.[197] Despite these requirements, the Department has received numerous complaints alleging that people with disabilities continue to face barriers to access, including inaccessible recipient websites and mobile applications, in addition to kiosks. To help ensure access for individuals with disabilities and provide additional clarity to recipients, the Department proposes to require specific standards for accessible recipient web content and mobile applications, as well as general accessibility for kiosks used in recipients' programs and activities, in this subpart.

History of web interpretation under section 504.

Section 504 provides that individuals with disabilities shall not, solely by reason of such disability, be excluded from participation in or be denied the benefits of programs or activities of a recipient, or be subjected to discrimination by any such entity.[198] Many recipients now regularly offer many of their programs and activities through web content and mobile apps, and the Department describes in detail some of the ways in which recipients have done so later in this section. To ensure equal access to such programs and activities, the Department is undertaking

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[197] *See, e.g.,* 45 CFR 92.104; 45 CFR 84.4, redesignated as 84.68. Note that compliance with these web and mobile accessibility requirements does not remove covered entities' obligations under Title I of the ADA to not discriminate against qualified individuals on the basis of disability in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; or other terms, conditions, and privileges of employment. These obligations include making reasonable accommodation to the known physical or mental limitations of applicants or employees, absent undue hardship.

[198] 29 U.S.C. 794.

this rulemaking to provide recipients with more specific information about how to meet their nondiscrimination obligations.

As with many other civil rights statutes, section 504's requirements are broad and its implementing regulations do not include specific standards for every obligation under the statute. This has been the case in the context of web and mobile app content accessibility under section 504. Because the Department has not adopted specific technical requirements for web content through rulemaking, recipients have not had specific direction on how to comply with section 504's general requirements of nondiscrimination and effective communication. However, recipients must still comply with these section 504 obligations with respect to their websites and mobile apps, including before this rule's effective date.

As the use of technology has become more prevalent in health programs and activities, the Department has articulated its position about the ways that Federal civil rights laws that prohibit discrimination on the basis of disability require accessibility for individuals with disabilities. In December of 2016, the Department issued a guidance document titled "Guidance and Resources for Electronic Information Technology: Ensuring Equal Access to All Health Services and Benefits Provided through Electronic Means."[199] This guidance document recognized that health care providers increasingly rely on information and communication technology (ICT),[200] including kiosks and websites, to provide health programs and activities, and that a failure to ensure that the services covered health care entities provide through ICT are accessible to people with disabilities may constitute discrimination under Federal civil rights laws.[201]

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[199] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance and Resources for Electronic Information Technology: Ensuring Equal Access to All Health Services and Benefits Provided through Electronic Means (Dec. 21, 2016), https://www.hhs.gov/sites/default/files/ocr-guidance-electronic-information-technology.pdf.

[200] The guidance document used the term "electronic and information technology (EIT)," which has since been effectively replaced with the term "information and communication technology (ICT)."

[201] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance and Resources for Electronic Information Technology: Ensuring Equal Access to All Health Services and Benefits Provided through Electronic Means (Dec. 21, 2016), https://www.hhs.gov/sites/default/files/ocr-guidance-electronic-information-technology.pdf.

Section 1557 of the Affordable Care Act.

In 2016, when the Department first issued its implementing regulation for section 1557 of the ACA, it required covered entities to ensure that their health programs or activities provided through electronic and information technology, including web content, mobile applications, and kiosks, were accessible to individuals with disabilities, unless doing so would result in a fundamental alteration in the nature of the health programs or activities or undue financial and administrative burdens.[202] The Department also noted that while it would not adopt specific accessibility standards for electronic and information technology at the time, it would be "difficult to ensure compliance with accessibility requirements without adherence to standards such as the Web Content Accessibility Guidelines (WCAG)[203] 2.0 AA standards or the Section 508 standards," and strongly encouraged recipients to use such standards.[204] While the Department released an updated implementing regulation for section 1557 in 2020, the existing regulation still requires that covered entities, many of whom are recipients and subject to the requirements of section 504, ensure that their health programs or activities provided through ICT are accessible to individuals with disabilities, unless doing so would result in a fundamental alteration in the nature of the programs or activities or undue financial and administrative burdens.[205]

DOJ's previous web accessibility-related rulemaking efforts under the ADA.

Title II of the ADA provides that individuals with disabilities shall not, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs

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[202] 81 FR 31376 (May 18, 2016).
[203] Web Content Accessibility Guidelines (WCAG) are developed by the World Wide Web Consortium process in cooperation with individuals and organizations around the world, with a goal of providing a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally. *See Web Content Accessibility Guidelines (WCAG) Overview*, W3C: Web Accessibility Initiative Mar. 18, 2022), https://www.w3.org/WAI/standards-guidelines/wcag/
[204] 81 FR 31376, 31426 (May 18, 2016).
[205] 45 CFR 92.104.

or activities of a State or local government entity, or be subjected to discrimination by any such entity.[206] Title II is modeled on section 504 of the Rehabilitation Act.[207]

Title II of the ADA and section 504 are generally understood to impose similar requirements, given the similar language employed in the ADA and the Rehabilitation Act.[208] The legislative history of the ADA makes clear that title II of the ADA was intended to extend the requirements of section 504 to apply to all state and local governments, regardless of whether they receive Federal funding, demonstrating Congress's intent that title II and section 504 be interpreted consistently.[209]

DOJ first articulated its interpretation that the ADA applies to websites of covered entities in 1996.[210] Under title II, this includes ensuring that individuals with disabilities are not, by reason of such disability, excluded from participation in or denied the benefits of the services, programs and activities offered by state and local government entities, including those offered via the web, such as education services, voting, town meetings, vaccine registration, tax filing systems, and applications for benefits.[211] DOJ has since reiterated this interpretation in a variety of online contexts.[212] Title II of the ADA also applies when public entities use mobile apps to offer their services, programs, and activities.

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[206] 42 U.S.C. 12132.
[207] *See e.g.,* H. Rep. 101-485 (II) at 84 (May 15, 1990).
[208] *See, e.g.,* 42 U.S.C. 12201(a).
[209] *See* H. Rep. 101-485 (II) at 84 (May 15, 1990).
[210] *See* Letter from Tom Harkin, U.S. Senator, to Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996).
[211] *See* 42 U.S.C. 12132.
[212] *See* U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA*, ADA.gov (March 18, 2022), https://www.ada.gov/resources/web-guidance/ [https://perma.cc/WH9E-VTCY]; Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District Under the Americans with Disabilities Act (Dec. 14, 2021), https://www.ada.gov/champaign-urbana_sa.pdf [https://perma.cc/VZU2-E6FZ]; Consent Decree, United States v. The Regents of the Univ. of Cal. (Nov. 20, 2022), https://www.justice.gov/opa/press-release/file/1553291/download [https://perma.cc/9AMQ-GPP3]; Consent Decree, Dudley v. Miami Univ. (Oct. 17, 2016), https://www.ada.gov/miami_university_cd.html [https://perma.cc/T3FX-G7RZ]; Settlement Agreement Between the United States of America and the City and County of Denver, Colorado Under the Americans with Disabilities Act (Jan. 8, 2018), https://www.ada.gov/denver_pca/denver_sa.html [https://perma.cc/U7VE-MBSG]; Settlement Agreement Between the United States of America and

In June 2003, DOJ published a document titled "Accessibility of State and Local Government Websites to People with Disabilities*,"*[213] which provides tips for State and local government entities on ways they can make their websites accessible so that they can better ensure that people with disabilities have equal access to the services, programs, and activities that are provided through those websites. Similar to the Department's 2016 Guidance, the DOJ guidance noted that "an agency with an inaccessible website may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line," while also acknowledging that this is unlikely to provide an equal degree of access.[214]

DOJ previously pursued rulemaking efforts regarding website accessibility under title II. On July 26, 2010, DOJ's advance notice of proposed rulemaking (ANPRM) titled "Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations" was published in the *Federal Register*.[215] The ANPRM announced that DOJ was considering revising the regulations implementing titles II and III of the ADA to establish specific requirements for state and local government entities and public accommodations to make their websites accessible to individuals with disabilities. In the ANPRM, DOJ sought information regarding what standards, if any, it should adopt for web accessibility; whether DOJ should adopt coverage limitations for certain entities, like small businesses; and what resources and services are available to make existing websites accessible to individuals with disabilities. DOJ also requested comments on the costs of making websites accessible; whether there were effective and reasonable alternatives to make websites accessible that DOJ should consider

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Nueces County, Texas Under the Americans with Disabilities Act (effective Jan. 30, 2015), https://www.ada.gov/nueces_co_tx_pca/nueces_co_tx_sa.html [https://perma.cc/TX66-WQY7]; Settlement Agreement Between the United States of America, Louisiana Tech University, and the Board of Supervisors for the University of Louisiana System Under the Americans with Disabilities Act (July 22, 2013), https://www.ada.gov/louisiana-tech.htm [https://perma.cc/78ES-4FQR].

[213] U.S. Dep't of Just., *Accessibility of State and Local Government Websites to People with Disabilities*, ADA.gov (June 2003), https://www.ada.gov/websites2.htm [https://perma.cc/Z3X5-NJ64].

[214] *Id.*

[215] 75 FR 43460 (July 26, 2010).

permitting; and when any web accessibility requirements adopted by DOJ should become effective. DOJ received approximately 400 public comments addressing issues germane to both titles II and III in response to that ANPRM. DOJ later announced that it decided to pursue separate rulemakings addressing website accessibility under titles II and III.[216]

On May 9, 2016, DOJ followed up on its 2010 ANPRM with a detailed Supplemental ANPRM that was published in the *Federal Register*. The Supplemental ANPRM solicited public comment about a variety of issues regarding establishing technical standards for web access under title II.[217] DOJ received more than 200 public comments in response to the title II Supplemental ANPRM.

On December 26, 2017, DOJ published a Notice in the *Federal Register* withdrawing four rulemaking actions, including the titles II and III web rulemakings, stating that it was evaluating whether promulgating specific web accessibility standards through regulations was necessary and appropriate to ensure compliance with the ADA.[218] DOJ has also previously stated that it would continue to review its entire regulatory landscape and associated agenda, pursuant to the regulatory reform provisions of Executive Order 13771 and Executive Order 13777.[219] Those Executive Orders were revoked by Executive Order 13992 in early 2021. In March 2022, DOJ released guidance addressing web accessibility for people with disabilities.[220] This technical assistance expanded on DOJ's previous ADA guidance by providing practical tips and resources for making websites accessible for both title II and title III entities. It also reiterated DOJ's

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[216] *See* Department of Justice—Fall 2015 Statement of Regulatory Priorities, *http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html* [*https://perma.cc/YF2L-FTSK*].
[217] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 FR 28658 (May 9, 2016).
[218] Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 FR 60932 (Dec. 26, 2017).
[219] *See* Letter for Charles E. Grassley, U.S. Senator, from Stephen E. Boyd, Assistant Attorney General, Civil Rights Division, Department of Justice (Oct. 11, 2018), *https://www.grassley.senate.gov/imo/media/doc/2018-10-11%20DOJ%20to%20Grassley%20-%20ADA%20Website%20Accessibility.pdf* [*https://perma.cc/8JHS-FK2Q*].
[220] U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA*, ADA.gov (March 18, 2022), https://www.ada.gov/resources/web-guidance/ [https://perma.cc/874V-JK5Z] (last visited Aug. 8, 2022).

longstanding interpretation that the ADA applies to all services, programs, and activities of covered entities, including when they are offered via the web.

The guidance did not include 24/7 staffed telephone lines as an alternative to accessible websites as was included in both the Department's 2016 Guidance on Electronic and Information Technology and in DOJ's 2003 guidance. Given the way the modern web has developed, the Department no longer believes that 24/7 staffed telephone lines can realistically provide equal access to people with disabilities. Websites—and often mobile apps—allow the public to get information or request a service within just a few minutes. Getting the same information or requesting the same service using a staffed telephone line takes more steps and may result in wait times or difficulty getting the information.

For example, a health care provider's website may allow members of the public to quickly review large quantities of information, like information about how to schedule an appointment, a certain specialty service, or health tips during a public health emergency. Members of the public can then use recipient websites to promptly act on that information by, for example, scheduling an appointment, attending a virtual telehealth appointment, or requesting a prescription refill through a virtual portal. A member of the public could not realistically accomplish these tasks efficiently over the phone. Additionally, a person with a disability who cannot use an inaccessible online new patient form might have to call to request assistance with filling out either online or mailed forms, which could involve significant delay and may require providing private information such as banking details or Social Security numbers over the phone without the benefit of certain security features available for online transactions. Finally, calling a staffed telephone line lacks the privacy of looking up information on a website. A caller needing public safety resources, for example, might be unable to access a private location to ask for help on the phone, whereas an accessible website would allow users to privately locate resources. For these reasons, the Department does not believe that a staffed telephone line—even if it is offered 24/7—provides equal access in the way that an accessible website can.

DOJ is now reengaging in efforts to promulgate regulations establishing technical standards for web accessibility for public entities and has begun distinct rulemaking to address web access under title II of the ADA.[221]

Need for Department Action.

Use of web content by recipients.

Recipients regularly use the web to disseminate information and offer programs and activities to the public. Health care providers frequently advertise their services, post health related information, and offer methods to schedule appointments through websites. Additionally, applications for many benefits are available through social service websites.

People also rely on recipients' websites to engage in health and human service programs and activities, particularly when more individuals prefer or need to stay at home following the COVID-19 pandemic. The Department believes that although many public health measures addressing the COVID-19 pandemic are no longer in place, there have been durable changes to recipient operations and public preferences that necessitate greater access to online programs and activities.

Health care provider websites and applications are important platforms for centralizing relevant health information for patients, scheduling appointments and procedures, accessing patient information, and providing contact information. During the COVID-19 Public Health Emergency, websites and applications were often used as the only means to schedule COVID testing and vaccination appointments, making it crucial for those appointment web pages and their navigation paths to be accessible to individuals with disabilities.[222] The Department

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[221] 88 FR 51948 (Aug. 4, 2023), to be codified at 28 CFR part 35.

[222] The HHS Office for Civil Rights released guidance on April 13, 2021, reminding recipients that vaccine scheduling and registration provided online must be accessible to individuals with disabilities. This was based in part on complaints OCR received alleging that recipients were requiring individuals to register for vaccine appointments using inaccessible websites. *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance on Federal Legal Standards Prohibiting Disability Discrimination in

received numerous complaints alleging that vaccination websites were not compatible with screen-reader software, did not allow individuals unable to use a computer mouse to select necessary boxes, and generally did not allow for individuals with disabilities to schedule vaccine appointments despite being eligible for vaccines.[223] Additionally, the Department is aware of allegations that electronic health records, including those available through patient portals on provider websites and applications, such as text-based reports describing x-rays and MRI results, are not readable with a screen reader, making them inaccessible to some individuals with vision disabilities.

Telehealth has been increasing in popularity, availability, and reliability among providers and patients, with the COVID-19 pandemic coinciding with a marked increase in telehealth capacity and use.[224] 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.[225] Unfortunately, these increased opportunities have also exposed accessibility shortcomings in the web content and applications used by some recipients to provide telehealth. Individuals with hearing

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COVID-19 Vaccination Programs (Apr. 13, 2021), https://www.hhs.gov/sites/default/files/federal-legal-standards-prohibiting-disability-discrimination-covid-19-vaccination.pdf.

[223] *See also* John Hopkins Univ. Disability Health Res. Ctr., Vaccine Website Accessibility Tables (May 19, 2021), https://disabilityhealth.jhu.edu/vaccinedashboard/webaccess/ (Dashboard that tracked accessibility of state websites with vaccine information).

[224] According to CDC Health Center Program Data, approximately 43% of providers were capable of providing telehealth in 2019 while approximately 95% of providers reported using telehealth during the COVID-19 pandemic. U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control, Trends in Use of Telehealth Among Health Centers During the COVID-19 Pandemic – United States, June 26-November 26, 2020 (Feb. 19, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7007a3.htm.

[225] *See, e.g.,* Letter from Am. Ass'n of People with Disabilities et al., to the Department (Feb. 24, 2022), https://autisticadvocacy.org/wp-content/uploads/2022/02/HHS_Disability-Advocates-Memo-02.24.22.pdf (noting that increased use of telehealth has led to some accessibility challenges for individuals with disabilities and requesting that the Department provide clear guidance on telehealth accessibility requirements); Kathleen Bogart et al., *Healthcare Access, Satisfaction, and Health-related Quality of Life Among Children and Adults with Rare Diseases*, 17 Orphanet J. of Rare Diseases 196 (May 12, 2022); JF Scherr et al., *Utilizing Telehealth to Create a Clinical Model of Care for Patients with Batten Disease and other Rare Diseases*, Therapeutic Advances in Rare Disease (Aug. 18, 2021).

disabilities may require real-time captioning.[226] Individuals with vision disabilities may require online portals to be accessible using assistive technology such as screen readers.

The Department is aware of numerous allegations that existing telehealth platforms are not accessible to individuals with disabilities, resulting in ineffective services. Even if the United States returns to pre-pandemic levels of in-person health care visits, telehealth will remain an integral part of health care and give a lifeline to individuals in rural communities and others who cannot access timely in-person health care or choose not to visit in person. Recently, the Department released joint guidance with DOJ on ensuring the accessibility of telehealth.[227] The guidance document lists specific Federal nondiscrimination laws that apply to telehealth and includes examples of the protections for individuals with disabilities.

Similar to its use in health programs and activities, web content has become a common method to disseminate information on and deliver human service programs and activities. If an individual with a disability is unable to access web content that a recipient uses for its programs or activities, they may be denied access to critical benefits they are entitled to receive. For example, a human service program that requires applicants to fill out an online application for benefits that is incompatible with screen readers, voice dictation, or hands-free devices will likely deny certain individuals with disabilities an equal opportunity to apply for those benefits. Even situations where application forms are also available in other formats, such as paper copies at a single physical location, may still result in unequal access and a delay in benefits if online forms are inaccessible.

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[226] *See* Nat'l Council on Disability, 2021 Progress Report: The Impact of COVID-19 on People with Disabilities (Oct. 29, 2021), https://ncd.gov/sites/default/files/NCD_COVID-19_Progress_Report_508.pdf (urging the Department to require that telehealth providers ensure their platforms are compatible with screen-readers and allow for third-party interpreters.).

[227] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., U.S. Dep't of Justice, Civil Rights Division, Guidance on Nondiscrimination in Telehealth: Federal Protections to Ensure Accessibility to People with Disabilities and Limited English Proficient Persons (July 29, 2022), https://www.hhs.gov/sites/default/files/guidance-on-nondiscrimination-in-telehealth.pdf.

As noted previously, access to the web has become increasingly important as a result of the COVID-19 pandemic, which shut down workplaces, schools, and in-person services, and has forced millions of Americans to stay home for extended periods.[228] In response, the American public has turned to the web for work, activities, and learning.[229] In fact, a study conducted in April 2021 found that 90 percent of adults say the web "has been at least important to them personally during the pandemic." Fifty-eight percent say it has been *essential*.[230]

Currently, a large number of Americans interact with recipients remotely and many recipients provide vital information and services for the general public online. Access to web-based information and services, while important for everyone during the pandemic, took on heightened importance for people with disabilities, many of whom face a greater risk of COVID-19 exposure, serious illness, and death.[231]

According to the CDC, some people with disabilities "might be more likely to get infected or have severe illness because of underlying medical conditions, congregate living settings, or systemic health and social inequities.[232] All people with serious underlying chronic medical conditions like chronic lung disease, a serious heart condition, or a weakened immune system seem to be more likely to get severely ill from COVID-19."[233] A report by the National Council

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[228] *See* Colleen McClain, Emily A. Vogels, Andrew Perrin, Stella Sechopoulos, and Lee Rainie, *The Internet and the Pandemic*, Pew Research Center (Sep. 1, 2021), https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/ [https://perma.cc/4WVA-FQ9P].

[229] *See* Kerry Dobransky and Eszter Hargittai, *Piercing the Pandemic Social Bubble: Disability and Social Media Use About COVID-19*, American Behavioral Scientist (Mar. 29, 2021), https://doi.org/10.1177/00027642211003146.

[230] *See* McClain, Vogels, Perrin, Sechopoulos, *The Internet and the Pandemic*, at 3.

[231] *See* Hannah Eichner, *The Time is Now to Vaccinate High-Risk People with Disabilities*, National Health Law Program (Mar. 15, 2021), https://healthlaw.org/the-time-is-now-to-vaccinate-high-risk-people-with-disabilities/ [https://perma.cc/8CM8-9UC4].

[232] *See* U.S. Dep't of Health and Hum. Servs., Centers for Disease Control and Prevention, Underlying Medical Conditions Associated with Higher Risk for Severe COVID-19: Information for Healthcare Professionals (Feb. 9. 2023), https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html.

[233] *See People with Disabilities*, Centers for Disease Control and Prevention, https://www.cdc.gov/ncbddd/humandevelopment/covid-19/people-with-disabilities.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fpeople-with-disabilities.html [https://perma.cc/WZ7U-2EQE] (last visited, Aug. 2, 2022).

on Disability indicated that COVID-19 has a disproportionately negative impact on people with disabilities' access to healthcare, education, and employment, among other areas, making remote access to these opportunities via the web even more important.[234]

Individuals with disabilities can often be denied equal access to programs and activities because many recipients' web content is not fully accessible. Thus, there is a digital divide between the ability of people with certain types of disabilities and people without those disabilities to access the programs and activities of recipients.

The Department is also proposing that recipients make their mobile apps accessible under proposed § 84.84, because recipients also use mobile apps to offer their programs and activities to the public. As discussed in the proposed definition, a mobile app is a software application that is downloaded and designed to run on mobile devices such as smartphones and tablets. Mobile apps are distinct from a website that can be accessed by a mobile device because, in part, mobile apps are not directly accessible on the web—they are often downloaded on a mobile device.[235] A mobile website, on the other hand, is a website that can be accessed by a mobile device similarly to how it can be accessed on a desktop computer.[236]

Recipients use mobile apps to provide services and reach the public in various ways. For example, some recipients use mobile apps as a method to access a patient portal and engage in a number of activities related to that patient, such as scheduling appointments, messaging physicians, and requesting medical records.

Although many individuals access web content, including telehealth platforms, on desktop computers and laptops, many others rely on mobile applications used on mobile devices such as

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[234] *See 2021 Progress Report: The Impact of COVID-19 on People with Disabilities*, National Council on Disability (Oct. 29, 2021), https://ncd.gov/progressreport/2021/2021-progress-report [https://perma.cc/96L7-XMKZ].

[235] Mona Bushnell, *What Is the Difference Between an App and a Mobile Website?,* Business News Daily (Nov. 19, 2021), https://www.businessnewsdaily.com/6783-mobile-website-vs-mobile-app.html [https://perma.cc/9LKC-GUEM]https://www.businessnewsdaily.com/6783-mobile-website-vs-mobile-app.html (last visited Aug. 8, 2022).

[236] *Id*.

smart phones and tablets. As of 2021, 15% of American adults relied on smartphones for internet access, i.e., owned a smartphone but did not have a traditional home broadband service.[237] Specific issues that arise when individuals with disabilities attempt to access web content on mobile devices include but are not limited to: actions (such as resizing) that require specific manual operations, cancellation functions that cannot be terminated, and orientation requirements. Any standards to ensure accessibility of web content and mobile applications must consider how that web content will be viewed and used on mobile devices.

The Department is aware that some recipients, including doctors' offices, hospitals, and social service offices, use kiosks or similar self-service transaction machines for members of the public to perform a number of tasks including checking in for appointments, providing information for the receipt of services, procuring services, measuring vitals, and performing other services without interacting directly with recipient staff.

While these kiosks may be convenient in certain instances, they may also be inaccessible to individuals with certain disabilities, especially when they were not designed with the needs of individuals with disabilities in mind. The use of inaccessible kiosks that result in delays checking in, privacy concerns, and even the complete inability of people with disabilities to check in for their appointments results in avoidable lack of access to health and human services.

The Department is also aware that some recipients, including health care providers, regularly use mobile devices and applications to coordinate check-in procedures, gather information, and communicate between patients, providers, and third parties, such as pharmacies and other clinicians. In some instances, recipients have begun to provide mobile devices, such as iOS or Android tablets, in waiting rooms so that individuals may fill out forms or questionnaires prior to an appointment, or during the process of interacting with the recipient, while others provide the tablets for check-in and other informational purposes. Much like with kiosks, the use

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[237] Mobile Fact Sheet, Pew Research Center (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/.

of mobile devices for check-in and other purposes may present barriers to services if they are not accessible to individuals with disabilities.

Barriers to web, mobile app, and kiosk accessibility.

Millions of individuals in the United States have disabilities that can affect their use of the web and mobile apps. Many of these individuals use assistive technology to enable them to navigate websites or access information contained on those sites. For example, individuals who are unable to use their hands may use speech recognition software to navigate a website, while individuals who are blind may rely on a screen reader to convert the visual information on a website into speech. Many websites and mobile apps fail to incorporate or activate features that enable users with certain types of disabilities to access all of the information or elements on the website or app. For instance, individuals who are deaf may be unable to access information in web videos and other multimedia presentations that do not have captions. Individuals with low vision may be unable to read websites or mobile apps that do not allow text to be resized or do not provide enough contrast. Individuals with limited manual dexterity or vision disabilities who use assistive technology that enables them to interact with websites may be unable to access sites that do not support keyboard alternatives for mouse commands. These same individuals, along with individuals with cognitive and vision disabilities, often experience difficulty using portions of websites that require timed responses from users but do not give users the opportunity to indicate that they need more time to respond.

Individuals who are blind or have low vision often face significant barriers attempting to access websites and mobile apps. For example, a study from the University of Washington analyzed approximately 10,000 mobile apps and found that many are highly inaccessible to people with disabilities.[238] The study found that 23 percent of the mobile apps reviewed did not

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[238] *See Large-Scale Analysis Finds Many Mobile Apps Are Inaccessible*, University of Wisconsin CREATE, https://create.uw.edu/initiatives/large-scale-analysis-finds-many-mobile-apps-are-inaccessible/ [https://perma.cc/442K-SBCG] (last visited Aug. 8, 2022).

provide content description of images for most of their image-based buttons. As a result, the functionality of those buttons is not accessible for people who use screen readers.[239] Additionally, other mobile apps may be inaccessible if they do not allow text resizing, which can provide larger text for persons with vision disabilities.[240]

Furthermore, many websites provide information visually, without features that allow screen readers or other assistive technology to retrieve information on the website so it can be presented in an accessible manner. A common barrier to website accessibility is an image or photograph without corresponding text describing the image. A screen reader or similar assistive technology cannot "read" an image without corresponding text, leaving individuals who are blind with no way of independently knowing what information the image conveys (e.g., a simple icon or a detailed graph). Similarly, if websites lack navigational headings or links that facilitate navigation using a screen reader it will be difficult or impossible for a someone using a screen reader to understand.[241] Additionally, these websites may fail to present tables in a way that allows the information in the table to be interpreted or accessed by someone who is using a screen reader.[242]

Web-based forms, which are an essential part of accessing certain health and human services, are often inaccessible to individuals with disabilities who use screen readers. For example, field elements on forms, which are the empty boxes on forms that hold specific pieces of information, such as a last name or telephone number, may lack clear labels that can be read by assistive technology. Inaccessible form fields make it difficult for persons using screen readers to fill out online forms, pay fees, submit inquiries, or otherwise participate in recipient

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[239] *Id*.
[240] *See* Chase DiBenedetto, *4 ways mobile apps could be a lot more accessible*, Mashable (Dec. 19, 2021), https://mashable.com/article/mobile-apps-accessibility-fixes [https://perma.cc/WC6M-2EUL].
[241] *See, e.g.*, W3C®, *Easy Checks – A First Review of Web Accessibility*, (updated Jan. 31, 2023), *https://www.w3.org/WAI/test-evaluate/preliminary/* [*https://perma.cc/N4DZ-3ZB8*].
[242] W3C®, *Tables Tutorial* (updated Feb. 16, 2023), *https://www.w3.org/WAI/tutorials/tables/* [*https://perma.cc/FMG2-33C4*].

programs or activities using a website. Some recipients use inaccessible third-party websites to accept online payments, while others request patients check in through their own inaccessible websites. These barriers greatly impede the ability of individuals with disabilities to access the programs and activities offered by recipients on the web. In many instances, removing certain website barriers is neither difficult nor especially costly. For example, the addition of invisible attributes known as alternative (alt) text or alt tags to an image helps orient an individual using a screen reader and allows them to gain access to the information on the website. This can be done without any specialized equipment.[243] Similarly, adding headings, which facilitate page navigation for those using screen readers, can often be done easily as well.

Beyond web and mobile content, kiosks may contain a host of barriers that limit accessibility. The Department has received information from individuals with physical disabilities who have experienced difficulty reaching the controls on kiosks, or operating controls that require tight grasping, pinching, or twisting. Individuals with hearing loss may not be able to operate a kiosk effectively if audio commands or information are not provided in an alternative format. The Department is aware of the barriers created by inaccessible kiosks, particularly in health care, so the proposed rule includes a provision specifically addressing recipients' existing obligations with respect to kiosks. Of course, the existing general nondiscrimination provision in § 84.4 (which this NPRM proposes to redesignate as § 84.68) continues to apply to all HHS-funded programs and activities, including those provided via technology.

Voluntary compliance with technical standards for web accessibility has been insufficient in providing access.

The web has changed significantly and its use has become far more prevalent since Congress enacted the Rehabilitation Act in 1973 and the ADA in 1990. Neither of the laws

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[243] W3C®, *Images Tutorial* (Feb. 08, 2022), *https://www.w3.org/WAI/tutorials/images/* [*https://perma.cc/G6TL-W7ZC*].

specifically addressed recipients' or public entities' use of websites, mobile apps, or kiosks to provide their programs and activities.

A variety of voluntary standards and structures have been developed for the web through nonprofit organizations using multinational collaborative efforts. For example, domain names are issued and administered through the Internet Corporation for Assigned Names and Numbers (ICANN), the Internet Society (ISOC) publishes computer security policies and procedures for websites, and the World Wide Web Consortium (W3C®) develops a variety of technical standards and guidelines ranging from issues related to mobile devices and privacy to internationalization of technology. In the area of accessibility, the Web Accessibility Initiative (WAI) of the W3C® created the Web Content Accessibility Guidelines (WCAG).

Many organizations, however, have indicated that voluntary compliance with these accessibility guidelines has not resulted in equal access for people with disabilities; accordingly, they have urged the Department and its Federal partners to take regulatory action to ensure web and mobile app accessibility. [244] The National Council on Disability, an independent Federal agency that advises the President, Congress, and other agencies about programs, policies, practices, and procedures affecting people with disabilities, has similarly emphasized the need for regulatory action on this issue.[245]

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[244] *See, e.g.*, Letter from Am. Ass'n of People with Disabilities et al. to the Department (Feb. 24, 2022), https://www.aapd.com/wp-content/uploads/2022/03/HHS_Disability-Advocates-Memo-02.24.22.pdf (noting that increased use of telehealth has led to some accessibility challenges for individuals with disabilities and requesting that the Department provide clear guidance on telehealth accessibility requirements); Letter from American Council of the Blind et al. to U.S. Dep't of Just. (Feb. 28, 2022), https://acb.org/accessibility-standards-joint-letter-2-28-22 [https://perma.cc/R77M-VPH9] (citing research showing persistent barriers in digital accessibility); Letter from Consortium for Citizens with Disabilities to U.S. Dep't of Just. (Mar. 23, 2022), https://www.c-c-d.org/fichiers/CCD-Web-Accessibility-Letter-to-DOJ-03232022.pdf [https://perma.cc/Q7YB-UNKV].

[245] National Council on Disability, *The Need for Federal Legislation and Regulation Prohibiting Telecommunications and Information Services Discrimination* (Dec. 19, 2006), https://www.ncd.gov/publications/2006/Dec282006 [https://perma.cc/7HW5-NF7P] (discussing how competitive market forces have not proven sufficient to provide individuals with disabilities access to telecommunications and information services)*; see also, e.g.*, National Council on Disability, *National Disability Policy: A Progress Report* (Oct. 7, 2016), https://ncd.gov/progressreport/2016/progress-report-october-2016 [https://perma.cc/J82G-6UU8] (urging the Department to adopt a web accessibility regulation).

Recent research documents the digital inaccessibility of the websites of more than 100 top hospitals across the United States, finding that only 4.9 percent are compliant with Web Content Accessibility Guidelines (WCAG) 2.1.[246] In general, as technology continues to advance, the methods for ensuring programs and activities are as effective for people with disabilities as those provided to others may need to change, as well.[247]

Despite the availability of voluntary web and mobile app accessibility standards; the Department's position that programs and activities of recipients, including those available on websites, must be accessible; and case law supporting that position, individuals with disabilities continue to struggle to obtain access to the websites of recipients.[248] In addition to the

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[246] Amanda Krupa et al., American Health Information Management Association (AHIMA) Foundation, The Critical Role of Web Accessibility in Health Information Access, Understanding, and Use (2022), https://mathematica.org/publications/the-critical-role-of-web-accessibility-in-health-information-access-understanding-and-use.

[247] *See, e.g.*, *Enyart v. Nat'l Conference*, 630 F. 3d 1153, 1163 (9th Cir. 2011)(an ADA title II case, in which the defendant refused to permit the plaintiff to take the Bar exam using a computer equipped with the assistive technology software JAWS and ZoomText. The court held that the software must be permitted, stating that "assistive technology is not frozen in time: as technology advances, testing accommodations should as well."); *See also California Council of the Blind v. Cnty of Alameda,* 985 F. Supp. 2d 1229, 1241 (N.D. Cal. 2013) (the plaintiffs alleged a violation of section 504 and the ADA because of defendant's failure to provide electronic voting machines with electronic ballots including an audio ballot feature that can read aloud instructions and voting options. In denying the defendant's motion to dismiss, the court noted that "while the Social Security Administration's practice of reading notices to blind individual was once sufficient, reading letters over the phone no longer constituted meaningful access because 'great strides have been made in computer-aided assistance for the blind...'"); *Argenyi v. Creighton Univ.*, 703 F. 3d 441 (8th Cir. 2013) (the court held that the University's failure to provide a system which transcribes spoken words into text on a computer screen violated section 504 and the ADA.).

[248] *See, e.g.*, *Meyer v. Walthall*, 528 F. Supp. 3d 928, 959 (S.D. Ind. 2021) ("[T]he Court finds that Defendants' websites constitute services or activities within the purview of Title II and section 504, requiring Defendants to provide effective access to qualified individuals with a disability."); *Price v. City of Ocala, Fla.*, 375 F. Supp. 3d 1264, 1271 (M.D. Fla. 2019) ("Title II undoubtedly applies to websites . . . ."); *Payan v. Los Angeles Cmty. Coll. Dist*., No. 2:17-CV-01697-SVW-SK, 2019 WL 9047062, at *12 (C.D. Cal. Apr. 23, 2019) ("[T]he ability to sign up for classes on the website and to view important enrollment information is itself a 'service' warranting protection under Title II and section 504."); *Eason v. New York State Bd. of Elections*, No. 16-CV-4292 (KBF), 2017 WL 6514837 (S.D.N.Y. Dec. 20, 2017) (stating, in a case involving a State's website, that "section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act . . . , long ago provided that the disabled are entitled to meaningful access to a recipient's programs and services. Just as buildings have architecture that can prevent meaningful access, so too can software."); *Hindel v. Husted*, No. 2:15-CV-3061, 2017 WL 432839, at *5 (S.D. Ohio Feb. 1, 2017) ("The Court finds that Plaintiffs have sufficiently established that Secretary Husted's website violates Title II of the ADA because it is not formatted in a way that is accessible to all individuals, especially blind individuals like the Individual Plaintiffs whose screen access software cannot be used on the website.").

Department's guidance and enforcement, DOJ has brought enforcement actions to address web access, resulting in a significant number of settlement agreements with state and local government entities as well as public entities.[249]

Moreover, other Federal agencies have also taken enforcement action against public entities regarding the lack of accessible websites for people with disabilities. In December 2017, for example, the U.S. Department of Education entered into a resolution agreement with the Alaska Department of Education and Early Development for violating Federal statutes, including section 504 and title II of the ADA, by denying people with disabilities an equal opportunity to participate in Alaska Department of Education and Early Development's services, programs, and activities, due to website inaccessibility.[250] Similarly, the U.S. Department of Housing and Urban Development took action against the City of Los Angeles, and its subrecipient housing providers, to ensure that it maintained an accessible housing website concerning housing opportunities.[251]

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[249] *See, e.g.*, Settlement Agreement Under the Americans With Disabilities Act Between the United States of America and Rite Aid Corporation (Nov. 1, 2021), https://www.justice.gov/opa/pr/justice-department-secures-agreement-rite-aid-corporation-make-its-online-covid-19-vaccine; Settlement Agreement Under the Americans With Disabilities Act Between the United States of America and Hy-Vee, Inc. (Dec. 1, 2021), https://www.justice.gov/crt/case-document/file/1493151/download; Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District Under the Americans with Disabilities Act (Dec. 14, 2021), https://www.ada.gov/champaign-urbana_sa.pdf [https://perma.cc/VZU2-E6FZ]; Consent Decree, *United States v. The Regents of the Univ. of Cal.* (Nov. 20, 2022), https://www.justice.gov/opa/press-release/file/1553291/download [https://perma.cc/9AMQ-GPP3]; Consent Decree, *Dudley v. Miami Univ.* (Oct. 17, 2016), https://www.ada.gov/miami_university_cd.html [https://perma.cc/T3FX-G7RZ]; Settlement Agreement Between the United States of America and the City and County of Denver, Colorado Under the Americans with Disabilities Act (Jan. 8, 2018), https://www.ada.gov/denver_pca/denver_sa.html [https://perma.cc/U7VE-MBSG]; Settlement Agreement Between the United States of American and Nueces County, Texas Under the Americans with Disabilities Act (effective Jan. 30, 2015), https://www.ada.gov/nueces_co_tx_pca/nueces_co_tx_sa.html [https://perma.cc/TX66-WQY7]; Settlement Agreement Between the United States of American, Louisiana Tech University, and the Board of Supervisors for the University of Louisiana System Under the Americans with Disabilities Act (July 22, 2013), https://www.ada.gov/louisiana-tech.htm [https://perma.cc/78ES-4FQR].

[250] *In re Alaska Dep't. of Educ. and Early Dev.*, OCR Reference No. 10161093 (U.S. Dep't of Educ. Dec. 11, 2017) (resolution agreement), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10161093-b.pdf [https://perma.cc/DUS4-HVZJ].

[251] *See* Voluntary Compliance Agreement Between the U.S. Department of Housing and Urban Development and the City of Los Angeles, California, (Aug. 2, 2019), https://www.hud.gov/sites/dfiles/Main/documents/HUD-City-of-Los-Angeles-VCA.pdf [https://perma.cc/X5RN-AJ5K].

The Department believes that adopting technical standards for web and mobile app accessibility will provide clarity to recipients regarding how to make the programs and activities they offer the public via the web and mobile apps accessible. Adopting specific technical standards for web and mobile app accessibility will also provide individuals with disabilities with consistent and predictable access to the websites and mobile apps of recipients.

Section-by-Section Analysis.

This section details the Department's proposed changes to the section 504 regulation, including the reasoning behind the proposals, and poses questions for public comment.

Definitions.

The Department proposes to add to § 84.10, the Definitions section, the following terms applicable to this subpart: "Archived web content," "Conventional electronic documents," "Kiosks," "Mobile applications (apps)," "WCAG 2.1," and "Web content." Each term is explained in the preamble discussion for § 84.10.

The Department poses questions for feedback about its proposed approach. Comments on all aspects of this proposed rule, including these proposed definitions, are invited. Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 1: The Department's definition of "conventional electronic documents" consists of an exhaustive list of specific file types. Should the Department instead craft a more flexible definition that generally describes the types of documents that are covered or otherwise change the proposed definition, such as by including other file types (e.g., images or movies), or removing some of the listed file types?*

- *Web Accessibility Question 2: The Department requests comment on whether a definition of "kiosks" is necessary, and if so, requests comment on the Department's proposed definition in § 84.10 and any suggested revisions to it.*
- *Web Accessibility Question 3: Are there refinements to the definition of "web content" the Department should consider? Consider, for example, WCAG 2.1's definition of "web content" as "information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions."*[252]

The Department is proposing to create a new subpart to its section 504 regulation. Subpart I will address the accessibility of recipients' web content, mobile apps, and kiosks.

§ 84.82 Application.

This proposed section states that this subpart applies to all programs or activities that receive Federal financial assistance from the Department.

§ 84.83 Accessibility of kiosks.

This section provides general nondiscrimination requirements for programs or activities that recipients provide through or with the use of kiosks. It provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of a recipient provided through or with the use of kiosks.

The Department proposes this section in light of the increasingly common use of kiosks in health care settings for purposes of checking in patients, gathering information from them, and taking vital signs. The Department is not proposing specific technical requirements for kiosks, but proposes to include general language recognizing that section 504 prohibits recipients from discriminating on the basis of disability in their programs or activities provided through kiosks

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[252] W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/WCAG21/ [https://perma.cc/UB8A-GG2F].

because of the inaccessibility of those devices. This language also aligns with DOJ's view that the ADA's protections apply when a covered entity uses kiosks to deliver its programs, services, or activities.[253] The Department believes the inclusion of this language is important to ensure that recipients are aware of their existing obligations to ensure that their programs and activities provided through kiosks are nondiscriminatory.

Recipients that use kiosks may make their programs accessible by instituting procedures that would allow persons with disabilities who cannot use kiosks because of their inaccessible features to access the program without using kiosks.[254] For example, a clinic or a social services office may allow persons with disabilities to go directly to the personnel at the main desk to register for necessary services. Such work-around procedures must afford persons with disabilities the same access, the same convenience, and the same confidentiality that the kiosk system provides.

In instances where kiosks are closed functionality devices that do not rely on web content or mobile apps, the proposed technical standards in § 84.84 will not apply. Under these circumstances, recipients are still obligated to ensure that individuals with disabilities are not excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any program or activity of the recipient, including the information exchange that would occur at the kiosk. This may require the recipient to provide reasonable modifications to policies, practices, or procedures, as required by § 84.68(b)(7), and take appropriate steps to ensure effective communication, including through the provision of appropriate auxiliary aids and services, which include accessible electronic and information technology, as required by subpart H.

The Department is aware that the U.S. Access Board is working on a rulemaking to amend the ADA Accessibility Guidelines to address the accessibility of fixed self-service

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[253] *See* Statement of Interest of the United States of America in *Vargas v. Quest Diagnostics Clinical Laboratories, Inc. et al*., No. 2:19-cv-08108 (C.D. Cal. filed Sept. 20, 2021).
[254] 45 CFR 84.22(b).

transaction machines, self-service kiosks, information transaction machines, and point-of-sale devices. The Access Board issued an advance notice of proposed rulemaking on these issues in September 2022 and heard from more than 70 commenters.[255] The Board is now in the process of developing a notice of proposed rulemaking, which may be issued by December 2023.[256] Once these guidelines are final, to be enforceable, DOJ and the U.S. Department of Transportation would have to adopt them, via separate rulemakings, before they would become enforceable standards for devices and equipment covered by the ADA. Similarly, HHS will consider adopting these guidelines under section 504 once they are finalized.

§ 84.84 Requirements for web and mobile accessibility.

General.

Proposed § 84.84 sets forth specific requirements for the accessibility of web content and mobile apps of recipients. Proposed § 84.84(a) requires a recipient to "ensure the following are readily accessible to and usable by individuals with disabilities: (1) web content that a recipient makes available to members of the public or uses to offer programs or activities to members of the public; and (2) mobile apps that a recipient makes available to members of the public or uses to offer programs and activities to members of the public." As detailed below, the remainder of proposed § 84.84 sets forth the specific standards that recipients are required to meet to make their web content and mobile apps accessible and the proposed timelines for compliance.

On August 4, 2023, DOJ published an NPRM in the *Federal Register*, 88 FR 51948, addressing the accessibility of web sites and mobile applications for entities covered by title II of the ADA. The Department has closely coordinated this subpart with DOJ and much of this Department's preamble and its regulatory text are the same as the language in the DOJ NPRM.

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[255] U.S. Access Board, Self Service Transaction Machines, https://www.access-board.gov/sstms/.
[256] U.S. Off. of Mgmt. & Budget, Off. of Information & Reg. Affs, Accessibility Guidelines for Self-Service Transaction Machines, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=3014-AA44 (last visited Aug. 8, 2023).

The Department will continue to work closely with DOJ as each agency reviews comments in response to their individual NPRMs and develops their rules in final form.

Background on accessibility standards for websites and web content.

Since 1994, the World Wide Web Consortium (W3C®) has been the principal international organization involved in developing protocols and guidelines for the web.[257] The W3C® develops a variety of voluntary technical standards and guidelines, including ones relating to privacy, internationalization of technology, and, relevant to this rulemaking, accessibility. The Web Accessibility Initiative (WAI) of theW3C® has developed voluntary guidelines for web accessibility, known as the Web Content Accessibility Guidelines (WCAG), to help web developers create web content that is accessible to individuals with disabilities.

The first version of WCAG, WCAG 1.0, was published in 1999. WCAG 2.0 was published in December 2008.[258] WCAG 2.0 was approved as an international standard by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) in October 2012.[259] WCAG 2.1, the most recent and updated recommendation of WCAG, was published in June 2018.[260]

WCAG 2.1 contains four principles that provide the foundation for web accessibility: perceivable, operable, understandable, and robust.[261] Testable success criteria (i.e., requirements for web accessibility that are measurable) are provided "to be used where requirements and conformance testing are necessary such as in design specification, purchasing, *regulation* and

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[257] W3C®*, About Us, https://www.w3.org/about/* [*https://perma.cc/TQ2W-T377*].
[258] W3C®, Web Content Accessibility Guidelines 2.0 (Dec., 2008), *http://www.w3.org/TR/2008/REC-WCAG20-20081211/ [https://perma.cc/L2NH-VLCR]*.
[259] W3C®*, Web Accessibility Guidelines 2.0 Approved as ISO/IEC International Standard* (Oct. 15, 2012), *https://www.w3.org/press-releases/2012/wcag2pas/* [*https://perma.cc/JQ39-HGKQ*].
[260] W3C®, Web Content Accessibility Guidelines 2.1 (June 2018), https://www.w3.org/TR/WCAG21/ [https://perma.cc/UB8A-GG2F]. Additionally, in May 2021, WAI published a working draft for WCAG 2.2, which has yet to be finalized. W3C®, Web Content Accessibility Guidelines 2.2 (May 21, 2021), https://www.w3.org/TR/WCAG22/ [https://perma.cc/M4G8-Z2GY]. The WAI also published a working draft of WCAG 3.0 in December 2021. W3C®, Web Content Accessibility Guidelines 3.0 (Dec. 7, 2021), https://www.w3.org/TR/wcag-3.0/ [https://perma.cc/7FPQ-EEJ7].
[261] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/WCAG21/ [https://perma.cc/UB8A-GG2F].

contractual agreements."[262] Thus, WCAG 2.1 contemplates establishing testable success criteria that could be used in regulatory efforts such as this one.

Proposed WCAG version.

The Department is proposing to adopt WCAG 2.1 as the technical standard for web and mobile app accessibility under section 504. WCAG 2.1 represents the most recent and updated published recommendation of WCAG. WCAG 2.1 incorporates and builds upon WCAG 2.0—meaning that WCAG 2.1 includes all of the WCAG 2.0 success criteria, in addition to success criteria that were developed under WCAG 2.1.[263] Specifically, WCAG 2.1 added 12 Level A and AA success criteria to the 38 success criteria contained in WCAG 2.0 AA.[264] The additional criteria provide important accessibility benefits, especially for people with low vision, manual dexterity disabilities, and cognitive and learning disabilities.[265] The additional criteria are intended to improve accessibility for mobile web content and mobile apps.[266] The Department anticipates that WCAG 2.1 is familiar to web developers as it comprises WCAG 2.0's requirements—which have been in existence since 2008—and 12 new Level A and AA requirements that have been in existence since 2018.

The Department expects that adopting WCAG 2.1 as the technical standard will have benefits that are important to ensuring access for people with disabilities to recipients' programs and activities. For example, WCAG 2.1 requires that text be formatted so that it is easier to read when magnified.[267] This is important, for example, for people with low vision who use magnifying tools. Without the formatting that WCAG 2.1 requires, a person magnifying the text

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[262] *See* W3C®, *Web Content Accessibility Guidelines 2.1*, *WCAG 2 Layers of Guidance* (June 5, 2018), https://www.w3.org/TR/WCAG21/#wcag-2-layers-of-guidance [https://perma.cc/5PDG-ZTJE] (emphasis added).
[263] W3C®, *What's New in WCAG 2.1* (Aug. 13, 2020), https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/ [https://perma.cc/W8HK-Z5QK].
[264] *Id.*
[265] *Id.*
[266] *See id.*
[267] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Reflow* (June 5, 2018), https://www.w3.org/TR/WCAG21/#reflow [https://perma.cc/YRP5-M599].

might find reading the text disorienting because they could have to scroll horizontally on every line.[268]

WCAG 2.1 also has new success criteria addressing the accessibility of mobile apps or web content viewed on a mobile device. For example, WCAG 2.1 Success Criterion 1.3.4 requires that page orientation (i.e., portrait or landscape) not be restricted to just one orientation unless a specific display orientation is essential.[269] This feature is important, for example, for someone who uses a wheelchair with a tablet attached to it such that the tablet cannot be rotated.[270] If content only works in one orientation (i.e., portrait or landscape) it will not always work for this individual depending on how the tablet is oriented and could render that content or app unusable for the person.[271] Another WCAG 2.1 success criterion requires, in part, that if a device can be operated by motion—for example, shaking the device to undo typing—that there be an option to turn off that motion sensitivity.[272] This could be important, for example, for someone who has tremors so that they do not accidentally undo their typing.[273]

Such accessibility features are critical for people with disabilities to have equal access to recipients' programs and activities. This is particularly true given that using mobile devices to access government services is commonplace. For example, in August 2022, about 54 percent of visits to Federal Government websites over the previous 90 days were from mobile devices.[274] In addition, WCAG 2.1's incorporation of mobile-related criteria is important because of recipients' increasing use of mobile apps in offering their programs and activities via mobile apps. As

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[268] *Id.*
[269] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Orientation* (June 5, 2018), https://www.w3.org/TR/WCAG21/#orientation [https://perma.cc/FC3E-FRYK].
[270] *Id.*
[271] *See id.*
[272] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Motion Actuation* (June 5, 2018), https://www.w3.org/TR/WCAG21/#motion-actuation [https://perma.cc/6S93-VX58].
[273] *Id.*
[274] General Services Administration Digital Analytics Program, https://analytics.usa.gov/ [https://perma.cc/2YZP-KCMG] (last visited Aug. 8, 2022).

discussed in more detail later, recipients are using mobile apps to offer a range of critical services.

Because WCAG 2.1 is the most recent recommended version of WCAG and generally familiar to web professionals, the Department expects it is well-positioned to continue to be relevant even as technology inevitably evolves. In fact, the W3C® advises using WCAG 2.1 over WCAG 2.0 when possible because WCAG 2.1 incorporates more forward-looking accessibility needs.[275] The WCAG standards were designed to be "technology neutral." This means that they are designed to be broadly applicable to current and future technologies.[276] Thus, WCAG 2.1 also allows web and mobile app developers flexibility and potential for innovation.

The Department also expects that recipients are likely already familiar with WCAG 2.1 or will be able to become familiar quickly. This is because WCAG 2.1 has been available since 2018, and it builds upon WCAG 2.0, which has been in existence since 2008 and has been established for years as a benchmark for accessibility. In other words, the Department expects that web developers and professionals who work for or with recipients are likely to be familiar with WCAG 2.1, and if they are not already familiar with WCAG 2.1, the Department expects that they are at least likely to be familiar with WCAG 2.0 and will be able to become acquainted quickly with WCAG 2.1's 12 additional Level A and AA success criteria. The Department also believes that resources exist to help recipients implement or understand how to implement not only WCAG 2.0 Level AA, but also WCAG 2.1 Level AA. Additionally, recipients will have two or three years to come into compliance with a final rule, which should also provide sufficient time to get acquainted with and implement WCAG 2.1.

According to the Department's research, WCAG 2.1 is also being increasingly used by members of the public and recipients. In fact, DOJ recently included WCAG 2.1 in several

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[275] W3C®, *WCAG 2.0 Overview* (June 30, 2022), https://www.w3.org/WAI/standards-guidelines/wcag/ [https://perma.cc/L7NX-8XW3].
[276] W3C®, *Understanding WCAG 2.1* (July 7, 2022), https://www.w3.org/WAI/WCAG21/Understanding/intro [https://perma.cc/4TZQ-USCJ].

settlement agreements with covered entities addressing inaccessible websites.[277]

In evaluating what technical standard to propose, the Department also considered WCAG 2.0. In addition, the Department considered the standards set forth under section 508 of the Rehabilitation Act, which governs the accessibility of the Federal Government's web content and is harmonized with WCAG 2.0.[278] In 2017, when the United States Access Board adopted WCAG 2.0 as the technical standard for the Federal Government's web content under section 508, WCAG 2.1 had not been finalized.[279] The Department ultimately decided to propose WCAG 2.1 as the appropriate standard. A number of countries that have adopted WCAG 2.0 as their standard are now making efforts to move or have moved to WCAG 2.1.[280] In countries that are part of the European Union, public sector websites and mobile apps generally must meet a technical standard that requires conformance with the WCAG 2.1 Level AA success criteria.[281] And although WCAG 2.0 is the standard adopted by the Department of Transportation in its rule implementing the Air Carrier Access Act, which covers airlines' websites and kiosks,[282] that rule—like the section 508 rule—was promulgated before WCAG 2.1 was published.

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[277] *See, e.g.*, Settlement Agreement with CVS Pharmacy, Inc. (Apr. 11, 2022), *https://archive.ada.gov/cvs_sa.pdf* [*https://perma.cc/H5KZ*
documents/attachments/2021/12/14/champaign-urbana_sa.pdf [*https://perma.cc/66XY-QGA8*]; Settlement Agreement with Hy-Vee, Inc. (Dec. 1, 2021) *https://archive.ada.gov/hy-vee_sa.pdf* [*https://perma.cc/GFY6-BJNE*]; Settlement Agreement with Rite Aid Corp. (Nov. 1, 2021), *https://archive.ada.gov/rite_aid_sa.pdf* [*https://perma.cc/4HBF-RBK2*].-*4VVF*]; Settlement Agreement with Meijer, Inc. (Feb. 2, 2022), *https://archive.ada.gov/meijer_sa.pdf* [*https://perma.cc/5FGD-FK42*]; Settlement Agreement with The Kroger Co. (Jan. 28, 2022), *https://archive.ada.gov/kroger_co_sa.pdf* [*https://perma.cc/6ASX-U7FQ*]; Settlement Agreement with Champaign-Urbana Mass Transit Dist. (Dec. 14, 2021), *https://www.justice.gov/d9/case-*

[278] 36 CFR 1194, app. A.

[279] *See* Information and Communication Technology ("ICT") Standards and Guidelines, 82 FR 5790, 5791 (Jan. 18, 2017); W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/UB8A-GG2F*].

[280] *See e.g.*, *Exploring WCAG 2.1 for Australian government services*, Australian Government Digital Transformation Agency (Aug. 22, 2018), https://www.dta.gov.au/blogs/exploring-wcag-21-australian-government-services.

[281] *Web Accessibility*, European Commission (July 13, 2022), https://digital-strategy.ec.europa.eu/en/policies/web-accessibility [https://perma.cc/LSG9-XW7L]; *Accessibility Requirements for ICT Products and Services*, European Telecommunications Standards Institute, 45–51, 64–78 (Mar. 2021), https://www.etsi.org/deliver/etsi_en/301500_301599/301549/03.02.01_60/en_301549v030201p.pdf [https://perma.cc/5TEZ-9GC6].

[282] *See* 14 CFR 382.

The Department expects that the wide usage of WCAG 2.0 lays a solid foundation for recipients to become familiar with and implement WCAG 2.1's additional Level A and AA criteria. According to the Department's research, approximately 48 States either use or strive to use a WCAG 2.0 standard or greater for at least some of their state web content. It appears that at least four of these States—Louisiana, Maryland, Nebraska, and Washington—already either use WCAG 2.1 or strive to use WCAG 2.1 for at least some of their web content.

WCAG 2.1 represents the most up-to-date recommendation and is generally familiar to web professionals. It offers important accessibility benefits for people with disabilities that affect manual dexterity, adds some criteria to reduce barriers for those with low vision and cognitive disabilities, and expands coverage of mobile content. Given that recipients will have two or three years to comply, the Department views WCAG 2.1 as the appropriate technical standard to propose at this time.

The Department is aware that a working draft for WCAG 2.2 was published in May 2021 with a newer draft published in July of 2023.[283] Several subsequent drafts have also been published.[284] All of the WCAG 2.0 and WCAG 2.1 success criteria except for one are included in WCAG 2.2.[285] But WCAG 2.2 also includes six additional Level A and AA success criteria beyond those included in WCAG 2.1.[286] Like WCAG 2.1, WCAG 2.2 offers benefits for individuals with low vision, limited manual dexterity, and cognitive disabilities. For example, Success Criterion 3.3.8, which is a new criterion under the working draft of WCAG 2.2, improves access for people with cognitive disabilities by limiting the use of cognitive function tests, like solving puzzles, in authentication processes.[287] Because WCAG 2.2 has not yet been finalized and is subject to change, and web professionals have had less time to become familiar

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[283] W3C®, *Web Content Accessibility Guidelines 2.*2 (July 20, 2023), https://www.w3.org/TR/WCAG22/.
[284] *See, e.g.*, W3C®, *Web Content Accessibility Guidelines 2.2* (May 17, 2023), https://www.w3.org/TR/WCAG22/ [https://perma.cc/SXA7-RF32].
[285] W3C®, *What's New in WCAG 2.2 Draft* (May 17, 2023), https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/ [https://perma.cc/Y67R-SFSE].
[286] *Id*.
[287] *Id.*

with the additional success criteria that have been incorporated into the working draft of WCAG 2.2, the Department does not believe it is appropriate to adopt WCAG 2.2 as the technical standard at this time.

The Department is seeking feedback from the public about its proposal to use WCAG 2.1 as the standard under this rule and its assumptions underlying this decision. Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 4: Are there technical standards or performance standards other than WCAG 2.1 that the Department should consider? For example, if WCAG 2.2 is finalized before the Department issues a final rule, should the Department consider adopting that standard? If so, what is a reasonable time frame for recipient conformance with WCAG 2.2 and why? Is there any other standard that the Department should consider, especially in light of the rapid pace at which technology changes?*

Proposed WCAG conformance level.

For a web page to conform to WCAG 2.1, the web page must satisfy the success criteria under one of three levels of conformance: A, AA, or AAA. The three levels of conformance indicate a measure of accessibility and feasibility. Level A, which is the minimum level of accessibility, contains criteria that provide basic web accessibility and are the least difficult to achieve for web developers.[288] Level AA, which is the intermediate level of accessibility, includes all of the Level A criteria and contains enhanced criteria that provide more comprehensive web accessibility and yet, are still achievable for most web developers.[289] Level AAA, which is the highest level of conformance, includes all of the Level A and Level AA

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[288] W3C®, *Web Content Accessibility Guidelines (WCAG) 2 Level A Conformance* (July 13, 2020), *https://www.w3.org/WAI/WCAG2A-Conformance* [*https://perma.cc/KT74-JNHG*].
[289] *Id.*

criteria and contains additional criteria that can provide a more enriched user experience, but are the most difficult to achieve for web developers.[290] The W3C® does not recommend that Level AAA conformance be required as a general policy for entire websites because it is not possible to satisfy all Level AAA criteria for some content.[291]

Based on review of previous public feedback and independent research, the Department believes that WCAG 2.1 Level AA is an appropriate conformance level because it includes criteria that provide web accessibility to individuals with disabilities—including those with visual, auditory, physical, speech, cognitive, and neurological disabilities—and yet is feasible for recipients' web developers to implement. In addition, Level AA conformance is widely used, making it more likely that web developers are already familiar with its requirements. While many of the entities that conform to Level AA do so under WCAG 2.0, not 2.1, this still suggests a widespread familiarity with most of the Level AA success criteria, given that 38 of the 50 Level A and AA success criteria in WCAG 2.1 are also included in WCAG 2.0. The Department believes that Level A conformance alone is not appropriate for recipients because it does not include criteria for providing web accessibility that the Department understands are critical, such as minimum level of color contrast so that items like text boxes or icons are easier to see, which is important for people with vision disabilities. Also, while Level AAA conformance provides a richer user experience, it is the most difficult to achieve for many entities. Therefore, the Department is proposing Level AA conformance for public feedback as to whether it strikes the right balance between accessibility for individuals with disabilities and achievability for recipients.

Adopting a WCAG 2.1 Level AA conformance level would make the ADA requirements consistent with a standard that has been widely accepted internationally. Many nations have

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[290] *Id.*
[291] *See* W3C®, *Understanding Conformance, Understanding Requirement 1* (last updated Aug. 19, 2022), https://www.w3.org/WAI/WCAG21/Understanding/conformance [https://perma.cc/9ZG9-G5N8].

selected Level AA conformance as their standard for web accessibility.[292] The web content of Federal agencies that are governed by section 508 also need to comply with Level AA.[293]

In its proposed regulatory text in § 84.84(b)(1) and (2), the Department provides that recipients must "comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1." WCAG 2.1 provides that for "Level AA conformance, the Web page [must] satisf[y] all the Level A and Level AA Success Criteria . . . ."[294] However, individual success criteria in WCAG 2.1 are labeled only as Level A or Level AA. Therefore, a person reviewing individual requirements in WCAG 2.1 may not understand that both Level A and Level AA success criteria must be met in order to attain Level AA. Accordingly, the Department has made explicit in its proposed regulation that both Level A and Level AA success criteria and conformance requirements must be met in order to comply with the proposed web accessibility requirements.

Conformance level for small recipients.

The Department considered proposing another population threshold of very small recipients that would be subject to a lower conformance level or WCAG version, to reduce the burden of compliance on those recipients. However, the Department decided against this proposal due to a variety of factors. First, this would make for inconsistent levels of WCAG conformance across recipients, and a universal standard for consistency in implementation would promote predictability. A universal level of conformance would reduce confusion about which standard applies, and it would create a basic level of compliance for all recipients to follow. It would also allow for people with disabilities to know what they can expect when navigating a

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[292] *See* W3C®, *Web Accessibility Laws & Policies* (Mar. 21, 2018), https://www.w3.org/WAI/policies/ [https://perma.cc/5EBY-3WX4].

[293] *See Information and Communication Technology ("ICT") Standards and Guidelines, 82 FR 5790, 5791 (Jan. 18, 2017).*

[294] *See* W3C®, *Conformance Requirements, Web Content Accessibility Guidelines (WCAG) 2.1* (June 5, 2018), https://www.w3.org/TR/WCAG21/#cc1 [https://perma.cc/ZL6N-VQX4]. WCAG 2.1 also states that a Level AA conforming alternate version may be provided. The Department has adopted a slightly different approach to conforming alternate versions, which is discussed below.

recipient's website; for example, it will be helpful for people with disabilities to know that they can expect to be able to navigate a recipient's website independently using their assistive technology. Finally, for the reasons discussed above, the Department believes that WCAG 2.1 Level AA contains criteria that are critical to accessing programs and activities of recipients, which may not be included under a lower standard. However, the Department recognizes that small recipients—those with fewer than fifteen employees —might initially face more technical and resource challenges in complying than larger recipients. Therefore, as discussed below, the Department has decided to propose different compliance dates according to a recipient's size to reduce burdens on small recipients.

Possible alternative standards for compliance.

The Department considered proposing to adopt the section 508 standards for ICT, but decided not to take this approach. The section 508 standards are harmonized with WCAG 2.0 for web content and certain other ICT, and for the reasons discussed above, the Department believes WCAG 2.1—which had not been finalized at the time the section 508 standards were promulgated—is the more appropriate recommendation for this proposed rule. Moreover, by adopting WCAG on its own rather than adopting it through the section 508 standards, the Department can then tailor the rules to recipients as it does in this proposed rule.

The Department also considered adopting performance standards instead of specific technical standards for accessibility of web content. Performance standards establish general expectations or goals for web accessibility and allow for compliance via a variety of unspecified methods. Performance standards could provide greater flexibility in ensuring accessibility as web technologies change. However, based on what the Department has heard previously from the public and its own knowledge of this area, the Department understands that performance standards might be too vague and subjective and could prove insufficient in providing consistent and testable requirements for web accessibility. Additionally, the Department expects that performance standards would likely not result in predictability for either recipients or people

with disabilities in the way that a more specific technical standard would. Further, similar to a performance standard, WCAG has been designed to allow for flexibility and innovation in the evolving web environment. The Department recognizes the importance of adopting a standard for web accessibility that provides not only specific and testable requirements, but also sufficient flexibility to develop accessibility solutions for new web technologies. The Department believes that WCAG achieves this balance because it provides flexibility similar to a performance standard, but it also provides more clarity, consistency, predictability, and objectivity. Using WCAG also enables recipients to know precisely what is expected of them under section 504, which may be of particular benefit to jurisdictions with less technological experience. This will assist recipients in targeting accessibility errors, which may reduce costs they would incur without clear expectations.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 5: What compliance costs and challenges might small recipients face in conforming with this rule? How accessible are small recipients' current web content and mobile apps? Do small recipients have internal staff to modify their web content and mobile apps, or do they use outside consulting staff to modify and maintain their web content and mobile apps? If small recipients have recently, for example in the past three years, modified their web content and mobile apps to make them accessible, what costs were associated with those changes?*
- *Web Accessibility Question 6: Should the Department adopt a different WCAG version or conformance level for small recipients or a subset of small recipients?*

Recipients' use of social media platforms.

Recipients are increasingly using social media platforms to provide information and communicate with the public about their programs and activities in lieu of or in addition to

engaging the public on their own websites. The Department is using the term "social media platforms" to refer to websites or mobile apps of third parties whose primary purpose is to enable users to create and share content in order to participate in social networking (i.e., the creation and maintenance of personal and business relationships online through websites and mobile apps like Facebook, Instagram, Twitter, and LinkedIn).

The Department is proposing to require that web content that recipients make available to members of the public or use to offer programs and activities to members of the public be accessible within the meaning of proposed § 84.84. This requirement would apply regardless of whether that web content is located on the recipient's own website, or elsewhere on the web. It therefore covers web content that a recipient offers via a social media platform. Even where a social media platform is not fully accessible, a recipient can generally take actions to ensure that the web content that it posts is accessible and in conformance with WCAG 2.1.[295] The Department understands that social media platforms often make available certain accessibility features like the ability to add captions or alt text. It is, however, the recipients' responsibility to use these features when they make web content available on social media sites. For example, if a recipient posts an image to a social media site that allows users to post alt text, the recipient needs to ensure that appropriate alt text accompanies that image so that screen reader users can access the information.

At this time, the Department is not proposing any regulatory text specific to the web content that recipients offer the public via social media platforms because content posted on social media platforms will be treated the same as any other content recipients post on the web. However, the Department is considering creating an exception from coverage under the rule for social media posts if they were posted before the effective date of the rule. This exception would

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[295] *See Federal Social Media Accessibility Toolkit Hackpad,* Digital.gov (June 21, 2022), https://digital.gov/resources/federal-social-media-accessibility-toolkit-hackpad/ [https://perma.cc/DJ8X-UCHA].

recognize that making preexisting social media content accessible may be impossible at this time or result in a significant burden. Many recipients have posted social media content for several years, often numbering thousands of posts, which may not all be accessible. The benefits of making all preexisting social media posts accessible might also be limited as these posts are intended to provide current updates on platforms that are frequently refreshed with new information. The Department is considering this exception in recognition of the fact that for many recipients their resources may be better spent ensuring that current web content is accessible, rather than reviewing all preexisting social media content for compliance or possibly deleting their previous posts. The Department is looking for input on whether this approach would make sense and whether any limitations to this approach are necessary, such as providing that the exception does not apply when preexisting social media content is currently used to offer a program or activity, or possibly limiting this exception when the public requests certain social media content to be made accessible.

The Department is also weighing whether recipients' preexisting videos posted to social media platforms such as YouTube should be excepted from coverage due to these same concerns or otherwise be treated differently.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 7*: *How do recipients use social media platforms and how do members of the public use content made available by recipients on social media platforms? What kinds of barriers do people with disabilities encounter when attempting to access recipients' services via social media platforms?*

Mobile applications.

The Department is proposing to adopt the same technical standard for mobile app accessibility as it is for web content—WCAG 2.1 Level AA. As discussed earlier, WCAG 2.1 was published in June 2018 and was developed, in part, to address mobile accessibility.[296]

The Department considered applying WCAG 2.0 Level AA to mobile apps, which is a similar approach to the requirements in the final rule promulgated by the United States Access Board in its update to the section 508 Standards.[297] WCAG 2.1 was not finalized when the Access Board adopted the section 508 Standards. When WCAG 2.0 was originally drafted in 2008, mobile apps were not as widely used or developed. Further, the technology has grown considerably since that time. Accordingly, WCAG 2.1 provides 12 additional Level A and AA success criteria not included in WCAG 2.0 to ensure, among other things, that mobile apps are more accessible to individuals with disabilities using mobile devices.[298] For example, WCAG 2.1 includes Success Criterion 1.4.12, which ensures that text spacing (e.g., letter spacing, line spacing, word spacing) meets certain requirements to ensure accessibility; Success Criterion 2.5.4, which enables the user to disable motion actuation (e.g., disable the ability to activate a device's function by shaking it) to prevent such things as accidental deletion of text; and Success Criterion 1.3.5, which allows a user to input information such as a name or address automatically.[299]

The Access Board's section 508 Standards include additional requirements applicable to mobile apps that are not in WCAG 2.1, and the Department is requesting feedback on whether to adopt those requirements as well. For example, the Section 508 Standards apply the following requirements not found in WCAG 2.1 to mobile apps: interoperability requirements to ensure

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[296] W3C®, *What's New in WCAG 2.1* (Aug. 13, 2020), https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/ [https://perma.cc/W8HK-Z5QK].

[297] *See* 82 FR 5790, 5815 (Jan. 18, 2017).

[298] W3C®, *What's New in WCAG 2.1* (Aug. 13, 2020), https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/ [https://perma.cc/W8HK-Z5QK].

[299] W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/WCAG21/ [https://perma.cc/UB8A-GG2F].

that a mobile app does not disrupt a device's assistive technology for persons with disabilities (e.g., screen readers for persons who are blind or have low vision); requirements for mobile apps to follow preferences on a user's phone such as settings for color, contrast, and font size; and requirements for caption controls and audio description controls that enable users to adjust caption and audio control functions.[300]

Adopting WCAG 2.1 Level AA for mobile apps will help ensure this rule's accessibility standards for mobile apps are consistent with this rule's accessibility standards for web content. We seek comments on this approach below. Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 8: How do recipients use mobile apps to make information and services available to the public? What kinds of barriers do people with disabilities encounter when attempting to access recipients' programs and activities via mobile apps? Are there any accessibility features unique to mobile apps that the Department should be aware of?*
- *Web Accessibility Question 9: Is WCAG 2.1 Level AA the appropriate accessibility standard for mobile apps? Should the Department instead adopt another accessibility standard or alternatives for mobile apps, such as the requirements from Section 508 discussed above?*

Requirements by recipient size.

Section 84.84(b) sets forth the proposed specific standard with which the web content and mobile apps that recipients make available to member of the public or use to offer programs and activities to members of the public must comply, and also proposes time frames for compliance. The proposed requirements of § 84.84(b) are generally delineated by the size of the recipient.

[300] 36 CFR part 1194, app. C (sections 502.1, 502.2.2, 503.2, 503.4.1, and 503.4.2).

Section 84.84(b)(1): Larger recipients.

Section 84.84(b)(1) sets forth the proposed web and mobile app accessibility requirements for recipients with fifteen or more employees. The requirements of § 84.84(b)(1) are meant to apply to larger recipients.[301] Under the Department's proposal, the number of employees is used to determine a recipient's compliance time frame. Each recipient should be able to easily determine whether it has fifteen or more employees.

Proposed § 84.84(b)(1) requires that a recipient with fifteen or more employees shall ensure that the web content and mobile apps it makes available to members of the public or uses to offer programs or activities to members of the public, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1. Recipients subject to § 84.84(b)(1) have two years after the publication of a final rule to make their web content and mobile apps accessible, unless they can demonstrate that compliance with § 84.84(b)(1) would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. The limitations on a recipient's obligation to comply with the proposed requirements are discussed in more detail below.

The Department is aware that members of the public have differing views on an appropriate time frame for requiring compliance with technical web accessibility standards. Individuals with disabilities or disability advocacy organizations tended to prefer a shorter time frame, often arguing that web accessibility has long been required by section 504 and that extending the deadline for compliance rewards recipients that have not made efforts to make their websites accessible. Some recipients have asked for more time to comply. Some recipients have been particularly concerned about shorter compliance deadlines, often citing budgets and

[301] Section 504 commonly differentiates between small and large recipients by measuring whether a recipient employs fifteen or more employees, and the Department will use that standard to determine whether a recipient is large or small for the purpose of this section. *See*, e.g., 45 CFR 84.9 (defining recipients with fewer than fifteen employees as "small recipients" and discussing administrative requirements).

staffing as major limitations. In the past, some recipients stated that they lacked qualified personnel to implement the web accessibility requirements of WCAG 2.0, which was relatively new at the time. Those recipients asserted that in addition to needing time to implement the changes to their websites, they also needed time to train staff or contract with professionals who are proficient in developing accessible websites.

Considering all these factors, the Department is proposing a two-year implementation time frame for recipients with 15 or more employees. Regulated entities and the community of web developers have had over a decade to familiarize themselves with WCAG 2.0, which was published in 2008 and serves as the foundation for WCAG 2.1, and five years to familiarize themselves with the additional 12 success criteria of WCAG 2.1. Though the Department is now proposing requiring recipients to conform with WCAG 2.1 instead of WCAG 2.0, the Department believes the time allowed to come into compliance is appropriate. As discussed above, WCAG 2.1 Level AA only adds 12 Level A and AA success criteria that were not included in WCAG 2.0. The Department believes these additional success criteria will not significantly increase the time or resources that it will take for a recipient to come into compliance with the proposed rule, beyond what would have already been required to conform with WCAG 2.0, though the Department seeks the public's input on this belief. The Department therefore believes this proposal balances the resource challenges reported by recipients with the interests of individuals with disabilities in accessing the multitude of programs and activities that recipients now offer via the web and mobile apps.

Section 84.84(b)(2): Small recipients.

The Department is also aware that some recipients believe there should be different compliance requirements or a different compliance date for small recipients in order to take into account the impact on small entities as required by the Regulatory Flexibility Act of 1980 and

Executive Order 13272.[302] Many disability organizations and individuals have opposed having a different timetable or accessibility requirements for smaller recipients, stating that many small recipients have smaller websites with fewer webpages, which would make compliance easier. The Department is also aware that other members of the public oppose different timetables or accessibility requirements for smaller recipients. These commenters note that small recipients are protected from excessive burdens deriving from rigorous compliance dates or stringent accessibility standards by the ADA's "undue burdens" compliance limitations. It is also the Department's understanding that many web accessibility professionals may operate online and could be available to assist recipients with compliance regardless of their location.

Many of those expressing concerns about compliance dates, including web developers, have stated that compliance in incremental levels would help recipients allocate resources—both financial and personnel—to bring their websites into compliance. The Department is aware that many small recipients do not have a dedicated web developer or staff. The Department is also aware that when these small recipients develop or maintain their own websites, they often do so with staff who have only a cursory knowledge of web design and use manufactured web templates or software, which may create inaccessible web pages. Some small recipients have expressed concern that even when they do use outside help, there is likely to be a shortage of professionals who are proficient in web accessibility and can assist all recipients in bringing their websites into compliance.

In light of these concerns, § 84.84(b)(2) sets forth the Department's proposed web and mobile app accessibility requirements for small recipients. Specifically, proposed § 84.84(b)(2) covers those recipients with fewer than fifteen employees. Section 84.84(b)(2) would require these recipients to ensure that the web content and mobile apps they make available to the public or use to offer programs and activities to members of the public comply with Level A and Level

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[302] *See* 75 FR 43460, 43467 (July 26, 2010).

AA success criteria and conformance requirements specified in WCAG 2.1, unless they can demonstrate that compliance would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. This is the same substantive standard that applies to larger recipients. However, the Department is proposing to give these small recipients additional time to bring their web content and mobile apps into compliance with § 84.84(b)(2). Specifically, small recipients covered by § 84.84(b)(2) will have three years after the publication of a final rule to make their web content and mobile apps compliant with the Department's proposed requirements. The Department believes this longer phase-in period would be prudent to allow small recipients to properly allocate their personnel and financial resources in order to bring their web content and mobile apps into compliance with the Department's proposed requirements.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 10: How will the proposed compliance date affect small recipients? Are there technical or budget constraints that small recipients would face in complying with this rule, such that a longer phase-in period is appropriate?*
- *Web Accessibility Question 11: How will the proposed compliance date affect people with disabilities, particularly in rural areas?*
- *Web Accessibility Question 12: How should the Department define "small recipient"? Should categories of small recipients other than those already delineated in this proposed rule be subject to a different WCAG 2.1 conformance level or compliance date?*
- *Web Accessibility Question 13: Should the Department consider factors other than the number of employees, such as annual budget, when establishing different*

or tiered compliance requirements? If so, what should those factors be, why are they more appropriate than the number of employees, and how should they be used to determine regulatory requirements?

Limitations.

The proposed rule sets forth the limitations on recipients' obligations to comply with the specific requirements of this proposed rule. For example, where it would impose an undue financial and administrative burden to conform with WCAG 2.1 (or part of WCAG 2.1), recipients would not be required to remove their web content and mobile apps, forfeit their web presence, or otherwise undertake changes that would be unduly burdensome. Further, as proposed in § 84.84(b), the web and mobile app accessibility requirements would not require any recipient to take actions that would result in a fundamental alteration in the nature of a program or activity.

In circumstances where officials of a recipient believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, a recipient has the burden of proving that compliance would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee after considering all resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with proposed § 84.84(b) would result in such an alteration or such burdens, a recipient must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the recipient. For more information, see the discussion below regarding limitations on obligations under proposed § 84.85.

Entities covered by both section 504 and title II of the ADA.

Compliance with this regulation does not necessarily ensure compliance with other statutes and their implementing regulations. For example, the Department is aware that DOJ is pursuing rulemaking regarding web and mobile application standards under title II of the ADA, and that some recipients under section 504 are also public entities covered by title II of the ADA. Because this regulation does not affect recipients' obligations under other laws, recipients who are subject to both section 504 and title II of the ADA must comply with both regulations.

- *Web Accessibility Question 14: Should the Department consider other methods to ensure that a recipient that is also a public entity under title II of the ADA has a single compliance period to come into conformance with WCAG 2.1 AA? If so, what should those methods be?*

Captions for Live-audio content.

WCAG 2.1 Level AA Success Criterion 1.2.4 requires synchronized captions for live-audio content. The intent of this success criterion is to "enable people who are deaf or hard of hearing to watch *real-time* presentations. Captions provide the part of the content available via the audio track. Captions not only include dialogue, but also identify who is speaking and notate sound effects and other significant audio."[303] Modern live captioning often can be created with the assistance of technology, such as by assigning captioners through Zoom or other conferencing software, which integrates captioning with live meetings.

The Department proposes to apply the same compliance date to all of the WCAG 2.1 Level AA success criteria, including live-audio captioning requirements. As noted above, this would allow for three years after publication of the final rule for small recipients to comply, and two years for large recipients. The Department believes this approach is appropriate for several reasons. First, the Department understands that technology utilizing live-audio captioning has

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[303] *See* W3C®, *Captions (Live), Understanding WCAG 2.0: A Guide to Understanding and Implementing WCAG 2.0*, http://www.w3.org/TR/UNDERSTANDING-WCAG20/media-equiv-real-time-captions.html [https://perma.cc/NV74-U77R] (last visited Aug. 10, 2022) (emphasis in original).

developed in recent years and continues to develop. In addition, the COVID-19 pandemic moved a significant number of formerly in-person appointments, meetings, activities, and other gatherings to online settings, many of which incorporated live-audio captioning. As a result of these developments, live-audio captioning has become even more critical for individuals with certain types of disabilities to participate fully in health and human service programs and activities. And while the Department believes that the two and three-year periods described above afford a sufficient amount of time for recipients to allocate resources towards live-audio captioning, recipients have the option to demonstrate that compliance with any success criterion would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.

While at least one country that has adopted WCAG 2.0 Level AA as its standard for web accessibility has exempted entities from having to comply with the live-audio captioning requirements,[304] the Department does not believe this approach is appropriate or necessary under the current circumstances, given the current state of live-audio captioning technology and the critical need for live-audio captioning for people with certain types of disabilities to participate more fully in civic life. Further, the Department believes that the state of live-audio captioning technology has advanced since 2016 when Canada made the decision to exempt entities from the live-audio captioning requirements.[305] However, the Department is interested in learning more about compliance capabilities. Accordingly, the Department poses several questions for commenters about the development of live-audio captioning technology and the Department's proposed requirement.

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[304] *See* W3C®, *Canada* (last updated Feb. 9, 2017), https://www.w3.org/WAI/policies/canada/ [https://perma.cc/W2DS-FAE9].
[305] *See id.*

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 15: Should the Department consider a different compliance date for the captioning of live-audio content in synchronized media or exclude some recipients from the requirement? If so, when should compliance with this success criterion be required and why? Should there be a different compliance date for different types or sizes of recipients?*
- *Web Accessibility Question 16: What types of live-audio content do small recipients post? What has been the cost for providing live-audio captioning?*

§ 84.85 Exceptions.

This rule would require recipients to make their web content and mobile apps accessible. However, the Department believes it may be appropriate in some situations for certain content to be excepted from compliance with the technical requirements of this proposed rule. The Department is aware of a range of views on this issue, including that a section 504 regulation should not include any exceptions because the compliance limitations for undue financial and administrative burdens would protect recipients from any unrealistic requirements. On the other hand, the Department has also heard that exceptions are necessary to avoid substantial burdens on recipients. The Department also expects that such exceptions may help recipients avoid uncertainty about whether they need to ensure accessibility in situations where it might be extremely difficult. After consideration of the public's views and after its independent assessment, the Department is proposing the following exceptions and poses questions for public feedback. The Department is interested in feedback about whether these proposed exceptions would relieve the burden on public entities, and also how these proposed exceptions would impact people with disabilities.

The Department is proposing exceptions from coverage—subject to certain limitations—for the following seven categories of web content: (1) archived web content; (2) preexisting conventional electronic documents; (3) web content posted by third parties on a recipient's website; (4) third-party web content linked from a recipient's website; (5) course content on a recipient's password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a public postsecondary institution; (6) class or course content on a recipient's password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course at an elementary or secondary school; and (7) conventional electronic documents that are about a specific individual, their property, or their account and that are password-protected or otherwise secured. Additionally, there are certain limitations to these exceptions—situations in which the otherwise excepted content still must be made accessible. This proposed rule's exceptions as well as the limitations on those exceptions are explained below.

Archived web content.

Recipients' websites can often include a significant amount of archived web content, which may contain information that is outdated, superfluous, or replicated elsewhere. The Department's impression is that generally, this historic information is of interest to only a small segment of the general population. Still, the information may be of interest to some members of the public, including some individuals with disabilities, who are conducting research or are otherwise interested in these historic documents. The Department is aware and concerned, however, that recipients would need to expend considerable resources to retroactively make accessible the large quantity of historic or otherwise outdated information available on recipients' websites. Thus, proposed § 84.85(a) provides an exception from the web access requirements of § 84.84 for web content that meets the definition of "archived web content" in § 84.10. As mentioned previously, § 84.10 defines "archived web content" as "web content that (1) is maintained exclusively for reference, research, or recordkeeping; (2) is not altered or

updated after the date of archiving; and (3) is organized and stored in a dedicated area or areas clearly identified as being archived." The archived web content exception allows recipients to keep and maintain historic web content, while utilizing their resources to make accessible the many up-to-date materials that people need to currently access public services or to participate in civic life.

The Department notes that under this exception, recipients may not circumvent their accessibility obligations by merely labeling their web content as "archived" or by refusing to make accessible any content that is old. The exception focuses narrowly on content that satisfies all three of the criteria necessary to qualify as "archived web content," namely content that is maintained exclusively for reference, research, or recordkeeping; is not altered or updated after the date of archiving; and is organized and stored in a dedicated area or areas clearly identified as being archived. If any one of those criteria is not met, the content does not qualify as "archived web content." For example, if a recipient maintains content for any purpose other than reference, research, or recordkeeping—such as for purposes of offering a current program or activity—then that content would not fall within the exception, even if a recipient labeled it as "archived." Similarly, a recipient would not be able to circumvent its accessibility obligations by rapidly moving newly posted content that is maintained for a purpose other than reference, research, or recordkeeping , or that the recipient continues to update, from a non-archived section of its website to an archived section.

Though the Department proposes that archived web content be excepted from coverage under this rule, if an individual with a disability requests that certain archived web content be made accessible, recipients generally have an existing obligation to make these materials accessible in a timely manner and free of charge.[306]

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[306] *See, e.g.*, 28 CFR 35.130(b)(7); 28 CFR 35.160(b)(2); 45 CFR 84.4, now appearing in 84.68.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 17: How do recipients manage content that is maintained for reference, research, or recordkeeping?*
- *Web Accessibility Question 18: What would the impact of this exception be on people with disabilities?*
- *Web Accessibility Question 19: Are there alternatives to this exception that the Department should consider, or additional limitations that should be placed on this exception? How would foreseeable advances in technology affect the need for this exception?*

Preexisting conventional electronic documents.

As discussed in the section-by-section analysis for § 84.5 above, the Department is proposing to add a definition for "conventional electronic documents." Specifically, the proposed definition provides that the term conventional electronic documents "means web content or content in mobile apps that is in the following electronic file formats: portable document formats (PDF), word processor file formats, presentation file formats, spreadsheet file formats, and database file formats." This list of conventional electronic documents is intended to be an exhaustive list of file formats, rather than an open-ended list.

Proposed § 84.85(b) provides that "conventional electronic documents created by or for a recipient that are available on a recipient's website or mobile app before the date the recipient is required to comply with this rule" do not have to comply with the web accessibility requirements of § 84.84, "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."

The Department is aware that many websites of recipients contain conventional electronic documents. The Department expects that many of these conventional electronic documents are in PDF format, but many conventional electronic documents are formatted as word processor files (e.g., Microsoft Word files), presentation files (e.g., Apple Keynote or Microsoft PowerPoint files), spreadsheet files (e.g., Microsoft Excel files), and database files (e.g., FileMaker Pro or Microsoft Access files).

Because of the presence of conventional electronic documents on recipient websites and mobile apps, and because of the difficulty of remediating some complex types of information and data to make them accessible after-the-fact, the Department believes recipients should generally focus their personnel and financial resources on developing new conventional electronic documents that are accessible and remediating existing conventional electronic documents that are currently used by members of the public to access the recipient's programs or activities. For example, if before the date a recipient is required to comply with this rule, the recipient's website contains a series of out-of-date PDF reports on local COVID-19 statistics, those reports need not conform with WCAG 2.1. Similarly, if a recipient maintains decades' worth of influenza infection reports in conventional electronic documents on the same web page as its current influenza infection report, the historic reports that were posted before the date the recipient was required to comply with this rule generally do not need to comply with WCAG 2.1. As the recipient posts new reports going forward, however, those reports must be accessible under WCAG 2.1. This approach is expected to reduce the burdens on recipients.

This exception is subject to a limitation: it does not apply to any existing documents that are currently used by members of the public to apply for, access, or participate in the recipient's programs or activities. In referencing "documents that are currently used," the Department intends to cover documents that are used by members of the public at any given point in the future, not just at the moment in time when this rule is published. This limitation includes documents that provide instructions or guidance. For example, a recipient must not only make a

new patient form accessible, but it must also make accessible other materials that may be needed to complete the form, understand the process, or otherwise take part in the program.

The Department notes that a recipient may not rely on this "preexisting conventional electronic documents" exception to circumvent its accessibility obligations by, for example, converting all of its web content to conventional electronic document formats and posting those documents before the date the recipient must comply with this rule. As noted above, any documents that are currently used by members of the public to access the recipient's programs or activities would need to be accessible as defined under this rule, even if those documents were posted before the date the recipient was required to comply with the rule. And if a recipient updates a conventional electronic document after the date the recipient must comply with this rule, that document would no longer qualify as "preexisting," and would thus need to be made accessible as defined under this rule.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 20: Where do recipients make conventional electronic documents available to the public? Do recipients post conventional electronic documents anywhere else on the web besides their own websites?*
- *Web Accessibility Question 21: Would this "preexisting conventional electronic documents" exception reach content that is not already excepted under the proposed archived web content exception? If so, what kinds of additional content would it reach?*
- *Web Accessibility Question 22: What would the impact of this exception be on people with disabilities? Are there alternatives to this exception that the Department should consider, or additional limitations that should be placed on this exception? How*

would foreseeable advances in technology affect the need for this exception?

Third-Party web content.

Recipients' websites can include or link to many different types of third-party content (i.e., content that is created by someone other than the recipient). For example, many recipients' websites contain third-party web content like maps, calendars, weather forecasts, news feeds, scheduling tools, reservations systems, or payment systems. Third-party web content may also be posted by members of the public on a recipient's online message board or other sections of their website that allow public comment. In addition to third-party content that is posted on the recipient's own website, recipients frequently provide links to third-party content (i.e., links on the recipient's website to content that has been posted on another website that does not belong to the recipient), including links to outside resources and information.

The Department has heard a variety of views regarding whether or not recipients should be responsible for ensuring that third-party content on their websites and linked third-party content are accessible. Some maintain that recipients cannot be held accountable for third-party content on their websites, and without such an exception, recipients may have to remove the content altogether. Others have suggested that recipients should not be responsible for third-party content and linked content unless that content is necessary for individuals to access recipients' programs or activities. The Department has also previously heard the view, however, that recipients should be responsible for third-party content because an entity's reliance on inaccessible third-party content can prevent people with disabilities from having equal access to the recipient's own programs and activities. Furthermore, boundaries between web content generated by a recipient and a third party are often difficult to discern.

At this time, the Department is proposing the following two limited exceptions related to third-party content in § 84.85(c)-(d) and is posing questions for public comment:

Section 84.85(c): web content posted by a third party on a recipient's website.

Proposed § 84.85(c) provides an exception to the web accessibility requirements of § 84.84 for "web content posted by a third party that is available on a recipient's website."

The Department is proposing this exception in recognition of the fact that individuals other than a recipient's agents sometimes post content on a recipient's website. For example, members of the public may sometimes post on a recipient's online message boards, wikis, social media, or other web forums, many of which are unregulated, interactive spaces designed to promote the sharing of information and ideas. Members of the public may post frequently, at all hours of the day or night, and a recipient may have little or no control over the content posted. In some cases, a recipient's website may include posts from third parties dating back many years, which are likely of limited, if any, relevance today. Because recipients often lack control over this third-party content, it may be challenging (or impossible) for them to make it accessible. Moreover, because this third-party content may be outdated or unrelated to a recipient's programs and activities, there may be only limited benefit to requiring recipients to make this content accessible. Accordingly, the Department believes it is appropriate to create an exception for this content from complying with the technical standard articulated in this rule. However, while this exception applies to web content posted by third parties, it does not apply to the tools or platforms used to post third-party content on a recipient's website such as message boards—these tools and platforms are subject to the rule's technical standard.

This exception applies to, among other third-party content, documents filed by third parties in administrative, judicial, and other legal proceedings that are available on a recipient's website. This example helps to illustrate why the Department believes this exception is necessary. Many recipients have either implemented or are in the process of developing an automated process for electronic filing of documents in administrative, judicial, or legal proceedings in order to improve efficiency in the collection and management of these documents. Courts and other recipients receive high volumes of filings in these sorts of proceedings each year. The majority of these documents are submitted by third parties—such as

a private attorney in a legal case or other members of the public—and often include appendices, exhibits, or other similar supplementary materials that may be difficult to make accessible.

However, the Department notes that recipients have existing obligations under section 504 and title II of the ADA to ensure the accessibility of their programs and activities.[307] Accordingly, for example, if a person with a disability is a party to a case and requests access to inaccessible filings submitted by a third party in a judicial proceeding that are available on a State court's website, the court may need to timely provide those filings in an accessible format. Similarly, recipients may need to provide reasonable modifications to ensure that people with disabilities have access to their programs and activities. For example, if a hearing had been scheduled in the proceeding referenced above, the court might need to postpone the hearing if it did not provide the filings in an accessible format to the requestor in sufficient time for the requestor to review the documents before the scheduled hearing.

Sometimes a recipient itself chooses to post content created by a third party on its website. This exception does not apply to content posted by the recipient itself, even if the content was originally created by a third party. For example, many recipients post third-party content on their websites, such as calendars, scheduling tools, maps, reservations systems, and payment systems that were developed by an outside technology company. To the extent a recipient chooses to rely on third-party content on its website, it must select third-party content that meets the requirements of § 84.84.

Moreover, a recipient may not delegate away its obligations under section 504.[308] Accordingly, if a recipient relies on a contractor or another third party to post content on the entity's behalf, the recipient retains responsibility for ensuring the accessibility of that content.

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[307] 45 CFR 84.4, now appearing in 84.68, 84.52; 28 CFR 35.130, 35.160.

[308] *See* 45 CFR 84.4, now appearing in 84.68(b)(1) (prohibiting discrimination directly or through a contractual, licensing, or other arrangement that would provide an aid, benefit, or service to a qualified individual with a disability that is not equal to that afforded others).

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 23: What types of third-party web content can be found on websites of recipients? How would foreseeable advances in technology affect the need for creating an exception for this content? To what extent is this content posted by the recipients themselves, as opposed to third parties? To what extent do recipients delegate to third parties to post on their behalf? What degree of control do recipients have over content posted by third parties, and what steps can recipients take to make sure this content is accessible?*
- *Web Accessibility Question 24: What would the impact of this exception be on people with disabilities?*

Section 84.85(d): Third-Party content linked from a recipient's website.

Proposed § 84.85(d) provides that a recipient is not responsible for the accessibility of third-party web content linked from the recipient's website "unless the recipient uses the third-party web content to allow members of the public to participate in or benefit from the recipient's programs or activities." Many recipients' websites include links to other websites that contain information or resources in the community offered by third parties that are not affiliated with the recipient. Clicking on one of these links will take an individual away from the recipient's website to the website of a third party. Typically, the recipient has no control over or responsibility for the web content or the operation of the third party's website. Accordingly, the recipient has no obligation to make the content on a third party's website accessible. For example, if for purely informational or reference purposes, a university posts a series of links to restaurants and tourist attractions in the surrounding area, the recipient is not responsible for ensuring the websites of those restaurants and tourist attractions are accessible.

Proposed § 84.85(d) generally allows recipients to provide relevant links to third-party web content that may be helpful without making them responsible for the third party's web content. However, because the Department's section 504 regulation prohibits discrimination in the provision of any aid, benefit, or service provided by recipients directly or through contractual, licensing, or other arrangements, if the recipient uses the linked third-party web content to allow members of the public to participate in or benefit from the recipient's programs or activities, then the recipient must ensure it links only to third-party web content that complies with the web accessibility requirements of § 84.84. This approach is consistent with recipients' obligation to make all of their programs or activities accessible to the public, including those they provide through third parties.[309] For example, a recipient that links to online payment processing websites offered by third parties to accept the payment of fees must ensure that the third-party web content it links to in order for members of the public to pay for the recipient's programs or activities complies with the web accessibility requirements of § 84.84. In other words, if a recipient links to a website for a third-party payment service that the recipient allows the public to use to pay fees, the recipient would be using that third-party website to allow members of the public to participate in its program, and the linked third-party website would need to comply with this rule. Otherwise, the recipient's program would not be equally accessible to people with disabilities. Similarly, if a recipient links to a third-party website that processes applications for benefits or requests to sign up to participate in classes or attend programs the recipient offers, the recipient is using the third party's linked web content to allow members of the public to participate in the recipient's programs or activities, and the recipient must thus ensure that it links to only third-party web content that complies with the requirements of § 84.84.

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[309] *See* 28 CFR 35.130(b)(1); *see also* 45 CFR 84.4(b)(1), redesignated as 84.68(1) (prohibiting discrimination directly or through a contractual, licensing, or other arrangement that would provide an aid, benefit, or service to a qualified individual with a disability that is not equal to that afforded others).

The Department believes this approach strikes the appropriate balance between acknowledging that recipients may not have the ability to make third parties' websites accessible and recognizing that recipients do have the ability to choose to use only third-party content that is accessible when that content is used to allow members of the public to participate in or benefit from the recipient's programs or activities.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 25: Do recipients link to third-party web content to allow members of the public to participate in or benefit from the entities' programs or activities? If so, to what extent does the third-party web content that recipients use for that purpose conform with WCAG 2.1 Level AA?*
- *Web Accessibility Question 26: What would the impact of this exception be on people with disabilities, and how would foreseeable advances in technology affect the need for this exception?*

External mobile apps.

Many recipients use mobile apps that are developed, owned, and operated by third parties, such as private companies, to allow the public to access the entity's programs or activities. We will refer to these mobile apps as "external mobile apps."[310] One example of an external mobile app is the "MyChart" app, a private company's website and app that some

[310] In this document, we refer to web content that is created by someone other than a public entity as "third-party web content." We note that we do not use "third-party" to describe mobile apps here to avoid confusion. It is our understanding that the term "third-party mobile app" appears to have a different meaning in the technology industry and some understand "a third-party app" as an application that is provided by a vendor other than the manufacturer of the device or operating system provider. *See* Alice Musyoka, *Third-Party Apps*, *Webopedia* (Aug. 4, 2022) *https://www.webopedia.com/definitions/third-party-apps/ [https://perma.cc/SBW3-RRGN]*. *See* Renée Lynn Midrack, *What is a Third Party App?,* Lifewire (updated Sept. 12, 2021), *https://www.lifewire.com/what-is-a-third-party-app-4154068 [https://perma.cc/F7X7-6K59]*.

recipients use to allow patients to view their medications, test results, appointments, and bills, and interact with their health care providers. [311]

At this time, the Department is not proposing to create an exception for recipients' use of external mobile apps (e.g., mobile apps operated by a third party) from proposed § 84.84. We expect that recipients are using these mobile apps mostly to provide access to the entities' programs and activities, such that excepting them would not be appropriate.

Accordingly, the Department is seeking comment and additional information on external mobile apps that recipients use to offer their programs and activities. Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 27: What types of external mobile apps, if any, do recipients use to provide access to their programs and activities to members of the public, and how accessible are these apps? While the Department has not proposed an exception to the requirements proposed in § 84.84 for recipients' use of external mobile apps, should the Department propose such an exception? If so, should this exception expire after a certain time, and how would this exception impact persons with disabilities?*

Password-Protected class or course content of educational institutions.

Proposed § 84.85(e) and (f) provide exceptions for educational institutions' password-protected class or course content where there is no student with a disability enrolled in the class or course (or, in the elementary and secondary school context, where there is no student enrolled in the class or course who has a parent with a disability) who needs the password-protected content to be made accessible.

Educational institutions, like many other recipients, use their websites to provide a variety of programs and activities to members of the public. Many of the programs and activities on

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[311] *See What You Can Do With MyChart*, https://www.mychart.org/Features (last visited June 27, 2023).

these websites are available to anyone. The content on these websites can include such general information as the academic calendar, enrollment process, admission requirements, school lunch menus, school policies and procedures, and contact information. Under the proposed regulation, all such programs or activities available to the public on the websites of public educational institutions must comply with the requirements of § 84.84 unless the content is subject to a proposed exception.

In addition to the information available to the general public on the websites of educational institutions, the websites of many schools, colleges, and universities also make certain programs and activities available to a discrete and targeted audience of individuals (e.g., students taking particular classes or courses or, in the elementary or secondary school context, parents of students enrolled in a particular class or course). This information is often provided using a Learning Management System (LMS) or similar platform that can provide secure online access and allow the exchange of educational and administrative information in real time. LMSs allow educational institutions and their faculty and staff to exchange and share information with students and parents about courses and students' progress. For example, faculty and staff can create and collect assignments, post grades, provide real-time feedback, and share subject-specific media, documents, and other resources to supplement and enrich the curriculum. Parents can track their children's attendance, assignments, grades, and upcoming class events. To access the information available on these platforms, students (and parents in the elementary and secondary school context) generally must obtain a password, login credentials, or some equivalent from the educational institution. The discrete population that has access to this content may not always include a person with a disability. For example, a student who is blind may not have enrolled in a psychology course, or a parent who is deaf may not have a child enrolled in a particular ninth-grade world history class.

The Department's regulatory proposal would require that the LMS platforms that recipient elementary and secondary schools, colleges, and universities use comply with § 84.84. However,

subject to limitations, the Department is proposing an exception for password-protected class or course content. Thus, while the LMS platform would need to be accessible, class or course content (such as syllabi and assigned readings) posted on the password-protected LMS platform would not need to be, except in specified circumstances. Specifically, the content available on password-protected websites for specific classes or courses would generally be excepted from the requirements of proposed § 84.84 unless a student is enrolled in that particular class or course and the student (or the parent[312] in the elementary and secondary school context) would be unable, because of a disability, to access the content posted on the password-protected website for that class or course. Thus, once a student with a disability (or a student in an elementary or secondary school with a parent with a disability) is enrolled in a particular class or course, the content available on the password-protected website for the specific class or course would need to be made accessible in accordance with certain compliance dates discussed below. This may include scenarios in which a student with a disability (or, in the elementary and secondary school context, a student whose parent has a disability) preregisters, enrolls, or transfers into a class or course or acquires a disability during the term, or when a school otherwise identifies a student in a class or course (or their parent in the elementary and secondary school context) as having a disability. The educational institution would generally be required to make the course content for that class or course fully compliant with all WCAG 2.1 Level AA success criteria, not merely the criteria related to that student or parent's disability. This will ensure that course content becomes more accessible to all students over time. In addition, the Department expects that it will be more straightforward and cost-effective for recipients to comply with WCAG 2.1 Level AA as a whole, rather than attempting to identify and isolate the WCAG 2.1 success criteria that

[312] The Department notes that the term "parent" as used throughout proposed § 84.85(f) is intended to include biological, adoptive, step-, or foster parents, legal guardians, or other individuals recognized under Federal and state law as having parental rights.

relate to a specific student, and then repeating that process for a subsequent student with a different disability.

The Department proposes this exception for class and course content based on its understanding that it would be burdensome to require educational institutions to make all of the documents, videos, and other content that many instructors upload and assign via LMS websites accessible. For instance, instructors may scan hard-copy documents and then upload them to LMS sites as conventional electronic documents. In some instances, these documents comprise multiple chapters from books and may be hundreds of pages long. Similarly, instructors may upload videos or other multimedia content for students to review. The Department believes that making all of this content accessible when students with disabilities (or their parents in the elementary and secondary context) are not enrolled in the course may be onerous for educational institutions, but the Department also understands that it is critical for students and parents with disabilities to have access to needed course content.

The Department believes its proposal provides a balanced approach by ensuring access to students with disabilities (or, in primary and secondary education settings, parents with disabilities) enrolled in the educational institution, while recognizing that there are large amounts of class or course content that may not immediately need to be accessed by individuals with disabilities because they have not enrolled in a particular class or course.

By way of analogy and as an example, under the Department's existing section 504 regulations, educational institutions are not required to proactively provide accessible course handouts to all students in a course, but they are required to do so for a student with a disability who needs them to access the course content. The Department envisions the requirements proposed here as an online analogue: while educational institutions are not required to proactively make all password-protected course handouts accessible, for example, once an institution knows that a student with a disability is enrolled in a course and, accordingly, needs the content to be made accessible, the institution must do so. The institution must also comply

with its obligations to provide accessible course content under all other applicable laws, including the IDEA.

The Department appreciates that some educational institutions may find it preferable or more effective to make all class or course content accessible from the outset without waiting for a student with a disability (or, in the elementary and secondary school context, a student with a parent with a disability) to enroll in a particular class or course, and nothing in this rule would prevent educational institutions from taking that approach. Even if educational institutions do not take this approach, the Department expects that those institutions will likely need to take steps in advance so that they are prepared to make all class or course content for a particular course accessible within the required time frames discussed below when there is an enrolled student with a disability (or, in the elementary and secondary school context, an enrolled student with a parent with a disability) who needs access to that content.

Because the nature, operation, and structure of elementary and secondary schools are different from those of public colleges and universities, the proposed regulation sets forth separate requirements for the two types of institutions.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following question.

- *Web Accessibility Question 28: Are there particular issues relating to the accessibility of digital books and textbooks that the Department should consider in finalizing this rule? Are there particular issues that the Department should consider regarding the impact of this rule on libraries?*

Postsecondary institutions: password-protected web content.

In proposed § 84.85(e), the Department is considering an exception to the requirements proposed in § 84.84 for public postsecondary institutions, subject to two limitations. This

exception would provide that "course content available on a recipient's password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a public postsecondary institution" would not need to comply with the web accessibility requirements of § 84.84 unless one of the two limitations described below applies. As used in this context, "admitted students" refers to students who have applied to, been accepted by, and are enrolled in a particular educational institution. These students include both matriculated students (i.e., students seeking a degree) and non-matriculated students (i.e., continuing education students or non-degree-seeking students). As noted above, this exception applies only to password-protected or otherwise secured content. Content may be otherwise secured if it requires some process of authentication or login to access the content.

The exception is not intended to apply to password-protected content for classes or courses that are made available to the general public, or a subset thereof, without enrolling at a particular educational institution. Such classes or courses generally only require limited, if any, registration to participate. These types of classes or courses may sometimes be referred to as Massive Open Online Courses (MOOCs). Because access to the content on these password-protected websites is not limited to a discrete student population within an educational institution, but is instead widely available to the general public—sometimes without limits as to enrollment—any individual, including one with a disability, may enroll or participate at almost any time. Under these circumstances, the recipient must make such class or course content accessible from the outset of the class or course regardless of whether a student with a disability is known to be participating. The Department is interested in the public's feedback on this exception, and in particular the impact it may have on recipients' continued use of MOOCs.

The phrase "enrolled in a specific course" as used in § 84.85(f) limits the exception to password-protected web content for a particular course, at a particular time, during a particular term. For example, if a university offers a 20th Century Irish Literature course at 10 a.m. that meets on Mondays, Wednesdays, and Fridays for the fall semester of the 2029–2030 academic

year, the exception would apply to the password-protected web content for that course, subject to the limitations discussed below.

The proposed exception in § 84.85(e) would not apply to non-course content on the recipient's password-protected website that is generally available to all admitted students. For example, content available on the recipient's password-protected website that is available to all admitted students, such as forms for registering for class, applications for meal plans or housing, academic calendars, and announcements generally made available to all students enrolled in the postsecondary institution would all be required to comply with § 84.84. In addition, if a postsecondary institution makes course content for specific courses available to all admitted students on a password-protected website, regardless of whether students had enrolled in that specific course, the exception would not apply, even if such content was only made available for a limited time, such as within a set time frame for course shopping.

Sections 84.85(e)(1)–(2): limitations to the exception for password-protected web content for specific courses.

As noted previously, there are two important limitations to the general exception for course content on password-protected websites of postsecondary institutions in proposed § 84.85(e); both limitations apply to situations in which an admitted student with a disability is enrolled in a particular course at a postsecondary institution and the student, because of a disability, would be unable to access the content on the password-protected website for the specific course. The phrase "the student, because of a disability, would be unable to access" is meant to make clear that these limitations are not triggered merely by the enrollment of a student with a disability, but instead they are triggered by the enrollment of a student whose disability would make them unable to access the content on the password-protected course website. These limitations would also be triggered by the development or identification of such a disability while a student is enrolled, or the realization that a student's disability makes them unable to access the course content during the time that they are enrolled. The phrase "unable to access"

does not necessarily mean a student has no access at all. Instead, the phrase "unable to access" is intended to cover situations in which a student's disability would limit or prevent their ability to equally access the relevant content.

The provisions set forth in the limitations to the exception are consistent with longstanding obligations of recipients under section 504 and title II of the ADA. Recipients are already required to make appropriate reasonable modifications and ensure effective communication, including by providing the necessary auxiliary aids and services to students with disabilities. It is the educational institution, not the student, that is responsible for ensuring that it is meeting these obligations. Such institutions, therefore, should be proactive in addressing the access needs of admitted students with disabilities, including those who would be unable to access inaccessible course content on the web. This also means that when an institution knows that a student with a disability is unable to access inaccessible content, the institution should not expect or require that the student first attempt to access the information and be unable to do so before the institution's obligation to make the content accessible arises.

Correspondingly, when an institution has notice that such a student is enrolled in a course, all of the content available on the password-protected website for that course must be made accessible in compliance with the accessibility requirements of proposed § 84.84. The difference between the two limitations to the exception to § 84.85(e) is the date that triggers compliance. The triggering event is based on when the institution knew, or should have known, that such a student with a disability would be enrolled in a specific course and would be unable to access the content available on the password-protected website.

The application of the limitation in proposed § 84.85(e)(1) and (2), discussed in detail below, is contingent upon the institution having notice both that a student with a disability is enrolled in a specific course and that the student cannot access the course content because of their disability. Once an institution is on notice that a student with a disability is enrolled in a specific course and that the student's disability would render the student unable to access the

content available on the password-protected website for the specific course, the password-protected web content for that course must be made accessible within the time frames set forth in proposed § 84.85(e)(1) and (2), which are described in greater detail below.

The first proposed limitation to the exception for postsecondary institutions, proposed § 84.85(e)(1), would require that "if a recipient is on notice that an admitted student with a disability is pre-registered in a specific course offered by a postsecondary institution and that the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific course," then "all content available on the recipient's password-protected or otherwise secured website for the specific course must comply with the requirements of § 84.84 by the date the academic term begins for that course offering. New content added throughout the term for the course must also comply with the requirements of § 84.84 at the time it is added to the website." Students may register for classes and make accessibility requests ahead of the start of the term—often during the previous term. The institution therefore knows, or should know, that a student with a disability has registered for a particular course or notified the school that content must be made accessible for a particular course. This provision would ensure that students with disabilities have timely access to and equal opportunity to benefit from content available on a password-protected website for their particular courses.

The second proposed limitation to the exception for postsecondary institutions, § 84.85(e)(2), applies to situations in which "a recipient is on notice that an admitted student with a disability is enrolled in a specific course offered by a postsecondary institution after the start of the academic term, and the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific course." In this instance, unlike § 84.85(e)(1), the postsecondary institution is not on notice until after the start of the academic term that a student is enrolled in a particular course and that the student, because of a disability, would be unable to access the content on the

password-protected course website. In such circumstances, all content available on the recipient's password-protected website for the specific course must comply with the requirements of § 84.84 within five business days of such notice. This second limitation would apply to situations in which students have not pre-registered in a class, such as when students enroll in a class during the add/drop period, or where waitlisted or transfer students enroll in a class at the start of, or during, the academic term. This second limitation to the exception for postsecondary institutions would also apply to situations in which the institution was not on notice that the enrolled student had a disability and would be unable to access online course content until after the academic term began—because, for example, the student newly enrolled at the institution or was recently diagnosed with a disability.

In proposing the five-day remediation requirement in this limitation, the Department is attempting to strike the appropriate balance between providing postsecondary institutions with a reasonable opportunity to make the content on the password-protected or otherwise secured website accessible and providing individuals with disabilities full and timely access to this information that has been made available to all other students in the course. The Department believes five days provides a reasonable opportunity to make the relevant content accessible in most cases, subject to the general limitations under proposed § 84.88. However, the Department is interested in the public's feedback and data on whether this remediation requirement provides a reasonable opportunity to make the relevant content accessible, and whether a shorter or longer period would be more appropriate in most cases.

If, for example, a college offers a specific fall semester course, a student with a disability pre-registers for it and, because of disability, that student would be unable to access the content available on the password-protected website for that course, all content available on the institution's password-protected website for that specific course must comply with the requirements of § 84.84 by the date the academic semester begins for the fall semester (according to the first limitation). If, instead, that same student does not enroll in that particular

course until two days after the start of the fall semester, all content available on the institution's password-protected or otherwise secured website for that specific course must comply with the requirements of § 84.84 within five business days of notice that a student with a disability is enrolled in that particular course and, because of disability, would be unable to access the content (according to the second limitation).

The exception applies to course content such as conventional electronic documents, multimedia content, or other course material "available" on a recipient's password-protected or otherwise secured website. As such, the two limitations apply when that content is made "available" to students with disabilities enrolled in a specific course who are unable to access course content. Although a professor may load all of their course content on the password-protected website at one time, they may also stagger the release of particular content to their students at various points in time during the term. It is when this content is made available to students that it must be made accessible in compliance with proposed § 84.84.

The two limitations to the exception for password-protected course content state that the limitations apply whenever "the student, because of a disability, would be unable to access the content available on the recipient's password-protected website for the specific course." Pursuant to longstanding obligations of recipients under section 504, the postsecondary institution must continue to take other steps necessary to timely make inaccessible course content accessible to an admitted student with a disability during the five-day period proposed in the second limitation, unless doing so would result in a fundamental alteration or undue financial and administrative burdens. This could include timely providing alternative formats, a reader, or a notetaker for the student with a disability, or providing other auxiliary aids and services that enable the student with a disability to participate in and benefit from the programs and activities of the recipient while the recipient is making the course content on the password-protected website accessible.

Once the obligation is triggered to make password-protected web content accessible for a specific course, the obligation is ongoing for the duration of the course (i.e., the obligation is not limited to course content available at the beginning of the term). Rather, all web content newly added throughout the remainder of the student's enrollment in the course must also be accessible at the time it is made available to students. Furthermore, once a postsecondary institution makes conventional electronic documents, multimedia content, or other course material accessible in accordance with the requirements of § 84.85(e)(1) or (2), the institution must maintain the accessibility of that specific content as long as that content is available to students on the password-protected course website, in compliance with the general accessibility requirement set forth in proposed § 84.84. However, new content added later, when there is no longer a student with a disability who is unable to access inaccessible web content enrolled in that specific course, would not need to be made accessible because that course-specific web content would once again be subject to the exception, unless and until another student with a disability is enrolled in that course.

With regard to third-party content linked to from a password-protected or otherwise secured website for a specific course, the exception and limitations set forth in proposed § 84.85(d) apply to this content, even when a limitation under proposed § 84.85(e)(1) or (2) has been triggered requiring all the content available to students on a password-protected website for a specific course to be accessible. Accordingly, third-party web content to which a recipient provides links for informational or resource purposes is not required to be accessible; however, if the postsecondary institution uses the third-party web content to allow members of the public to participate in or benefit from the institution's programs or activities, then the postsecondary institution must ensure it links to third-party web content that complies with the web accessibility requirements of § 84.84. For example, if a postsecondary institution requires students to use a third-party website it links to on its password-protected course website to complete coursework, then the third-party web content must be accessible.

The Department believes that this approach strikes a proper balance of providing necessary and timely access to course content, while not imposing burdens where web content is currently only utilized by a population of students without relevant disabilities, but it welcomes public feedback on whether alternative approaches might strike a more appropriate balance.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 29: How difficult would it be for postsecondary institutions to comply with this rule in the absence of this exception?*
- *Web Accessibility Question 30: What would the impact of this exception be on people with disabilities?*
- *Web Accessibility Question 31: How do postsecondary institutions communicate general information and course-specific information to their students?*
- *Web Accessibility Question 32: Do postsecondary institutions commonly provide parents access to password-protected course content?*
- *Web Accessibility Question 33: The proposed exception and its limitations are confined to content on a password-protected or otherwise secured website for students enrolled in a specific course. Do postsecondary institutions combine and make available content for particular groups of students (e.g., newly admitted students or graduating seniors) using a single password-protected website and, if so, should such content be included in the exception?*
- *Web Accessibility Question 34: On average, how much content and what type of content do password-protected course websites of postsecondary institutions contain? Is there content posted by students or parents? Should content posted by students or parents be required to be accessible and, if so, how long would it take a postsecondary institution to make it accessible?*

- *Web Accessibility Question 35: How long would it take to make course content available on a recipient's password-protected or otherwise secured website for a particular course accessible, and does this vary based on the type of course? Do students need access to course content before the first day of class? How much delay in accessing online course content can a student reasonably overcome in order to have an equal opportunity to succeed in a course, and does the answer change depending on the point in the academic term that the delay occurs?*
- *Web Accessibility Question 36: To what extent do educational institutions use or offer students mobile apps to enable access to password protected course content? Should the Department apply the same exceptions and limitations to the exceptions under proposed § 84.85(e) and (e)(1)-(2), respectively, to mobile apps?*
- *Web Accessibility Question 37: Should the Department consider an alternative approach, such as requiring that all newly posted course content be made accessible on an expedited time frame, while adopting a later compliance date for remediating existing content?*

Elementary and Secondary Schools: Password-Protected Web Content.

In proposed § 84.85(f), the Department is considering an exception to the requirements proposed in § 84.84 for elementary and secondary schools that would provide, subject to four limitations, that "class- or course content available on a recipient's password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course at an elementary or secondary school" would not need to comply with the web accessibility requirements of § 84.84.

Because parents of students in elementary and secondary schools have greater rights, roles, and responsibilities with regard to their children and their children's education than in the postsecondary education setting, and because these parents typically interact with such schools much more often and in much greater depth and detail, parents are expressly included in both the

general exception for password-protected web content in § 84.85(f) and its limitations.[313] Parents use password-protected websites to access progress reports and grades, track homework and long-term project assignments, and interact regularly with their children's teachers and administrators.

Proposed exception § 84.85(f) provides that "class or course content available on a recipient's password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course offered by an elementary or secondary school" does not need to comply with the accessibility requirements of § 84.84 unless and until a student is enrolled in that particular class or course and either the student or the parent would be unable, because of a disability, to access the content available on the password-protected website. As used in this context, "enrolled . . . in a specific class or course" limits the exception to password-protected class or course content for a particular class or course during a particular academic term. For example, content on a password-protected website for students, and parents of students, in a specific fifth-grade class would not need to be made accessible unless a student enrolled, or the parent of a student enrolled, in the class that term would be unable, because of a disability, to access the content on the password-protected website.

The proposed exception in § 84.85(f) is not intended to apply to password-protected content that is available to all students or their parents in an elementary or secondary school. Content on password-protected websites that is not limited to students enrolled, or parents of students enrolled, in a specific class or course, but instead is available to all students or their parents at the elementary or secondary school is not subject to the exception. For example, a school calendar available on a password-protected website to which all students or parents at a particular elementary school are given a password would not be subject to the exception for

[313] The Department notes that the term "parent" as used throughout § 84.85(f) is intended to include biological, adoptive, step, or foster parents; legal guardians; or other individuals recognized under Federal or State law as having parental rights.

password-protected web content for a specific class or course. It would, therefore, need to comply with the requirements of proposed § 84.84.

Section 84.85(f)(1)-(4): limitations to the exception for password-protected class or course content.

There are four critical limitations to the general exception in § 84.85(f) for elementary and secondary schools' class or course content. These limitations are identical to those discussed above in the postsecondary context, except that they arise not only when a school is on notice that a student with a disability is enrolled in a particular class or course and cannot access content on the class or course's password-protected website because of their disability, but also when the same situation arises for a parent with a disability. The discussion above of the limitations in the postsecondary context applies with equal force here. A shorter discussion of the limitations in the elementary and secondary context follows. However, the Department acknowledges that there are existing legal frameworks specific to the public elementary and secondary education context which are described further in this section.

The first limitation, in proposed § 84.85(f)(1), addresses situations in which the recipient is on notice before the beginning of the academic term that a student with a disability is pre-registered in a specific class or course offered by an elementary or secondary school, and the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific class or course. In such circumstances, all content available on the recipient's password-protected website for the specific class or course must comply with the requirements of § 84.84 by the date the term begins for that class or course. New content added throughout the term for the class or course must also comply with the requirements of proposed § 84.84 at the time it is added to the website.

Similarly, the second limitation, proposed § 84.85(f)(2), addresses situations in which the pre-registered student's parent has a disability. Section 84.85(f)(2) applies when the recipient is on notice that a student is pre-registered in an elementary or secondary school's class or course, and that the student's parent needs the content to be accessible because of a disability that inhibits access to the content available on the password-protected website for the specific class or course. In such circumstances, all content available on the recipient's password-protected website for the specific class or course must comply with the requirements of § 84.84 by the date the school term begins for that class or course. New content added throughout the term for the class or course must also comply with the requirements of proposed § 84.84 at the time it is added to the website.

The third and fourth limitations to the exception for class or course content on password-protected websites for particular classes or courses at elementary and secondary schools are similar to the first and second limitations, but have different triggering events. These limitations apply to situations in which a student is enrolled in an elementary or secondary school's class or course after the term begins, or when a school is otherwise not on notice until after the term begins that there is a student or parent with a disability who is unable to access class or course content because of their disability. The third limitation, in proposed § 84.85(f)(3) would apply once a recipient is on notice that "a student with a disability is enrolled in an elementary or secondary school's class or course after the term begins, and the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific class or course." In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the class or course must also comply with the requirements of proposed § 84.84 at the time it is added to the website.

Proposed § 84.85(f)(4), the fourth limitation, applies the same triggering event as in § 84.85(f)(3) to situations in which the student's parent has a disability. Proposed § 84.85(f)(4) would apply once a recipient is on notice that a student is enrolled in an elementary or secondary school's class or course after the term begins, and that the student's parent needs the content to be accessible because of a disability that would inhibit access to the content available on the recipient's password-protected website for the specific class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the class or course must also comply with the requirements of proposed § 84.84 at the time it is added to the website.

The procedures for enrollment in the elementary or secondary school context likely vary from the postsecondary context. Unlike in postsecondary institutions, elementary and secondary schools generally have more autonomy and authority regarding student placement in a particular class or course. The student or parent generally does not control placement in a particular class or course. To the extent a parent or student has such autonomy or authority, the application of the limitations in § 84.85(f)(1) through (4) is contingent on whether the elementary or secondary school knows, or should know, that a student with a disability is enrolled, or a parent with a disability has a child enrolled, in a particular class or course, and that the student or parent would be unable to access the class or course content because of their disability.

Regardless of what process a school follows for notification of enrollment, accessibility obligations for password-protected class or course content come into effect once a school is on notice that materials need to be made accessible under these provisions. For example, some schools that allow students to self-select the class or course in which they enroll may require students with disabilities to notify their guidance counselor or the special education coordinator each time they have enrolled in a class or course. With respect to parents, some schools may have a form that parents fill out as part of the process for enrolling a student in a school, or in a

particular class or course in that school, indicating that they (the parent) are an individual with a disability who, because of their disability, needs auxiliary aids or services. Other schools may publicize the schools' responsibility to make class or course content accessible to parents with disabilities and explain the process for informing the school that they cannot access inaccessible websites. Under this rule, regardless of the process a school follows, once the elementary or secondary school is on notice, the password-protected class or course content for that class or course must be made accessible within the time frames set forth in § 84.85(f)(1) through (4). We note that section 504 would prohibit limiting assignment of students with disabilities only to classes for which the content has already been made accessible.[314]

The Department emphasizes that in the public elementary and secondary school context a variety of Federal laws include robust protections for students with disabilities, and this rule is intended to build on, but not to supplant those protections for students with disabilities. Public schools that receive Federal financial assistance already must ensure they comply with obligations under other statutes such as the IDEA and section 504 of the Rehabilitation Act, including the Department of Education's regulations implementing those statutes. The IDEA and section 504 already include affirmative obligations that covered schools work to identify children with disabilities, regardless of whether the schools receive notice from a parent that a student has a disability, and provide a Free Appropriate Public Education (FAPE).[315] The Department acknowledges that educational entities likely already employ procedures under those frameworks to identify children with disabilities and assess their educational needs. Under the IDEA and section 504, schools have obligations to identify students with the relevant disabilities that would trigger the limitations in proposed § 84.85(f)(1) through (4). The proposed rule would add to and would not supplant the already robust framework for identifying children with disabilities and making materials accessible. The language used in the educational exceptions and their

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[314] *See* 45 CFR 84.4, now appearing in 84.68.
[315] *See* 20 U.S.C. 1412; 34 CFR 104.32–104.33.

limitations is not intended to replace or conflict with those existing procedures. In other words, regardless of the means by which schools identify students with the relevant disabilities here, including procedures developed to comply with the IDEA and section 504 regulations, once a school is on notice that either the student or the parent has a disability and requires access because of that disability, the limitation is triggered. Further, schools should not alter their existing practices to wait for notice because of this rule—this rule does not modify existing requirements that schools must follow under other statutes such as the IDEA.

Federal and state laws may have a process for students who are newly enrolled in a school and those who are returning to have their educational program or plan reviewed and revised annually. This generally would include a determination of the special education, related services, supplementary aids and services, program modifications, and supports from school personnel that the student needs. However, once the school is on notice that the student has a disability and requires access because of the disability, those processes and procedures cannot be used to delay or avoid compliance with the time frames set forth in § 84.85(f)(1) through (4). For example, if a school knows that a student who is blind is enrolled at the school for the first time over the summer, the school is then on notice that, in accordance with § 84.85(f)(1), the content on the school's password-protected website for the class to which the school assigns the student must be accessible in compliance with the requirements of § 84.84 by the date the term begins, regardless of the time frames for evaluation or the review or development of an Individualized Education Program or section 504 plan.

As in the postsecondary context, the Department believes that these exceptions and limitations strike a proper balance of providing necessary and timely access to class or course content, while not imposing burdens where class or course content is currently only utilized by a population of students and parents without relevant disabilities, but it welcomes public feedback on whether alternative approaches might strike a more appropriate balance.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 38: How difficult would it be for elementary and secondary schools to comply with this rule in the absence of this exception?*
- *Web Accessibility Question 39: What would the impact of this exception be on people with disabilities?*
- *Web Accessibility Question 40: How do elementary and secondary schools communicate general information and class- or course-specific information to students and parents?*
- *Web Accessibility Question 41: The proposed exception and its limitations are confined to content on a password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course. Do elementary or secondary schools combine and make available content for all students in a particular grade or certain classes (e.g., all 10th graders in a school taking chemistry in the same semester) using a single password-protected website and, if so, should such content be included in the exception?*
- *Web Accessibility Question 42: Do elementary and secondary schools have a system allowing a parent with a disability to provide notice of their need for accessible course content?*
- *Web Accessibility Question 43: On average, how much content and what type of content do password-protected course websites of elementary or secondary schools contain? Is there content posted by students or parents? Should content posted by students or parents be required to be accessible and, if so, how long would it take an elementary or secondary school to make it accessible?*
- *Web Accessibility Question 44: How long would it take to make class- or course content available on a recipient's password-protected or otherwise secured website for the*

particular class or course accessible, and does this vary based on the type of course? Do parents and students need access to class or course content before the first day of class? How much delay in accessing online course content can a student reasonably overcome in order to have an equal opportunity to succeed in a course, and does the answer change depending on the point in the academic term that the delay occurs?

- *Web Accessibility Question 45: To what extent do elementary or secondary schools use or offer students or parents mobile apps to enable access to password-protected course content? Should the Department apply the same exceptions and limitations to the exceptions under § 84.85(f) and (f)(1)-(4), respectively, to mobile apps?*
- *Web Accessibility Question 46: Should the Department consider an alternative approach, such as requiring that all newly posted course content be made accessible on an expedited time frame, while adopting a later compliance date for remediating existing content?*

Individualized, Password-Protected Documents.

In proposed § 84.85(g), the Department is considering an exception to the accessibility requirements of § 84.84 for web-based "conventional electronic documents that are: (1) about a specific individual, their property, or their account; and (2) password-protected or otherwise secured."

Many recipients use the web to provide access to digital versions of documents for their customers, constituents, and other members of the public. For example, many hospitals offer a virtual platform where health care providers can send digital versions of test results and scanned documents to their patients. The Department anticipates that a recipient could have many such documents. The Department also anticipates that making conventional electronic documents accessible in this context may be difficult for recipients, and that in many instances, the individuals who are entitled to view a particular individualized document will not need an accessible version. However, some recipients might be able to make some types of documents

accessible relatively easily after they make the template they use to generate these individualized documents accessible. To help better understand whether these assumptions are accurate, the Department asks questions for public comment below about what kinds of individualized, conventional electronic documents recipients make available, how recipients make these documents available to individuals, and what experiences individuals have had in accessing these documents.

This proposed exception is expected to reduce the burdens on recipients. The Department expects that making such documents accessible for every individual, regardless of whether they need such access, could be too burdensome and would not deliver the same benefit to the public as a whole as if the recipient were to focus on making other types of web content accessible. The Department expects that it would generally be more impactful for recipients to focus resources on making documents accessible for those individuals who actually need the documents to be accessible. It is the Department's understanding that making conventional electronic documents accessible is generally a more time and resource intensive process than making other types of web content accessible. As discussed below, recipients must still provide accessible versions of individualized, password-protected conventional electronic documents in a timely manner when those documents pertain to individuals with disabilities. This approach is consistent with the broader section 504 regulatory framework. For example, hospitals are not required to provide accessible bills to all customers. Instead, hospitals need only provide accessible bills to those customers who need them because of a disability.

This exception is limited to "conventional electronic documents" as defined in § 84.10. This exception would, therefore, not apply in a case where a recipient makes individualized information available in formats other than a conventional electronic document. For example, if a hospital makes individualized bills available on a password-protected web platform as HTML content (rather than a PDF), that content would not be subject to this exception. Such bills, therefore, would need to be made accessible in accordance with proposed § 84.84. On the other

hand, if a recipient makes individualized bills available on a password-protected web platform in PDF form, that content would be excepted from the accessibility requirements of § 84.84, subject to the limitation discussed in further detail below.

This exception also only applies when the content is individualized for a specific person or their property or account. Examples of individualized documents include medical records or notes about a specific patient or receipts for purchases. Content that is broadly applicable or otherwise for the general public (i.e., not individualized) is not subject to this exception. For instance, a PDF notice that explains an upcoming rate increase for all utility customers and is not addressed to a specific customer would not be subject to this exception. Such a general notice would not be subject to this exception even if it were attached to or sent with an individualized letter, like a bill, that is addressed to a specific customer.

Finally, this exception applies only to password-protected or otherwise secured content. Content may be otherwise secured if it requires some process of authentication or login to access the content. Unless subject to another exception, conventional electronic documents that are on a recipient's general, public web platform would not be excepted.

This proposed exception for individualized, password-protected conventional electronic documents has certain limitations. While the exception is meant to alleviate the burden on recipients of making all individualized, password-protected or otherwise secured conventional electronic documents generally accessible, people with disabilities must still be able to access information from documents that pertain to them. An accessible version of these documents must be provided in a timely manner.[316] A recipient might also need to make reasonable modifications to ensure that a person with a disability has equal access to its programs or activities.[317] For example, if a person with a disability requests access to an inaccessible bill from a county hospital, the hospital may need to extend the payment deadline and waive any late fees if the

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[316] *See* proposed 45 CFR 84.77(b)(2); 28 CFR 35.160(b)(2).
[317] *See* proposed 45 CFR 84.68(b)(7).

hospital does not provide the bill in an accessible format in sufficient time for the person to review the bill before payment is due.

As in other situations involving a recipient's effective communication obligations—for example, when providing an American Sign Language interpreter—this exception and its accompanying limitation would also apply to the companion of the person receiving the recipient's services in appropriate circumstances.[318]

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 47: What kinds of individualized, conventional electronic documents do recipients make available and how are they made available (e.g., on websites or mobile apps)? How difficult would it be to make such documents accessible? How do people with disabilities currently access such documents?*
- *Web Accessibility Question 48: Do recipients have an adequate system for receiving notification that an individual with a disability requires access to an individualized, password-protected conventional electronic document? What kinds of burdens do these notification systems place on individuals with disabilities and how easy are these systems to access? Should the Department consider requiring a particular system for notification or a particular process or timeline that recipients must follow when they are on notice that an individual with a disability requires access to such a document?*
- *Web Accessibility Question 49: What would the impact of this exception be on people with disabilities?*

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[318] *See* proposed 45 CFR 84.77; ADA Requirements: Effective Communication, U.S. Dep't of Just. (updated Feb. 28, 2020), https://www.ada.gov/effective-comm.htm [https://perma.cc/W9YR-VPBP].

- *Web Accessibility Question 50: Which provisions of this rule, including any exceptions (e.g., individualized, password-protected conventional electronic documents; content posted by a third party), should apply to mobile apps?*

§ 84.86 Conforming alternate versions.

Generally, to meet the WCAG 2.1 standard, a web page must satisfy one of the defined levels of conformance—in the case of this proposed rule, Level AA.[319] However, WCAG 2.1 allows for the creation of a "conforming alternate version," a separate web page that is accessible, up-to-date, contains the same information and functionality as the inaccessible web page, and can be reached via a conforming page or an accessibility-supported mechanism.[320] The ostensible purpose of a "conforming alternate version" is to provide individuals with relevant disabilities access to the information and functionality provided to individuals without relevant disabilities, albeit via a separate vehicle.

Having direct access to an accessible web page provides the best user experience for many individuals with disabilities, and it may be difficult for recipients to reliably maintain conforming alternate versions, which must be kept up-to-date. Accordingly, the W3C® explains that providing a conforming alternate version of a web page is intended to be a "fallback option for conformance to WCAG and the preferred method of conformance is to make all content directly accessible."[321] However, WCAG 2.1 does not explicitly limit the circumstances under which a recipient may choose to create a conforming alternate version of a web page instead of making the web page directly accessible.

The Department is concerned that WCAG 2.1 can be interpreted to permit the development of two separate websites—one for individuals with relevant disabilities and another

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[319] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#cc1* [*https://perma.cc/ZL6N-VQX4*].
[320] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Conforming Alternate Version* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#dfn-conforming-alternate-version* [*https://perma.cc/5NJ6-UZPV*].
[321] *See* W3C®, *Understanding WCAG 2.0* (Oct. 7, 2016), *https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html#uc-conforming-alt-versions-head* [*https://perma.cc/DV5L-RJUG*].

for individuals without relevant disabilities—even when doing so is unnecessary and when users with disabilities would have a better experience using the main web page. This segregated approach is concerning and appears inconsistent with section 504's core principles of inclusion and integration.[322] The Department is also concerned that the creation of separate websites for individuals with disabilities may, in practice, result in unequal access to information and functionality. However, as the W3C® explains, certain limited circumstances may warrant the use of conforming alternate versions of web pages. For example, a conforming alternate version of a web page may be necessary when a new, emerging technology is used on a web page, but the technology is not yet capable of being made accessible, or when a website owner is legally prohibited from modifying the web content.[323]

Due to the concerns about user experience, segregation of users with disabilities, unequal access to information, and maintenance burdens discussed above, the Department is proposing to adopt a slightly different approach to "conforming alternate versions" than that provided under WCAG 2.1. Instead of permitting entities to adopt "conforming alternate versions" whenever they believe this is appropriate, proposed § 84.86 makes it clear that use of conforming alternate versions of websites and web content to comply with the Department's proposed requirements in § 84.84 is permissible only where it is not possible to make websites and web content directly accessible due to technical limitations (e.g., technology is not yet capable of being made accessible) or legal limitations (e.g., web content is protected by copyright). Conforming alternate versions should be used rarely—when it is truly not possible to make the content accessible for reasons beyond the recipient's control. For example, a conforming alternate version would not be permissible due to technical limitations just because a recipient's web developer lacked the knowledge or training needed to make content accessible. By contrast, the

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[322] *See, e.g.*, 45 CFR 84.4(b)(2)(requiring that recipients administer programs and activities in "the most integrated setting appropriate"); proposed 45 CFR 84.68(d).
[323] *See* W3C®, *Understanding WCAG 2.0* (Oct. 7, 2016), *https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html#uc-conforming-alt-versions-head* [*https://perma.cc/DV5L-RJUG*].

recipient could use a conforming alternate version if its website included a new type of technology that it is not yet possible to make accessible, such as a specific kind of immersive virtual reality environment. Similarly, a recipient would not be permitted to claim a legal limitation because its general counsel failed to approve contracts for a web developer with accessibility experience. Instead, a legal limitation would apply when the inaccessible content itself could not be modified for legal reasons specific to that content, such as lacking the right to alter the content or needing to maintain the content as it existed at a particular time due to pending litigation. The Department believes this approach is appropriate because it ensures that, whenever possible, people with disabilities have access to the same web content that is available to people without disabilities. However, proposed § 84.86 does not prohibit recipients from providing alternate versions of web pages *in addition* to their accessible main web page to possibly provide users with certain types of disabilities a better experience.

In addition to allowing conforming alternate versions to be used where it is not possible to make websites and web content directly accessible due to technical or legal limitations, this proposed rulemaking also incorporates general limitations if recipients can demonstrate that full compliance with § 84.84 would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.[324] If an action would result in such an alteration or such burdens, a recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient to the maximum extent possible.[325] One way in which recipients could fulfill their obligation to provide the benefits or services to the maximum extent possible, in the rare instance when they can demonstrate that full compliance would result in a fundamental alteration or undue burdens, is through creating conforming alternate versions.

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[324] *See* proposed § 84.88.
[325] *See* proposed § 84.88(a).

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 51: Would allowing conforming alternate versions due to technical or legal limitations result in individuals with disabilities receiving unequal access to a recipient's programs and activities?*

§ 84.87 Equivalent facilitation.

Proposed § 84.87 provides that nothing prevents a recipient from using designs, methods, or techniques as alternatives to those prescribed in the proposed regulation, provided that such alternatives result in substantially equivalent or greater accessibility and usability. The 1991 and 2010 ADA Standards for Accessible Design both contain an equivalent facilitation provision.[326] However, for purposes of proposed subpart I, the reason for allowing for equivalent facilitation is to encourage flexibility and innovation by recipients while still ensuring equal or greater access to web and mobile content. Especially in light of the rapid pace at which technology changes, this proposed provision is intended to clarify that recipients can use methods or techniques that provide equal or greater accessibility than this proposed rule would require. For example, if a recipient wanted to conform its website or mobile app to WCAG 2.1 Level AAA—which includes all the Level AA requirements plus some additional requirements for even greater accessibility—this provision makes clear that the recipient would be in compliance with this rule. A recipient could also choose to comply with this rule by conforming its website to WCAG 2.2 or WCAG 3.0, so long as the version and conformance level of those guidelines that the recipient selects includes all of the WCAG 2.1 Level AA requirements. The Department believes that this proposed provision offers needed flexibility for entities to provide usability and accessibility that

[326] *See* 28 CFR pt. 36, app. D, at 1000 (1991); 36 CFR pt. 1191, app. B at 329.

meet or exceed what this rule would require as technology continues to develop. The responsibility for demonstrating equivalent facilitation rests with the recipient.

§ 84.88 Duties.

Section 84.88 sets forth the general limitations on the obligations under subpart I. Proposed § 84.88(a) provides that in meeting the accessibility requirements set out in this subpart, a recipient is not required to take any action that would result in a fundamental alteration in the nature of its programs or activities or undue financial and administrative burdens. These proposed limitations on a recipient's duty to comply with the proposed regulatory provisions mirror the fundamental alteration and undue burdens compliance limitations proposed in this rulemaking in § 84.22(a)(2) (program accessibility), § 84.81 (effective communication), § 84.92(e) (accessible medical equipment), and the fundamental alteration compliance limitation in § 84.68(b)(7)(i) (reasonable modifications in policies, practices, or procedures). These fundamental alteration and undue burdens compliance limitations are also currently provided in the title II regulation in 28 CFR 35.150(a)(3) (program accessibility) and 35.164 (effective communication), and the fundamental alteration compliance limitation is currently provided in the title II regulation in 28 CFR 35.130(b)(7) (reasonable modifications in policies, practices, or procedures).

Generally, the Department believes it would not constitute a fundamental alteration of a recipient's programs or activities to modify web content or mobile apps to make them accessible, though the Department seeks the public's input on this view. Moreover, like the fundamental alteration and undue burdens limitations in the title II regulation referenced above, proposed § 84.88(a) does not relieve a recipient of all obligations to individuals with disabilities. Although a recipient under this proposed rule is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens, it nevertheless must comply with the requirements of this subpart to the extent that compliance does not result in a fundamental alteration or undue financial and

administrative burdens. For instance, a recipient might determine that full Level AA compliance would result in a fundamental alteration or undue financial and administrative burdens. However, this same recipient must then determine whether it can take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient to the maximum extent possible. To the extent that the recipient can, it must do so. This may include the recipient bringing its web content into compliance with some of the WCAG 2.1 Level A or Level AA success criteria.

It is the Department's view that most entities that choose to assert a claim that full compliance with the proposed web or mobile app accessibility requirements would result in undue financial and administrative burdens will be able to attain at least partial compliance. The Department believes that there are many steps a recipient can take to comply with WCAG 2.1 that should not result in an undue financial and administrative burdens, depending on the particular circumstances.

In determining whether an action would result in undue financial and administrative burdens, all of a recipient's resources available for use in the funding and operation of the program or activity should be considered. The burden of proving that compliance with proposed § 84.88 would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the recipient. The Department of Justice first promulgated this language in its title II regulation in 1991 and has consistently maintained that the decision that compliance would result in a fundamental alteration or impose undue burdens must be made by the head of the recipient or their designee, and must be memorialized with a written statement of the reasons for reaching that conclusion.[327] The Department is adopting this language in its proposed section 504 rule to maintain consistency between the ADA and section

[327] 28 CFR 35.150(a)(3), 35.164.

504 and to maintain continuity for its recipients, most of whom are also covered by the ADA. The Department recognizes the difficulty recipients have in identifying the official responsible for this determination, given the variety of organizational structures within recipients and their components.[328] Thus, the Department intends to follow the approach that the determination must be made by a high level official, no lower than a major component head, that has been designated by the head of the recipient and has budgetary authority and responsibility for making spending decisions.[329] Where a recipient cannot bring web content or a mobile app into compliance without a fundamental alteration or undue burdens, it must take other steps to ensure that individuals with disabilities receive the benefits or services provided by the recipient to the maximum extent possible.

Once a recipient has complied with the web or mobile app accessibility requirements set forth in subpart I, it is not required to make further modifications to its web or mobile app content to accommodate an individual who is still unable to access, or does not have equal access to, the web or mobile app content due to their disability. Compliance with these web and mobile accessibility requirements does not remove covered entities' obligations as employers, with respect to job applicants and employees, under Title I of the ADA to not discriminate against qualified individuals on the basis of disability in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; or other terms, conditions, and privileges of employment. These obligations include making reasonable accommodation to the known physical or mental limitations of applicants or employees, absent undue hardship. The Department realizes that the proposed rule is not going to meet the needs of and provide access to every individual with a disability, but believes that setting a consistent and enforceable web accessibility standard that meets the needs of a majority of individuals with

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[328] *See* similar determination by the Department of Justice. 28 CFR pt. 35, app. B, at 708 (2022).
[329] *See id.*

disabilities will provide greater predictability for recipients, as well as added assurance of accessibility for individuals with disabilities.

Fully complying with the web and mobile app accessibility requirements set forth in subpart I means that a recipient is not required to make any further modifications to its web or mobile app content. However, if an individual with a disability, on the basis of disability, cannot access or does not have equal access to a program or activity through a recipient's web content or mobile app that conforms to WCAG 2.1 Level AA, the recipient still has an obligation to provide the individual an alternative method of access to that program or activity unless the recipient can demonstrate that alternative methods of access would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.[330] Thus, just because a recipient is in full compliance with this rule's web or mobile app accessibility standard does not mean it has met all of its obligations under section 504 or other applicable laws. Even though no further changes to a recipient's web or mobile app content are required by section 504, a recipient must still take other steps necessary to ensure that an individual with a disability who, on the basis of disability, is unable to access or does not have equal access to the program or activity provided by the recipient through its web content or mobile app can obtain access through other effective means. The recipient must still satisfy its general obligations to provide effective communication, reasonable modifications, and an equal opportunity to participate in or benefit from the entity's services using methods other than its website or mobile app.[331] Of course, a recipient may also choose to further modify its web or mobile app content to make that content more accessible or usable than this subpart requires.

The recipient must determine on a case-by-case basis how best to accommodate those individuals who cannot access the program or activity provided through the recipient's fully compliant web content or mobile app. A recipient should refer to 45 CFR 84.77 (effective

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[330] *See, e.g.,* proposed 45 CFR 84.22(a)(2).
[331] *See* 45 CFR 84.4, redesignated as 84.68; proposed 84.68(b)(7); proposed 84.77.

communication) to determine its obligations to provide individuals with disabilities with the appropriate auxiliary aids and services necessary to afford them an equal opportunity to participate in, and enjoy the benefits of, the recipient's program or activity. A recipient should refer to 45 CFR 84.68(b)(7) (reasonable modifications) to determine its obligations to provide reasonable modifications in policies, practices, or procedures to avoid discrimination on the basis of disability. It is helpful to provide individuals with disabilities with information about how to obtain the modifications or auxiliary aids and services they may need. The Department therefore strongly recommends that the recipient provide notice to the public on how an individual who cannot use the web content or mobile app because of a disability can request other means of effective communication or reasonable modifications in order to access the recipient's programs or activities that are being provided through the web content or mobile app. The Department also strongly recommends that the recipient provide an accessibility statement that tells the public about how to bring web or mobile app accessibility problems to the recipient's attention, and that recipients consider developing and implementing a procedure for reviewing and addressing any such issues raised. For example, a recipient is encouraged to provide an email address, accessible link, accessible web page, or other accessible means of contacting the recipient to provide information about issues individuals with disabilities may encounter accessing web or mobile app content or to request assistance.[332] Providing this information will help recipients to ensure that they are satisfying their obligations to provide equal access, effective communication, and reasonable modifications.

Measuring Compliance.

As discussed above, the Department is proposing to adopt specific standards for recipients to use to ensure that their web content and mobile apps are accessible to individuals with disabilities. Proposed § 84.84 requires recipients to ensure that any web content and mobile

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[332] *See* W3C®, *Developing an Accessibility Statement* (Mar. 11, 2021), *https://www.w3.org/WAI/planning/statements/* [*https://perma.cc/85WU-JTJ6*].

apps that they make available to members of the public or use to offer programs and activities to members of the public are readily accessible to and usable by individuals with disabilities. Proposed § 84.84(b) sets forth the specific technical requirements in WCAG 2.1 Level AA with which recipients must conform unless compliance results in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. Now that the Department is proposing requiring recipients to conform with a specific technical standard for web accessibility, it seeks to craft a framework for determining when a recipient has complied with that standard. The framework will ensure the full and equal access to which individuals with disabilities are entitled, while setting forth obligations that will be achievable for recipients.

1. Existing approaches to defining and measuring compliance.

a. Federal approaches.

The Department is aware of two Federal agencies that have implemented requirements for complying with technical standards for web accessibility. Each agency has taken a different approach to defining what it means to comply with its regulation. As discussed above, for Federal agency websites covered by Section 508, the Access Board requires conformance with WCAG 2.0 Level A and Level AA.[333] In contrast, in its regulation on accessibility of air carrier websites, the Department of Transportation took a tiered approach that did not require all web content to conform to a technical standard before the first compliance date.[334] Instead, the Department of Transportation required those web pages associated with "core air travel services and information" to conform to a technical standard first, while other types of content could come into conformance later.[335] The Department of Transportation also required air carriers to consult with members of the disability community to test, and obtain feedback about, the usability of their websites.[336]

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[333] 36 CFR 1194.1; *id.* part 1194, app. A (E205.4).
[334] 14 CFR 382.43(c)(1).
[335] *Id.*
[336] 14 CFR 382.43(c)(2).

b. State governments' approaches.

Within the United States, different public entities have taken different approaches to measuring compliance with a technical standard under State laws. For example, Florida,[337] Illinois,[338] and Massachusetts[339] require conformance, without specifying how compliance will be measured or how recipients can demonstrate compliance with this requirement.[340] California requires the director of each State agency to certify compliance with technical standards and post a certification form on the agency's website.[341] California also provides assessment checklists for its agencies and guidelines for sampling and testing, including recommending that agencies use analytics data to conduct thorough testing on frequently used pages.[342] Minnesota requires compliance with a technical standard, provides accessibility courses and other resources, and notes the importance of both automated and manual testing; it also states that "[f]ew systems are completely accessible," and that "[t]he goal is continuous improvement."[343] Texas law requires state agencies to, among other steps, comply with a technical standard, conduct tests with one or more accessibility validation tools, establish an accessibility policy that includes criteria for compliance monitoring and a plan for remediation of noncompliant items, and establish goals and progress measurements for accessibility.[344] Texas has also developed an automated

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[337] Fla. Stat. 282.603 (2023).
[338] 30 Ill. Comp. Stat. 587 (2023); *Illinois Information Technology Accessibility Act* (Mar. 18, 2022), *https://www.dhs.state.il.us/page.aspx?item=32765*.
[339] Commonwealth of Massachusetts, *Enterprise Information Technology Accessibility Policy* (July 28, 2021), *https://www.mass.gov/policy-advisory/enterprise-information-technology-accessibility-policy* [*https://perma.cc/8293-HXUA*].
[340] Fla. Stat. § 282.603 (2021); *Illinois Information Technology Accessibility Act* (Mar. 18, 2022), https://www.dhs.state.il.us/page.aspx?item=32765; *Web Accessibility Standards* (Jan. 20, 2005), https://www.mass.gov/guides/web-accessibility-standards [https://perma.cc/MTG3-94PR].
[341] Cal. Gov't Code 11546.7.
[342] Department of Rehabilitation, *Website Accessibility Requirements and Assessment Checklists*, *https://www.dor.ca.gov/Home/WebRequirementsAndAssessmentChecklists* [*https://perma.cc/JAS9-Q343]*.
[343] Minnesota IT Services, *Guidelines for Accessibility and Usability of Information Technology Standard* (Apr. 17, 2018), *https://mn.gov/mnit/assets/accessibility-guidelines-2018_tcm38-336072.pdf* [*https://perma.cc/Q9P5-NGMT*].
[344] 1 Tex. Admin. Code 206.50, 213.21.

accessibility scanning tool and offers courses on web accessibility.[345]

c. Other approaches to defining and measuring compliance.

The Department understands that businesses open to the public, which are subject to title III of the ADA, have taken different approaches to web accessibility. These approaches may include collecting feedback from users with disabilities about inaccessible websites or mobile apps, or relying on external consultants to conduct periodic testing and remediation. Other businesses may have developed detailed internal policies and practices that require comprehensive automated and manual testing, including testing by people with disabilities, on a regular basis throughout their digital content development and quality control processes. Some businesses have also developed policies that include timelines for remediation of any accessibility barriers; these policies may establish different remediation time frames for different types of barriers.

2. Challenges of defining and measuring compliance with this rule.

The Department recognizes that it must move forward with care, weighing the interests of all stakeholders, so that as accessibility for individuals with disabilities is improved, innovation in the use of the web or mobile apps by public entities is not hampered. The Department appreciates that the dynamic nature of web content and mobile apps presents unique challenges in measuring compliance. For example, as discussed further below, this type of content can change frequently and assessment of conformance can be complex or subjective. Therefore, the Department is seeking public input on issues concerning how compliance should be measured, which the Department plans to address in its final rule.

The Department is concerned that the type of compliance measures it currently uses in the ADA and other portions of section 504, such as the one used to assess compliance with the

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[345] Texas Department of Information Resources, *EIR Accessibility Tools & Training*, *https://dir.texas.gov/electronic-information-resources-eir-accessibility/eir-accessibility-tools*-training [*https://perma.cc/A5LC-ZTST*].

ADA Standards, may not be practical in the web or mobile app context. Specifying what it means to comply with a technical standard for web accessibility is unlike the physical accessibility required by the UFAS or the 2010 ADA Design Standards. While section 504 physical accessibility standards can be objectively and reliably assessed with one set of tools, different automated testing tools may provide different assessments of the same website's accessibility. For example, using different web browsers with different testing tools or assistive technology can yield different results. Assessments of a website's or mobile app's accessibility may change frequently over time as the web content or mobile apps change. Automated testing tools also may report purported accessibility errors inaccurately. For example, an automated testing tool may report an error because an image lacks alt text, but WCAG does not require such alternative text if the content is purely decoration or used for formatting.[346] These tools may also provide an incomplete assessment of a website's accessibility because automated tools cannot assess conformance with certain WCAG success criteria, such as whether color is being used as the only visual means of conveying information or whether all functionality of the content is operable through a keyboard interface.[347] Furthermore, the Department understands that a person's experiences of web or mobile app accessibility may vary depending on what assistive technology or other types of hardware or software they are using. Accordingly, the Department is considering what the appropriate measure for determining compliance with the web and mobile app accessibility requirements should be.

While the Department understands the challenges that full conformance with WCAG 2.1 Level AA at all times may pose for some recipients, the Department also appreciates the serious impact that a failure to conform with WCAG 2.1 Level AA can have on people with disabilities. For example, if a person who has limited manual dexterity and uses keyboard navigation is

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[346] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *http://www.w3.org/TR/WCAG21/ [https://perma.cc/UB8A-GG2F].*

[347] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Use of Color* (June 5, 2018), https://www.w3.org/TR/WCAG21/#use-of-color [https://perma.cc/R3VC-WZMY]; *id.* at *Keyboard Accessible http://www.w3.org/TR/WCAG21/#keyboard-accessible [https://perma.cc/5A3C-9KK2].*

trying to apply for public benefits, and the "submit" button on the form is not operable using the keyboard, that person will not be able to apply for benefits independently for benefits online, even if the rest of the website is fully accessible. A person who is blind and uses a screen reader may not be able to make an appointment at a county health clinic if an element of the clinic's appointment calendar is not coded properly. Nearly all of a recipient's web content could conform with the WCAG 2.1 Level AA success criteria, but one instance of nonconformance could still prevent someone from accessing services on the website. People with disabilities must be able to access the many important government programs and activities that are offered through web content and mobile apps on equal terms, without sacrificing their privacy, dignity, or independence. The Department's concern about the many barriers to full and equal participation in civic life that inaccessible web content can pose for people with disabilities is an important motivating factor behind the Department's decision to propose requiring compliance with a technical standard. By clarifying what compliance with a technical standard means, the Department seeks to enhance the impact this requirement will have on the daily lives of people with disabilities by helping recipients to understand their obligations, thereby increasing compliance.

The Department believes that a more nuanced definition of compliance might be appropriate because some instances of nonconformance with WCAG success criteria may not impede access to the programs or activities offered through a public entity's web content or mobile app. For example, if the contrast between the text and background colors used for application instructions deviates by a few hundredths from the color contrast ratio required by WCAG 2.1 Level AA, most people with low vision will likely still be able to access those instructions without difficulty. However, the web content would be out of conformance with WCAG 2.1 Level AA. If the Department does not establish a more detailed compliance framework, a person with a disability would have a valid basis for filing a complaint with the Department or in Federal court about the scenario. This could expose recipients to extensive

litigation risk, while potentially generating more complaints than the Department or the courts have capacity to resolve, and without improving access for people with disabilities.

Some may argue that the same risk of allegedly unjustified enforcement action also exists for some provisions of section 504. Yet, the Department believes that a recipient's website may be more likely to be out of full conformance with WCAG 2.1 Level AA than its buildings are to be out of compliance with the design standards required by Federal law, like UFAS or the 2010 ADA Standards. Sustained, perfect conformance with WCAG 2.1 Level AA may be more difficult to achieve on a website that is updated several times a week and includes thousands of pages of content than compliance with the ADA Standards is in a town hall that is renovated once a decade. The Department also believes that slight deviations from WCAG 2.1 Level AA may be more likely to occur without having a detrimental impact on access than is the case with the ADA Standards. Additionally, it may be easier for an aggrieved individual to find evidence of nonconformance with WCAG 2.1 Level AA than noncompliance with the ADA Standards, given the availability of many free testing tools and the fact that public entities' websites can be accessed from almost anywhere. The Department welcomes public comment on the accuracy of all of these assumptions, as well as about whether it is appropriate to consider the impact of nonconformance with a technical standard when evaluating compliance with the proposed rule.

3. Possible Approaches to Defining and Measuring Compliance with this Rule.

The Department is considering a range of different approaches to measuring compliance with this proposed rule. These approaches involve linking noncompliance with a technical standard to:

(a) A numerical percentage of compliance with a technical standard;

(b) Situations that impact the ability to have equal access to the website or mobile app;

(c) The use of robust policies and practices for accessibility feedback, testing, and remediation; or

(d) Organizational maturity.

Numerical percentage.

The Department is considering whether to require a numerical percentage of conformance with a technical standard, which could be 100 percent or less. This percentage could be a simple numerical calculation based on the number of instances of nonconformance across a website or mobile app, or the percentage could be calculated by weighting different instances of nonconformance differently. Weighting could be based on factors like the importance of the content; the frequency with which the content is accessed; the severity of the impact of nonconformance on a person's ability to access the services, programs, or activities provided on the website; or some other formula.

However, the Department does not believe that a percentage-based approach would achieve the purposes of this rule or be feasible to implement. First, a percentage-based approach seems unlikely to ensure access for people with disabilities. Even if the Department were to require that 95 percent or 99 percent of an entity's web content or mobile apps conform with WCAG 2.1 (or that all content or apps conform to 95 percent or 99 percent of the WCAG 2.1 success criteria), the relatively small percentage that does not conform could still block an individual with a disability from accessing a program or activity.

A percentage-based standard is also likely to be difficult to implement. If the Department adopts a specific formula for calculating whether a certain percentage-based compliance threshold has been met, it could be challenging for members of the public and recipients to determine whether web content and mobile apps comply with this rule. Calculations required to evaluate compliance could become complex, particularly if the Department were to adopt a weighted or tiered approach that requires certain types of core content to be fully accessible, while allowing a lower percentage of accessibility for less important or less frequently accessed content. People with disabilities who are unable to use inaccessible parts of a website or mobile app may have particular difficulty calculating a compliance percentage, because it could be difficult, if not impossible, for them to correctly evaluate the percentage of a website or mobile

app that is inaccessible if they do not have full access to the entire website or app. For these reasons, the Department currently is not inclined to adopt a percentage-based approach to measuring compliance, though we welcome public comment on ways that such an approach could be implemented successfully.

Finding noncompliance where nonconformance with a standard impacts the ability to have equal access.

Another possible approach would be to limit an entity's compliance obligations where nonconformance with a technical standard does not impact a person's ability to have equal access to programs or activities offered on a recipient's website or mobile app. For example, the Department could specify that nonconformance with WCAG 2.1 Level AA does not constitute noncompliance with this part if that nonconformance does not prevent a person with a disability from accessing or acquiring the same information, engaging in the same interactions, performing the same transactions, and enjoying the same programs and activities that the recipient offers visitors to its website without relevant disabilities, with substantially equivalent ease of use. This approach would provide equal access to people with disabilities, while limiting the conformance obligations of recipients where technical nonconformance with WCAG 2.1 Level AA does not affect access. If a recipient's compliance were to be challenged, in order to prevail, the recipient would need to demonstrate that, even though it was technically out of conformance with one or more of the WCAG 2.1 Level AA success criteria, the nonconformance had such a minimal impact that this provision applies, and the recipient has therefore met its obligations under the ADA despite nonconformance with WCAG 2.1.

The Department believes that this approach would have a limited impact on the experience of people with disabilities who are trying to use web content or mobile apps for two reasons. First, by its own terms, the provision would require a recipient to demonstrate that any nonconformance did not have a meaningful effect. Second, it is possible that few recipients will choose to rely on such a provision, because they would prefer to avoid assuming the risk inherent

in this approach to compliance. A recipient may find it easier to conform to WCAG 2.1 Level AA in full so that it can depend on that clearly defined standard, instead of attempting to determine whether any nonconformance could be excused under this provision. Nonetheless, the Department believes some recipients may find such a provision useful because it would prevent them from facing the prospect of failing to comply with the ADA based on a minor technical error. The Department seeks public comment on all of these assumptions.

The Department also believes such an approach may be logically consistent with the general nondiscrimination principles of Section 508, which require comparable access to information and data,[348] and of the ADA's implementing regulation, which require an equal opportunity to participate in and benefit from services.[349] The Department has heard support from the public for ensuring that people with disabilities have equal access to the same information and services as people without disabilities, with equivalent ease of use. The Department is therefore evaluating ways that it can incorporate this crucial principle into a final rule, while simultaneously ensuring that the compliance obligations imposed by the final rule will be attainable for public entities in practice.

Accessibility feedback, testing, and remediation.

Another approach the Department is considering is whether a recipient could demonstrate compliance with this part by affirmatively establishing and following certain robust policies and practices for accessibility feedback, testing, and remediation. The Department has not made any determinations about what policies and practices, if any, would be sufficient to demonstrate compliance, and the Department is seeking public comment on this issue. However, for illustrative purposes only, and to enable the public to better understand the general approach the Department is considering, assume that a recipient proactively tested its existing web and mobile app content for conformance with WCAG 2.1 Level AA using automated testing on a regular

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[348] *See* 29 U.S.C. 794d(a)(1)(A).
[349] 28 CFR 35.130(b)(ii).

basis (e.g., every 30 days), conducted user testing on a regular basis (e.g., every 90 days), and tested any new web and mobile app content for conformance with WCAG 2.1 Level AA before that content was posted on its website or added to its mobile app. This recipient also remediated any nonconformance found in its existing web and mobile app content soon after the test (e.g., within two weeks). A recipient that took these (or similar) steps on its own initiative could be deemed to have complied with its obligations under the section 504, even if a person with a disability encountered an access barrier or a particular automated testing report indicated nonconformance with WCAG 2.1 Level AA. The recipient would be able to rely on its existing, effectively working web and mobile app content accessibility testing and remediation program to demonstrate compliance with section 504. In a final rule, the Department could specify that nonconformance with WCAG 2.1 Level AA does not constitute noncompliance with this part if a recipient has established certain policies for testing the accessibility of web and mobile app content and remediating inaccessible content, and the entity can demonstrate that it follows those policies.

This approach would enable a recipient to remain in compliance with section 504 even if its website or mobile app is not in perfect conformance with WCAG 2.1 Level AA at all times, if the entity is addressing any nonconformance within a reasonable period of time. A new policy that a recipient established in response to a particular complaint, or a policy that an entity could not demonstrate that it has a practice of following, would not satisfy such a provision. The Department could craft requirements for such policies in many different ways, including by requiring more prompt remediation for nonconformance with a technical standard that has a more serious impact on access to programs and activities; providing more detail about what testing is sufficient (e.g., both automated testing and manual testing, testing by users with certain types of disabilities); setting shorter or longer time frames for how often testing should occur; setting shorter or longer time frames for remediation; or establishing any number of additional criteria.

Organizational maturity.

The Department is also considering whether a recipient should be permitted to demonstrate compliance with this rule by showing organizational maturity—that the organization has a sufficiently robust program for web and mobile app accessibility. Organizational maturity models provide a framework for measuring how developed an organization's programs, policies, and practices are—either as a whole or on certain topics (e.g., cybersecurity, user experience, project management, accessibility). The authors of one accessibility maturity model observe that it can be difficult to know what a successful digital accessibility program looks like, and they suggest that maturity models can help assess the proficiency of accessibility programs and a program's capacity to succeed.[350] Whereas accessibility conformance testing evaluates the accessibility of a particular website or mobile app at a specific point in time, organizational maturity evaluates whether a recipient has developed the infrastructure needed to produce accessible websites and mobile apps consistently.[351] For example, some outcomes that an organization at the highest level of accessibility maturity might demonstrate include integrating accessibility criteria into all procurement and contracting decisions, leveraging employees with disabilities to audit accessibility, and periodically evaluating the workforce to identify gaps in accessibility knowledge and training.[352]

A focus on organizational maturity would enable a recipient to demonstrate compliance with section 504 even if its website or mobile app is not in perfect conformance with WCAG 2.1 Level AA at all times, so long as the recipient can demonstrate sufficient maturity of its digital accessibility program, which would indicate its ability to quickly remedy any issues of nonconformance identified. The Department could define requirements for organizational

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[350] *See* Level Access, *The Digital Accessibility Maturity Model: Introduction to DAMM*, https://www.levelaccess.com/the-digital-accessibility-maturity-model-introduction-to-damm/, [https://perma.cc/6K38-FJZU]

[351] *See* W3C®, *W3C Accessibility Maturity Model, About the W3C Accessibility Maturity Model* (Sept. 6, 2022), https://www.w3.org/TR/maturity-model/ [https://perma.cc/NB29-BDRN].

[352] *See* W3C®, *W3C Accessibility Maturity Model, Ratings for Evaluation* (Sept. 6, 2022), https://www.w3.org/TR/maturity-model/ [https://perma.cc/W7DA-HM9Z].

maturity in many different ways, including by adopting an existing organizational maturity model in full, otherwise relying on existing organizational maturity models, establishing different categories of organizational maturity (*e.g.*, training, testing, feedback), or establishing different criteria for measuring organizational maturity levels in each category. The Department could also require a recipient to have maintained a certain level of organizational maturity across a certain number of categories for a specified period of time, or require a recipient to have improved its organizational maturity by a certain amount in a specified period of time.

The Department has several concerns about whether allowing recipients to demonstrate compliance with this rule through their organizational maturity will achieve the goals of this rulemaking. First, this approach may not provide sufficient accessibility for individuals with disabilities. It is not clear that when recipients make their accessibility programs more robust, that will necessarily result in websites and mobile apps that consistently conform to WCAG 2.1 Level AA. If the Department permits a lower level of organizational maturity (e.g., level 4 out of 5) or requires the highest level of maturity in only some categories (e.g., level 5 in training), this challenge may be particularly acute. Second, this approach may not provide sufficient predictability or certainty for recipients. Organizational maturity criteria may prove subjective and difficult to measure, so disputes about a recipient's assessments of its own maturity may arise. Third, an organizational maturity model may be too complex for the Department to define or for recipients to implement. Some existing models include as many as ten categories of accessibility, with five levels of maturity, and more than ten criteria for some levels.[353] Some of these criteria are also highly technical and may not be feasible for some recipients to understand or satisfy (e.g., testing artifacts are actively updated and disseminated based on lessons learned from each group; accessibility testing artifacts required by teams are actively updated and

[353] Level Access, *Digital Accessibility Maturity Model (DAAM) Archives,* https://www.levelaccess.com/category/damm/, [https://perma.cc/Z683-X9H5].

maintained for form and ease of use).[354] Of course, a recipient that does not want to use an organizational maturity model would not need to do so; it could meet its obligations under the rule by conforming with WCAG 2.1 Level AA. But it is unclear whether this approach will benefit either people with disabilities or recipients. We seek public comment on whether the Department should adopt an approach to compliance that includes organizational maturity, and how such an approach could be implemented successfully.

The Department seeks public comment on how compliance with the web and mobile app accessibility requirements should be assessed or measured, including comments on these approaches to measuring compliance and any alternative approaches it should consider.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 52: What should be considered sufficient evidence to support an allegation of noncompliance with a technical standard for purposes of enforcement action? For example, if a website or mobile app is noncompliant according to one testing methodology, or using one configuration of assistive technology, hardware, and software, is that sufficient?*
- *Web Accessibility Question 53: In evaluating compliance, do you think a recipient's policies and practices related to web and mobile app accessibility (e.g., accessibility feedback, testing, remediation) should be considered and, if so, how?*
- *Web Accessibility Question 54: If you think a recipient's policies and practices for receiving feedback on web and mobile app accessibility should be considered in assessing compliance, what specific policies and practices for feedback would be effective? What specific testing policies and practices would be effective? What specific testing policies and practices would*

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[354] Level Access, *The Digital Accessibility Maturity Model: Dimension #7 – Testing and Validation*, https://www.levelaccess.com/the-digital-accessibility-maturity-model-dimension-7-testing-and-validation/, [https://perma.cc/VU93-3NH4].

be effective?

- *Web Accessibility Question 55: Should a recipient be considered in compliance with this part if the recipient remediates web and mobile app accessibility errors within a certain period of time after the recipient learns of nonconformance through accessibility testing or feedback? If so, what time frame for remediation is reasonable?*
- *Web Accessibility Question 56: Should compliance with this rule be assessed differently for web content that existed on the recipient's website on the compliance date than for web content that is added after the compliance date?*
- *Web Accessibility Question 57: In evaluating compliance, do you think a recipient's organizational maturity related to web and mobile app accessibility should be considered and, if so, how? For example, what categories of accessibility should be measured? Would such an approach be useful for recipients?*
- *Web Accessibility Question 58: Should the Department consider limiting recipients' compliance obligations if nonconformance with a technical standard does not prevent a person with disabilities from accessing the programs and activities offered on the recipient's website or mobile app?*
- *Web Accessibility Question 59: When assessing compliance, should all instances of nonconformance be treated equally? Should nonconformance with certain WCAG 2.1 success criteria, or nonconformance in more frequently accessed content or more important core content, be given more weight when determining whether a website or mobile app meets a particular threshold for compliance?*
- *Web Accessibility Question 60: How should the Department address isolated or temporary noncompliance*[355] *with a technical standard and under what circumstances should noncompliance be considered isolated or temporary? How should the Department address*

[355] See 28 CFR 35.133(b).

noncompliance that is a result of technical difficulties, maintenance, updates, or repairs?

- *Web Accessibility Question 61: Are there any local, state, Federal, international, or other laws or policies that provide a framework for measuring, evaluating, defining, or demonstrating compliance with web or mobile app accessibility requirements that the Department should consider adopting?*

Subpart J - Accessible Medical Equipment

Background.

The Department is proposing adding a new subpart J to the existing section 504 regulation to address the lack of accessible medical equipment for people with disabilities. Disability advocates have long sought adoption of Federal accessibility standards for medical equipment – a step that will help endure nondiscriminatory access to critical, and potentially lifesaving, care for people with disabilities. In addition, regulated entities would benefit from specific technical guidance on how to fulfill their obligations and make their programs accessible. NCD has issued multiple reports recommending that HHS adopt the U.S. Access Board's Standards for Accessible Medical Diagnostic Equipment (MDE Standards).[356]

OCR has recognized, in its enforcement, that section 504 requires covered medical practices to be accessible to persons with disabilities, including by utilizing accessible

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[356] *See, e.g.*, Nat'l Council on Disability, Enforceable Accessible Medical Equipment Standards: A Necessary Means to Address the Health Care Needs of People with Mobility Disabilities (2021), https://ncd.gov/sites/default/files/Documents/NCD_Medical_Equipment_Report_508.pdf; Nat'l Council on Disability, 2021 Progress Report: The Impact of Covid on People with Disabilities (2021), https://ncd.gov/sites/default/files/NCD_COVID-19_Progress_Report_508.pdf ("the lack of accessible examination and medical equipment in medical care means that people with disabilities, specifically people with mobility disabilities, receive substandard primary care compared to people without disabilities."). NCD also contacted OCR directly with these concerns. *See, e.g.*, Advisory Letter from Nat'l Council on Disability to U.S. Dep't of Health & Hum. Servs (Aug. 27, 2019) (responding to Section 1557 Notice of Proposed Rulemaking, https://ncd.gov/publications/2019/advisory-letter-1557 ("NCD is extremely concerned about the significant barriers to health care posed by the common lack of accessible medical diagnostic equipment (AMDE) in most health care settings. As HHS is aware, lack of AMDE contributes to a lack of preventive care that is necessary for early diagnosis of diseases and has been linked to poor health outcomes, poorer quality of life, and shorter length of life for people with disabilities. When a person cannot be properly examined because he cannot transfer onto an exam table or a diagnostic machine, non-diagnosis and misdiagnosis are likely. Disease and illness that may be treatable if caught early may become worse or incurable, resulting in high human and economic costs.").

equipment.[357] OCR has investigated and resolved complaints of alleged discrimination resulting from the lack of accessible medical equipment. In addition, DOJ has investigated complaints involving the lack of accessible medical equipment and entered into numerous agreements with hospitals requiring the purchase, lease, or acquisition of accessible medical equipment.[358] And for years, the Department has received comments and letters, including public comments on versions of the Section 1557 rule, detailing the harm that people with disabilities face from the lack of accessible medical equipment and the expectation that the Department would address these barriers using its regulatory authority.[359]

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[357] *See, e.g.*, OCR Complaint 01-21-421198 (Complainant alleged that there was no method to receive an x-ray from the covered entity as their x-ray machine was not sufficiently adjustable to accommodate her in her wheelchair, nor was there a method to transfer her from her wheelchair to the x-ray machine. After investigation the complaint was closed with corrective action by the covered entity including asking for necessary accommodations during scheduling, training staff on transfers, and acquiring a Hoyer lift for transfers); OCR Complaint 02-18-302905 (Complainant alleged that she told covered entity she would require accessible equipment or a Hoyer lift to transfer for her OBGYN exam. Despite her request, there was no lift or accessible equipment present at her appointment. The complaint was resolved through the early complaint resolution process and corrective action.); OCR Complaint 01-16-248000 (Complainant alleged that covered entity told her she would have to bring her own means of transfer to appointments. Covered entity subsequently acquired a lift, trained employees on its use, and updated its nondiscrimination training.).

[358] U.S. Dep't of Justice, Justice Department Settles with Tufts Medical Center to Better Ensure Equal Access for Individuals with Disabilities (Feb. 28, 2020), https://www.justice.gov/opa/pr/justice-department-settles-tufts-medical-center-better-ensure-equal-access-individuals; U.S. Dep't of Justice, Justice Department Reaches ADA Settlement with Beth Israel Deaconess Medical Center (Oct. 22, 2009), https://www.justice.gov/opa/pr/justice-department-reaches-ada-settlement-beth-israel-deaconess-medical-center; U.S. Dep't of Justice, Washington Hospital Center Agreement Fact Sheet (Nov. 2, 2005), https://www.ada.gov/whcfactsheet.htm, https://archive.ada.gov/whc.htm; U.S. Dep't of Justice, Settlement Agreement between U.S. and Valley Radiologists Medical Group (Nov. 2, 2005), Settlement Agreement between the United States of America and Valley Radiologists Medical Group, Inc. (Nov. 2, 2005)Settlement Agreement between the United States of America and Valley Radiologists Medical Group, Inc. (Nov. 2, 2005) https://archive.ada.gov/vri.htm.

[359] Examples include, from the 2013 Request for Information, U.S. Dept. of Health and Human Serv., 78 F.R. 46558, the comments from the Disability Rights Education and Defense Fund, *available at* https://www.regulations.gov/comment/HHS-OCR-2013-0007-0152; Letter from Nat'l Council on Disability, to Alex Azar, Sec'y U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. (July 31, 2020)(on need for accessible medical equipment rule), https://ncd.gov/publications/2020/ncd-letter-hhs-secretary-azar-accessible-medical-equipment-rule; *Lankford, Colleagues Press HHS to Prevent Discrimination of Individuals with Disabilities in Health Care*, Lankford.senate.gov (May 26, 2021), https://www.lankford.senate.gov/news/press-releases/lankford-colleagues-press-hhs-to-prevent-discrimination-of-individuals-with-disabilities-in-health-care https://www.lankford.senate.gov/news/press-releases/lankford-colleagues-press-hhs-to-prevent-discrimination-of-individuals-with-disabilities-in-health-care; Letter from Autistic Self Advocacy Network et al., to Xavier Beccera, Sec'y, U.S. Dept. of Health and Human Servs. (Aug. 18, 2022) (urging the Department to provide clear standards for medical exam and diagnostic equipment); Letter from American Association of People with Disabilities et al., to Xavier Beccera, Sec'y, U.S. Dept. of Health

The ACA added Section 510 to the Rehabilitation Act, directing the Access Board, in consultation with the Food and Drug Administration, to promulgate regulatory standards setting forth the minimum technical criteria for medical diagnostic equipment (MDE) used in (or in conjunction with) physicians' offices, clinics, emergency rooms, hospitals, and other medical settings.[360] These standards were needed to ensure that such equipment would be accessible to, and usable by, individuals with disabilities with accessibility needs, and allow independent entry to, use of, and exit from the equipment by such individuals to the maximum extent possible. However, the MDE Standards are not enforceable requirements for health care providers or equipment manufacturers until they are adopted by a Federal regulatory agency. In 2010, DOJ issued an Advance Notice of Proposed Rulemaking (ANPRM) on "Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation,"[361] that identified the need for accessible medical equipment and furniture:

> Without accessible medical examination tables, dental chairs, radiological diagnostic equipment, scales, and rehabilitation equipment, individuals with disabilities do not have an equal opportunity to receive medical care. Individuals with disabilities may be less likely to get routine preventative medical care than people without disabilities because of barriers to accessing that care.[362]

The ANPRM said that DOJ may propose regulations to ensure the accessibility of medical equipment that is used for treatment, rehabilitative, or other purposes. However, DOJ later formally withdrew the ANPRM.[363] In the Fall 2022 Unified Regulatory Agenda, DOJ restated its intent to publish an NPRM under title II of the ADA covering accessibility of MDE.[364]

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and Human Servs. (Feb. 24, 2022) (requesting that the Department issue medical diagnostic equipment standards) *at* https://www.aapd.com/wp-content/uploads/2022/03/HHS_Disability-Advocates-Memo-02.24.22.pdf.

[360] 29 U.S.C. 794f.

[361] 75 FR 43452 (July 26, 2010).

[362] 75 FR 43452, 43455 (July 26, 2010).

[363] 82 FR 60932 (Dec. 26, 2017).

[364] Nondiscrimination on the Basis of Disability by State and Local Government, Public Accommodations, and Commercial Facilities: Medical Diagnostic Equipment, RIN 1190-AA78, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1190-AA78 (last visited April. 2, 2023).

In 2015, HHS issued an NPRM on Nondiscrimination in Health Programs and Activities under Section 1557 of the ACA prohibiting discrimination on various bases, including disability, in certain health programs and activities. In the NPRM, the Department stated that once the Access Board standards were promulgated, OCR "intends to issue regulations or policies that require covered entities to conform to those standards." In 2017, the Access Board published the final rule on Standards for Accessible Medical Diagnostic Equipment.[365] However, when the Department issued a final rule on Section 1557 in 2020, the Department did not include the MDE Standards.[366] Similarly, the Department's 2022 Section 1557 NPRM does not require adherence to the MDE Standards, but requests comment on the MDE Standards.[367] The Department has determined that action on this issue is overdue and, as a result, is proposing this new subpart to the section 504 regulation. While some entities covered under Section 1557 may not be covered under section 504, and vice versa, "health programs or activities" under Section 1557 that are also "programs or activities" under section 504 receiving Federal financial assistance would be covered by this proposed subpart.[368]

The Department is coordinating its publication of this proposed rule with DOJ, which is concurrently publishing a proposed rule addressing the accessibility of medical diagnostic equipment under title II of the ADA. Given the relationship between section 504 and title II and Congressional intent that the two disability rights laws generally be interpreted consistently, both Departments are proceeding with rulemakings that provide the same requirements, one for recipients of Federal financial assistance from HHS and the other for public entities subject to title II of the ADA.

Overview of Access Board's MDE Standards.

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[365] 36 CFR 1195.
[366] 85 FR 37160 (June 19, 2020).
[367] 87 FR 47824, 47909 (Aug. 4, 2022).
[368] *See* 42 USC 18116(a).

In implementing the mandate set forth in § 510 of the Rehabilitation Act to promulgate technical standards for accessible MDE, the Access Board received input from various stakeholders through a multi-year deliberative process and published the MDE Standards on January 9, 2017.[369] The Access Board divides the MDE Standards into four separate technical criteria based on how the equipment is used by the patient: (1) supine, prone, or side lying position; (2) seated position; (3) seated in a wheelchair; and (4) standing position. For each category of use, the MDE Standards provide for independent entry to, use of, and exit from the equipment by patients with disabilities to the maximum extent possible.

The technical requirements for MDE used by patients in the supine, prone, or side-lying position (such as examination tables) and MDE used by patients in the seated position (such as examination chairs) focus on ensuring that the patient can transfer from a mobility device onto the MDE. The other two categories set forth the necessary technical requirements to allow the patient to use the MDE while seated in their wheelchair (such as during a mammogram) or while standing (such as on a weight scale), respectively. The MDE Standards also include technical criteria for supports, including for transfer, standing, leg, head and back supports; instructions or other information communicated to patients through the equipment; and operable parts used by patients.

The Access Board's MDE Standards currently contain a temporary standard governing the minimum low height requirement for transfers from diagnostic equipment used by patients in a supine, prone, side-lying, or seated position. Specifically, the temporary standard provides for a minimum low transfer height requirement of 17 inches to 19 inches. The temporary nature of this standard was due to insufficient data on the extent to which, and how many, individuals would benefit from a transfer height lower than 19 inches. While this temporary standard is in effect,

[369] 82 FR 2810 (Jan. 9, 2017).

any low transfer height between 17 and 19 inches will meet the MDE Standards. Under a sunset provision, as extended, this low height range remains in effect only until January 10, 2025.[370]

On May 23, 2023, the Access Board issued an NPRM that proposes removing the sunset provisions in the Board's existing MDE Standards related to the low-height specifications for transfer surfaces, and replacing them with final specifications for the low transfer height of medical diagnostic equipment used in the supine, prone, side-lying, and seated positions.[371] Comments on this NPRM will be received until August 31, 2023.[372] After the Access Board analyzes the comments that it receives, the Board will issue a final, updated minimum low transfer height standard. After this new standard is adopted, the Department will consider issuing a supplemental rulemaking under section 504 to adopt the updated Standards.

Need for the Adoption of MDE Standards.

The accessibility of MDE is essential to providing equal access to medical care to people with disabilities. In developing this proposed subpart, the Department considered the well-documented barriers individuals with disabilities face when accessing MDE, as well as the benefits for people with disabilities and health care workers alike of using accessible MDE.[373] The accessibility or inaccessibility of MDE impacts a substantial population—approximately 61 million adults live with a disability in the U.S., and 13.7% of those individuals have a mobility disability with serious difficulty walking or climbing stairs.[374] According to the U.S. Census Bureau, as of 2019, of the over 41 million people with disabilities in the U.S. living outside of

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[370] *See* 87 FR 6037 (Feb. 3, 2022).
[371] 88 FR 33056 –33063 (May 23, 2023).
[372] 88 FR 50096 (Aug. 1, 2023).
[373] Nat'l Council on Disability, The Current State of Health Care for People with Disabilities (2009), https://www.ncd.gov/publications/2009/Sept302009 (last accessed Aug. 17, 2022). *See, e.g.,* Dep't of Health & Human Servs., Administration for Community Living, Wheelchair-Accessible Medical Diagnostic Equipment: Cutting Edge Technology, Cost-Effective for Health Care Providers, and Consumer-Friendly (2020), https://health.maryland.gov/bhm/DHIP/Documents/Medical%20Diagnostic%20Equipment%20Fact%20Sheet%20Final.pdf (last accessed Aug. 17, 2022).
[374] U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control, Disability Impacts All of Us, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html (last visited Oct. 25, 2022).

institutional settings, mobility or ambulatory impairment is estimated to be the most common category of disability.[375] While not all individuals with a mobility disability with serious difficulty walking or climbing stairs, or individuals with mobility or ambulatory impairments will require accessible MDE, or benefit from it to the same extent, significant portions of these populations will benefit from accessible MDE. Further, a number of studies and reports have shown that individuals with disabilities may be less likely to get routine or preventative medical care than people without disabilities because of barriers to accessing appropriate care through MDE.[376] In one case, a patient with a disability remained in his wheelchair for the entirety of his annual physical exam, which consisted of his doctor listening to his heart and lungs underneath his clothing, looking inside his ears and throat, and then stating, "I assume everything below the waist is fine."[377] In another case, a patient with a disability could be transferred to a standard exam table, but extra staff was needed to keep her from falling off the table since it did not have any side rails. As a result of this and a number of other frightening experiences, the patient avoided going to the doctor unless she was very ill.[378] Multiple studies have been conducted that found individuals with certain disabilities face barriers to accessing MDE and are often denied accessible MDE by their health care providers.[379] Accessible MDE is thus often critical to an entity's ability to provide a person with a disability equal access to, and opportunities to benefit from, its health care programs and activities.

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[375] U.S. Census Bureau, American Community Survey, Disability Characteristics, https://data.census.gov/cedsci/table?t=Disability&tid=ACSST1Y2019.S1810 (last visited Dec. 27, 2021).
[376] *See, e.g.*, Anna Marrocco and Helene J Krouse, "Obstacles to preventive care for individuals with disability: Implications for nurse practitioners," J. Am. Ass'n of Nurse Pract. 2017 May;29(5):282-293 (2017) at 289; U.S. Dep't of Health & Human Servs., Off. of the Surgeon Gen., "The Surgeon General's Call To Action To Improve the Health and Wellness of Persons with Disabilities," (2005), *available at* https://www.ncbi.nlm.nih.gov/books/NBK44667/ (last visited Dec. 2, 2021); NCD Report at 14.
[377] Nat'l Council on Disability Enforceable Accessible Medical Equipment Standards at 15 (2021), https://ncd.gov/sites/default/files/Documents/NCD_Medical_Equipment_Report_508.pdf.
[378] *Id.* at 16-17.
[379] *See* A. Ordway et al., "Health Care Access and the Americans with Disabilities Act: A Mixed Methods Study," 14 Disability and Health J. (2021) (Stating that of 536 people with disabilities surveyed, 25% had difficulty accessing exam tables). *See also* J. L. Wong et al., "Identification of Targets for Improving Access to Care in Persons with Long Term Physical Disabilities," 12 Disability and Health J. 366 (2019) (stating that of the 462 people who needed a height-adjustable examination table, 56% received it).

The Department has also consistently provided information to covered entities on how they can make their health care programs and activities accessible to individuals with mobility disabilities. For example, the Department and DOJ jointly issued a technical assistance document on medical care for people with mobility disabilities, addressing how accessible MDE can be critical to ensure that people with disabilities receive medical services equal to those received by people without disabilities.[380] In particular, the document explains that the "availability of accessible medical equipment is an important part of providing accessible medical care, and doctors and other providers must ensure that medical equipment is not a barrier to individuals with disabilities."[381] The guidance also provides examples of accessible medical equipment, including adjustable-height exam tables and chairs, wheelchair-accessible scales, adjustable-height radiologic equipment, portable floor and overhead track lifts, gurneys, and stretchers, and discusses how people with mobility disabilities use this equipment.

The Department recognizes that in addition to its efforts to ensure that people with disabilities have equal access to medical care, including through technical assistance,[382] providing enforceable technical standards will help ensure clarity to recipients on how to fulfill their existing obligations under title II and section 504 in their health care programs and activities. As discussed in the preamble to § 84.56, Medical treatment, the COVID-19 pandemic has had a devastating and disproportionate impact on people with disabilities and has underscored how dire the consequences may be for those who lack adequate access to medical care and treatment. As the NCD Report notes, significant health care disparities for persons with disabilities are due in part to the lack of physical access to MDE, and "[e]nsuring physical access to care through accessible MDE is necessary to equitably provide medical care for all people,

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[380] *See* "Access to Medical Care for Individuals with Mobility Disabilities," May 17, 2010, *available at* https://www.ada.gov/medcare_mobility_ta/medcare_ta.htm (last visited Dec. 2, 2021).
[381] *Id.*
[382] *See, e.g.,* U.S. Dep't of Just. & U.S. Dep't of Health & Human Servs., *Access to Medical Care for Individuals with Mobility Disabilities* (July 22, 2010), *available at* https://www.ada.gov/medcare_mobility_ta/medcare_ta.htm.

and the need continues to grow."[383] As a result of its findings, NCD called upon DOJ to revise its ADA regulations to require health care providers to formally adopt the MDE Standards.[384]

Accordingly, the Department is proposing changes to its section 504 regulations that can help ensure that vital health care programs and activities are equally available to individuals with disabilities. Specifically, the Department is considering adopting and incorporating into its section 504 regulation the specific technical requirements for accessible MDE that are set forth in the Access Board's MDE Standards.

Section-by-Section Analysis.

This analysis discusses the Department's proposed changes to the section 504 regulation, including the reasoning behind the proposals, and poses questions for public comment.

§ 84.90 Application.

This section states that the subpart applies to recipients of Federal financial assistance from the Department.

§ 84.91 Requirements for medical diagnostic equipment.

This section provides general accessibility requirements for programs and activities that recipients provide through or with the use of MDE. Recipients must ensure that their programs and activities offered through or with the use of MDE are accessible to individuals with disabilities.

Under this general provision (barring an applicable limitation or defense), a recipient cannot deny services that it would otherwise provide to a patient with a disability because the recipient lacks accessible MDE. A recipient also cannot require a patient with a disability to bring someone along with them to help during an exam. A patient may choose to bring another person such as a friend, family member, or personal care aide to an appointment, but regardless,

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[383] NCD Report at 14.
[384] *Id.* at 52.

the recipient may need to provide reasonable assistance to enable the patient to receive medical care. Such assistance may include helping a person who uses a wheelchair to transfer from their wheelchair to the exam table or diagnostic chair.[385] The recipient cannot require the person accompanying the patient to assist.

§ 84.92 Newly purchased, leased, or otherwise acquired medical diagnostic equipment.

For MDE that recipients purchase, lease, or otherwise acquire after the effective date of this proposed rule (60 days after its publication in the *Federal Register*), the proposed rule adopts an approach that draws on the approach that the existing section 504 regulations apply to new construction and alterations of buildings and facilities. The Department would require that all MDE that a recipient purchases, leases, or otherwise acquires after the rule's effective date must be accessible, unless and until the proposed rule's scoping requirements, set forth in more detail in § 84.92(b), are satisfied. As in the fixed or built-in environment, this rule is proposing that the accessibility of MDE will be governed by a specific set of design standards promulgated by the Access Board that set forth technical requirements for accessibility. So long as a recipient has the amount of accessible MDE set forth in the scoping requirements in § 84.92(b), the recipient is not required to continue to obtain accessible MDE when it purchases, leases, or otherwise acquires MDE after the effective date. However, a recipient may choose to acquire additional accessible MDE after it satisfies the scoping requirements.

§ 84.92(a) Requirements for newly purchased, leased, or otherwise acquired medical diagnostic equipment.

Paragraph (a) adopts the Access Board's MDE Standards as the standard governing whether MDE is accessible and establishes one of the proposed rule's key requirements: that subject to applicable limitations and defenses, all MDE that recipients purchase, lease, or otherwise acquire after the effective date must meet the MDE Standards unless and until the

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[385] *See* U.S. Dep't of Just. & U.S. Dep't of Health & Human Servs., *Access to Medical Care for Individuals with Mobility Disabilities* (July 22, 2010), *available at* https://www.ada.gov/medcare_mobility_ta/medcare_ta.htm.

recipient already has a sufficient amount of accessible MDE to satisfy the scoping requirements of the proposed rule.

As explained above in more detail, the MDE Standards include technical criteria for equipment that is used when patients are either 1) in a supine, prone, or side-lying position; 2) in a seated position; 3) in a wheelchair; or 4) in a standing position. They also contain standards for supports, communication, and operable parts. In addition, the MDE Standards also contain requirements for equipment to be compatible with patient lifts where a patient would transfer under positions (1) and (2) above.

Consistent with the language in 29 U.S.C. 794f(b), MDE covered under this subpart includes examination tables, examination chairs (including chairs used for eye examinations or procedures, and dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological equipment commonly used for diagnostic purposes by health professionals. This section covers medical equipment used by health professionals for diagnostic purposes even if it is also used for treatment purposes.

Given the many barriers to health care that people with disabilities encounter due to inaccessible MDE, adopting the MDE Standards will give many people with disabilities an equal opportunity to participate in and benefit from health care programs and activities.

§ 84.92(b) Scoping.

Paragraph (b) proposes scoping requirements for accessible MDE. Accessibility standards generally contain scoping requirements (how many accessible features are needed) and technical requirements (what makes a particular feature accessible). For example, the 2010 ADA Standards for Accessible Design (2010 ADA Standards) provide scoping requirements for how many toilet compartments in a particular toilet room must be accessible and provide technical requirements on what makes these toilet compartments accessible.[386] The MDE Standards issued by the Access Board contain technical requirements, but they do not specify scoping

[386] *See* 36 CFR pt. 1191, app. B sec. 213.3.1.

requirements. Rather, the MDE Standards state that "[t]he enforcing authority shall specify the number and type of diagnostic equipment that are required to comply with the MDE Standards."[387] For the technical requirements to be implemented and enforced effectively, it is necessary for the Department to provide scoping requirements to specify how much accessible MDE is needed for a recipient's program or activity to comply with section 504.

The scoping requirements that the Department proposes are based on the requirements the 2010 ADA Standards establish for accessible patient sleeping rooms and parking in hospitals, rehabilitation facilities, psychiatric facilities, detoxification facilities, and outpatient physical therapy facilities.[388] Because many recipients must comply with titles II and III of the ADA,[389] many recipients are likely already familiar with these standards.

According to the 2010 ADA Standards, licensed medical care facilities and licensed long-term care facilities where the period of stay exceeds 24 hours shall provide accessible patient or resident sleeping rooms and disperse them proportionately by type of medical specialty.[390] Where sleeping rooms are altered or added, the sleeping rooms being altered or added shall be made accessible until the minimum number of accessible sleeping rooms is provided.[391] Hospitals, rehabilitation facilities, psychiatric facilities, and detoxification facilities that do not specialize in treating conditions that affect mobility shall have at least 10 percent of their patient sleeping rooms, but no fewer than one, provide specific accessibility features for patients with mobility disabilities.[392] Hospitals, rehabilitation facilities, psychiatric facilities, and detoxification facilities that specialize in treating conditions that affect mobility must have 100 percent of their patient sleeping rooms provide specific accessibility features for patients with

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[387] 82 FR 2810, 2846 (Jan. 9, 2017).
[388] *See* 36 CFR pt. 1191, app. B secs. 208.2.2, 223.2.1, 223.2.2.
[389] Recipients that are public entities are subject to the requirements of title II of the ADA; recipients that are private entities engaged in providing health care or social services, among other entities, are subject to the requirements of title III of the ADA.
[390] *See* 28 CFR 35.151(h); 36 CFR pt. 1191, app. B sec. 223.1.
[391] *See* 36 CFR pt. 1191, app. B sec. 223.1.
[392] *See* 36 CFR pt. 1191, app. B sec. 223.2.1.

mobility disabilities.[393] In addition, at least 20 percent of patient and visitor parking spaces at outpatient physical therapy facilities and rehabilitation facilities specialized in treating conditions that affect mobility must be accessible.[394]

- *MDE Question 1: The Department seeks public comment on whether and how to apply the existing scoping requirements for patient or resident sleeping rooms or parking spaces in certain medical facilities to MDE; and on whether there are meaningful differences between patient or resident sleeping rooms, accessible parking, and MDE that the Department should consider when finalizing the scoping requirements.*
- *MDE Question 2: The Department seeks public comment on whether different scoping requirements should apply to different types of MDE, and if so, what scoping requirements should apply to what types of MDE.*

Proposed paragraphs (b)(1)-(3) lay out scoping requirements for this section. Paragraph (b)(1) provides the general requirement for physician's offices, clinics, emergency rooms, hospitals, outpatient facilities, multi-use facilities, and other medical programs and activities that do not specialize in treating conditions that affect mobility. When these entities use MDE to provide programs or activities, they must ensure that at least 10 percent, but no fewer than one unit, of each type of equipment complies with the MDE Standards. For example, a medical practice with 20 examination chairs would be required to have two examination chairs (10 percent of the total) that comply with the MDE Standards. In a medical practice with five examination chairs, the practice would be required to have one examination chair that complies with the MDE Standards (because every covered entity must have no fewer than one unit of each type of equipment that is accessible). If a dental practice has one x-ray machine, that x-ray machine would be required to be accessible. Proposed paragraph (b)(2) provides the scoping requirement for rehabilitation facilities that specialize in treating conditions that affect mobility,

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[393] See 36 CFR pt. 1191, app. B sec. 223.2.2.
[394] See 36 CFR pt. 1191, app. B sec. 208.2.2.

outpatient physical therapy facilities, and other medical programs and activities that specialize in treating conditions that affect mobility. This paragraph requires that at least 20 percent of each type of MDE used in these types of programs and activities, but no fewer than one unit of each type of MDE, must comply with the MDE Standards. Because these facilities specialize in treating patients who are likely to need accessible MDE, it is reasonable for them to have more accessible MDE than is required for the health care providers covered by paragraph (b)(1), who do not have the same specialization. The Department considered whether to require 100 percent of MDE in these programs to be accessible, like ec. 223.2.2 of the 2010 ADA Standards for Accessible Design, which requires that 100 percent of patient sleeping rooms in similar facilities provide specific accessibility features for patients with mobility disabilities. However, the Department is instead proposing a scoping requirement analogous to sec. 208.2.2 of the 2010 ADA Standards, which requires 20 percent of visitor and patient parking spaces at such facilities to be accessible. The time-limited use of MDE is more analogous to the use of parking spaces at a rehabilitation facility than to the use of sleeping rooms. As with parking spaces, several different patients with mobility disabilities could use the same piece of MDE in a day, while patients generally occupy a sleeping room for all or a significant part of the day. Thus, the Department's proposed rule draws on the 2010 ADA Standards' scoping requirements by requiring at least 20 percent (but no fewer than one unit) of each type of equipment in use in facilities that specialize in treating conditions that affect mobility to meet the MDE Standards, and requiring at least 10 percent (but no fewer than one unit) of each type of equipment in use in other facilities to meet the MDE Standards.

- *MDE Question 3: Because more patients with mobility disabilities may need accessible MDE than need accessible parking, the Department seeks public comment on whether the Department's suggested scoping requirement of 20 percent is sufficient to meet the needs of persons with disabilities.*

- *MDE Question 4: The Department seeks public comment on any burdens that this proposed requirement or a higher scoping requirement might impose on recipients.*

Paragraph (b)(3) addresses facilities or programs with multiple departments, clinics, or specialties. The current ADA title II regulation requires medical care facilities that do not specialize in the treatment of conditions that affect mobility to disperse the accessible patient sleeping rooms in a manner that is proportionate by type of medical specialty.[395] The proposed rule includes an analogous dispersion requirement. In any facility or program that has multiple departments, clinics, or specialties, where a program or activity utilizes MDE, the accessible MDE required by paragraphs (b)(1) and (2) shall be dispersed proportionately across departments, clinics, or specialties. For example, a hospital that is required to have five accessible x-ray machines cannot place all the accessible x-ray machines in the orthopedics department and none in the emergency department. People with disabilities must have an opportunity to benefit from each type of medical care provided by the recipient that is equal to the opportunity provided to people without disabilities.[396] The proposed rule would not require recipients to acquire additional MDE, beyond the amount specified in proposed paragraphs (b)(1) and (2), to ensure that accessible MDE is available in every department, clinic, and specialty. The Department believes that this approach is consistent with many provisions of the 2010 ADA Standards.[397] Additionally, the Department believes that if the rule were to require full dispersion across every department, clinic, and specialty, it could be difficult to determine whether the scoping requirements have been satisfied. For example, a clinic may be part of a department and also part of a specialty (or include providers with multiple specialties), so calculating the percentages of accessible MDE each department, clinic, or specialty has could

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[395] 28 CFR 35.151(h). A similar dispersion requirement was not necessary for medical care facilities that specialize in the treatment of conditions that affect mobility, because 100 percent of patient sleeping rooms in those facilities are required to be accessible. See 36 CFR pt. 1191, app. B sec. 223.2.2.
[396] See 28 CFR 35.130(b)(ii); 35.150(a).
[397] *See, e.g.*, 36 CFR pt. 1191, app. B secs. 221.2.2, 224.5, 225.3.1, 235.2.1. According to these sections, when the required number of accessible elements has been provided, further dispersion is not required.

become complex. However, the Department also recognizes that it is critically important for people with disabilities to have access to all types of medical care. Therefore, covered entities would still be required to ensure that all of their programs and activities are accessible to and usable by individuals with disabilities, regardless of whether a specific department, clinic, or specialty would be required to acquire accessible MDE under proposed paragraph (b)(3).

- *MDE Question 5: The Department seeks public comment on whether the proposed approach to dispersion of accessible MDE is sufficient to meet the needs of individuals with disabilities, including the need to receive different types of specialized medical care.*
- *MDE Question 6: The Department seeks public comment on whether additional requirements should be added to ensure dispersion (e.g., requiring at least one accessible exam table and scale in each department, clinic, or specialty; requiring each department, clinic and specialty to have a certain percentage of accessible MDE).*
- *MDE Question 7: The Department seeks information regarding:*
    - *The extent to which accessible MDE can be moved or otherwise shared between clinics or departments.*
    - *The burdens that the rule's proposed approach to dispersion or additional dispersion requirements may impose on recipients.*
    - *The burdens that the rule's proposed approach to dispersion may impose on people with disabilities (e.g., increased wait times if accessible MDE needs to be located and moved, embarrassment, frustration, or impairment of treatment that may result if a patient must go to a different part of a hospital or clinic to use accessible MDE).*

84.92(c) Requirements for examination tables and weight scales.

Paragraph (c) sets forth specific requirements for examination tables and weight scales. Proposed paragraph (c)(1) would require recipients that use at least one examination table in their program or activity to purchase, lease, or otherwise acquire, within two years after the

publication of this part in final form, at least one examination table that meets the requirements of the MDE Standards, unless the entity already has one in place. Similarly, proposed paragraph (c)(2) requires recipients that use at least one weight scale in their program or activity to purchase, lease, or otherwise acquire, within two years after the publication of this part in final form, at least one weight scale that meets the requirements of the MDE Standards, unless the entity already has one in place. This requirement is subject to the other requirements and limitations set forth in § 84.92. Thus, this section does not require a recipient to acquire an accessible examination table and an accessible weight scale if doing so would result in a fundamental alteration in the nature of the program or activity or undue financial and administrative burdens, per § 84.92(e) and (f). In addition, recipients may use designs, products, or technologies as alternatives to those prescribed by the MDE Standards if the criteria set forth in § 84.92(d) are satisfied.

The Department notes that it is proposing to retain § 84.22(c) in the Existing Facilities section of its current section 504 rule, which applies to small health, welfare, or other social service providers. Under this provision, when a recipient with fewer than fifteen employees finds, after consultation with an individual with disabilities seeking its services, that there is no method of complying with these requirements other than making a significant alteration in its existing facilities, it may refer the patient with a disability who seeks health care services to other providers of those services that are accessible. The Department is considering applying the framework of that provision to this subpart. The recipient in question must ensure that the other medical practice is taking patients and that the practice is accessible. It should also be within a reasonable distance of the referring provider. The Department seeks comment on the advisability and equity implications of retaining this provision and applying it to the obligation to acquire accessible MDE under this proposed rule. The Department also seeks any suggestions for addressing its scope, including what should constitute a “reasonable distance” to a referred provider.

- *MDE Question 8: The Department seeks public comment on the potential impact of the requirement of paragraph (c) on people with disabilities and recipients, including the impact on the availability of accessible MDE for purchase and lease.*
- *MDE Question 9: The Department seeks public comment on whether two years would be an appropriate amount of time for the requirements of paragraph (c); and if two years would not be an appropriate amount of time, what the appropriate amount of time would be.*

§ 84.92(d) Equivalent Facilitation.

Paragraph (d) specifies that a recipient may use designs, products, or technologies as alternatives to those prescribed by the MDE Standards, for example, to incorporate innovations in accessibility. However, this exception applies only where the recipient provides substantially equivalent or greater accessibility and usability than the MDE Standards require. It does not permit a recipient to use an innovation that reduces access below what the MDE Standards would provide. The responsibility for demonstrating equivalent facilitation rests with the recipient.

§ 84.92(e) Fundamental Alteration and Undue Burdens.

Paragraph (e) addresses the fundamental alteration and undue financial and administrative burdens defenses. While the proposed rule generally requires recipients to adhere to the MDE Standards when newly purchasing, leasing, or otherwise acquiring equipment, it does not require recipients to take steps that would result in a fundamental alteration in the nature of their programs or activities or undue financial or administrative burdens. These proposed limitations mirror the existing ADA title II regulation at 28 CFR 35.150(a)(3). If a particular action would result in a fundamental alteration or undue burdens, the recipient would be obligated to take other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services the recipient provides.

§ 84.92(f) Diagnostically required structural or operational characteristics.

Paragraph (f) incorporates what the Access Board's MDE Standards refer to as a General Exception. The paragraph states that, where a recipient can demonstrate that compliance with the MDE Standards would alter diagnostically required structural or operational characteristics of the equipment, preventing the use of the equipment for its intended diagnostic purpose, compliance with the Standards would result in a fundamental alteration and therefore would not be required. The Department expects that this provision will apply only in rare circumstances.

In such circumstances, the recipient would still be required to take other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities could receive the programs or activities the recipient provides. For example, the Department has been informed that certain positron emission tomography (PET) machines cannot meet the MDE Standards' technical requirements for accessibility and still serve their diagnostic function. If this is so, then recipients would not be required to make those PET machines fully accessible, but they would be required to take other action that would enable individuals with disabilities to access PET machines in some other way without fundamentally altering the nature of the program or activity or imposing an undue financial or administrative burdens. Such actions may include assisting patients who use wheelchairs with transferring so that they can receive a PET scan.

§ 84.93 Existing Medical Diagnostic Equipment.

In addition to the requirements for newly purchased, leased, or otherwise acquired MDE, proposed § 84.93 requires that recipients address access barriers resulting from a lack of accessible MDE in their existing inventory of equipment. Here the proposed rule adopts an approach analogous to the concept of program accessibility in the existing regulation at § 84.22. Under this approach, recipients may make their programs and activities available to individuals with disabilities without extensive retrofitting of their existing buildings and facilities that predate the regulations, by offering access to those programs through alternative methods. The

Department intends to adopt a similar approach with MDE to provide flexibility to recipients, address financial concerns about acquiring new MDE, and at the same time ensure that individuals with disabilities will have access to the programs and activities of the recipient.

Proposed § 84.93 requires that each program or activity of a recipient, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. Section 84.93(a)(1) makes clear, however, that a recipient is not required to make each piece of its existing MDE accessible. Like § 84.92(e), § 84.93(a)(2) incorporates the concepts of fundamental alteration and undue financial and administrative burdens. These provisions do not excuse a recipient from addressing the accessibility of the program. If a particular action would result in a fundamental alteration or undue burdens, the recipient would still be obligated to ensure that individuals with disabilities are able to receive the recipient's benefits and services.

§ 84.93(b) Methods.

Paragraph (b) sets forth various methods by which recipients can make their programs and activities readily accessible to and usable by individuals with disabilities when the requirements in proposed § 84.92 have not been triggered by the new acquisition of MDE. Of course, the purchase, lease, or other acquisition of accessible MDE may often be the most effective way to achieve program accessibility. However, except as stated in proposed § 84.92, a recipient is not required to purchase, lease, or acquire accessible MDE if other methods are effective in achieving compliance with this subpart.

For example, if doctors at a medical practice have staff privileges at a local hospital that has accessible MDE, the medical practice may be able to achieve program accessibility by ensuring that the doctors see these patients at the hospital, rather than at the local office, so long as the person with a disability is afforded an opportunity to participate in or benefit from the program or activity equal to that afforded to others. Similarly, if a medical practice has offices in several different locations, and one of the locations has accessible MDE, the medical practice may be able to achieve program accessibility by serving the patient who needs accessible MDE

at that location. However, such an arrangement would not provide an equal opportunity to participate in or benefit from the program or activity if it was, for example, significantly less convenient for the patient, or if the visit to a different location resulted in higher costs for the patient.

- *MDE Question 10: The Department seeks information about other methods that recipients can use to make their programs and activities readily accessible to and usable by individuals with disabilities in lieu of purchasing, leasing, or otherwise acquiring accessible MDE.*

Similarly, if the scoping requirements set forth in § 84.92(b) would require a recipient's medical practice to have three height-adjustable exam tables and an accessible weight scale, but the practice's existing equipment includes only one accessible exam table and one accessible scale, then until the practice must comply with § 84.92, the practice could ensure that its services are readily accessible to and usable by people with disabilities by establishing operating procedures such that, when a patient with a mobility disability schedules an appointment, the accessible MDE can be reserved for the patient's visit. In some cases, a recipient may be able to make its services readily accessible to and usable by individuals with disabilities by using a patient lift or a trained lift team, especially in instances in which a patient cannot or chooses not to independently transfer to the MDE in question.[398]

If the means by which a recipient carries out its obligation under § 84.93(a) to make its program or activity readily accessible to and usable by individuals with disabilities is by purchasing, leasing, or otherwise acquiring accessible MDE, the requirements for newly purchased, leased, or otherwise acquired MDE set forth in § 84.92 apply.

The Department is also aware that there may be initial supply issues for accessible MDE, particularly if a large number of recipients seek to purchase accessible MDE at the same time.

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[398] *See* U.S. Dep't of Just. & U.S. Dep't of Health & Human Servs., Access to Medical Care for Individuals with Mobility Disabilities (July 22, 2010), available at https://www.ada.gov/medcare_mobility_ta/medcare_ta.htm.

The Department does note that the fundamental alteration and undue financial and administrative burdens limitations may apply if supply chain issues hamper the ability of recipients to purchase, lease, or otherwise acquire accessible MDE.

The proposed rule's requirements apply regardless of whether recipients are using MDE that is leased, purchased, or acquired through other means. The Department is aware that some recipients may lease MDE, rather than purchasing it outright. The Department's existing section 504 regulation, at 45 CFR 84.4(b)(4), redesignated as § 84.68(b)(4), provides that a recipient may not, directly or through contractual or other arrangements, use criteria or methods of administration that subject qualified persons with disabilities to discrimination on the basis of disability. The Department's existing section 504 regulation, at 45 CFR 84.4(b)(1)(i)–(ii), redesignated as § 84.68(b)(1)(i)-(ii), also prohibits a recipient from, directly or through contractual or other arrangements, denying a qualified individual with a disability the opportunity to participate in or benefit from a service, or affording a qualified individual with a disability an opportunity to participate in or benefit from a service that is not equal to the opportunity afforded others. Under these longstanding regulatory provisions, the manner in which a recipient acquires its equipment does not alter the entity's obligation to provide an accessible program or activity. The proposed rule's requirements also apply if the recipient contracts with a third party to provide medical programs, services, or activities.

- *MDE Question 11: The Department seeks information regarding recipients' leasing practices, including how many and what types of recipients use leasing, rather than purchasing, to acquire MDE; when recipients lease equipment; whether leasing is limited to certain types of equipment (e.g., costlier and more technologically complex types of equipment); and the typical length of recipients' MDE lease agreements.*
- *MDE Question 12: The Department seeks information regarding whether there is a price differential for MDE lease agreements for accessible equipment.*

- *MDE Question 13: The Department seeks information regarding any methods that recipients use to acquire MDE other than purchasing or leasing.*

Medical equipment used for treatment, not diagnostic, purposes.

Many types of medical equipment other than MDE are used in the provision of health care. The accessibility, or lack thereof, of these types of equipment can determine whether people with disabilities have an equal opportunity to participate in and benefit from health programs and activities. This non-diagnostic medical equipment may be used in federally assisted programs and includes, for example, devices intended to be used for therapeutic or rehabilitative care such as treatment tables and chairs for oncology, obstetrics, physical therapy, and rehabilitation medicines; lifts; infusion pumps used for dispensing chemotherapy drugs, pain medications, or nutrients into the circulatory system; dialysis chairs used while a patient's blood is pumped between a patient and a dialyzer; other tables or chairs designed for highly specialized procedures; general exercise and rehabilitation equipment used while seated or standing; and ancillary equipment[399] needed to ensure the safety and comfort of patients in the use of medical equipment.[400] Although the MDE Standards do not address non-diagnostic medical equipment, certain types of other medical equipment that are not diagnostic in purpose may still fall into the technical criteria categories set out by the MDE Standards (equipment used in (1) supine, prone, or side lying position, (2) seated position, (3) while seated in a wheelchair, and (4) standing position; certain technical requirements concerning methods of communication and operable parts). As noted above, equipment used for both diagnostic purposes and other purposes is MDE if it otherwise meets the definition of MDE.

The Department is considering adding a provision establishing that when the MDE Standards contain technical standards that can be applied to a particular piece of non-diagnostic

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[399] Ancillary equipment may include equipment such as cushions, bolsters, straps, sliding boards, or other items used to facilitate transfers and to help position patients.

[400] *See* U.S. Access Board, Medical Diagnostic Equipment Accessibility Standards Advisory Committee, Advancing Equal Access to Diagnostic Services: Recommendations on Standards for the Design of Medical Diagnostic Equipment for Adults with Disabilities (Dec. 6, 2013).

medical equipment, the requirements set forth in §§ 84.91-84.94 apply to the non-diagnostic medical equipment at issue. Although MDE Standards were promulgated by the Access Board in response to a statutory mandate to provide standards specific to diagnostic equipment, recipients have an obligation under section 504 to provide equal opportunity to benefit from medical care of all types, including through the use of equipment that does not satisfy the definition of MDE. The Department seeks comment on whether to apply the Access Board's MDE Standards to non-diagnostic equipment—for example, because the relevant characteristics of some types of non-diagnostic equipment may be sufficiently similar to MDE to warrant applying the same standards—and if there is adequate justification for applying the MDE Standards' technical specifications to non-diagnostic equipment, which non-diagnostic equipment should be covered. For example, infusion chairs used only to dispense chemotherapy drugs are not used for diagnostic purposes and therefore would not fall under the definition of MDE. But if the MDE Standards contained technical standards that could be applied to infusion chairs, the requirements set forth in §§ 84.91-84.94 could apply to such equipment. The Department seeks public comment on whether this rule should apply to medical equipment that is not used for diagnostic purposes, and if so, in what situations it should apply.

- *MDE Question 14: If this rule were to apply to medical equipment that is not used for diagnostic purposes,*
    - *"Should the technical standards set forth in the Standards for Accessible Medical Diagnostic Equipment be applied to non-diagnostic medical equipment, and if so, in what situations should those technical standards apply to non-diagnostic medical equipment?"*
    - *Are there particular types of non-diagnostic medical equipment that should or should not be covered?*

§ ***84.94 Qualified staff.***

The proposed rule requires recipients to ensure that their staff are able to successfully operate accessible MDE, assist with transfers and positioning of individuals with disabilities, and carry out the program access obligation with respect to existing MDE. This will enable recipients to carry out their obligation to make the programs and activities that they offer through or with the use of MDE readily accessible to and usable by individuals with disabilities. The Department believes recipients must have, at all times when services are provided to the public, appropriate and knowledgeable personnel who can operate MDE in a manner that ensures services are available and timely provided. Often, the most effective way for recipients to ensure that their staff are able to successfully operate accessible MDE is to provide staff training on the use of MDE.

- *MDE Question 15: The Department seeks general comments on this proposal, including any specific information on the effectiveness of programs used by recipients in the past to ensure that their staff is qualified and any information on the costs associated with such programs.*
- *MDE Question 16: The Department seeks public comment on whether there are any barriers to complying with this proposed requirement, and if so, how they may be addressed.*

III. Nondiscrimination in Programs and Activities

B. Revised Provisions Addressing Discrimination and Ensuring Consistency with Statutory Changes and Significant Court Decisions

The Department seeks to revise its existing section 504 regulation for federally assisted programs to incorporate statutory amendments to the Rehabilitation Act, the enactment of the ADA and the ADAAA , the Affordable Care Act, and Supreme Court and other significant court cases. The regulations also need to be revised to update outdated terminology and regulatory provisions.

The ADA revised the Rehabilitation Act to include definitions of the terms "drugs" and "illegal use of drugs," directing that these terms be interpreted consistent with the principles of the Controlled Substances Act, 21 U.S.C. 801 et seq.[401] Both the ADA and the Rehabilitation Act expressly exclude from coverage an individual who is currently engaging in the illegal use of drugs,[402] although the exclusions in the Rehabilitation Act differ in some ways from those in the ADA.[403] The Rehabilitation Act Amendments of 1992 changed the term "handicapped person" to "individual with a disability" and provided that the standards contained in title I of the ADA apply to determinations of employment discrimination under section 504. More recently, the ADAAA revised the meaning and interpretation of the definition of "disability" under section 504 to ensure that the term is interpreted consistently with the expanded definition of "disability" codified in the ADA and in section 504's statutory language.

To ensure consistency with the ADA, the proposed rule contains the following provisions that mirror the ADA provisions: definition of "disability," notice, maintenance of accessible features, retaliation or coercion, personal devices and services, service animals, mobility devices, and communications. Provisions that are similar to the ADA include purpose and broad coverage, definitions, general prohibitions against discrimination, program accessibility, illegal drugs, direct threat, and integration. Courts have generally interpreted section 504 consistently with title II of the ADA.[404] For this reason, and because applying the same standard under both

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[401] *See* 29 U.S.C. 705(10).
[402] *See* 29 U.S.C. 705(10), (20)(C).
[403] *Compare* 42 U.S.C. 12210 (ADA) *with* 29 U.S.C. 705(20)(C) (Rehabilitation Act).
[404] *See, e.g.*, *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 117, 120 (3d Cir. 2018) (concluding that courts "constru[e] the provisions of [both statutes] in light of their close similarity of language and purpose," and "generally apply the same standard for determination of liability" to both "in recognition that the scope of protection afforded under both statutes, i.e., the general prohibition[ ] against discrimination, is materially the same," and holding "that the service animal regulations, although technically interpreting the ADA, are no less relevant to the interpretation of the RA") (cleaned up); *Argenyi v. Creighton Univ.*, 703 F.3d 441, 448 (8th Cir. 2013) (stating, in a communications access case, that "[s]ince the ADA and the Rehabilitation Act are similar in substance," we treat the case law interpreting them as interchangeable.") (cleaned up); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) ("There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.") *See also*, *Abrahams v. MTA Long Island Bus.,* 644 F. 3d 110, 115 (2d Cir. 2011) ("Because the ADA and the Rehabilitation Act impose nearly identical

statutes promotes compliance and eases the burden on recipients of the Department's financial assistance, we propose to align the provisions of this rule with ADA requirements absent some specific statutory language or strong policy reason to take a divergent path.[405]

In addition, there have been significant U.S. Supreme Court decisions interpreting section 504 requirements relating to the "direct threat" limitation and to the obligation to provide "reasonable modifications" unless those modifications can be shown to pose a fundamental alteration to the program or activity.[406] The proposed regulation incorporates the "direct threat" principle in § 84.75 and the "reasonable modifications" principle in § 84.68(b)(7).

Relationship between section 504 and the ADA.

Title II of the ADA prohibits discrimination on the basis of disability by public entities (i.e., State and local governments and their agencies),[407] and is modeled on section 504 of the Rehabilitation Act.[408] Title II of the ADA and section 504 are generally understood to impose similar requirements, given the similar language employed in the ADA and the Rehabilitation Act.[409] The legislative history of the ADA makes clear that title II of the ADA was intended to extend the requirements of section 504 to apply to all State and local governments, regardless of

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requirements, we focus on the ADA but our analysis applies to the Rehabilitation Act as well."); *Weixel v. Bd. of Educ*., 287 F. 3d 138, 146 n. 6 (2d Cir. 2002) (". . . the reach and requirements of both statutes are precisely the same . . . ."); *Rodriguez v. City of N.Y.,* 197 F. 3d 611, 618 (2d Cir. 1999) ("Because section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem."); *Theriault v. Flynn*, 162 F. 3d 46, 48 n. 3 (1st Cir. 1998)("Title II of the ADA was expressly modeled after section 504 of the Rehabilitation Act, and is to be interpreted consistently with that provision."); *Doe v. Univ. of Md. Med. Sys. Corp.,* 50 F. 3d 1261, 1265 n. 9 (4th Cir. 1995) ("Because the language of the two statutes is substantially the same, we apply the same analysis to both."); *Collings v. Longview Fibre Co*., 63 F. 3d 828, 832 n. 3 (9th Cir. 1995) ("The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.").

[405] In addition, the legislative history of the 1992 amendments to the Rehabilitation Act reveals congressional intent that the policies, practices, and procedures of the ADA should guide all titles of the Rehabilitation Act. S. Rept. 102-357, at 14 (Aug. 3, 1992); H.R. Rep. 102-822, at 81 (Aug. 10, 1992).

[406]*See, e.g., Schl. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987); *Alexander v. Choate*, 469 U.S. 287 (1985); *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979).

[407] 42 U.S.C. 12132.

[408] *See, e.g.*, H. Rept. 101-485(II) at 84 (May 15, 1990).

[409] *See, e.g.*, 42 U.S.C. 12201(a).

whether they receive Federal funding, demonstrating Congress's intent that title II and section 504 be interpreted consistently.[410]

The Rehabilitation Act Amendments of 1992 revised the Rehabilitation Act's findings, purpose, and policy provisions to incorporate language acknowledging the discriminatory barriers faced by persons with disabilities, and recognizing that persons with disabilities have the right to "enjoy full inclusion and integration in the economic, political, social, cultural and educational mainstream of American society."[411] The legislative history to the Rehabilitation Act Amendments of 1992 states that the purpose and policy statement is "a reaffirmation of the precepts of the Americans with Disabilities Act,"[412] and that these principles are intended to guide the Rehabilitation Act's policies, practices, and procedures.[413] Further, courts interpret these statutes consistently.[414] Thus, the Department believes there is and should be parity between the relevant provisions of section 504 and title II of the ADA. Because the Department is amending its existing, longstanding regulation and not simply issuing a new regulation, it is necessary to incorporate its revisions in several subparts of the existing rule.[415] The added or revised provisions are:

Purpose and broad coverage (§ 84.1): Revisions to Subpart A

Application (§ 84.2): Revisions to Subpart A

Relationship to other laws (§ 84.3): Revisions to Subpart A

Definition of disability (§ 84.4): Revisions to Subpart A

Notice (§ 84.8): Revisions to Subpart A

Definitions (§ 84.10): Revisions to Subpart A

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[410] *See* H. Rep. 101-485(II) at 84 (May 15, 1990).
[411] 29 U.S.C. 701(a)(3)(F), *as amended*.
[412] S. Rep. 102–357, at 14 (Aug. 3, 1992).
[413] *See id.*; *see also* H.R. Rep. 102–822, at 81 (Aug. 10, 1992).
[414] *See supra* note 243.
[415] Where HHS has made changes to this section 504 regulation to correspond to provisions in the Department of Justice's title II regulation, HHS encourages individuals to look to the corresponding title II guidance and section-by-section analysis for guidance on how to interpret these provisions. See 28 CFR part 35, app. A, B, C.

Employment (§ 84.16): Revisions to Subpart B

Program Accessibility (§§ 84.21-84.23): Revisions to Subpart C

Childcare, Preschool, Elementary and Secondary, and Adult Education (§§ 84.31, 84.38): Revisions to Subpart D

Health, Welfare, and Social Services (§§ 84.51-84.55): Revisions to Subpart F

Subpart G: General Requirements (§§ 84.68-84.76)): New subpart

General prohibitions against discrimination (§ 84.68)

Illegal use of drugs (§ 84.69)

Maintenance of accessible features (§ 84.70)

Retaliation and coercion (§ 84.71)

Personal devices and services (§ 84.72)

Service animals (§ 84.73)

Mobility devices (§ 84.74)

Direct threat (§ 84.75)

Integration (§ 84.76)

Subpart H: Communications (§§ 84.77-84.81): New subpart

Subpart K: Procedures (§ 84.98)

Proposed section 504 regulations and existing requirements.

Recipients of Federal financial assistance from HHS that are also State and local governments (subject to title II of the ADA) and those that are places of public accommodation (subject to title III of the ADA) have been obligated to comply with the ADA title II and title III regulations since 1991 when those regulations were promulgated. Most entities covered by section 504 that are not covered by title II are covered by title III. Accordingly, in most instances, this proposed section 504 regulation is not imposing new requirements on recipients. Rather, in such instances, it is aligning section 504 requirements with existing ADA requirements to which many entities have been subject since 1991.

The sections of the proposed regulation that track the ADA title II and/or III regulations are: definition of "disability," notice, general prohibitions against discrimination, maintenance of accessible features, retaliation and coercion, personal devices and services, service animals, mobility devices, and communications. The following sections are similar to the ADA title II and/or title III regulations: purpose and broad coverage, definitions, program accessibility, illegal use of drugs, direct threat, and integration.

Terminology.

When the Department's section 504 regulation was issued in 1977, it followed the terminology of the statute, using the word "handicap" and the phrase "handicapped person." However, the Rehabilitation Act Amendments of 1992 changed the term "handicapped person" to "individual with a disability." The Department's proposed revisions incorporate these terminology changes into its rules. The revisions also include use of the phrase "qualified individual with a disability" rather than the phrase "qualified handicapped person." The terminology changes also include substitution of the phrase "individual with a substance use disorder" for "drug addict" and "individual with an alcohol use disorder" for "alcoholic." In making these changes as well as other similar ones, the Department is merely updating terminology and intends no substantive change to its interpretation of section 504 and its implementing regulation.

§ 84.1 Purpose and broad coverage: Revision to Subpart A.

Proposed § 84.1(a) states that the purpose of this part is to implement section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of disability in programs and activities receiving Federal financial assistance.

Proposed § 84.1(b) states that the definition of "disability" in this part shall be construed broadly in favor of expansive coverage. This is consistent with the ADAAA's purpose of reinstating a broad scope of protection under the ADA and ensuring that the Rehabilitation Act was interpreted consistently by including a conforming amendment for section 504. The

ADAAA amended the definition of disability provisions of the ADA and applied the same new definitional provisions to section 504.[416] Congress passed the ADAAA to overturn Supreme Court decisions that had too narrowly interpreted the ADA's definition of disability.[417] Those narrow interpretations resulted in the denial of the ADA's protection for many individuals with impairments who Congress intended to cover under the law. The ADAAA provides clear direction about what "disability" means under the ADA and how it should be interpreted so that covered individuals seeking the protection of the ADA can establish that they have a disability.[418] Section 84.4 sets forth the definition of the term. The ADAAA codified the broad view of disability adopted by the Supreme Court in the section 504 case, *School Board of Nassau County v. Arline.*[419] To ensure consistency in defining disability, the ADAAA includes a conforming amendment for section 504's definition of disability to have the "same meaning" as the ADA definition.[420]

In the ADAAA, Congress made clear that it intended the definition of disability to be construed very broadly.[421] The primary object of attention, Congress said, should be "whether entities covered under the ADA have complied with their obligations" and whether discrimination has occurred, not whether the individual meets the definition of "individual with a disability." [422] According to both the ADAAA purpose provisions and the ADA regulations, this question of whether an individual meets the definition of disability should not demand extensive analysis.[423]

§ 84.2 Application: Revisions to Subpart A.

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[416] See 29 U.S.C. 705(20)(B); ADA Amendments Act of 2008, Pub. L. No. 110–325 section 7(2) (2008).
[417] *See* ADAAA section 2(a)(6), (b)(2)-(5) (2008).
[418] ADAAA section 4(a) (2008).
[419] 480 U.S. 273 (1987).
[420] ADAAA section 7 (2008).
[421] 42 U.S.C. 12102(4)(A).
[422] *Id.* at section 2.
[423] 42 U.S.C. 12101; 28 CFR 35.101(b) and 35.108.

Paragraph (a) states that this part applies to the recipient's programs or activities that involve individuals in the United States. It does not apply to the recipient's programs and activities outside of the United States that do not involve individuals with disabilities in the United States.

Paragraph (b) states that the section 504 requirements do not apply to ultimate beneficiaries of any program or activity receiving Federal financial assistance. An ultimate beneficiary is a person who is entitled to benefits from, or otherwise participates in, a program or activity.

In paragraph (c), the Department proposes language addressing the issue of severability. The provision states that, if any provision at 45 CFR part 84 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be construed to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which case the provision shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances. The Department seeks to ensure that, if a specific regulatory provision in this rule is found to be invalid or unenforceable, the remaining provisions of the rule will remain in effect.

§ 84.3 Relationship to other laws: Revisions to Subpart A.

This section states that this part does not invalidate or limit remedies, rights, and procedures of other laws that provide greater or equal protection for the rights of individuals with disabilities or those associated with them, such as the ACA and the Fair Housing Act. The section is substantially similar to the corresponding section in the ADA regulations at 28 CFR 35.103(b).

§ 84.4 Definition of Disability: Revisions to Subpart A.

One of the main purposes of the ADAAA was to ensure that the term "disability" – in both the ADA and the Rehabilitation Act — would be construed broadly in favor of expansive

coverage to the maximum extent possible. The ADAAA revised the meaning and interpretation of the definition of "disability" under section 504 to ensure that the term is interpreted consistently with the ADAAA, Pub. L. No. 110–325 (2008), and applied the same definitional provisions to section 504, *id.* section 7(2). In this section, the Department incorporates the definition contained in the ADA title II regulations at 28 CFR 35.108, with modifications when the terminology about a particular disability mentioned in the regulation has changed, including capitalizing certain impairments; substituting "autism spectrum disorder" for "autism"; substituting "substance use disorder" for "drug addiction"; and substituting "alcohol use disorder" for "alcoholism." In addition, long COVID, a condition that did not exist when the ADA regulations were published, has been added to the list of physical and mental impairments.

This proposed regulation recodifies many of the sections in the existing rule. Section 84.4 in the existing rule contains the general prohibitions. Those general prohibitions now appear in Subpart G, General Requirements, § 84.68. Proposed § 84.4 contains the definition of "disability." Similar redesignations in the numbering of sections occur throughout the proposed regulation.

Section 84.4(a) - Disability.

Proposed § 84.4(a)(1) states that, with respect to an individual, disability means "(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."

Proposed § 84.4(a)(2)(i) states that the definition of "disability" is to be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of section 504.

Proposed § 84.4(a)(2)(ii) provides that an individual can establish coverage using any of the three prongs, the "actual disability" in the first prong, the "record of" in the second prong, or the "regarded as" in the third prong. The use of the word "actual disability" is a shorthand for the

first prong and is not meant to suggest that individuals covered under the first prong have any more rights than those covered by the second or third prongs, with the exception that the ADAAA revised the ADA to expressly state that an individual who meets the definition of "disability" solely under the "regarded as" prong is not entitled to reasonable modifications of policies, practices, or procedures. *See* 42 U.S.C. 12201(h)).

Proposed § 84.4(a)(2)(iii) indicates that consideration of coverage under the first two prongs will generally be unnecessary except when there has been a request for reasonable modifications. Accordingly, absent a claim of a failure to provide reasonable modifications, typically it is not necessary to rely on the "actual disability" or "record of" disability prongs. Instead, in such cases, coverage can be evaluated exclusively under the "regarded as" prong, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. However, individuals can proceed under the first or second prongs if they choose.

Section 84.4(b)—Physical or mental impairment.

Proposed § 84.4(b)(1) provides an illustrative and non-exhaustive list of examples of physiological disorders or conditions, cosmetic disfigurement, or anatomical loss affecting one or more body systems that may be affected by a physical impairment. It also provides an illustrative list of mental or psychological disorders. Section 84.4(b)(2) contains a non-exhaustive list of examples of physical or mental impairments. The preamble to the ADA title II regulations explains why there was no attempt made to set forth a comprehensive list of physical and mental impairments. The preamble states that "[i]t is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future." 28 CFR part 35, app. B. This proposed section adopts that reasoning.

On July 26, 2021, DOJ and HHS issued guidance on how "long COVID" can be a disability under the ADA, section 504, and Section 1557.[424] The guidance notes that some people continue to experience symptoms that can last months after first being infected with COVID-19 or may have new or recurring symptoms at a later time.[425] This can happen even if the initial illness was mild. This condition, "long COVID," can meet the definition of "disability" if it, or one of the conditions that results from it, satisfies one of the three prongs of the disability definition.

The guidance states that long COVID is a physiological condition affecting one or more body systems and is a physical or mental impairment. For example, some people experience lung damage, heart damage, kidney damage, neurological damage, damage to the circulatory system resulting in poor blood flow, and/or mental health symptoms. It, or its symptoms, can substantially limit one or more life activities. For example, a person with lung damage that causes shortness of breath, fatigue, and related effects is substantially limited in respiratory function, among other major life activities. The inclusion of long COVID as a physical or mental impairment aligns with DOJ's interpretation under the ADA.

Section 84.4(b)(3) states that sexual orientation is not included in the definition of physical or mental impairment. The Rehabilitation Act at 29 U.S.C. 705(20)(E) contains a specific exclusion of individuals on the basis of homosexuality or bisexuality. It states that the term "impairment" does not include homosexuality or bisexuality. Therefore, the term "individual with a disability" does not include individuals who are homosexual or bisexual. The ADA likewise states that homosexuality and bisexuality are not impairments and, as such, are

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[424] *See* U.S. Dep't of Health & Human Servs., U.S. Dep't of Justice, *Guidance on "Long COVID" as a Disability Under the ADA, section 504, and section 1557* (July 26, 2021), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html.

[425] As the CDC has described, "Long COVID can last weeks, months, or years after COVID-19 illness…" *See Long COVID or Post-COVID Conditions,* Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html#:~:text=For%20some%20people%2C%20Long%20COVID,over%20different%20lengths%20of%20time (last updated Dec. 16, 2022).

not disabilities. 42 USC 12211(a). The title II regulations incorporate this exclusion in 28 CFR 35.108(b)(3).

Section 84.4(c)—Major life activities.

The ADAAA significantly expanded the range of major life activities by directing that "major" be interpreted in a more expansive fashion than previously. It specified that major life activities include major bodily functions, and provided non-exhaustive lists of examples of major life activities. Proposed § 84.4(c) incorporates the title II regulation at 28 CFR 35.108(c). "Major life activities" includes not only activities such as caring for oneself, seeing, hearing, and walking, but also includes the operation of a major bodily function such as the functions of the immune system, normal cell growth, and reproductive systems.

Proposed § 84.2(c)(1)(i) and (ii) list examples of major life activities. The absence of a particular life activity or bodily function from the lists should not create a negative implication as to whether an activity or function is a major life activity.

Proposed § 84.4(c)(2) sets forth two specific principles applicable to major life activities. Proposed § 84.4(c)(2)(i) states that the term "major" should not be interpreted strictly. Proposed § 84.4(c)(ii) states that whether an activity is a "major life activity" is not determined by reference to whether it is of "central" importance to daily life. This language is included to align with the incorporation of the ADAAA in the ADA regulations and the ADAAA's rejection of standards articulated in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that (1) strictly interpreted the terms "substantially" and "major" in the definition of "disability" to create a demanding standard for qualifying as disabled under the ADA, and that (2) required an individual to have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.[426]

Section 84.4(d)—Substantially limits.

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[426] 534 U.S. 184 (2002).

Proposed § 84.4(d)(1) sets forth nine rules of construction clarifying how to interpret the meaning of "substantially limits" when determining whether an individual's impairment substantially limits a major life activity. The language in these provisions reflects the rules of construction that Congress provided in the ADAAA.

Proposed § 84.4(d)(1)(i) states that the term "substantially limits" should be construed broadly in favor of expansive coverage to the maximum extent permitted by section 504. This is not meant to be a demanding standard.

Proposed § 84.4(d)(1)(ii) states that the primary object of attention should be whether entities have complied with their obligations and whether discrimination occurred, not the extent to which the impairment substantially limits a major life activity. Thus, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

Proposed § 84.4(d)(1)(iii) indicates that an impairment that substantially limits just one major life activity is sufficient to be considered a substantially limiting impairment. For example, an individual seeking to establish coverage need not show a substantial limit in the ability to learn if that individual is substantially limited in another major life activity, such as walking or the functioning of the nervous or endocrine systems. The proposed section also is intended to clarify that where the major life activity is something that may include a range of different activities (such as manual tasks), the ability to perform some of those tasks does not preclude a finding that the person is substantially limited in the major life activity. For example, an individual with cerebral palsy could have the capacity to perform certain manual tasks and be unable to perform others. Such an individual still has a substantial limitation in the ability to carry out the "major life activity" of performing manual tasks

Proposed § 84.4(d)(1)(iv) states that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. This section is intended to reject the reasoning of court decisions concluding that certain individuals with certain

conditions—such as epilepsy or post-traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent.

The legislative history provides that "[t]his … rule of construction thus rejects the reasoning of the courts in cases like *Todd v. Academy Corp.*, where the court found that the plaintiff's epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically.[427] It similarly rejects the results reached in cases [such as *Pimental v. Dartmouth-Hitchcock Clinic*,] where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. [428] It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, post-traumatic stress disorder, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity."[429] This language incorporates the ADAAA's rejection of court decisions finding that individuals with certain conditions such as epilepsy or post-traumatic stress disorder were not protected because their conditions were episodic or in remission.

Proposed § 84.4(d)(1)(v) states that determinations as to whether an impairment substantially limits a major life activity should be based on a comparison to most people in the general population. The impairment does not need to prevent, or significantly or severely restrict an individual from performing a major life activity to be considered substantially limiting. For example, an individual with the physical impairment of carpal tunnel syndrome can demonstrate that the impairment substantially limits the major life activity of writing even if the impairment does not prevent or severely restrict the individual from writing. However, not every impairment will constitute a disability within the meaning of this section.

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[427] 57 F. Supp. 2d 448, 453 (S.D. Tex. 1999).
[428] *Pimental v. Dartmouth-Hitchcock Clinic,* 236 F. Supp. 2d 177, 182–83 (D.N.H. 2002).
[429] H.R. Rep. No. 110–730, pt. 2, at 19-20 (2008) (House Committee on the Judiciary).

Proposed § 84.4(d)(1)(vi) states that determination as to whether an impairment substantially limits a major life activity requires an individualized assessment. Additionally, the paragraph requires that, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a standard of functional limitation that is lower than that the standard applied prior to the ADAAA. These rules of construction reflect Congress's concern that prior to the adoption of the ADAAA, courts were using too high a standard to determine whether an impairment substantially limited a major life activity.[430]

Proposed § 84.4(d)(1)(vii) states that comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population does not usually require scientific, medical, or statistical evidence. This section seeks to prevent an overbroad, burdensome, and generally unnecessary requirement on individuals seeking accommodations or modifications. Other types of evidence that are less onerous to collect, such as statements or affidavits of affected individuals, school records, or determinations of disability status under other statutes should, in most cases, be considered adequate to establish that an impairment is substantially limiting. However, nothing in this paragraph is intended to prohibit or limit the presentation of scientific, medical, or statistical evidence where appropriate.

Proposed § 84.4(d)(1)(viii) prohibits any consideration of the ameliorative effects of mitigating measures when determining whether an individual's impairment substantially limits a major life activity, except for the ameliorative effects of ordinary eyeglasses or contact lenses. The determination as to whether an individual's impairment substantially limits a major life activity is unaffected by an individual's choice to forego mitigating measures. For individuals who do not use a mitigating measure (including, for example, medication or auxiliary aids and

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[430] *See* Pub. L. No. 110–325, sec. 2(b)(4)–(5); *see also* 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers) ("This bill lowers the standard for determining whether an impairment constitute[s] a disability and reaffirms the intent of Congress that the definition of disability in the ADA is to be interpreted broadly and inclusively.").

services that might alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity.

Proposed § 84.4(d)(1)(ix) states that the six-month "transitory" part of the "transitory and minor" exception in § 84.4(f)(2), the "regarded as" prong of the definition, does not apply to the "actual disability" or "record of" prongs of the definition. The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability. Whether an impairment is both "transitory and minor" is a question of fact that is dependent upon individual circumstances.

Proposed § 84.4(d)(2), Predictable assessments, states that the rules of construction in this section are intended to provide a generous and expansive application of the prohibition on discrimination. Specific rules of construction are contained in subsections discussing the definition of "disability," § 84.4(a)(2); "major life activities," § 84.4(c)(2); and "substantially limits," § 84.4(d)(1). Proposed § 84.4(d)(2)(ii) states that the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under the first prong of the definition ("actual disability") or the second prong ("record of"). Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward and should not demand extensive analysis.

Proposed § 84.4(d)(2)(iii) contains a non-exhaustive list of eleven types of impairments and the major life activity limited by those impairments. The list illustrates impairments that virtually always will result in a substantial limitation of one or more major life activities. It is consistent with the Equal Employment Opportunity Commission's (EEOC) predictable assessment list at 29 CFR 1630.2(g)(3)(iii), except that this section adds traumatic brain injury to the list. The section is intended to provide clear, strong, consistent, enforceable standards.

The absence of any particular impairment from the list of examples of predictable assessments does not indicate that the impairment should be subject to undue scrutiny. Also, the

listed impairments may substantially limit additional major life activities not explicitly mentioned.

Proposed § 84.4(d)(3), Condition, manner, or duration, provides guidance on determining whether an individual is substantially limited in a major life activity. The determination is intended to be an appropriate threshold issue but not an onerous burden. However, individuals can still offer evidence needed to establish that their impairment is substantially limiting if they so desire. While condition, manner, and duration are not required factors that must be considered, to the extent that such factors may be useful or relevant, some or all of the factors may be considered. However, evidence relating to each of these factors often will not be necessary to establish coverage.

Proposed § 84.4(d)(3)(i) states that it may be useful to consider as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

Proposed § 84.4(d)(3)(ii) sets forth examples of the types of evidence that might demonstrate condition, manner, or duration limitations, including the way that an impairment affects the operation of a major bodily function, the difficulty or effort required to perform a major life activity, the pain experienced when performing a major life activity, and the length of time it takes to perform a major life activity. The section clarifies that the non-ameliorative effects of mitigating measures may be taken into account to demonstrate the impact of an impairment on a major life activity. These non-ameliorative effects could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications arising from surgery.

An impairment may substantially limit the “condition” or “manner” in which a major life activity can be performed in a number of ways. For example, it may refer to how the individual

performs a major life activity, e.g., the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that most people in the general population would perform the same tasks. The terms may also describe how performance of a major life activity affects an individual with an impairment. For example, an individual whose impairment causes more pain or fatigue than most people would experience when performing that major life activity may be substantially limited. The condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects.

Condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. In some cases, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment causes the operation of a bodily function to over-produce or under-produce in a harmful fashion. For example, the pancreas, which is part of the endocrine system, of a person with type 1 diabetes does not produce sufficient insulin. For that reason, compared to most people in the general population, the impairment of diabetes substantially limits the major bodily functions of endocrine function and digestion.

"Duration" refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes them from standing for more than two hours without significant pain would be substantially limited in standing, because most people can stand for more than two hours without significant pain. Some impairments, such as Attention-Deficit/Hyperactivity Disorder (ADHD) may have two different types of impact on duration considerations. ADHD frequently affects both an ability to sustain focus for an extended period of time and the speed with which someone can process information. Each of these duration-related concerns could demonstrate that someone

with ADHD, as compared to most people in the general population, takes longer to complete major life activities such as reading, writing, concentrating, or learning.

Proposed § 84.4(d)(3)(iii) states that in determining whether an individual has a disability under the "actual disability" or "record of" prongs, the focus should be on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort that he or she must spend to read, speak, write, or learn compared to most people in the general population.

Proposed § 84.4(d)(3)(iv) clarifies that analysis of condition, manner, or duration will not always be necessary, particularly with respect to certain impairments that can easily be found to substantially limit a major life activity such as those included in the list of impairments contained in § 84.4(d)(2)(iii). However, should an individual seeking coverage under the first or second prong wish to offer evidence establishing that their impairment is substantially limiting, they should be permitted to do so.

Proposed § 84.4(d)(1)(viii) described earlier makes clear that ameliorative effects of mitigating measures must not be considered when determining whether an impairment substantially limits a major life activity except that the ameliorative effects of ordinary eyeglasses or contact lenses must be considered. Proposed § 84.4(d)(4) provides a non-exclusive list of mitigating measures that may not be considered. As in § 84.4(d)(1)(viii), this section reiterates the exception for eyeglasses or contact lenses, stating that mitigating measures include "low-vision devices," defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses. The absence of any particular measure from this list should not convey a negative implication as to whether it is a mitigating measure.

Section 84.4(e)—Has a record of such an impairment.

Proposed § 84.4(e)(1) states that an individual meets the second prong of the definition of disability, the "record of" prong, if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. An example of the first group (those who have a history of an impairment) is a person with a history of mental or emotional illness or cancer who is denied entry to a program based on their record of disability. An example of the second group (those who have been misclassified as having an impairment) is an individual who does not have an intellectual or developmental disability, but has been misclassified as having that disability. There could be a violation of § 84.4(e)(1) if a recipient acts based on a "record of" disability. Proposed § 84.4(e)(2) states that whether an individual meets this prong shall be construed broadly to the maximum extent permitted by section 504. The determination should not demand extensive analysis.

There are many types of records that could potentially contain information demonstrating a record of an impairment, including but not limited to, education, medical, or employment records. However, past history need not be reflected in a specific document. Any evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is needed to establish coverage under this prong. An individual can meet this prong even if the recipient does not specifically know about the relevant record. However, the individual with a "record of" a substantially limiting impairment must prove that the recipient discriminated on the basis of the record of a disability.

Individuals who are covered under the "record of" prong may be covered under the first prong of the definition of "disability" as well. This is because an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. For example, a person with cancer that is in remission is covered under the first "actual disability" prong because he has an impairment that would substantially limit normal cell growth when active. He also is covered under the "record of"

prong because of his history of having had an impairment that substantially limited normal cell growth.

Proposed § 84.4(e)(3) provides that an individual who falls within this prong may be entitled reasonable modifications. For example, a student with a record of an impairment that previously was substantially limiting, but no longer substantially limits a major life activity, may need permission to miss a class or have a schedule change as a reasonable modification that would permit him or her to attend follow-up or monitoring appointments from a health care provider.

Section 84.4(f)—Is regarded as having such an impairment.

The third prong of the definition of disability, "regarded as having such an impairment," was included in the ADA specifically to protect individuals who might not meet the first two prongs of the definition but were subject to adverse decisions based upon unfounded concerns, mistaken beliefs, fears, myths, or prejudices about persons with disabilities. 42 U.S.C. 12102(3). The third prong was later amended by the ADAAA. Consistent with this amended version, proposed § 84.4(f)(1) states that an individual is regarded as having an impairment if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit a major life activity, even if the recipient asserts, or may or does ultimately establish, a defense to the action prohibited by section 504.

The rationale for this prong was articulated by the Supreme Court in a case involving section 504, *School Board of Nassau County v. Arline*.[431] The Court noted that although an individual may have an impairment that does not diminish their physical or mental capabilities, it could "nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[432] Thus, individuals seeking section 504 protection under

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[431] 480 U. S. 273 (1987).
[432] *Id.* at 283.

this third prong only had to show that some action prohibited by the statute was taken because of an actual or perceived impairment. At the time of the *Arline* decision, there was no requirement that the individual demonstrate that they, in fact had or were perceived to have, an impairment that substantially limited a major life activity. For example, if a childcare center refused to admit a child with burn scars because of the presence of those scars, then the childcare center regarded the child as an individual with a disability, regardless of whether the child's scars substantially limited a major life activity.

In *Sutton v. United Air Lines, Inc.*, the Supreme Court significantly narrowed application of this prong, holding that individuals who asserted coverage under the "regarded as" prong had to establish either that the covered entity mistakenly believed that the individual had a physical or mental impairment that substantially limited a major life activity, or that the covered entity mistakenly believed that "an actual, nonlimiting impairment substantially limit[ed] a major life activity" when in fact the impairment was not so limiting. [433] Congress expressly rejected this standard in the ADAAA by amending the ADA to clarify that it is sufficient for an individual to establish that the covered entity regarded him or her as having an impairment, regardless of whether the individual actually has the impairment or whether the impairment constitutes a disability under the Act.[434] This amendment restores Congress's intent to allow individuals to establish coverage under the "regarded as" prong by showing that they were treated adversely because of an actual or perceived impairment without having to establish the covered entity's beliefs concerning the severity of the impairment.[435]

This clarification of the "regarded as" prong by the ADAAA responded primarily to narrow interpretations of the ADA but ensured that the same amendments were made to 504 since the definitions were intended to be the same.

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[433] 527 U.S. 471, 489 (1999).
[434] 42 U.S.C. 12102(3)(A).
[435] *See* H.R. Rep. No. 110–730, pt. 2, at 18 (2008).

Thus, it is not necessary for an individual to demonstrate that a recipient perceived him as substantially limited in the ability to perform a major life activity to meet the "regarded as" requirements. Nor is it necessary to demonstrate that the impairment relied on by a recipient is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be "regarded as having such an impairment." In short, to be covered under this prong, an individual is not subject to any functional test. The concepts of "major life activities" and "substantial limitation" are not relevant in evaluating whether an individual meets this prong.

Proposed § 84.4(f)(2) states that an individual is not "regarded as" having an impairment if the recipient demonstrates that the impairment is, objectively, both "transitory" and "minor." It is not enough for a recipient to simply demonstrate that it subjectively believed that the impairment was transitory and minor; rather, the recipient must demonstrate that it is (in the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both "transitory" and "minor." For purposes of this section, "transitory" is defined as lasting or expected to last six months or less. This section makes clear that the "transitory and minor" exception to a claim under this prong is a defense to a claim of discrimination and not part of the individual's prima facie case. For example, an individual with a minor back injury could be "regarded as" an individual with a disability if the back impairment lasted or was anticipated to last more than six months.

The relevant inquiry is whether the actual or perceived impairment is objectively "transitory and minor," not whether the recipient claims it subjectively believed the impairment was transitory or minor. Moreover, as an exception to the general rule for broad coverage under the "regarded as" prong, this limitation on coverage should be construed narrowly. For example, a school that expelled a student whom it believes has Bipolar Disorder cannot take advantage of this exception by asserting that it believed the student's impairment was transitory and minor, because Bipolar Disorder is not objectively transitory and minor. It is important to note that the

six-month "transitory" part of the "transitory and minor" exception does not apply to the "actual disability" or "record of" prongs of the disability definition.

Proposed § 84.4(f)(3) provides that an individual who is "regarded as" having an impairment does not establish liability based on that showing alone. Instead, the individual must prove that the recipient discriminated on the basis of disability within the meaning of section 504. This provision was intended to make clear that to establish liability, an individual must establish coverage as a person with a disability, as well as establish that they had been subjected to an action prohibited by section 504.

Section 84.4(g)—Exclusions.

Proposed § 84.4(g), is taken directly from the Rehabilitation Act, 29 U.S.C. 705(20)(F), and is consistent with similar exclusions contained in the ADA.[436] The section states that the term "disability" does not include:

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

The issue of gender identity disorders was recently addressed by the Fourth Circuit in *Williams v. Kincaid*, a case brought under both section 504 and the ADA.[437]

The Fourth Circuit reversed and remanded the district court's dismissal of the case, holding that the plaintiff "has plausibly alleged that gender dysphoria does not fall within section 504's and the ADA's exclusion for "gender identity disorders not resulting from physical impairments."[438] The court noted that the term "gender dysphoria," was not used in section 504 or the ADA nor in the then current version of the Diagnostic and Statistical Manual of Mental

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[436] 42 U.S.C. 12211.

[437] *Williams v. Kincaid*, 45 F. 4th 759 (4th Cir. 2022), *cert. denied,* 600 U.S. ___(U.S. June 30, 2023)(No. 22-633).

[438] *Id.* at 780.

Disorders (DSM). In 2013, the phrase was changed in the DSM from "gender identity disorder" to "gender dysphoria," a revision that the court said was not just semantic but reflected a shift in medical understanding. Under the court's reasoning, gender dysphoria is not included in the scope of "gender identity disorder" and is thus not excluded from coverage under the ADA or section 504.[439] Alternatively, the court held that even if gender dysphoria were a gender identity disorder, the exclusion would not apply in this case because the plaintiff's complaint "amply supports [the] inference[]" that her gender dysphoria "result[s] from a physical impairment.".[440]

Recognizing "Congress' express instruction that courts construe the ADA in favor of maximum protection for those with disabilities,"[441] the court said that it saw "no legitimate reason why Congress would intend to exclude from the ADA's protections transgender people who suffer from gender dysphoria."[442] The Department agrees that restrictions that prevent, limit, or interfere with otherwise qualified individuals' access to care due to their gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may violate section 504.

§ 84.10 Definitions: Revisions to Subpart A.

Proposed § 84.10 contains the definitions. These definitions are revised to correspond to the ADA title II regulations, to delete terminology that is obsolete, to revise or add certain terms to incorporate statutory changes to the Rehabilitation Act, to add terms used in new sections specific to the Department, and to make other minor edits.

To ensure consistency of terminology between section 504 and title II of the ADA and include additional terms that are needed in the proposed rule, the Department is proposing to add definitions of the following terms: "2004 ADA Accessibility Guidelines (ADAAG)," "2010 Standards," "ADA," "Architectural Barriers Act," "Archived web content," "Auxiliary Aids and

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[439] *Id*. at 769.
[440] *Id.* at 773-774 (citing 42 U.S.C. 12211(b)); see also *id.* at 770-772.
[441] *Id.* at 769-70.
[442] *Id.* at 773.

Services," "Companion," "Conventional electronic documents," "Current illegal use of drugs," "Direct threat," "Disability," "Drug," "Existing facility," "Foster care, " "Illegal use of drugs," "Individual with a disability," "Kiosks," "Medical diagnostic equipment," "Mobile applications (apps)," "Most integrated setting," "Other power-driven mobility device," "Parents," "Prospective parents," "Qualified individual with a disability," "Qualified interpreter," "Qualified reader," "Service animal," "Standards for Accessible Medical Diagnostic Equipment," "State," "Ultimate beneficiary," "Video remote interpreting (VRI) services," "WCAG 2.1," "Web content," and "Wheelchair."

Terms added without change from the title II ADA regulations are: "2004 ADA Accessibility Guidelines," "2010 Standards," "Auxiliary aids and services," "Current illegal use of drugs," "Direct threat," "Disability," "Drug," "Existing facility," "Facility," "Illegal use of drugs," "Individual with a disability," "Other power-driven mobility device," "Qualified individual with a disability," "Qualified interpreter," "Qualified reader," "section 504," "Service animal," "State," "Video Remote Interpreting (VRI)," and "Wheelchair."

Terms added without change from the Department of Justice title II NPRM, "Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities" are: "Archived web content," "Conventional electronic documents," "Mobile applications (apps)," "WCAG 2.1," and "Web content."

The Department proposes to remove "The Act," "Education of the Handicapped Act," "Handicap," "Handicapped person," and "Qualified handicapped person." The Department proposes to retain and make minor revisions to the following terms: "Applicant for assistance," (changed to "Applicant"), "Federal financial assistance," "Program or activity," and "section 504."

The definition of "Federal financial assistance" in the existing rule states that Federal financial assistance means "any grant, cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty) . . . ." The proposed revision adds

"direct Federal" so that it reads "(other than a direct Federal procurement contract or a contract of insurance or guaranty"). No substantive change is intended.

Finally, the Department proposes to retain with no revisions the terms "Recipient," "Director," and "Department."

New definitions of note are discussed below.

"Archived web content"

The Department proposes to add a definition for "archived web content" to proposed § 84.10. The proposed definition defines "archived web content" as "web content that (1) is maintained exclusively for reference, research, or recordkeeping; (2) is not altered or updated after the date of archiving; and (3) is organized and stored in a dedicated area or areas clearly identified as being archived." The definition is meant to capture web content that, while outdated or superfluous, is maintained unaltered in a dedicated area on a recipient's website for historical, reference, or other similar purposes, and the term is used in the proposed exceptions set forth in § 84.85. Throughout this rule, a recipient's "website" is intended to include not only the websites hosted by the recipient, but also websites operated on behalf of a recipient by a third party. For example, recipients sometimes use vendors to create and host their web content. Such content would also be covered by this rule.

"Auxiliary aids and services"

This section, added to be consistent with the title II regulations, sets forth a non-exhaustive list of auxiliary aids and services that reflect the latest technology and devices available in some places that may provide effective communication in some situations.[443] The Department does not intend to require that every recipient provide every device or all new technology at all times as long as the communication that is provided is as effective as communication with others.

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[443] The voice, text, and video-based communications included in the definition for auxiliary aids and services include Telecommunication Relay Services (such as Internet Protocol Relay Services) and Video Relay Services.

"*Companion"*

This phrase, added to be consistent with the title II regulations, means a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

"Conventional electronic documents"

The Department proposes to add a definition for "conventional electronic documents." The proposal defines "conventional electronic documents" as "web content or content in mobile apps that is in the following electronic file formats: portable document formats (PDFs), word processor file formats, presentation file formats, spreadsheet file formats, and database file formats." The definition thus provides an exhaustive list of electronic file formats that constitute conventional electronic documents. Examples of conventional electronic documents include: Adobe PDF files (i.e., portable document formats), Microsoft Word files (i.e., word processor files), Apple Keynote or Microsoft PowerPoint files (i.e., presentation files), Microsoft Excel files (i.e., spreadsheet files), and FileMaker Pro or Microsoft Access files (i.e., database files).

The term "conventional electronic documents" is intended to describe those documents created or saved as an electronic file that are commonly available on recipients' websites and mobile apps in either an electronic form or as printed output. The term is intended to capture documents where the version posted by the recipient is not open for editing by the public. For example, if a recipient maintains a Word version of a flyer on its website, that would be a conventional electronic document. A third party could technically download and edit that Word document, but their edits would not impact the "official" posted version. Similarly, a Google Docs file that does not allow others to edit or add comments in the posted document would be a conventional electronic document. The term "conventional electronic documents" is used in proposed § 84.85(b) to provide an exception for certain electronic documents created by or for a recipient that are available on a recipient's website before the compliance date of this rule and in

proposed § 84.85(g) to provide an exception for certain individualized, password-protected documents, and is addressed in more detail in the discussion regarding proposed § 84.85(b) and (g).

- *Definitions (conventional electronic documents) Question 1: The Department's definition of "conventional electronic documents" consists of an exhaustive list of specific file types. Should the Department instead craft a more feasible definition that generally describes the types of documents that are covered or otherwise change the proposed definition, such as by including other file types (e.g., images or movies), or removing some of the listed file types?*

"Current illegal use of drugs"

This phrase, added to be consistent with the title II regulations, means illegal use of drugs that occurred recently enough to justify a reasonable belief that the person's drug use is current or that continuing use is a real and ongoing problem.

"Direct threat"

The definition of "direct threat" under section 504 was added to be consistent with the title II regulations and with the Supreme Court case of *School Board of Nassau County v. Arline,*[444] which states that a "direct threat" is 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. In *Arline,* a case interpreting section 504, the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety.

Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others constituting a direct threat will not be "qualified" if reasonable modifications to the recipient's policies, practices, or procedures will not eliminate

[444] 480 U.S. 273 (1987).

that risk. The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.[445] It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.[446] This is the test established by the Supreme Court in *Arline*. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control and Prevention (CDC), and the National Institutes of Health, including the National Institute of Mental Health. [447]

Specific provisions concerning "direct threat" are derived from the ADA title II regulations and are contained in the proposed Direct threat section at § 84.75.

"Disability"

The ADAAA was passed to revise the meaning and interpretation of the definition of "disability" and to ensure that the definition is broadly construed and applied without extensive analysis. The definition of "disability" can be found at § 84.4. With respect to employment, the definition of "disability" is found at the regulations of the EEOC at 29 CFR 1630.2.

"Foster care"

The term means 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes,

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[445] 28 CFR pt. 35, app. B (1991) (addressing § 35.139).
[446] *Id.*
[447] *Id.*

but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, childcare institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made. Foster care providers include individuals and institutions. The proposed rule makes clear where the language applies specifically to foster parents. The proposed definition is consistent with the definition of "foster care" in the Department's title IV-E foster care program regulations at 45 CFR 1355.20.

"Illegal use of drugs"

The term, added for consistency with title II of the ADA, means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812 et seq.). The term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law. Specific provisions are contained in the Illegal use of drugs section at § 84.69.

The definitions section includes "drug," which means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812 et seq.). Also defined is "current illegal use of drugs" which means the illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

"Kiosks"

The Department proposes to add a definition of "kiosks." Kiosks are self-service transaction machines made available by recipients at set physical locations for the independent use of patients or program participants in health or human service programs or activities. The devices usually consist of a screen and an input device, either a keyboard, touch screen or similar

device, onto which the program participant independently types in or otherwise enters requested information. In health and human service programs, recipients often make kiosks available so that patients or program participants can check in, provide information for the receipt of services, procure services, have their vital signs taken, or perform other similar actions. These devices may rely on web content or mobile apps or may be closed functionality devices, i.e., devices that do not rely on web content or mobile apps.

- *Definitions (kiosks) Question 2: The Department requests comment on whether a definition of "kiosks" is necessary, and if so, requests comment on the Department's proposed definition in § 84.10 and any suggested revisions to it.*

"Medical diagnostic equipment"

The term "medical diagnostic equipment" (MDE) comes from Section 510 of the Rehabilitation Act and means equipment used in, or in conjunction with, medical settings by health care providers for diagnostic purposes.[448] It includes, for example, examination tables, examination chairs (including those used for eye examinations or procedures and for dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological equipment commonly used for diagnostic purposes by health care professionals.

"Mobile applications (apps)"

Mobile apps are software applications that are downloaded and designed to run on mobile devices such as smartphones and tablets. For the purposes of this part, mobile apps include, for example, native apps built for a particular platform (e.g., Apple iOS, Google Android, among others) or device and hybrid apps using web components inside native apps.

"*Most integrated setting"*

[448] 29 U.S.C. 794f.

The most integrated setting is described in Appendix B to the regulation implementing title II of the ADA as "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."[449] As further described in DOJ's "Guidance on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.," integrated settings provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible; are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; and afford individuals choice in their daily life activities.[450] The Department proposes to adopt this language as its definition for *"most integrated setting*."

- *Definitions (most integrated setting) Question 3: The Department requests comment on the need to include additional language in the definition of "most integrated setting."*

"Other power-driven mobility device"

The term "other power-driven mobility device" (OPDMD) is a term of art coined by DOJ in its regulations implementing the ADA at 28 CFR 35.104. It covers any mobility device powered by batteries, fuel, or other engines, whether or not designed primarily for use by individuals with mobility disabilities, that is used by individuals with mobility disabilities for the purpose of locomotion. Common OPDMD's include golf carts, electronic personal assistance mobility devices such as the Segway®, or other mobility devices designed to operate in areas without defined pedestrian routes but that is not a wheelchair within the meaning of this section.

"Parents"

The terms "parents" means biological or adoptive parents or legal guardians as determined by applicable State law. For purposes of this section, "prospective parents" means

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[449] 28 CFR pt. 35 app. B, 690 (2015) (addressing §35.130(d)).
[450] U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Feb. 12, 2023).

individuals who are seeking to become foster or adoptive parents. The proposed definition is based on the definition of "parents" in the Social Security Act title IV-E.[451]

"Qualified individual with a disability"

The Department proposes to replace the term and definition of "qualified handicapped person" with the term "qualified individual with a disability" and the corresponding definition drawn from title II of the ADA. The introduction of the definition from the Department's title II regulation will ensure consistency with title II of the ADA. Paragraph (1) states that except as provided in paragraph (2), a "qualified individual with a disability" is an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the recipient.

Paragraph (2) provides the definition of qualified individual with a disability in the employment context. The language tracks the corresponding EEOC provision at 29 CFR 1630.2(m) because the meaning of "qualified" is different in an employment context as compared to a nonemployment context. The employment portion of the definition incorporates the EEOC definition of "qualified," thereby implementing the employment standards of title I of the ADA in accordance with section 503(b) of the Rehabilitation Act Amendments of 1992, at 29 U.S.C. 791(f).

Paragraph (3) sets forth the definition with respect to childcare, preschool, elementary and secondary, and adult educational services. The definition in § 84.3 of the existing regulations limits the definition to public preschool, elementary, secondary, or adult education services. That rule makes a distinction between requirements for recipients that operate public elementary and secondary education programs and activities (§ 84.32 and 84.33) and recipients who provide private education (§ 84.39). The proposed rule is not retaining those provisions and makes no

[451] 42 U.S.C. 675.

distinction between public and private programs or activities. Accordingly, the reference to "public" is deleted from this definition. It should be noted that the application section at § 84.31, which is being retained with the addition of "childcare," states that the subpart applies to all preschool, elementary and secondary, and adult education and does not limit the coverage to public programs and activities. The requirement that the entity be public is contained only in the sections dealing specifically with recipients who operate elementary and secondary programs, sections that are not retained in the proposed rule.

Paragraph (4) provides the definition with respect to postsecondary education.

"Qualified interpreter"

This definition is added for consistency with title II of the ADA. A qualified interpreter must be able to interpret effectively, accurately, and impartially. Qualified interpreters include sign language interpreters, oral transliterators, and cued-language transliterators.

This list of interpreters is illustrative. Different situations require different types of interpreters. For example, an oral interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing may be necessary for an individual who was raised orally and taught to read lips or was diagnosed with hearing loss later in life and does not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker's voice is unclear, if there is a quick-paced exchange of communications (e.g., in a meeting), or when the speaker does not directly face the individual who is deaf or hard of hearing. A cued-speech interpreter functions in the same manner as an oral interpreter except that they use a hand code or cue to represent each speech sound. The guiding criterion is that the recipient must provide appropriate auxiliary aids and services to ensure effective communication.

In addition to sign language interpreters, the illustrative list in the definition includes "cued-language transliterators" and "oral transliterators." A cued-language transliterator is an interpreter who has special skill and training in the use of the Cued Speech system of handshapes

and placements, along with non-manual information, such as facial expression and body language, to show auditory information visually, including speech and environmental sounds. An oral transliterator is an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing.

"Qualified reader"

This definition is added for consistency with the ADA. A qualified reader is a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary. Failure to provide a qualified reader to an individual with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

To be "qualified," a reader must be skilled in reading the language and subject matters and must be able to be easily understood by the individual with a disability. For example, if a reader is reading aloud the questions for a college microbiology examination, that reader, to be qualified, must know the proper pronunciation of scientific terminology used in the text, and must be sufficiently articulate to be easily understood by the individual with a disability for whom he or she is reading.

"Service animal"

This definition was added for consistency with the ADA. Service animals, which are limited to dogs, must be individually trained to do work or perform tasks for the benefit of an individual with a disability. The work and tasks must be directly related to the individual's disability. This includes alerting individuals who are deaf or hard of hearing to the presence of people or sounds and providing non-violent protection or rescue work. The phrase "non-violent protection" is used to exclude so-called "attack dogs" or dogs with traditional "protection training" as service animals. The crime-deterrent effect of a dog's presence, by itself, does not qualify as work or tasks for purposes of the definition. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of the definition.

"Standards for Accessible Medical Diagnostic Equipment"

The Department proposes that the term "Standards for Accessible Medical Diagnostic Equipment" means the standards at 36 CFR part 1195, promulgated by the Architectural and Transportation Barriers Compliance Board (Access Board) under section 510 of the Rehabilitation Act of 1973, as amended, found in the Appendix to 36 CFR part 1195.

"Video remote interpreting service (VRI)"

This definition was added for consistency with the ADA. Video remote interpreting services are a means of providing interpreting services for persons who are deaf or hard of hearing that use video conference technology over dedicated lines or wireless technologies offering high-speed, wide-bandwidth video connection that delivers high-quality video images.

"WCAG 2.1"

The Department proposes to add a definition of "WCAG 2.1." The term "WCAG 2.1" refers to the 2018 version of the voluntary guidelines for web accessibility, known as the Web Content Accessibility Guidelines 2.1 (WCAG). The W3C®, the principal international organization involved in developing standards for the web, published WCAG 2.1 in June 2018, and it is available at https://www.w3.org/TR/WCAG21/.[452] WCAG 2.1 is discussed in more detail in proposed § 84.84.

"Web content"

The Department proposes to add a definition for "web content" that is based on the WCAG 2.1 definition but is slightly less technical and intended to be more easily understood by the public generally. The Department's proposal defines "web content" as "information or sensory experience—including the encoding that defines the content's structure, presentation, and interactions—that is communicated to the user by a web browser or other software. Examples of web content include text, images, sounds, videos, controls, animations, and

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[452] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/WCAG21/ [https://perma.cc/UB8A-GG2F].

conventional electronic documents." WCAG 2.1 defines web content as "information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions."[453]

The definition of "web content" attempts to describe the different types of information and experiences available on the web. The Department's NPRM proposes to cover the accessibility of recipients' web content available on public entities' websites and web pages regardless of whether the web content is viewed on desktop computers, laptops, smartphones, or other devices.

The definition of "web content" also includes the encoding used to create the structure, presentation, or interactions of the information or experiences on web pages that range in complexity from, for example, pages with only textual information to pages where users can complete transactions. Examples of languages used to create web pages include Hypertext Markup Language (HTML), Cascading Style Sheets (CSS), Python, SQL, PHP, and JavaScript.

- *Definitions (web content) Question 4: Are there refinements to the definition of "web content" the Department should consider? Consider, for example, WCAG 2.1's definition of "web content" as "information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions."*

"Wheelchair"

The proposed rule adopts the definition of wheelchair used by the DOJ in its ADA rules. It defines wheelchair as a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion.

Sections retained.

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[453] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/WCAG21/#glossary [https://perma.cc/YB57-ZB8C].

This proposed rule is retaining existing sections on (1) Assurances (§ 84.5); (2) Remedial action, voluntary action, and self-evaluation (§ 84.6); and (3) Designation of responsible employee and adoption of grievance procedures (§ 84.7). The Notice section (§ 84.8) has been revised to be consistent with the title II regulations. It states that a recipient must make available to all employees, applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the programs or activities of the recipient, and make such information available to them in such manner as the head of the recipient or his or her designee finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

It is also retaining Administrative requirements for small recipients, § 84.9. That section states that recipients with fewer than 15 employees need not comply with the Designation of responsible employee and adoption of grievance procedures section or the Notice section unless the Director determines that compliance is appropriate because of a finding of a violation or a finding that such compliance will not significantly impair the ability of the recipient to provide benefits or services.

Employment Practices: Revisions to Subpart B.

Proposed § 84.16 lists the general prohibitions in employment practices. This proposed rule replaces the existing employment section at § 84.11. Paragraph (a) states that no qualified individual with a disability shall be subjected to discrimination on the basis of disability. The Rehabilitation Act Amendments of 1992, Public Law 102-569 (Oct. 29,1992), amended title V of the Rehabilitation Act to apply the employment standards set forth in title I of the ADA to employment discrimination under section 504.[454] Paragraph (b) implements this requirement. It states that the standards to be used in determining whether the section has been violated shall be

[454] 29 U.S.C. 794(d). *See also* 29 CFR pt. 1630 (Regulations to Implement the Equal Opportunity Provisions of the ADA); 29 CFR pt. 1640 (Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973.

the standards applied under title I of the ADA of 1990 and sections 501 through 504 and 511 of the ADA, as amended (codified at 42 U.S.C. 12201–12204, 12210), as implemented in the EEOC's regulation at 29 CFR part 1630. This employment section recognizes the potential for jurisdictional overlap that exists with respect to laws prohibiting discrimination in employment. The EEOC enforces title I of the ADA and, under E.O. 12067, has the responsibility for coordinating and leading the Federal Government's efforts to eradicate workplace discrimination. The Department of Labor enforces section 503 of the Rehabilitation Act; and at least 25 Federal agencies that provide financial assistance are responsible for enforcing section 504 in their programs. Section 107 of the ADA requires that coordination mechanisms be developed in connection with the administrative enforcement of complaints alleging discrimination under title I and complaints alleging discrimination in employment in violation of the Rehabilitation Act. This provision ensures that Federal investigations of title II and section 504 complaints will be coordinated on a government-wide basis.

Program Accessibility: Revisions to Subpart C.

Section 84.21 states that except as provided in § 84.22, no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the programs or activities of a recipient, or be subjected to discrimination by any recipient. This subpart addresses accessibility to the built environment with two approaches: (1) providing standards for new construction and alterations, and (2) applying the concept of program access for programs or activities carried out in new as well as previously existing facilities, even when those facilities are not directly controlled by the recipient. For example, where a recipient hospital contracts out certain health care activities to another entity, and those activities are inaccessible, then the recipient hospital may have impermissibly denied qualified individuals with disabilities the benefits of the programs and activities and subjected those individuals to discrimination.

The Department's existing rule at § 84.22, which is retained in part in the proposed rule, states that a recipient is not required to make each of its existing facilities accessible if its program as a whole is accessible. Access to a program may be achieved by a number of means, including reassignment of services to already accessible facilities, redesign of equipment, delivery of services at alternate accessible sites and, if necessary, structural changes.

Section 84.22(a)(2), which mirrors the ADA title II regulation and the section 504 regulations for federally conducted programs, provides that in meeting the program accessibility requirement, a recipient is not required to take any action that would result in a fundamental alteration in the program or activity or undue financial and administrative burdens. A similar limitation is provided in § 84.22 (Existing facilities), §84.81 (Communications), § 84.88 (Web, mobile, and kiosk accessibility), and § 84.93 (Accessible medical equipment.)

This paragraph does not establish an absolute defense: it does not relieve a recipient of all obligations to individuals with disabilities. Although a recipient is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the recipient.

It is the Department's view that compliance with § 84.22(a), like compliance with the corresponding provisions of the ADA title II regulation and the section 504 regulations for federally conducted programs, would in most cases not result in undue financial and administrative burdens on a recipient. In determining whether financial and administrative burdens are undue, all recipient resources available for use in the funding and operation of the program or activity should be considered. The burden of proving that compliance with § 84.22(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the recipient.

The decision that compliance would result in such alterations or burdens must be made

by the head of the recipient or their designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The Department recognizes the difficulty of identifying the official responsible for this determination, given the variety of organizational forms that may be taken by recipients and their components. The intention of this paragraph is that the determination must be made by a high level official or senior leader who has budgetary authority and responsibility for making spending decisions.

Section 84.22 (b), methods, is identical to the title II provision at 28 CFR 35.150 (b) and, with minor changes, the existing section 504 regulation at § 84.22(b). Any differences between this proposed section and the existing section are intended to be non-substantive. The proposed rule retains provisions based in the existing rule relating to small health, welfare, or other social services providers (§ 84.22(c)); time period for compliance (§ 84.22(d)); transition plan (§ 84.22(e)); and notice (§ 84.22(f)).

The requirements for new construction and alterations, set forth in § 84.23, are more stringent than § 84.22, which contains the requirements for existing facilities. Section 84.23(a)), Design and construction, requires each facility or part of a facility constructed by, on behalf of, or for the use of a recipient to be designed and constructed in such a manner that the facility or part of the facility is "readily accessible to and usable by" individuals with disabilities, if the construction was commenced after June 3, 1977.

Section 84.23(b), Alterations, states that each facility or part of a facility constructed by, on behalf of, or for the use of a recipient that affects or could affect the usability of the facility or part of the facility, shall, to the maximum extent feasible, be altered in such a manner that the altered portion is readily accessible and usable by individuals with disabilities, if the alteration was commenced after June 3, 1977.

Section 84.23(c) addresses accessibility standards and compliance dates for recipients that are public entities. The term "public entities" is derived from DOJ's ADA title II regulation and is incorporated in subsection (c)(1) and means any State or local government; any

department, agency, special purpose district, or other instrumentality of a State or states or local government; and The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act). (45 U.S.C. 541). Section 84.23(d) addresses accessibility standards and compliance dates for recipients that are private entities. The term "private entities" is derived from DOJ's ADA title III regulation and is incorporated in subsection (d)(1) and means any person or entity other than a public entity.

Section 84.23(c)(1) states that as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS)[455] shall be deemed to comply with the requirements of § 84.23(a). When the Department first issued its section 504 rule in 1977, it included a different standard, the ANSI (American National Standard Institute's Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped), known as ANSI A117.1-1961(R1971). This standard covered facilities built or altered during the time period from June 3, 1977 until January 18, 1991. In 1990, the Department changed its standard to sections 3-8 of the Uniform Federal Accessibility Standards ("UFAS") and applied the standard to all facilities constructed by recipients of HHS funding after January 18, 1991.

In its regulations implementing the ADA, DOJ adopted more up-to-date and comprehensive accessibility standards, first the 1991 ADA Accessibility Guidelines (ADAAG) Standards and then the 2010 ADAAG Standards. For example, the 2010 Standards contain requirements for children's facilities, standards for a series of recreation facilities, higher requirements for the number of accessible entrances, and more detailed provisions on accessible toilet facilities. In addition, these Standards are written in a different format that follows the approach of private accessibility standards that are commonly used in state and local building codes. Under title II of the ADA, these Standards apply to all public entities; under title III of the ADA, these Standards apply to a wide range of private entities, including hospitals, the offices of

[455] Appendix A to 41 CFR 101–19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984).

health care providers, pharmacies, childcare centers, senior citizen centers, homeless shelters, food banks, adoption agencies, or other social service center establishments. Therefore, these Standards have applied to many recipients of HHS funding for many years.[456]

In this rule, the Department seeks to use the Standards currently used in the ADA: the 2010 Standards. The 2010 Standards for Accessible Design consist of the 2004 ADAAG and the requirements contained in 28 CFR 35.151. To avoid making this regulation overly cumbersome, the Department incorporates the components of the 2010 Standards (that is, the 2004 ADAAG and 28 CFR part 151, as defined in § 84.10 of this rule) by reference. Sections (c) and (d) clarify the considerations for choosing between UFAS and the 2010 Standards for new construction and alterations. Unlike the Department's previous provision for new construction in §84.23, which used a "deeming" approach, § 84.23(c)(5) and (d)(5) of the amended rule, which will apply to physical construction or alterations that commence on or after one year from the publication date of the final rule in the *Federal Register*, will require recipients to comply with the 2010 Standards. Section 84.23(c)(2) and (3) and (d)(2) and (3) of the amended rule, which will apply to physical construction and alterations that commenced before the rule's effective date, will still use the "deeming" approach. Section 84.23(c)(4) and (d)(4) of the amended rule, which will apply to physical construction or alterations that commence (or, in certain situations set forth in Section (d)(4), construction or alterations that are permitted) on or after the effective date of the final rule and before the date one year from the publication date of the final rule in the *Federal Register,* will require recipients to comply either with UFAS or the 2010 Standards. This will

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[456] For private entities subject to title III of the Americans with Disabilities Act, any facility designed and constructed for first occupancy after January 26, 1993, would be required to meet the accessibility requirements of DOJ's 1991 Accessibility Standards. 28 CFR 36.401. For such facilities for which the start of physical construction or alterations occurred on or after March 15, 2012, the facility would be required to meet DOJ's 2010 Accessibility Standards. 28 CFR 36.406(a).
For public entities subject to title II of the Americans with Disabilities Act, any facility, where construction was commenced after January 26, 1992, would be required to meet the accessibility requirements of either UFAS or the DOJ's 1991 Accessibility Standards, excluding the elevator exemption. 28 CFR 35.151(a). For such facilities where the physical construction commenced on or after March 15, 2012, the facility would be required to meet the accessibility requirements of DOJ's 2010 Accessibility Standards. 28 CFR 35.151(c).

make the Department's approach under section 504 parallel to the approach under the ADA. Similar to its approach in the existing section 504 regulation, the Department will allow recipients that are public entities to depart from particular technical and scoping requirements by the use of other methods where those methods provide equivalent or greater access to and usability of the building or facility.

One of the major advantages of using the 2010 Accessibility Standards rather than UFAS is that the 2010 Standards have been harmonized with private sector codes that form the basis for many State and local building codes. In addressing building accessibility, HHS recipients must now comply with local and State building codes as well as UFAS — distinct bodies of regulation that in many instances impose overlapping and sometimes inconsistent requirements. Because the 2010 Standards were designed to harmonize with other accessibility codes, HHS recipients will face less confusion and difficulty in determining how to undertake alterations to existing facilities or to construct new facilities. In addition, the 2010 Standards are much more complete, providing specific requirements for certain types of facilities, including medical care facilities and social service care establishments, and providing specific guidance on the types of features in buildings, such as standards for toilet rooms, assembly areas, and accessible routes both within a facility and from outside features like parking areas and public transportation stops. The new Standards also include technical requirements based on children's dimensions and anthropometrics.

The Department proposes that this new Standard will take effect on the effective date of this rule, which is 60 days after the publication date in the *Federal Register.*

To address how recipients of Federal financial assistance from the Department should address construction standards for projects that are being built during a variety of time periods, the proposed rule offers a detailed blueprint on how construction should proceed. The series of scenarios detailed in § 84.23(c) follow the approach used by the DOJ in its 2010 regulation implementing the ADA at 28 CFR 35.151(c).

For example, proposed § 84.23(c)(3) states that physical construction or alterations that commence after January 18, 1991, but before the effective date of the final rule, will be deemed in compliance with the new construction obligation if the recipient's construction meets the requirements of UFAS. Under proposed § 84.23(c)(4), if the construction commences after the effective date of the final rule but before one year from that publication date, the recipient will be in compliance if it follows either UFAS or the 2010 Standards. (However, if the recipient is also covered by the ADA, it will be required by the ADA and the proposed regulation to follow the 2010 Standards.) All new construction and alterations projects that start physical construction one year from the publication date in the *Federal Register,* i.e., this date for which the last application for a building permit is certified as complete, must follow the 2010 Standards. This approach is necessary because of the delays that often occur in the construction process between the design process and the permitting and actual construction process.

~~may~~ *Program accessibility and the "safe harbor" under § 84.22(g).*

The adoption of a new standard for accessible buildings and facilities necessitates a change to the Department's existing regulation for existing facilities. The "program accessibility" requirement in regulations implementing section 504 requires that each program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities.[457] Section 504 requires recipients' programs and activities to be accessible in their entirety, and recipients generally have flexibility in how to address accessibility issues or barriers as long as program access is achieved. Program access does not necessarily require a recipient to make each of its existing facilities accessible to and usable by individuals with disabilities, and recipients are not required to make structural changes to existing facilities where other methods are effective in achieving program access.[458] Recipients do, however, have program access

[457] 45 CFR 84.21-22.
[458] *See id*.

considerations that are independent of, but may coexist with, requirements imposed by new construction or alteration requirements in those same facilities.

Where a recipient opts to alter existing facilities to comply with its program access requirements, the recipient must look to the accessibility requirements in § 84.23(c). Under the Department's rule, these alterations will be required to comply with the 2010 Standards. The 2010 Standards introduce technical and scoping specifications for many elements not covered by UFAS, the Department's existing standard. In existing facilities, these supplemental requirements need to be taken into account by a recipient in ensuring program access. Also included in the 2010 Standards are revised technical and scoping requirements for a number of elements that were addressed in earlier standards. These revised requirements reflect incremental changes that were added either because of additional study by the Access Board or to harmonize Federal access requirements with those of private model codes.

Although the program accessibility standard offers recipients a level of discretion in determining how to achieve program access, in the NPRM, the Department proposes to follow the lead established by DOJ in its ADA regulations and include an addition to the existing facilities requirements, a new paragraph, § 84.22(g), entitled "Safe harbor," to clarify that if a recipient has constructed or altered elements in accordance with the specifications of UFAS (or for facilities constructed or altered under ANSI), such recipient is not, solely because of the Department's proposed use of the 2010 Standards, required to retrofit such elements to reflect incremental changes in the proposed standards. In these circumstances, the recipient would be entitled to a safe harbor for the already compliant elements until those elements are altered. The safe harbor does not negate a recipient's new construction or alteration obligations; it must comply with the new construction or alteration requirements in effect at the time of the construction or alteration. With respect to existing facilities designed and constructed after the effective date of the first section 504 regulation, but before the recipients were required to comply with the 2010 Standards (between June 3, 1977 and one year from the publication date of

this NPRM in final in the *Federal Register*), the rule is that any elements in these facilities that were not constructed in conformance with accessibility requirements are in violation of section 504 and must be brought into compliance. *See* proposed § 84.23(a), (c)(5), and (d)(5). Similarly, if elements in existing facilities were altered during this time period, and those alterations were not made in conformance with the alteration requirements in effect at the time, then those alteration violations must be corrected. *See* proposed § 84.23(b), (c)(5), and (d)(5).

Section 84.23(g) states that nothing in this section relieves recipients whose facilities are covered by the Architectural Barriers Act from their responsibility of complying with that Act.

Section 84.23(h) sets forth requirements with regard to mechanical rooms.

Childcare, Preschool, Elementary and Secondary, and Adult Education: Revisions to Subpart D.

The proposed rule clarifies two sections from the existing regulation: § 84.31, Application, and § 84.38, Preschool and adult education. The existing application section states that it applies to adult education among other things, but childcare is not mentioned. However, the existing § 84.38 refers both to day care (which was intended to include childcare) and adult education. We propose to add childcare to § 84.31, the application section, since the regulation was intended to broadly reach any form of childcare, whether or not it would be considered "day care." We also propose to change the heading of § 84.38 to "Childcare, preschool, and adult education" to reflect the text of the section. In addition, we propose to add Child Care and Adult Education to the subpart heading to reflect what is contained in the two sections we are retaining. Other sections in the existing regulation concerning elementary and secondary education are reserved.

HHS administers the largest Federal funding source for childcare through the Child Care and Development Fund (CCDF) and provides significant Federal financial assistance to early childhood education through Early Head Start, Head Start, and the Preschool Development Birth through Five (PDG B-5) programs.

Although "day care" is included in the existing § 84.38, in recent years, there has been national attention to the lack of availability and accessibility of inclusive childcare and preschool for children with disabilities. Section 504 follows the precedent set by other civil rights laws based on the receipt of Federal funds, most prominently, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. Thus, section 504 applies to recipients of Federal funding, including public or private preschools, childcare centers, family childcare homes, and other entities that receive Federal funds including through a grant, loan, contract, or voucher.[459]

The proposed regulation clarifies existing obligations for childcare providers under subpart D of section 504 (childcare, preschool, elementary and secondary, and adult education.) Childcare providers must also comply with obligations in subpart A (general), B (employment), C (program accessibility), F (health, welfare, and social services), G (general requirements), H (communications), and I (web and mobile accessibility), subparts that apply to all recipients. The Department is aware that some childcare providers that receive financial assistance from HHS may not be familiar with these obligations.[460]

- *Child Care, Preschool, Elementary and Secondary, and Adult Education Question 1: The Department wants to better understand potential impacts of the proposed rule on these recipients and requests comment on the application of the proposed rule to childcare providers and any potential barriers to compliance.*

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[459] *See, e.g., Grove City Coll. v. Bell*, 465 U.S. 555 (1988) (addressing Title IX, the Supreme Court held that the method by which the assistance reached the entity operating a program or service was not determinative of whether the assistance was Federal financial assistance under the Spending Clause civil rights statutes. The Court held that Basic Educational Opportunity Grants were Federal financial assistance to a college, even though the grants were dispersed to students, who in turn used those funds for education-related expenses).

[460] Because childcare providers are covered by both titles II and III of the ADA, the obligations of this proposed regulation will be coextensive with the existing disability rights obligations for most childcare entities, except for those private childcare entities that are controlled and operated by a religious entity and are exempt from coverage by the ADA.

Upon finalizing this regulation, the Department would provide additional guidance to childcare providers to ensure that they understand the requirements of these provisions.

In January 2020, the Center for American Progress (CAP) issued a report, "The Child Care Crisis Disproportionately Affects Children With Disabilities." Analyzing the 2016 Early Childhood Program Participation Survey and a combined sample of the 2016–2018 National Survey of Children's Health, as well as family interviews, CAP found that "compared with parents of nondisabled children, a larger proportion of parents with disabled children experience at least some difficulty finding care (34 percent vs. 25 percent)."[461] These parents face many barriers to care, "including a lack of available slots, scheduling challenges, and concerns about quality."[462] "Compared with parents of nondisabled children, parents of young children with disabilities are three times more likely to experience job disruptions because of problems with childcare."[463]

In 2015, the Department and the Department of Education issued a joint "Policy Statement on Inclusion of Children With Disabilities in Early Childhood Programs" that cited the ADA and section 504 as part of the legal foundation for inclusion.[464] The Department stated that "all young children with disabilities should have access to inclusive high-quality early childhood programs, where they are provided with individualized and appropriate support in meeting high expectations." In 1997, DOJ issued guidance titled "Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act,"[465] which set forth requirements for childcare services, programs, and activities covered by title II of the ADA and privately-run childcare centers covered by title III of the ADA. The guidance provides that, barring an

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[461] Ctr. for Am. Progress, *The Child Care Crisis Disproportionately Affects Children With Disabilities*, (Jan. 29, 2020), https://www.americanprogress.org/article/child-care-crisis-disproportionately-affects-children-disabilities/.
[462] *Id.*
[463] *Id.*
[464] U.S. Dep't of Health & Hum. Servs., U.S. Dep't of Ed., Policy Statement on Inclusion of Children with Disabilities in Early Childhood Programs (Sept. 14, 2015), https://www2.ed.gov/policy/speced/guid/earlylearning/joint-statement-full-text.pdf.
[465] U.S. Dep't of Justice, Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act (2020), https://www.ada.gov/childqanda.htm (last accessed Feb. 15, 2023).

applicable limitation, childcare centers must make reasonable modifications to their policies, practices, and procedures to integrate children, parents, and guardians with disabilities into their programs unless their presence would pose a direct threat to the health or safety of others or require a fundamental alteration of the program. In addition, centers must make reasonable modifications to their policies and practices to integrate children, parents, and guardians with disabilities into their programs unless doing so would constitute a fundamental alteration. Centers must generally make their facilities accessible to persons with disabilities. Existing facilities are subject to the readily achievable standard for barrier removal, while newly constructed facilities and any altered portions of existing facilities must be fully accessible.

In past years, OCR has received several complaints about discrimination on the basis of disability in childcare services. For example, OCR investigated a complaint filed by the parent of a child with autism spectrum disorder who was denied an opportunity to participate in the childcare program based on the child's disability. The childcare center committed to a corrective action plan aimed at remedying its discriminatory policy, including a requirement to provide staff training and to implement a grievance procedure. In another complaint, a child with a disability was denied enrollment in a childcare program because he needed assistance with toileting. Following the complaint, the program revised its policies. Diapering, medication assistance, and the need for one-on-one support are common reasons children with disabilities are denied enrollment. These complaints demonstrate that some covered childcare entities lack awareness of their obligations to comply with section 504. By explicitly including "childcare" providers in the regulatory language, the Department clarifies obligations for these recipients.

Recipients generally are subject to all the general and specific prohibitions against discrimination contained at proposed § 84.68 as well as the specific prohibition applicable to childcare and early education programs in § 84.38. Accordingly, recipients must provide auxiliary aids and services; make reasonable modifications to their policies, practices, and procedures; and integrate children, parents, and guardians with disabilities into their programs.

The question of what is a "reasonable modification" will depend on a number of factors including the size of the entity, the types of services provided at the center, and staffing demands. For example, as explained in DOJ's "Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act" guidance document, "[c]enters that provide personal services such as diapering or toileting assistance for young children must reasonably modify their policies and provide diapering services for older children who need it due to a disability. Generally speaking, centers that diaper infants should diaper older children with disabilities when they would not have to leave other children unattended to do so." However, if the program never provides toileting assistance to any child, the program is not required to do so for a child with a disability.[466]

The Department is retaining current subpart E, Postsecondary Education.

Health, Welfare, and Social Services: Revisions to Subpart F.

The Department proposes to retain § 84.51, Application, as well as the general prohibitions in § 84.52(a) and the notice requirement in § 84.52(b). It is deleting paragraph (c), concerning emergency treatment of [individuals who are deaf or hard of hearing] and paragraph (d) concerning auxiliary aids, and is substituting in their place proposed new subpart H, §§ 84.77-84.81, Communications.[467] That subpart provides detailed requirements for communications and is not limited to requirements with regard to auxiliary aids.

The Department also proposes to retain § 84.53, which states that a recipient that operates a general hospital or outpatient facility may not discriminate in admission or treatment against an individual with a [substance use disorder] who is suffering from a medical condition, because of the person's [substance use disorder]. The Appendix states that the section was included "pursuant to section 407, Public Law 92-255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174), as amended, and section 321, Public Law 901-616, the Comprehensive

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[466] *Id.*

[467] Throughout the regulation, brackets are used to indicate substitution of an obsolete word or phrase, unless they are being used in a direct quotation. .

Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended, and section 321, Public Law 93-282." It notes that the section prohibits discrimination against [individuals with substance use disorders] not just by hospitals as in section 407 of the Drug Abuse Office and Treatment Act but it also includes outpatient facilities "because of the broader application of section 504."[468]

- *Health, Welfare, and Social Services Question 1: The Department seeks comment on whether the application of the section should extend beyond hospitals (including inpatient, long-term hospitals, and psychiatric hospitals) and outpatient facilities. If so, what types of treatment programs, providers, or other facilities should be included in this section?*

This section should be read in conjunction with § 84.69, Illegal use of drugs.

The Department proposes to retain § 84.54, Education of institutionalized persons, which provides that individuals with disabilities who are institutionalized must be provided with an appropriate education. The existing regulation states that the appropriate education must be consistent with § 84.33(b), a section not retained in this rule. In its place, the proposed rule references the section 504 regulations of the Department of Education, 34 CFR 104.33(b).

The Department is also retaining paragraphs (a) and (f) of § 84.55, Procedures relating to health care for [infants with disabilities]. Paragraphs (b)-(e) are not retained because they are subject to an injunction prohibiting their enforcement. In *Bowen v. American Hospital Association,* the Supreme Court upheld the action of the United States District Court declaring invalid and enjoining enforcement of those provisions.[469]

Paragraph (a) encourages, but does not require, that recipients that provide health care services to infants establish an Infant Care Review Committee (ICRC) to assist the provider in delivering health care services to infants. The committee would assist in the development of

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[468] 45 CFR part 84, app. A (addressing § 84.53).
[469] 476 U.S. 610 (1986), (*aff'g Am. Hosp. Ass'n v. Heckler*, 585 F. Supp. 541 (S.D.N.Y. 1984).

standards, policies, and procedures for providing treatment to infants with disabilities and in making decisions concerning medically beneficial treatment in specific cases. The ICRC should be composed of individuals representing a broad range of perspectives and should include a practicing physician, a representative of a disability organization, a practicing nurse, and other individuals. A suggested model ICRC is set forth in paragraph (f).

Subpart G – General Requirements

To accommodate provisions needed to update the Department's section 504 regulation to be consistent with the ADA and to incorporate these provisions in the Department's existing section 504 regulatory framework, the Department is proposing to add a new subpart G – General Requirements. This new subpart will house the provisions dealing with general prohibitions against discrimination, the illegal use of drugs, the maintenance of accessible features, retaliation and coercion, personal devices or services, service animals, mobility devices, and direct threat. In addition, it will address integration.

§ 84.68 General prohibitions against discrimination.

The Department proposes several changes to ensure consistency between section 504 and the ADA by revising and adding several paragraphs to the general existing prohibitions contained in § 84.4, Discrimination prohibited. The general prohibitions are now contained in § 84.68, General prohibitions against discrimination. These proposed regulations are intended to be interpreted in the same manner as the corresponding ADA regulatory provisions.[470]

The Department is adopting these changes in order to preserve parity with the ADA regulations given Congress's intent that the ADA and section 504 be interpreted consistently. Both recipients and individuals with disabilities benefit from establishing consistent regulations. The preamble to the general prohibitions section contained at 28 CFR 35.130 of the title II ADA regulations explains that "[t]he general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 and,

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[470] 28 CFR 35.130 -139.

therefore, are already familiar to State and local entities covered by section 504. In addition, [this regulation] includes a number of provisions derived from title III of the Act that are implicit to a certain degree in the requirements of regulations implementing section 504."[471]

Existing § 84.4(a), the general prohibition against discrimination, is now contained in § 84.68(a). The Department has inserted the word "solely" in the text of this provision to be consistent with the statute because this regulatory language tracks the general nondiscrimination statement of the statute. This change is a technical amendment and is not intended to alter the Department's 46-year history of interpretation or alter the decades-long reach of the Department's regulations under this rule. As used in this part, solely on the basis of disability is consistent with, and does not exclude, the forms of discrimination delineated throughout the rule.

Paragraphs (b)(1)(i) to (vii) list prohibited actions that apply directly to recipients as well as those with whom it is connected through contractual, licensing, or other arrangements.

Paragraph (b)(1)(i) states that a recipient may not deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service.

Paragraph (b)(1)(ii) states that a recipient may not afford an opportunity that is not equal to or as effective as that given to individuals without disabilities.

Paragraph (b)(1)(iii) states that a recipient may not provide a qualified individual with a disability an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the benefit of or to reach the same level of achievement as that provided to others.

Paragraphs (b)(1)(iv) states that a recipient may not provide different or separate aids, benefits, or services unless necessary to be as effective as provided to others.

Paragraph (b)(1)(v) states that a recipient may not provide significant assistance to an entity that discriminates on the basis of disability.

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[471] 56 FR 35702 (July 26, 1991).

Paragraph (b)(1)(vi) states that a recipient may not deny the opportunity to be a member of a planning or advisory board.

Paragraph (b)(1)(vii) states that a recipient may not otherwise limit an individual with disabilities in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.

Paragraph (b)(2) states that a recipient may not deny a qualified individual with a disability the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

Paragraph (b)(3) states that a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (1) that have the effect of subjecting qualified individuals with disabilities to discrimination or (2) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the program or activity or (3) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

Paragraph (b)(4) prohibits the same actions when determining the site or location of a facility although, as in the title II regulations, the third type of discrimination above is not included.

Proposed§ 84.68(b)(5) states that the regulation applies to recipients' selection of procurement contractors and includes proposed language prohibiting the use of criteria that would subject qualified individuals with disabilities to discrimination on the basis of disability This provision is contained in the Department's section 504 regulations for federally conducted programs at 45 CFR 85.21(b)(5), which were issued in 1988.[472]

Proposed § 84.68(b)(6) includes language prohibiting a recipient from administering a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability and from establishing requirements for the programs or activities of licensees that subject qualified individuals with disabilities to discrimination on

[472] 53 FR 25603 (July 8, 1988).

the basis of disability.[473] It makes clear that the programs or activities of entities that are licensed or certified by the recipient are not, themselves, covered by the proposed regulation. This provision is also contained in the Department's section 504 regulations for federally conducted programs at 45 CFR 85.21(b)(6).

The Department proposes to add a new paragraph, § 84.68(b)(7), which reflects section 504's longstanding obligation that a recipient make reasonable modifications in policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the program or activity.

The "reasonable modification" provision is the same as that in the ADA title II regulations.[474] Despite a body of case law and history of agency practice, the Department's existing section 504 regulation has lacked a specific provision implementing this requirement outside of the employment and education context.[475] Consistent with this case law and agency practice, as well as with the ADA title II regulations, the Department is proposing to include a provision setting forth the requirement for recipients of Federal financial assistance from the Department at § 84.68(b)(7).

To distinguish this requirement in the employment versus the non-employment context and to conform the Department's section 504 regulation to the ADA title II regulation, the regulation uses the term "reasonable modifications" when referring to the requirement to modify policies, procedures, and practices outside the employment context and "reasonable accommodations" when referring to its use in the employment context.

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[473] This proposed provision reflects existing case law. *See, e.g., Ramsay v. Nat'l. Bd. Of Med. Examiners,* 968 F.3d 251, 254 (3d Cir. 2020) (affirming the lower court's preliminary injunction requiring reasonable accommodations for a medical exam board licensing exam under section 504 and the ADA). *See also Singh v. Prasifka,* No. B302113 (Cal. Ct. Of App. Oct. 22, 2021) (finding that the failure to provide reasonable accommodations for a medical exam required to become a physician violated section 504 and the ADA).

[474] 35 CFR 130(b)(7).

[475] *See* 45 CFR 84.12 (employment) and 84.44 (education).

Although the reasonable modification concept is not contained in the Department's existing section 504 regulations, two major Supreme Court cases make clear that the statute imposes a reasonable modification requirement. Since those cases, the Department has consistently required the provision of reasonable modifications of policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the health service or program.

The obligation to modify policies, practices, or procedures was first enunciated by the Supreme Court in *Southeastern Community College v. Davis*, which held that, while section 504 prohibits the exclusion of an otherwise qualified individual with a disability from participation in a federally funded program solely by reason of the individual's disability, that person is not protected by section 504 if, in order to meet essential eligibility standards, the person needs program or policy modifications that would fundamentally alter the nature of the recipient's program.[476] Subsequently, in *Alexander v. Choate*, which addressed a section 504 challenge to a State policy reducing the annual number of days of inpatient hospital care covered by the State's Medicaid program, the Court explained that recipients must provide "meaningful access" to programs for individuals with disabilities, and noted that "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made."[477] Since those cases, the Department has consistently required the provision of reasonable modifications of policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the health service or program.[478]

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[476] 442 U.S. 397 (1979).
[477] 469 U.S. 287, 301 (1985).
[478] *See e.g.,* U.S. Dep't of Health & Hum. Servs., Voluntary Resolution Agreement between the U.S. Dep't of Health & Hum. Servs., Off.for Civil Rts. and Citizens Med. Ctr. (Aug. 23, 2011), https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/cmcsettlementagmt.pdf (OCR entered into a settlement agreement with CMC, after finding violations of section 504 and the

Similarly, over the past decades, in keeping with these U.S. Supreme Court decisions, Federal courts and Federal agencies have regularly acknowledged agencies' affirmative obligation to ensure that recipients provide individuals with disabilities reasonable modifications in programs and activities unless the recipient can demonstrate that making these modifications would fundamentally alter the program or activity.[479]

Proposed § 84.68(b)(7) only addresses fundamental alterations but does not mention undue financial and administrative burdens, which is a limitation applied to other sections of the rule. The Department does not propose an express limitation for undue financial and administrative burdens in this reasonable modifications provision because it believes this explicit limitation is unnecessary since the "reasonableness" limitation circumscribes the scope of the underlying obligation. The Department believes this approach is appropriate in this section because the degree to which a modification would create a financial or administrative burden could bear on whether the modification is "reasonable." By contrast, other obligations in this proposed rule—§ 84.22 (Existing facilities); § 84.81, (Communications) § 84.88 (Web, mobile, and kiosk accessibility); and § 84.92(e), Accessible medical equipment— are framed in categorical terms. An explicit undue burdens limitation applies to those provisions because no

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ADA, when it rejected a child with autism for enrollment in a program based on its concern that the child would need one-on-one care as a reasonable modification.); U.S. Dep't of Health & Hum. Servs., Voluntary Resolution Agreement between the U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. and R.I. Dep't Children, Youth, & Families (Mar. 30, 2022) https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/vra-ri-dcyf/index.html (requiring the State agency to fulfill its obligations under title II of the ADA and section 504 to provide reasonable modifications and auxiliary aids and services in a timely manner).

[479] Courts have held that both the ADA and section 504 create "an affirmative obligation to make 'reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services' to enable disabled persons to receive services or participate in programs or activities," *Constantine v. Rectors & Visitors of George Mason Univ.,* 411 F.3d 474, 488 (4th Cir. 2005) (discussing title II) (quoting 42 U.S.C. § 12131(2)). *See also, e.g., Pierce v. Dist.of Columbia*, 128 F. Supp. 3d 250, 266 (D.D.C. 2015) ("[T]he express prohibitions against disability-based discrimination in section 504 and Title II include *an affirmative obligation* to make benefits, services, and programs accessible to disabled people." (emphasis in original)); *Berardelli v. Allied Servs. Inst. of Rehab. Med.,* 900 F.3d 104, 115 (3d Cir. 2018) (discussing the Rehabilitation Act's affirmative obligation "to make reasonable accommodations or reasonable modifications").

"reasonableness" limitation is included. This approach is consistent with the Department's understanding of the Supreme Court precedent on limitations discussed above.

Reasonable modifications may include, but are not limited to, permitting the use of supported decision-making or a third-party support, where needed by a person with a disability. Supported decision-making is an approach used to assist individuals with disabilities in making decisions in an informed and accessible way, through the provision of person-centered decision-making that focuses on the wants and needs of the individual receiving support.

Supported decision-making allows an individual with a disability to collaborate with trusted sources and make their own decisions without the need for a substitute decision-maker. Supported decision-making reinforces an individual's autonomy in decision-making, involves the individual in the decision-making process, and recognizes that in some instances assistance may be needed.[480] It is the role of the supporter to help the individual with a disability understand the range of options and the implications of each, leaving the ultimate decision to the individual with a disability.

As defined in the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act,[481] supported decision-making means assistance from one or more persons of an individual's choosing in understanding the nature and consequences of potential personal and financial decisions, including health-related decisions, which enables the individual to make the decisions, and in communicating a decision once made, consistent with the individual's wishes. NCD has recognized the potential autonomy benefits of supported decision-making.[482] In health

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[480] Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination for People with Disabilities, 130-31 (2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

[481] Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) § 102(31) (UNIF. L. COMM'N 2017). UGCOPAA is intended as a "comprehensive guardianship statute for the twenty-first century," completed by the Uniform Law Association, endorsed by the National Guardianship Association, approved by the American Bar Association, and enacted or partially enacted in a number of states.

[482] Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination for People with Disabilities, 131 (2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

care, supported decision-making may mean supports and services from friends, family members, and professionals that help an adult with a disability make their own decisions, including assistance monitoring health; obtaining, scheduling, and coordinating service; understanding information and options; making decisions; and communicating those decisions to others.

The supporter's role may include helping an individual to understand the range of possible treatment options and their implications, placing that information in terms they can understand, and helping the individual apply their own values to the decision. In research contexts, supported decision-making may include a supporter providing such assistance in the informed consent process.[483]

As an example of a reasonable modification in supported decision-making, a health care provider may need to modify their policy on disclosing information to third parties about a medical procedure, if the individual with a disability needs their supporter to help understand their treatment options. A human service provider who normally does not share benefit applicant information with third parties may need to make additional copies of information about an individual with a disability's benefits eligibility to share with their supporter so the supporter can help explain the options available.

In the context of human services, supported decision-making may be used to assist an individual with a disability who requires decision-making support to make decisions regarding different options, choose whether or not to continue a particular course of service-provision, and otherwise express their will and preference with the assistance of a supporter to ensure that the individual fully understands the range of options available and the implications of each. Once the individual has made a decision, the supporter can help to translate, explain, or substantiate that position to medical professionals, human services systems, or other relevant entities. In some

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[483] Benjamin C. Silverman et al., *Supported Decision-Making Can Advance Clinical Research Participation for People with Disabilities*, 28 Nature Med. 2250 (2022), https://doi.org/10.1038/s41591-022-02035-3.

instances, however, the use of supported decision-making will not require any modification at all. For example, a person with a disability may decide to obtain support for a decision by consulting with others ahead of time, but be in a position to communicate a decision to a provider without any reasonable modifications.

When Congress enacted the ADAAA, it expressly provided that a covered entity need not provide a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability solely under the "regarded as" prong.[484] Consistent with Congress' intent that section 504 and the ADA impose similar requirements and be interpreted consistently, the Department proposes to adopt this limitation to reasonable modifications at § 84.68(b)(7)(ii) to ensure parity between section 504 and title II of the ADA. The Department notes, however, that while individuals who meet the definition of disability only under the "regarded as" prong are not entitled to reasonable modifications, they are still protected from discrimination under the general prohibitions against discrimination.

Proposed § 84.68(b)(8) prohibits imposing or applying eligibility criteria that screen out or tend to screen out individuals with disabilities or classes of individuals with disabilities from "fully and equally" enjoying any program or activity, unless the criteria can be shown to be necessary for the provision of the program or activity being offered. This provision concerning eligibility criteria is contained in the current regulation at § 84.13(a) but there it is only applicable in the employment context.

The title II ADA regulations at § 35.130(b)(8) expanded the application of the provision to all covered services, programs, and activities. In the preamble to the title II ADA regulation, DOJ explained that this language comes directly from the HHS section 504 regulation at 45 CFR 84.13, Employment criteria.[485] Proposed § 84.68(b)(8) tracks that ADA provision.

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[484] ADAAA section 6(h) (2008); 42 U.S.C. 12201(h).
[485] 56 FR 35705 (July 26, 1991).

For example, assume that a researcher employed by an entity receiving Federal financial assistance develops a protocol for use in clinical research evaluating a new intervention for diabetes care. In doing so, the researcher articulates inclusion and exclusion criteria for the study and includes a requirement that study participants must not have a visual impairment, based on the determination that patients who have diabetes-related visual impairments would be medically contraindicated from making use of the intervention. In this case, potential study participants with any form of visual impairment are excluded. A determination as to whether a qualified individual with a disability is eligible to participate in a clinical research program made based on broad-based categorical judgments related to their disability but unrelated to the study screens out individuals with disabilities from participating in the research study without being necessary for the operation of the research program. In contrast, a researcher in similar circumstances who excludes only patients with diabetes-related visual impairments from the study is not likely to be unnecessarily screening out individuals with disabilities, as these patients are medically contraindicated while patients with other forms of visual impairment may not be.

Proposed § 84.68(c) states that nothing in the part prohibits a recipient from providing benefits, services, or advantages beyond those required by this part. This paragraph maintains the longstanding approach of the Department, as reflected in § 84.4(c) of the Department's existing section 504 regulations, as well as DOJ's longstanding approach in its title II regulation. In its title II preamble, DOJ explained the rationale for this provision, noting that the ADA provision is derived from existing section 504 regulations. Those regulations permit programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those with disabilities.

In explaining the revisions to the section in the ADA regulations, the title II preamble states that "section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically limited to individuals with disabilities or a particular class of

individuals with disabilities."[486] The preamble explains that although based on existing section 504 regulations, the provision has been revised so that it no longer contains the requirement that the covered program or activity be conducted pursuant to a Federal statute or Executive order designed to benefit only individuals with disabilities. Instead, covered entities "may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities."[487]

Proposed § 84.68(d) states that a recipient shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. This provision is discussed in detail in proposed § 84.76.

Proposed § 84.68(e)(1) states that nothing requires an individual with a disability to accept a modification, aid, service, opportunity, or benefit if the individual chooses not to so accept. As noted above in the discussion of § 84.68(b)(7), the concept of reasonable modifications is derived from section 504 case law.

Proposed § 84.68(e)(2) states that nothing in section 504 authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

Proposed § 84.68(f) includes language that would prohibit a recipient from placing a surcharge on a particular individual with a disability or any group of individuals with disabilities to defray the costs of measures that are required by section 504 or this regulation to ensure nondiscriminatory treatment. In explaining the related ADA provision, DOJ stated in the preamble to the title II ADA regulations that the origin of the provision came from its section 504 regulation which stated that the imposition of the cost of courtroom interpreter services is

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[486] 28 CFR part 35, app. A (addressing 84.130(c)).
[487] *Id.*

impermissible under section 504.[488] This provision is an extension of that established section 504 principle.

Proposed § 84.68(g) prohibits discrimination against an individual or an entity because of the known disability of an individual with whom the individual or the entity is known to have a relationship or association. In *McCullum v. Orlando Regional Healthcare System, Inc.,* the court said that "[i]t is widely accepted that under both the [Rehabilitation Act] and the ADA, non-disabled individuals have standing to bring claims when they are injured because of their association with a disabled person."[489] Many circuit courts that have analyzed section 504 for associational discrimination have agreed with this interpretation.[490] This interpretation accords with the Department's longstanding approach to this issue under section 504.

Proposed § 84.68(h) allows recipients to impose legitimate safety requirements that are necessary for the safe operation of their programs or activities as long as the safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities. This concept is derived from *School Board of Nassau County, Florida v. Arline,*[491] a section 504 case that held that individuals with disabilities cannot be excluded from programs based on concerns that they pose a risk to others unless the recipient can provide current, objective evidence regarding the nature, severity, and duration of the risk and the likelihood that the risk will occur. The basic purpose of section 504 is to ensure that

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[488] 45 CFR part 84, app. A (addressing § 84.130(f)).

[489] 768 F. 3d 1135, 1142 (11th Cir. 2014).

[490] *See e.g., Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 279 (2d Cir. 2009) (permitting associational discrimination claim under section 504); *Addiction Specialists v. Twp. of Hampton*, 411 F. 3d 399, 405 (3d Cir. 2005) (". . . the broad language of the . . .[Rehabilitation Act] evidences a Congressional intent to confer standing on entities like ASI to bring discrimination claims based on their association with disabled individuals."); *Durand v. Fairview Health Servs.,* 902 F.3d 836, 844 (8th Cir. 2018) (recognizing associational standing under ADA and RA as discussed in *Loeffler* and *McCullum*). Despite several circuit court holdings, case law is not unanimous in recognizing associational claims under section 504. In *Todd v. Carstarphen,* 236 F. Supp. 3d 1311, 1341–42 (N.D. Ga. 2017), the court distinguished associational claims under title II and title III, finding no associational standing under title II and requiring the Rehabilitation Act associational claims to be analyzed in parallel with the relevant ADA title. That case did acknowledge that it was in tension with existing case law outside of its circuit. *See id.* at 1342 n.59.

[491] 480 U.S. 273 (1987).

individuals with disabilities are not "denied jobs or other benefits because of the prejudiced attitudes or ignorance of others."[492]

Proposed § 84.68(i) states that this rule does not provide a basis for a claim that an individual without a disability is subject to discrimination because of a lack of disability, including any claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

§ 84.69 Illegal Use of Drugs.

Proposed § 84.4 adopts the ADA's definition of disability. That definition states that a "physical or mental impairment" includes drug addiction and alcoholism.[493] Although the existing section 504 regulation at § 84.3(j)(2)(i) does not include drug addiction and alcoholism as physical or mental impairments, the interpretive guidance states that alcoholism and drug addiction are "physical or mental impairments" within the meaning of the Rehabilitation Act. Therefore, an individual with alcoholism or drug addiction is included within section 504's definition of an individual with a disability if the impairment substantially limits one or more of their major life activities.[494] Accordingly, while the definition of "disability" in this proposed rule adopts the ADA's definition, which states that physical or mental impairments include drug addiction and alcoholism, the inclusion of these impairments is consistent with HHS's longstanding interpretation of its Rehabilitation Act regulation. An individual with a substance or alcohol use disorder is a protected individual with a disability if their impairment substantially limits one of their major life activities.

However, proposed § 84.69 generally excludes from protection individuals engaged in the current illegal use of drugs if a recipient takes action against them based on that current illegal drug use, except as specified in proposed § 84.69(b). The ADA amended the

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[492] *Id.* at 284.
[493] 28 CFR 35.108(b)(2).
[494] 45 CFR part 84, app. A (addressing § 84.3).

Rehabilitation Act to exclude individuals currently engaging in the illegal use of drugs from section 504 coverage when a covered entity acts on the basis of such use.

Proposed § 84.69(a)(1) states that, except as provided in paragraph (b), this part does not prohibit discrimination based on an individual's current illegal use of drugs. Consistent with the language in section 705(10) of the Rehabilitation Act, the proposed section distinguishes between illegal use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Proposed § 84.69 does not affect use of controlled substances pursuant to a valid prescription under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by this section (although persons with alcohol use disorders are individuals with disabilities, subject to the protections of the statute).

A distinction is made between the use of a substance and the status of being addicted to that substance. Section 84.4, the definition of disability, includes substance use disorder in the list of physical impairments. Since the addiction substantially limits major life activities, addicts are individuals with disabilities protected by the Act. In other words, an individual with a substance use disorder cannot use the fact of their substance use as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are individuals with substance use disorders, but to provide protection to individuals with substance use disorders as long as they are not currently using drugs.

Another distinction is the difficult one between current use and former use. As defined in proposed § 84.10 and 28 CFR 35.104 of the ADA title II regulations, "current illegal use of drugs" means "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem." Proposed § 84.69(a)(2) describes the circumstances in which recipients are prohibited from discriminating against an individual who is not engaging in current illegal use of drugs. Paragraph (a)(2)(i) specifies that such an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully is protected. Paragraph (a)(2)(ii) clarifies that such an individual who is currently participating in a supervised rehabilitation program is protected. Paragraph (a)(2)(iii) provides that such an individual who is erroneously regarded as engaging in current illegal use of drugs is protected.

Paragraph (b)(1) provides an exception to the exclusion of current illegal users of drugs from the protections of section 504. It prohibits exclusion of an individual from the benefits of programs or activities providing health services and services provided under the Rehabilitation Act subchapters I (Vocational Rehabilitation Services), II (Research and Training), and III (Professional Development and Special Projects and Demonstrations) on the basis of that individual's current illegal use of drugs if the individual is otherwise entitled to such services.

The exception is different in some respects than the one contained in the ADA. The ADA prohibits the denial of health and drug rehabilitation services to an individual on the basis of that individual's current illegal use of drugs if the individual is otherwise entitled to such services.[495] However, while section 504, like the ADA, prohibits the denial of health and drug rehabilitation services to such an individual, on the basis of that individual's current illegal use of drugs if the individual is otherwise entitled to such services, section 504 prohibits the denial of other services as well, including vocational rehabilitation services provided under subchapter I of the

[495] 42 U.S.C. 12114.

Rehabilitation Act.[496] Thus, if an individual who is currently using illegal drugs approaches a recipient requesting health or drug rehabilitation services, the recipient must provide those services if the individual is otherwise entitled to such services. Failure to do so would violate the ADA and would also violate section 504.

However, assume that the individual who is currently using illegal drugs is not seeking health or drug rehabilitation services but, instead, is seeking vocational rehabilitation services and is otherwise entitled to these services, and a recipient denies those vocational rehabilitation services on the basis of the individual's current illegal use of drugs. In this situation, proposed § 84.69(b) has been violated because vocational rehabilitation services are provided under subchapter I of the Rehabilitation Act. However, the ADA has not been violated because, in the ADA, the exception that mandates treatment even for current users of illegal drugs applies only to health and drug rehabilitation services. Although § 84.69(a), the general prohibitions paragraph, is added to align with the ADA title II regulations, the statutory language of the ADA is different than the statutory language of the Rehabilitation Act with regard to required provision of services to current illegal drug users. Accordingly, proposed § 84.69(b) reflects that difference.

A recipient may not refuse treatment to an individual in need of the services it provides on the grounds that the individual is illegally using drugs, but it is not required by this section to provide services that it does not ordinarily provide. For example, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat an individual's burns on the grounds that the individual is illegally using drugs. This is a longstanding position of the Department under section 504. Appendix A to the existing rule makes clear that denying

[496] 29 U.S.C. 705 (20)(C)(iii).

treatment to an individual with a [substance use disorder] who is otherwise entitled to such treatment for unrelated conditions is prohibited.[497]

Paragraph (b)(2) provides that a drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

Paragraph (c)(1) addresses testing for illegal use of drugs. This paragraph is derived from the Rehabilitation Act at 29 U.S.C. 705(20)(C), and similar language in the title II regulations, which allows recipients to "adopt or administer reasonable policies or procedures, including but not limited to drug testing," designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs. This paragraph does not authorize inquiries, tests, or other procedures that would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of "illegal use of drugs."

Paragraph (c)(2) states that the section is not to be "construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs."

§ 84.70 Maintenance of accessible features.

This provision provides that a recipient must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by individuals with disabilities. The failure to maintain accessible features can deny equal opportunities, and thus discriminate against individuals with disabilities, as surely as the failure to construct those accessible features in the first place. The ADA and the Rehabilitation Act generally are interpreted using the same legal standards and, accordingly, the ADA analysis applies with full force to the Rehabilitation Act.[498] Failure of a recipient to ensure that accessible

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[497] 45 CFR part 84, app. A (addressing § 84.3).

[498] *See, e.g., Frame v. City of Arlington*, 657 F.3d 215, 223–24 (5th Cir. 2011) (en banc) (" The ADA and the Rehabilitation Act generally are interpreted in *pari materia.*"); *Liberty Res. v. City of Phila.,* Civ. Action 9-3846, *2 n.4 (E.D. Pa. Oct. 27, 2021) ("The court will consider the Rehabilitation Act claims

routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part. Similarly, storing excess furniture or supplies in the larger, accessible toilet stall, putting potted plants in front of the elevator buttons in the building lobby, or, in northern climates, placing the ploughed snow in the accessible spaces in the hospital parking lot could make these facilities and the programs they support inaccessible to persons with disabilities.

This provision also addresses the situation where the 2010 Standards reduce either the technical requirements or the number of required accessible elements below that required by UFAS. In such a case, the recipient may choose to reduce the technical requirements or the number of accessible elements in a covered facility in accordance with the requirements of the 2010 Standards.

This paragraph is intended to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of section 504. However, allowing obstructions or "out of service" equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance.

§ 84.71 Retaliation or coercion

Proposed § 84.71(a) provides that a recipient shall not discriminate against an individual because that individual has opposed any act or practice made unlawful by this part, or because that individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under section 504 or this part.

Proposed § 84.71(b) provides that a recipient shall not coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that

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together with the ADA claims because the substantive standards for determining liability are the same." (quotation marks and citation omitted)). It further held that "[p]ractical reasons also demand this result: while a street resurfacing is a discrete act, the failure to maintain a curb ramp is not").

individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by section 504 or this part.

This provision protects not only individuals who allege a violation of section 504 or this part, but also any individuals who support or assist them. This section applies to all investigations or proceedings initiated under section 504 or this part without regard to the ultimate resolution of the underlying allegations.

§ 84.72 Personal devices and services.

Proposed § 84.72, Personal devices and services, states that the provision of personal devices and services is not required by the section 504 regulation. The existing section addressing personal devices and services is contained in § 84.44(d)(2), the communications section in Subpart D, Postsecondary Education, which is retained in the proposed rule. Section § 84.72 supplements that section. A wide range of the programs funded by the Department incorporate the provision of personal care services. For example, hospitals, nursing homes, child welfare services, and home and community-based care by their very nature include the provision of personal care devices and services. Where personal services are customarily provided as part of recipient's programs or activities, then these personal services should also be provided to persons with disabilities.

§ 84.73 Service animals.

The Department proposes to add a new "service animals" section to its regulation, which tracks the title II regulations. This new regulation is consistent with the recognition by the Third Circuit in *Berardelli v. Allied Services Institute of Rehabilitation Medicine*[499] that the ADA's "service animal regulations, although technically interpreting the ADA, are no less relevant to the interpretation of the RA [Rehabilitation Act]."[500] There are many similar service animal cases

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[499] 900 F. 3d 104 (3d Cir. 2019).
[500] *Id.* at 120.

that were brought both under section 504 and the ADA.[501] Throughout the years, OCR has processed numerous complaints alleging that exclusions of service animals violated section 504, including instances where service animals were denied entry to hospitals, specialist clinics, and emergency departments.[502] OCR has provided technical assistance to many recipients concerning service animal issues.

As defined in proposed § 84.10, a service animal is "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or

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[501] *See, e.g., C.G. v. Saucon Valley Sch. Dist.,* 571 F.Supp.3d 430, 443-44 (E.D. Pa. Nov. 18, 2021) ("C.G. has shown a substantial likelihood of success on the merits because there is a substantial likelihood that George qualifies as a service animal because he has been trained to perform tasks that related to one or more of C.G.'s disabilities."); *E.F. v. Napoleon Cty. Sch.,* No. 12-15507, 15, 32 (E.D. Mich. Sept. 25, 2019) (finding that section 504 and the ADA "are quite similar in purpose and scope, such that the analysis of a title II ADA claim roughly parallels one brought under Section 504 of the Rehabilitation Act." The court further stated that "…E.F. has the right to request a service dog as an accommodation for her disability."); *Alboniga v. Sch. Bd. of Broward Cty.,* 87 F. Supp. 3d 1319, 1345 (S.D. Fla. 2015) ("Defendant is permanently enjoined to provide the minor plaintiff A.M. reasonable accommodation in assisting him with use of his service animal. . .."); *Hurley v. Loma Linda Univ. Med. Ctr.,* No. CV12-5688 DSF, 15, 18 (C.D. Cal. Feb. 12, 2014) (noting that Casey repeatedly asking Hurley for documentation providing that her dog was indeed a service animal "clearly violated the ADA" and "[b]ecause Hurley was subjected to disability discrimination under the ADA, she was also subjected to discrimination under Section 504." *Id.* at 18).

[502] For example, one OCR complaint alleged that the recipient refused to allow a service animal when an individual was visiting his son in the hospital. Other complaints have alleged that service animals have been barred from accompanying individuals in hospital emergency rooms and specialty clinics.

interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition."

The definition limits service animals to dogs. No other species of animals is included. Limiting the species recognized as service animals provides greater predictability to recipients and provides added assurance of access for individuals with disabilities who use dogs as service animals.

The proposed definition states that a service animal must be "individually trained to do work or perform tasks for the benefit of an individual with a disability." The work or tasks must be directly related to the individual's disability. The definition provides an illustrative and non-exhaustive list of examples of work or tasks. These include alerting individuals who are deaf or hard of hearing to the presence of people or sounds and providing non-violent protection or rescue work. The phrase "non-violent protection" is used to exclude so-called "attack dogs" or dogs with traditional "protection training" as service animals. The proposed regulation also notes that the crime-deterrent effect of a dog's presence, by itself, does not qualify as work or tasks for purposes of the service animal definition.

The proposed definition states that "the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for purposes of this definition." Unless the dog is individually trained to do something that qualifies as work or a task, the animal is a pet or support animal and does not qualify for coverage as a service animal. A pet or support animal may be able to discern that the individual is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from a pet or support animal.

An example of a service animal would be a psychiatric service dog that can help some individuals with dissociative identity disorder remain grounded in time or place. This animal does work or performs a task that would qualify it as a service animal as compared to an

untrained emotional support animal whose presence affects a person's disability. It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal. The process must have two steps: recognition and response. For example, if a service animal senses that a person is about to experience an exacerbation of their mental health symptoms, and it is trained to respond, for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event. Other tasks performed by psychiatric service animals may include reminding the individual to take medicine, providing safety checks or room searches for persons with post-traumatic stress disorder, interrupting self-harming behaviors, and removing disoriented individuals from dangerous situations. The difference between an emotional support animal and a psychiatric service animal is the work or tasks that the animal performs.

Proposed § 84.73(a) states that, generally, a recipient shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability. The section reflects a specific application of the general requirement in proposed § 84.68(b)(7) that a recipient make reasonable modifications to its policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the modifications would fundamentally alter the nature of the health service, program or activity.

For example, assume that a recipient permits a service animal in a waiting area of a clinic where an individual with severe allergies to dog dander is sitting. As DOJ has explained in guidance entitled "ADA Requirements: Service Animals," "Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom or at a homeless shelter, they both

should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility." [503]

Although permitting the presence of a service animal will usually not constitute a fundamental alteration, there are some exceptions. In its guidance entitled "Frequently Asked Questions about Service Animals and the ADA,"[504] DOJ provided the following example: "[A]t a boarding school, service animals could be restricted from a specific area of a dormitory reserved specifically for students with allergies to dog dander." Similarly, as applied to the health care context, for example, at a hospital, a service animal could be restricted from a specific area of patient rooms in a hospital reserved specifically for individuals with allergies to dog dander. A service animal could also be restricted from a class being given at a long-term care facility if it continually barks and interrupts the class as long as other types of noise are likewise not tolerated.

Proposed § 84.73(b) contains two exceptions to the requirement that a recipient permit the use of service animals by individuals with disabilities: (1) if the animal is out of control and the animal's handler does not take effective actions to control it, or (2) if the animal is not housebroken.

There are occasions when service animals are provoked to disruptive or aggressive behavior by agitators or troublemakers, as in the case of a blind individual whose service dog is taunted or pinched. While all service animals are trained to ignore and overcome these types of incidents, misbehavior in response to provocation is not always unreasonable. In circumstances where a service animal misbehaves or responds reasonably to a provocation or injury, the recipient must give the handler a reasonable opportunity to gain control of the animal. Further, if the individual with a disability asserts that the animal was provoked or injured, or if the recipient

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[503] U.S. Dep't of Justice, ADA Requirements: Service Animals (2010), www.ada.gov/resources/service-animals-2010-requirements.
[504] U.S. Dep't of Justice, Frequently Asked Questions about Service Animals and the ADA (2015), https://archive.ada.gov/regs2010/service_animal_qa.html.

otherwise has reason to suspect that provocation or injury has occurred, the recipient should seek to determine the facts and, if provocation or injury occurred, the recipient should take effective steps to prevent further provocation or injury, which may include asking the provocateur to leave the recipient's facility.

Proposed § 84.73(c) states that if a recipient properly excludes a service animal under § 84.73(b), it shall give the individual with a disability the opportunity to participate in the program or activity without having the service animal on the premises.

Proposed § 84.73(d) states that a service animal shall be under the control of its handler. It shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).

Proposed § 84.73(e) states that a recipient is not responsible for the care or supervision of a service animal. There may be occasions when a person with a disability is confined to bed in a hospital for a period of time and may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with disabilities, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied.

Proposed § 84.73(f) states that a recipient shall not ask about the nature or extent of a person's disability. In its guidance entitled "Frequently Asked Questions about Service Animals and the ADA,"[505] DOJ explained: "In situations where it is not obvious that the dog is a service animal, [a recipient] may ask . . . two specific questions: (1) [I]s the dog a service animal required because of a disability? and (2) [W]hat work or task has the dog been trained to

[505] U.S. Dep't of Justice, Frequently Asked Questions about Service Animals and the ADA (2015), https://archive.ada.gov/regs2010/service_animal_qa.html.

perform?" Generally, these inquiries cannot be made when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability. A recipient shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

Proposed § 84.73(g) provides that individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of the recipient's facilities where members of the public, participants in programs or activities, or invitees, as relevant, are allowed to go.

Proposed § 84.73(h) provides that a recipient shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a recipient normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by their service animal.

Proposed § 84.73(i) addresses miniature horses. This provision is added to ensure consistency between this regulation and the regulation under title II of the ADA which has long recognized that use of miniature horses may need to be permitted as a reasonable modification. The section states that a recipient shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to work or perform tasks for the benefit of the individual with a disability. The traditional service animal is a dog, which has a long history of guiding individuals who are blind or have low vision, and over time dogs have been trained to perform an even wider variety of services for individuals with all types of disabilities. Miniature horses can be a viable alternative to dogs for individuals with allergies, or for those whose religious beliefs preclude the use of dogs. Also, miniature horses have a longer life span and greater strength as compared to dogs. Specifically, miniature horses can provide service for more than 25 years while dogs can provide service for approximately seven years and, because of their strength, miniature horses can provide services that dogs cannot provide. Accordingly, use of

miniature horses reduces the cost involved to retire, replace, and train replacement service animals.

The miniature horse is not one specific breed, but may be one of several breeds, with distinct characteristics that produce animals suited to service animal work. They generally range in height from 24 inches to 34 inches and generally weigh between 70 and 100 pounds. These characteristics are similar to those of large breed dogs. Like dogs, miniature horses can be trained to be housebroken. They are trained to provide a wide array of services, primarily guiding individuals who are blind or have low vision, pulling wheelchairs, providing stability and balance for individuals with disabilities that impair the ability to walk, and supplying leverage that enables a person with a mobility disability to get up after a fall. They are particularly effective for large stature individuals.

The miniature horse is not included in the definition of service animal, which is limited to dogs. However, the proposed section makes it clear that a recipient must make reasonable modifications in policies, practices, or procedures to permit use of a miniature horse by an individual with a disability if the animal has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The recipient may take into account a series of assessment factors in determining whether to allow a miniature horse into a specific facility. These include the type, size, and weight of the miniature horse; whether the handler has sufficient control of the miniature horse; whether the miniature horse is housebroken; and whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. In addition, paragraphs (c)-(h) of this section, which are applicable to dogs, also apply to miniature horses.

§ 84.74 Mobility devices.

The title II regulations were amended in 2010 to include a section on mobility devices. In 1991 when the initial ADA regulations were published, there was no pressing need to define the terms "wheelchair" or "other power-driven mobility device," because relatively few individuals

with disabilities were using nontraditional mobility devices in 1991. However, since the 1991 title II regulations and amendments to the ADA regulations in 2010, the choices of mobility devices available to individuals with disabilities have increased dramatically. The ADA regulation, 28 CFR 35.137, on which proposed § 84.74 is modeled, addresses the use of unique mobility devices, concerns about their safety, and the parameters for the circumstances under which these devices must be accommodated. section 504 cases have also addressed power-driven mobility devices.[506] Advances in technology have given rise to new power-driven devices that are not necessarily designed specifically for people with disabilities but are being used by some people with disabilities for mobility. The term "other power-driven mobility devices" was developed in the ADA regulations and is adopted here to refer to any mobility device powered by batteries, fuel, or other engines, whether or not they are designed primarily for use by individuals with mobility disabilities, for the purpose of locomotion. The term "other power-driven mobility devices" is defined in § 84.10 of this proposed rule. Such devices include Segways®, golf carts, and other devices designed to operate in non-pedestrian areas.

The Department is aware that its recipients have encountered the increased use of "other power-driven mobility devices," such as Segways®. Including regulatory provisions on how recipients should approach allowing such vehicles in a variety of health care settings is necessary to provide access to persons with disabilities who use these devices and also to ensure the safe and efficient operations of the programs and activities.

Under this proposed regulation, recipients must allow individuals with disabilities who use these devices into all areas where the public is allowed to go, unless the recipient can demonstrate that the particular type of device cannot be accommodated because of legitimate

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[506] *See, e.g., Meagley v. City of Little Rock,* Case No. 4:09-cv-226-DPM, 16 (E.D. Ark. Aug. 13, 2010) *aff'd,* 639 F. 3d 384 (8th Cir. 2011). In *Meagley,* the plaintiff rented an electric scooter at a city zoo, the scooter slipped on a bridge, and the plaintiff suffered injuries. The court held that both the ADA and section 504 had been violated, stating that "Meagley proved, without question, that the City violated her rights under both Title II of the ADA and section 504 of the Rehabilitation Act. The steep-sloped bridge where Meagley's accident occurred did not comply with the ADA Accessibility Guidelines."

safety requirements. Such safety requirements must be based on actual risks, not on speculation or stereotypes about a particular class of devices or how individuals will operate them.

The proposed rule at § 84.74(b)(2) lists the factors that recipients must consider in determining whether to permit other power-driven mobility devices on their premises. They include the type, size, weight, dimensions, and speed of the device; the volume of pedestrian traffic (which may vary at different times of the day, week, month, or year); the facility's design and operational characteristics, such as its square footage, whether it is indoors or outdoors, the placement of stationary equipment, or devices, and whether it has storage space for the device if requested by the individual; whether legitimate safety standards can be established to permit the safe operation of the device; and whether the use of the device creates a substantial risk of serious harm to the environment or natural or cultural resources or poses a conflict with Federal land management laws and regulations.

As DOJ has set forth in a guidance document entitled "Wheelchairs, Mobility Aids, and Other Power-Driven Mobility Devices," using these assessment factors, a recipient may decide, for example, that it can allow smaller electric devices like Segways® in a facility, but cannot allow the use of larger electric devices like golf carts for safety reasons, because the facility's corridors or aisles are not wide enough to accommodate these vehicles.[507] It is likely that many recipients will allow the use of Segways® generally, although some may determine that it is necessary to restrict their use during certain hours or on particular days when pedestrian traffic is particularly dense. Large hospitals with multiple departments and specialties may also decide that such devices can be safely and appropriately allowed in certain parts of the facilities, but not in others. It is also likely that recipients will prohibit the use of combustion-powered devices from all indoor facilities and perhaps some outdoor facilities with heavy pedestrian traffic.

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[507] *ADA Requirements: Wheelchairs, Mobility Aids, and Other Power-Driven Mobility Devices,* U.S. Dep't of Justice, Civil Rts. Div., https://www.ada.gov/resources/opdmds/ (last updated Jan. 2014).

Proposed § 84.74(c) addresses the types of questions that a recipient's staff may ask of those using other power-driven mobility devices. Recipients may not ask individuals using such devices about their disability but may ask for a credible assurance that the device is required because of a disability. If the person presents a valid, State-issued disability parking placard or card or a State-issued proof of disability, that must be accepted as credible assurance on its face. However, recipients cannot demand or require the presentation of a valid disability placard or card, or state-issued proof of disability, as a prerequisite for use of a power-driven mobility device, because not all persons with mobility disabilities have such means of proof. If the person does not have this documentation, but states orally that the device is being used because of a mobility disability, that also must be accepted as credible assurance, unless the person is observed doing something that contradicts the assurance. For example, as DOJ's guidance document sets forth, if a person is observed running and jumping, that may be evidence that contradicts the person's assertion of a mobility disability. However, the fact that a person with a disability is able to walk for a short distance does not necessarily contradict a verbal assurance – many people with mobility disabilities can walk but need their mobility device for longer distances or uneven terrain. This is particularly true for people who lack stamina, have poor balance, or use mobility devices because of respiratory, cardiac, or neurological disabilities.

§ 84.75 Direct threat.

Proposed § 84.10 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. This is similar to the definition in the title II ADA regulations although this proposed definition contains a subsection applicable to employment. Proposed § 84.75 likewise is similar to the direct threat provisions in the title II ADA regulations at 28 CFR 35.139 but, as in the definition, it contains a subsection applicable to employment, which uses a distinct definition of direct threat.

This provision of the ADA regulation is modeled on the section 504 Supreme Court case of *School Board of Nassau County v. Arline.*[508] In that case, the Supreme Court established that exclusion of persons with disabilities from programs based on concerns that they pose risk to others can violate section 504 unless the recipient can provide current, objective evidence regarding the nature, severity, and duration of the risk and the likelihood that the risk will occur. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the recipient's policies, practices, or procedures will not eliminate that risk.[509]

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arlin*e.[510] Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health. These principles have been the law since *Arline* was decided in 1987, and this proposed section would merely codify them into regulatory text.

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[508] 480 U.S. 273 (1987).
[509] *Id. at* 288 n.16.
[510] *Id.* at 287-88.

In the medical treatment context, when determining whether a recipient is required to treat an individual with a disability, the recipient must assess whether an individual poses a direct threat to the health or safety of others. Proposed § 84.56(b)(1) prohibits denial of medical treatment based on bias or stereotypes about a patient's disability.[511] A recipient cannot refuse to treat patients they would normally treat but for the patient having a separate disability (for which the recipient does not normally provide treatment). For example, an Ebola specialist who refuses to treat an Ebola patient —- who also has HIV — on the basis of the patient's HIV status cannot refuse to treat the patient because of an assessment that the individual poses a direct threat to physician's health or safety unless there are no reasonable modifications that could mitigate the risk.

§ 84.76 Integration.

The current section 504 regulation includes an "integration mandate" that requires recipients of Federal funds to administer programs and activities "in the most integrated setting appropriate to the … needs" of the person with a disability.[512] The ADA title II regulation similarly requires a public entity to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[513] In the decades since the Department's initial integration mandate language was published in the 1977 section 504 regulation, a substantial body of case law has developed with respect to obligations of covered entities to serve individuals with disabilities in the most integrated setting appropriate to the qualified person's needs under section 504 and title II of the ADA. The respective integration obligations under section 504 and the ADA have been interpreted consistently, with

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[511] The medical treatment provisions of this rule involve a straightforward application of the general prohibitions against disability discrimination and, therefore, do not alter the direct threat analysis in any way.
[512] 45 CFR 84.4(b)(2).
[513] 28 CFR 35.130(d).

claims brought under both laws "generally treated identically."[514] The Department proposes to update the section 504 regulation consistent with cases from the U.S. Supreme Court and lower courts, as well as DOJ's interpretation of the integration mandate under title II,[515] adding greater specificity to the obligations of recipients to serve persons with disabilities in the most integrated setting appropriate.

In *Olmstead v. L.C.*, the Supreme Court established that unjustified isolation is a form of discrimination under the title II integration mandate. [516] As the Court interpreted the law, public entities are required to provide community-based services to persons with disabilities when such services are appropriate,[517] the affected persons do not oppose community-based treatment, and

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[514] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, note 4 (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited June 18, 2022); *see also, e.g., Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998) ("cases interpreting either are applicable and interchangeable."); *Pashby v. Delia,* 709 F.3d 307, 321 (4th Cir. 2013) ("We consider their Title II and section 504 claims together because these provisions impose the same integration requirements."). *See also Radaszewski ex Rel. Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004); *Frederick L. v. Dep't of Public Welfare of Pennsylvania*, 364 F.3d 487, 491 (3d Cir. 2004); *Fisher v. Oklahoma Health Care Auth*., 335 F.3d 1175, 1179 n. 3 (10th Cir. 2003); *Bruggeman ex Rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 912 (7th Cir. 2003); *M.R. v. Dreyfus*, 697 F.3d 706, 733 (9th Cir. 2012).

[515] U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Feb. 22, 2023).

[516] 527 U.S. 581 (1999).

[517] Courts and the Department of Justice have recognized that the "appropriateness" of community-based services is not necessarily limited to the determination of a treating professional. DOJ's Olmstead guidance states "An individual may rely on a variety of forms of evidence to establish that an integrated setting is appropriate. A reasonable, objective assessment by a public entity's treating professional is one, but only one, such avenue… People with disabilities can also present their own independent evidence of the appropriateness of an integrated setting, including, for example, that individuals with similar needs are living, working and receiving services in integrated settings with appropriate supports. This evidence may come from their own treatment providers, from community-based organizations that provide services to people with disabilities outside of institutional settings, or from any other relevant source." U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (2020), Question 4 https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Feb. 22, 2023). This guidance is consistent with court holdings that the public entity's determination of appropriateness is not required for the individual with a disability to show that a community based setting is appropriate. *See Frederick L. v. Dep't of Pub. Welfare,* 157 F.Supp.2d 509, 539–40 (E.D.Pa. 2001) (denying defendants' motion to dismiss Olmstead claims and rejecting the argument that Olmstead "require[s] a formal recommendation for community placement."); *Disability Advocates, Inc. v. Paterson*, 653 F.Supp.2d 184, 258–59 (E.D.N.Y. 2009) (requiring a determination by treating professionals, who are contracted by the State, "would eviscerate the integration mandate" and "condemn the placements of [individuals with disabilities in adult homes] to the virtually unreviewable discretion" of the State and its contractors); *Day v. D.C.,* 894 F.

the placement in a community setting can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity.[518] Since *Olmstead*, courts have interpreted analysis of the integration mandate of the ADA and section 504 consistently.[519] The proposed rule applies *Olmstead* in the context of section 504. The most integrated setting is defined in proposed § 84.10 as "a setting that provides individuals with disabilities the opportunity to interact with nondisabled persons to the fullest extent possible; is located in mainstream society; offers access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; and affords individuals choice in their daily life activities. This language is consistent with the description of "most integrated setting" in title II guidance.[520]

HHS has played a significant role in implementation of the *Olmstead* decision for decades. Through the Medicaid program, HHS is also the nation's primary funder of home and community-based services (HCBS). OCR has intervened and assisted in scores of *Olmstead* complaints, many of which involved State agencies administering long-term services and supports. OCR has received complaints filed by or on behalf of a wide range of individuals, including individuals with physical, psychiatric, intellectual, and developmental disabilities, and individuals of all ages. OCR also coordinates with DOJ on *Olmstead* complaints, including through consultations, case referrals (both to and from DOJ) and collaboration on cases. As a result of OCR's efforts, many individuals have transitioned from an institution to the community, and many individuals have avoided unnecessary institutionalization. OCR has also played an important role in providing technical assistance to states and other entities about the integration

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Supp. 2d 1, 23–24 (D.D.C. 2012) (rejecting District's assertion that plaintiffs must be subject to the District's determination of whether or not such services are appropriate to meet their needs).

[518] *Olmstead,* 527 U.S. at 607.

[519] *See, e.g., Guggenberger v. Minn.,* 198 F. Supp. 3d 973, 1024 (D. Minn. 2016) (applying same analysis to title II and section 504 integration mandate claims).

[520] 28 CFR pt. 35, app. A (2010) (addressing § 35.130); *see also* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited June 18, 2022).

mandate. Despite this work, *Olmstead* issues continue to comprise a significant portion of disability-related complaints received by OCR.

Additionally, changes in the administration of health services and long-term services and supports necessitate rulemaking to address unnecessary segregation in evolving service models. In recent years, there has been a growing shift away from traditional fee-for-service health care towards alternative payment models and other new approaches. Many recipients have adopted pay-for-performance frameworks and contract with third-party entities, such as accountable care organizations, pharmaceutical benefit managers, and managed care organizations, for the delivery or management of services to individuals with disabilities. The growing reliance on managed care in State Medicaid programs and other changes, such as quality incentives, quality assurance activities, and risk-sharing arrangements, necessitate addressing unnecessary segregation in these emerging models in this proposed rule.

The COVID-19 public health emergency underscored the importance of the integration mandate. During the pandemic, community services to people with disabilities have frequently been disrupted, forcing many to enter or remain in segregated settings that elevated their risk of infection and death and isolated them from the broader community.[521] Such segregation is not made permissible by virtue of a public emergency. The Department notes that civil rights protections, including the integration mandate, remain applicable during public health emergencies, natural disasters, and other public crisis.[522] While the Department is also proposing an integration mandate provision under Section 1557, that provision relates to benefit design in

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[521] *See* Nat'l Council on Disability, 2021 Progress Report: The Impact of COVID-19 on People with Disabilities, 89-91 (2021), https://ncd.gov/progressreport/2021/2021-progress-report; *see also, e.g.,* Scott D. Landes et al., *Covid-19 Outcomes Among People With Intellectual and Developmental Disability Living in Residential Group Homes in New York State*, 13 Disability & Health J. 13, no. 4 (2020); Scott D. Landes et al., *Covid-19 Outcomes Among People With Intellectual and Developmental Disability in California: The Importance of Type of Residence and Skilled Nursing Care Needs*, 14 Disability & Health J. 14, no. 2 (2021) (COVID-19 death rates were consistently higher for people with IDD living in congregate residential settings (such as group homes) and receiving 24/7 nursing services.).

[522] *See, e.g.,* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID-19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.

health insurance coverage or other health-related coverage. The proposed integration provision in this rule does not relate to benefit design or other health insurance coverage issues. The obligations in this proposed provision include many that are also articulated in Section 1557, but also extend to a broader range of programs and activities by recipients of Federal financial assistance.

The Department proposes a new § 84.76 articulating the obligations of recipients under section 504 to serve individuals with disabilities in the most integrated setting appropriate to their needs, as mandated in proposed § 84.68(d).

Application.

Proposed § 84.76(a) clarifies that the integration mandate applies to programs or activities that receive Federal financial assistance from the Department and to recipients that operate such programs and activities.

Although the specific factual context of the *Olmstead* decision involved residential services financed through the Medicaid program, the integration mandate by its terms has always been applied more broadly to any administration of programs or activities by a recipient. The integration mandate has been applied to State and local government service systems that rely on a range of residential and non-residential settings, including nursing facilities,[523] publicly and privately operated mental health facilities,[524] Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF-IIDs)[525] and board and care homes.[526] Courts and DOJ have also applied *Olmstead* to segregated non-residential settings such as sheltered employment

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[523] *See, e.g., Radaszewski ex Rel. Radaszewski v. Maram*, 383 F. 3d 599 (7th Cir. 2004); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009); *Vaughn v. Walthall*, 968 F. 3d 814 (7th Cir. 2020).

[524] *See, e.g., Pa. Protection and Advocacy, Inc. v. Pa. Dep't of Pub. Welfare,* 402 F. 3d 374 (3d Cir. 2005); *Martin v. Taft*, 222 F. Supp. 2d 940, 981 (D. Ohio 2002); *United States v. Miss.*, 400 F. Supp. 3d 546 (S.D. Miss. 2019); *Frederick L. v. Dep't of Pub. Welfare of Pa.* 364 F. 3d 487 (3d Cir. 2004); *Guggenberger v. Minn*, 198 F. Supp. 3d 973 (D. Minn. 2016).

[525] *See, e.g., ARC of Wash. State, Inc. v. Braddock,* 427 F. 3d 615 (9th Cir. 2005); *Ball v. Kasich*, 244 F. Supp. 3d 662 (S.D. Ohio 2017).

[526] *See, e.g., Pashby v. Delia*, 709 F. 3d 307 (4th Cir. 2013).

programs.[527] Segregation can occur in residential services, day and employment services, and other services that people with disabilities may receive. For example, a recipient State agency that provides employment or day habilitation services to individuals with disabilities only in congregate settings may violate section 504. Consistent with this longstanding body of precedent and administrative pronouncements and the existing section 504 regulation, we propose to apply the requirement to administer a program or activity in the most integrated setting appropriate to the person's needs to all programs and activities of recipients of HHS funding.

The Department also notes that although the plaintiffs in *Olmstead* had intellectual and mental health disabilities, the integration mandate applies to all types of disabilities. Courts and Federal enforcement agencies have applied *Olmstead* in cases involving people with a wide range of disabilities, including people with intellectual and developmental disabilities, other mental disabilities, physical disabilities, older adults with disabilities, and children with complex medical needs.[528] OCR has received *Olmstead* complaints filed by or on behalf of a wide range of individuals, including individuals with physical and mental disabilities.

Discriminatory action prohibited.

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[527] *See U.S. v. R.I.*, 1:14-CV-00175 (D.R.I. 2014); *U.S. v. R.I. and City of Providence*, 1:13-CV-00442 (D.R.I. 2013); *Lane v. Brown* (formerly *Lane v. Kitzhaber*), 166 F. Supp. 1180 (D. Or. 2016); *Steward v. Roppe Corp*, 3:18-CV-2905 (N.D. Oh. Nov. 12, 2020).

[528] *See, e.g.*, *Townsend v. Quasim*, 328 F. 3d 511 (9th Cir. 2003) (finding covered disabilities included diabetic peripheral vascular disease and bilateral amputation); *Davis v. Shah,* 821 F. 3d 231 (2d Cir. 2016) (plaintiff had multiple sclerosis, paraplegia, lymphedema, cellulitis, psoriatic arthritis, peripheral neuropathy, and trans-metatarsal amputation.); *U.S. v. State of Fla.*, 1:13-cv-61576, (S.D. Fla. 2013) (children with complex medical needs); *Vaughn v. Walthall*, 968 F. 3d 814 (7th Cir. 2020) (quadriplegia); *M.R. v. Dreyfus*, 663 F. 3d 1100 (9th Cir. 2011) (one plaintiff had IDD, daily seizures, scoliosis, cerebral palsy, hypothyroidism, and mood disorder; second plaintiff had spinal stenosis, congestive heart failure, emphysema, hepatitis B and C, chronic bacterial infections, neuropathy in both hands and feet, high blood pressure, depression, and bipolar disorder; third plaintiff had diabetes, congenital glaucoma, macular degeneration, and clinical depression); *Steimel v. Wernert*, 823 F. 3d 902 (7th Cir. 2016) (first plaintiff had cerebral palsy; second plaintiff had cerebral palsy and ID; third and fourth plaintiffs had cerebral palsy, additional plaintiffs had intellectual and developmental disabilities); *Fisher v. Okla. Health Care Auth.*, 335 F. 3d 1175 (10th Cir. 2003) (wheelchair user with insulin-dependent diabetes, hypertension, asthma, congestive heart failure, residual bilateral paresis, and deep-vein thrombosis; second plaintiff used a wheelchair, had cerebral palsy, and had two strokes; third plaintiff had difficulty walking and standing and had acute mixed connective tissue disease with seizure disorder, residual from a stroke and cardiac malfunction); *Rogers v. Cohen*, No. 5:18-CV-193-D (E.D.N.Y. Feb. 25, 2019) (first plaintiff had cerebral palsy; second plaintiff had a rare chromosomal abnormality that caused her to be intellectually and physically disabled).

Proposed §84.76(b) articulates the integration obligation in broad terms, indicating that a recipient of Federal financial assistance shall administer a program or activity in the most integrated setting appropriate to the needs of a qualified person with a disability. Administering a program or activity in a manner that results in unnecessary segregation of persons with disabilities – including through the failure to make reasonable modifications to policies, practices, or procedures, as required in proposed § 84.68(b)(7) – constitutes discrimination under this section.

Recipients cannot avoid their obligations under section 504 and *Olmstead* by characterizing as a "new service" those services that they currently or plan to in the future offer only in institutional settings. Where a recipient provides a service, it cannot discriminate against individuals with disabilities in the provision of that service, including through denial of access to the most integrated setting appropriate for their needs. Once a recipient chooses to provide certain services, it must do so in a nondiscriminatory fashion by ensuring access to such services in the most integrated setting appropriate to the needs of the qualified individual.[529]

Segregated settings.

Proposed § 84.76(c) describes characteristics of segregated settings. In the context of the integration mandate, segregation means the unnecessary separation of people with disabilities from people without disabilities. Unnecessary segregation may occur in a variety of settings, such as board-and-care homes, sheltered workshops, and other congregate settings populated exclusively or primarily with individuals with disabilities. It is not limited to residential institutions such as a psychiatric hospital, an Intermediate Care Facility, or a nursing home. DOJ provides guidance that "[s]egregated settings include, but are not limited to: (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate

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[529] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Question 8 (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm; *see also, e.g., Steimel v. Wernert*, 823 F.3d 902, 914 (7th Cir. 2016).

settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities."[530] Such settings may be in compliance with applicable regulations under Medicaid or another payer but may nonetheless not meet their obligations under the integration requirement, as discussed in more detail below.

Even in smaller, disability-specific congregate settings located in mainstream society, regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living may further isolate and segregate people with disabilities.[531] All of these sorts of restrictions limit the opportunity for people with disabilities to interact as members of the community with nondisabled individuals.

We note that these characteristics need not be present for a setting to be considered segregated.

- *Integration Question 1: In the discussion in the preamble of the proposed definition of "most integrated setting," we solicit comments on whether the definition should be expanded.*

Examples of discrimination on the basis of disability.

Proposed § 84.76(d) includes a non-exhaustive list of actions that may lead to unnecessary segregation and violate this section to the extent that such actions result in unnecessary segregation, or serious risk of unnecessary segregation, of persons with disabilities.

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[530] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Question 1 (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Feb. 13, 2023).

[531] U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Question 1 (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Feb. 13, 2023); *See also Disability Advocates Inc. v. Patterson,* 653 F. Supp. 2d 184 (E.D.N.Y. 2009) (finding adult care facilities, although physically located in the community, were segregated settings because they failed to allow free interaction between disabled and non-disabled individuals).

These include: (1) establishing or applying policies and practices that limit or condition individuals with disabilities' access to the most integrated setting appropriate to their needs;[532] (2) providing greater benefits or benefits under more favorable terms in segregated settings than integrated settings;[533] (3) establishing or applying more restrictive eligibility rules and requirements for individuals with disabilities in integrated settings than for individuals with disabilities in segregated settings; and (4) failure to provide community-based services as alternatives to institutional services that results in institutionalization, placement in a segregated setting, or serious risk of institutionalization. This category includes, but is not limited to planning, service system design, funding, or service implementation practices that result in such risk. Individuals with disabilities need not wait until the harm of institutionalization or segregation occurs to assert their right to avoid unnecessary segregation. [534] These examples are all drawn from existing case law and Federal agency guidance. [535]

For example, a policy that individuals with mental health disabilities residing in institutional settings have access to additional hours of services not made available to individuals with comparable mental health disabilities residing in community-based settings may constitute a violation of section 504's integration mandate if it leads to unnecessary institutionalization or serious risk of such institutionalization.[536] As another example, a hospital or acute care provider that routinely discharges persons with serious health disabilities into nursing homes due to

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[532] *Olmstead v. L.C.,* 527 U.S. 581 (1999).

[533] *Fisher v. Oklahoma Health Care Auth*., 335 F.3d 1175 (10th Cir. 2003) (finding State's decision to cease providing unlimited, medically-necessary prescription benefits for participants in community-based Medicaid program while continuing to provide such benefits to disabled persons who had been institutionalized, could place participants in community-based program with high prescription drug costs and limited monthly income at high risk for premature entry into nursing homes).

[534] *See e.g*., *M.R. v. Dreyfus*, 697 F.3d 706, 733 (9th Cir. 2012) (finding a reduction in service hours for personal care assistance may pose a serious risk of institutionalization).

[535] *See e.g.*, U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Question 1 (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm.

[536] *See, e.g., Pashby v. Delia*, 709 F. 3d 307 (4th Cir. 2013) (finding stricter eligibility requirements for personal care services for individuals residing in their own homes compared to those residing in adult care homes violated the integration mandate).

inadequate discharge planning procedures that fail to assess patients for home-based supportive services and refer them to community-based providers, might be in violation of section 504's integration mandate, based on discharge practices that result in serious risk of unnecessary placement within an institution or other segregated setting.

Protections from discrimination on the basis of disability are violated by policies that place individuals at serious risk of institutionalization or segregation. *Fisher v. Oklahoma Health Care Authority*, decided shortly after *Olmstead*, recognized that the integration mandate prohibited practices that place individuals at serious risk of institutionalization. In *Fisher*, the Tenth Circuit held that "disabled persons… who stand imperiled with segregation" were not required to already be institutionalized to assert claims under *Olmstead*.[537] Instead, the court held, they need only show that they were "at high risk for premature entry."[538] In the years since *Fisher*, numerous courts have applied *Olmstead* to protect individuals at risk of unnecessary segregation.[539] They have also held that the integration mandate extends not only to a serious risk of institutionalization but also to a serious risk of unjustified isolation.[540]

DOJ has promulgated guidance stating the ADA's integration mandate extends "to persons at serious risk of institutionalization or segregation and are not limited to individuals

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[537] *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003).
[538] *Id.* at 1185, quoting Joint App. at 70.
[539] *See, e.g., Steimel v. Wernert*, Nos. 15-2377, 15-2389, 2016 WL 2731505, 8 (7th Cir. May 10, 2016) (holding that at-risk claims were ripe because the State's provided services were inadequate to prevent life-threatening gaps in care.)); *Pashby v. Delia*, 709 F.3d 307, 317 (4th Cir. 2013) (holding that at-risk claims were ripe even though plaintiffs had not perfected administrative appeals of service reductions because plaintiffs' claim focused not on the outcome of their individual appeals, but on the state's decision to reduce services); *Guggenberger v. Minn.* 198 F. Supp. 3d 973 (D. Minn. 2016) (holding that the state's denial to young adults with disabilities living with parental caregivers of "essential Waiver Services based on Defendants' purported mismanagement and administration" presented a decision ripe for judicial review); U.S. Dep't of Justice, Statement of Interest of the United States, *Ball v. Kasich*, 244 F. Supp 3d 662 (S.D. Oh. 2017), https://www.ada.gov/olmstead/documents/ball_kasich_soi.pdf.2017), https://archive.ada.gov/olmstead/documents/ball_kasich_soi.pdf. *But see E.B. ex rel. M.B. v. Cuomo*, 16-CIV-735 (W.D. NY, July 11, 2020).
[540] *See, e.g.*, *Guggenberger v. Minn.*, 198 F. Supp. 3d 973, 1029, n. 22 (D. Minn. 2016) In *Guggenberger*, the court held that "the integration mandate also applies to non-institutional segregated settings." The court concluded that the plaintiffs "have plausibly alleged that they are not living, working, and receiving services" in 'a setting that enables [them] to interact with nondisabled persons to the fullest extent possible,'" *Id.* at 1030-31, *quoting* 28 CFR pt. 35, app. B (1977) (addressing § 35.130)).

currently in institutional or other segregated settings."[541] Proposed § 84.76(d)(4) makes clear that the same obligation would apply under section 504 to recipients of HHS funding. In *Davis v. Shah*, the Second Circuit cited the DOJ guidance to make clear that "a plaintiff 'need not wait until the harm of institutionalization or segregation occurs or is imminent' in order to bring a claim...."[542]

The Department proposes to codify this longstanding case law and DOJ guidance. A recipient could place individuals with disabilities at serious risk of unnecessary segregation in a variety of ways. It could do so by failing to provide services that are necessary for those individuals to live, work, and receive services in community-based settings. A recipient could also create such a risk by cutting services or budgets where those cuts will likely cause a decline in health, safety, or welfare that would lead to an individual's placement in an institution or other segregated setting. Examples include failing to provide services or alternatives other than institutional care to people with urgent needs who are on waiting lists for community services,[543] or a recipient's decision to deny or reduce services on which people with disabilities rely to live,

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[541] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act (emphasis added) and *Olmstead v. L.C.*, Note 4 (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited June 18, 2022).

[542] In *Davis v. Shah*, 821 F.3d 231, 262-63 (2d Cir. 2016), the court adopted as its standard the DOJ *Olmstead* guidance. The court quoted DOJ: "a plaintiff "need not wait until the harm of institutionalization or segregation occurs or is imminent" to bring a claim under the ADA. Plaintiff establishes a "sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services ... will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution."

[543] *See, e.g., Olmstead v. L.C.,* 527 U.S. 581, 605-06 (1999) ("If . . . the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a *waiting list that moved at a reasonable pace* not controlled by the State's endeavors to keep its institutions fully occupied, the reasonable modifications standard would be met. (*emphasis added*)). *See also Makin v. Haw.,* 114 F.Supp.2d 1017, 1034 (D. Haw. 1999), a case decided 11 months after *Olmstead,* in which the court found that individuals in the community on the waiting list for community-based services offered through Hawaii's Medicaid program could challenge administration of program for violating title II integration mandate because the program could potentially force the plaintiffs into institutions; *Cruz v. Dudek*, No. 10-23048-CIV, 2010 WL 4284955 (S.D. Fla. Oct. 12, 2010), *report and recommendation adopted sub nom. Cruz v. Arnold*, No. 10-23048-CIV, 2010 WL (finding that plaintiffs on waiting list for services met burden for a preliminary injunction based on imminent risk of institutionalization.); *Arc of Wash. State v. Braddock,* 427 F. 3d 615, 621 (9th Cir. 2005) (finding no violation of the ADA by the state of Washington because "there is a waiting list that admits new participants when slots open up." The court further stated that "all Medicaid-eligible disabled persons will have an opportunity to participate in the program once space becomes available, based solely on their mental-health needs and position on the waiting list").

work, and recreate independently in the community.[544] While the ADA and section 504 do not require a recipient to provide services at a specified standard of care or tailored to an individual's needs, a recipient cannot discriminate by providing some services only in less integrated settings.[545]

Service reductions resulting from budget cuts – even where permitted under Medicaid and other public program rules – may violate the integration mandate if they create a serious risk of institutionalization or segregation.[546] In making such service reductions, recipients have a duty to take reasonable steps to avoid placing individuals at risk of institutionalization or segregation. For example, recipients may be required to make exceptions to the service reductions or to provide alternative services to individuals who would be forced into institutions as a result of the cuts. If providing alternative services, recipients must ensure that those services are actually available and that individuals can actually secure them to avoid institutionalization or segregation.[547] Budget cuts or other otherwise permissible actions may also violate obligations

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[544] *See*, *e.g.*, *Steimel v. Wernert,* 823 F.3d 902, 913 (7th Cir. 2016) (holding that at-risk claims were ripe because the plaintiffs "have provided evidence that they need constant supervision and, despite their best efforts, the services [the state] provided... have proved inadequate to prevent life-threatening gaps in care."); *Pashby v. Delia*, 709 F.3d 307, 317 (4th Cir. 2013) (holding that the state's denial to young adults with disabilities living with parental caregivers of "essential Waiver Services based on Defendants' purported mismanagement and administration" presented a decision ripe for judicial review. "[T]here is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized").

[545] *See Radaszewski ex rel. Radaszewski v. Maram,* 383 F.3d 599, 611 (7th Cir. 2004)("Although a State is not obliged to create entirely new services or to otherwise alter the substance of the care that it provides to Medicaid recipients in order to accommodate an individual's desire to be cared for at home, the integration mandate may well require the State to make reasonable modifications to the form of existing services in order to adapt them to community-integrated settings.").

[546] *See, e.g.*, *M.R. v. Dreyfus,* 663 F. 3d 1100 (9th Cir. 2011) (finding across-the-board service reductions in Medicaid personal assistance services posed a serious risk of institutionalization); *Oster v. Lightbourne,* No. C 09-4668 CW, 36 (N.D. Cal. Mar. 2, 2012) (finding a twenty percent reduction in service hours "will compromise the health and well-being of... recipients such that they will be at serious risk of institutionalization"); *Steimel v. Wernert,* 823 F. 3d 902 (7th Cir. 2016) (holding that a changed cap in waiver services hours, which dramatically curtailed plaintiffs' ability to participate in community activities, violated integration mandate); U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Question 9 (2020) https://www.ada.gov/olmstead/q&a_olmstead.htmhttps://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Feb.13, 2023).

[547] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Question 9 (2020)

under section 504's integration mandate if they result in more favorable access to services in segregated settings than in integrated settings.

Civil rights obligations as distinct from Medicaid law and regulations.

The Medicaid program, established in Title XIX of the Social Security Act, is a voluntary, joint Federal-State program. Under the program, the Federal Government matches a portion of expenses incurred by participating states for expenditures for Medicaid beneficiaries. State participation in the Medicaid program is not mandatory, but if a State chooses to participate, the Social Security Act requires it to comply with Federal statutory and regulatory requirements — and all states participate in the program.[548] Among other functions, Medicaid is the major source of financing for long-term services and supports provided to people with disabilities to facilitate living independently in the community. The majority of home and community-based services are provided through section 1915(c) Medicaid waivers, as well as through Medicaid State plan authorities (such as 1915(i), (j) and (k)), and section 1115 Medicaid demonstrations. States have significant discretion in how they design these programs, including setting eligibility requirements and limitations for home and community-based waiver services. Unlike Medicaid State plan benefits, waiver enrollment can be capped, resulting in waiting lists when the number of people seeking services exceeds the amount of available funding. HHS and

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https://www.ada.gov/olmstead/q&a_olmstead.htmhttps://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Feb.13, 2023).

[548] 42 U.S.C. 1396a.

DOJ have made clear that obligations under the integration mandate "are independent from the requirements of the Medicaid program,"[549] and courts have also recognized this distinction.[550]

For example, a State might violate the integration mandate, but not the Medicaid law or implementing regulations, by making cuts to HCBS programs while at the same time increasing funding to institutional services. The section 504 proposed rule would not change the requirements of the Medicaid program in the Social Security Act or in Medicaid regulations, nor would it require CMS to assess compliance with section 504 as part of their work approving Medicaid proposals (i.e., Medicaid waivers, State plans, and demonstrations).

CMS regularly communicates to states that they have separate and independent obligations under Medicaid and other civil rights laws. For example, CMS explicitly articulates that compliance with the Medicaid statute and rules is a separate determination and obligation

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[549] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Question 7 (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Feb.13, 2023) *citing* U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs., *Olmstead* Update No. 4, 4 (Jan. 10, 2001), https://www.cms.gov/smdl/downloads/smd011001a.pdf; U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs, Medicaid Program: Home and Community-Based State Plan Services, 79 Fed. Reg. 3016 (Jan. 16, 2014), https://www.federalregister.gov/documents/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider (In the preamble to the final HCBS settings rule, CMS makes clear that "this regulation change does not alleviate states' independent obligations under the Americans with Disabilities Act or the Supreme Court's Olmstead decision."); U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs, Instructions, Technical Guidance and Review Criteria: Application for a §1915(c) Home and Community Based-Waiver, 15 (2019), https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/instructions_technicalguide_v3.6_66.pdf ("Although this is guidance with respect to the Medicaid program, we note that states have obligations pursuant to the Americans with Disabilities Act, section 504 of the Rehabilitation Act, and the Supreme Court's *Olmstead* decision interpreting the integration regulations of those statutes. Approval of any Medicaid Waiver action does not in any way address the State's independent obligations under the Americans with Disabilities Act or the Supreme Court's Olmstead decision.").

[550] In *Davis v. Shah*, 821 F.3d 231, 264 (2d Cir. 2016), the court discussed the separate obligations of the ADA and Medicaid Act, noting "New York's conceded discretion to decide whether to provide coverage of orthopedic footwear and compression stockings under the Medicaid Act, 42 U.S.C.S. § 1396 et seq., does not affect its duty to provide those services in a non-discriminatory manner under the Americans with Disabilities Act (ADA). A state's duties under the ADA are wholly distinct from its obligations under the Medicaid Act."). In *Wilborn v. Martin*, 965 F. Supp. 2d 834, 847 (M.D. Tenn. 2013), the court noted that CMS approval is independent from obligations under the ADA and Rehabilitation Act (RA, explaining "[…] the ADA and the RA stand independent of the Medicaid statute and simply require consideration of an individual enrollee's medical needs and the impact of providing such needs for similarly situated enrollees."

from compliance with the ADA and section 504, in both its initial and final approval letters for State Transition Plans (STPs)[551] under the HCBS settings rule.

A State may violate the integration mandate in administering its system of services, including approved HCBS services under Medicaid waivers or other authorities, if it does so in a manner that unnecessarily segregates people with disabilities and fails to make available sufficient services in integrated, community-based settings. [552] Section 504 does not require states to create new programs to assist people with disabilities,[553] nor does it require states to provide a particular standard of care or level of benefits.[554] However, states must adhere to the disability nondiscrimination requirements—including the integration mandate—with regard to the services they in fact provide.[555] In addition, states may be required to offer in an integrated setting services that are only offered in a segregated setting. Proposed § 84.76(d)(2) includes as

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[551] *See, e.g.,* U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs, Alabama Initial Approval (Feb. 21, 2017), https://www.medicaid.gov/sites/default/files/2019-12/al-initial-approval_0.pdf ("[i]t is important to note that CMS' initial approval of an STP solely addresses the state's compliance with the applicable Medicaid authorities. CMS' approval does not address the state's independent and separate obligations under the Americans with Disabilities Act, section 504 of the Rehabilitation Act, or the Supreme Court's Olmstead decision."); *see also* U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs, Alaska Final Approval (Aug. 22, 2018), https://www.medicaid.gov/sites/default/files/2019-12/ak-final-appvl_0.pdf.

[552] *See* 28 CFR 35.130(b),(d). *See also Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016) (finding that a reduction of Medicaid waiver hours, which results in a loss of ability to participate in the community and increases the risk of medical complications, puts plaintiffs at risk of institutionalization in violation of the integration mandate).

[553] *See e.g., Rodriguez v. City of New York*, 197 F.3d 611, 615-16 (2d Cir. 1999) (neither the ADA nor the Rehabilitation Act compels the City to offer safety monitoring to people with disabilities so that they can remain at home, where safety monitoring was not an existing Medicaid service offered.); *Alexander v. Choate*, 469 U.S. 287, 303 (Jan. 9, 1985).

[554] The integration mandate imposes neither a "standard of care" nor "a certain level of benefits to individuals with disabilities." *Olmstead*, 527 U.S. at 603 n. 14; *Amundson ex rel. Amundson v. Wisconsin Dep't of Health Servs*., 721 F.3d 871, 875 (7th Cir. 2013) (holding that the ADA does not support "a claim of absolute entitlement" to Medicaid benefits); *see also Cohon ex rel. Bass v. New Mexico Dep't of Health*, 646 F.3d 717, 729 (10th Cir. 2011) (holding that ADA did not give plaintiff "legal entitlement" to specific requested services and that she did not state an Olmstead claim because she failed to allege that the program would lead to her unjustified isolation or premature institutionalization); *Rodriguez v. City of New York*, 197 F.3d at 619 (noting that "*Olmstead* reaffirms that the ADA does not mandate the provision of new benefits.").

[555] *See Olmstead v. L.C.*, 527 U.S. at 603; *see also Radaszewski v. Maram,*383 F.3d at 609 (citing *Olmstead v. L.C.,* 527 U.S. at 603 n. 14, for the principle "that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide") ("While 'a State is not obligated to create new services,' it 'may violate Title II when it refuses to provide an existing benefit to a disabled person that would enable that individual to live in a more community-integrated setting.'").

an example of a specific prohibition "providing greater benefits or benefits under more favorable terms in segregated settings than in integrated settings." The type and level of services needed and what services the State provides are fact-specific inquiries.

Providing services beyond what a State currently provides under its Medicaid program may not be a fundamental alteration, and the ADA and section 504 may require states to provide those services, under certain circumstances. For example, the fact that a State is permitted to "cap" the number of individuals it serves in a particular waiver program under Medicaid does not exempt the State from serving additional people in the community to comply with the ADA or other laws.[556] This same logic applies to recipients under section 504, who may be in violation of their obligations under section 504's integration mandate even when they are in compliance with the requirements of other public programs, such as terms and conditions for participation for providers participating in Medicare, Federal requirements for State Medicaid agencies, and other requirements distinct from those of the integration mandate. For example, a long-term care facility may violate section 504 if the facility continues an individual's inpatient placement when the individual could live in a more integrated setting and desires to do so.[557] To comply with the integration mandate, inpatient facilities may be required to discharge patients in such circumstances. In the process of planning for such discharges, inpatient facilities (including hospitals) may be required to develop individualized treatment and discharge plans and coordinate with local community-based service providers to ensure that ongoing services, like personal care, without which an individual is at risk of institutionalization and which are offered in the inpatient setting, are available to the individual in the community.

Limitations.

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[556] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Question 7 (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Feb. 13, 2023).

[557] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance and Resources for Long Term Care Facilities: Using the Minimum Data Set to Facilitate Opportunities to Live in the Most Integrated Setting (May 20, 2016).

A recipient's obligation under the integration mandate to provide services in the most integrated setting appropriate for the needs of a qualified individual is not unlimited. A recipient may be excused in instances where it can prove that the requested modification would result in a "fundamental alteration" of its service, program, or activity.[558] Proposed paragraph (e) provides that a recipient may establish a defense to the application of this section if it can demonstrate that a requested modification would fundamentally alter the nature of its program or activity. However, the recipient bears the burden of establishing that a requested modification to its program or activity to facilitate access to the most integrated setting would constitute a fundamental alteration.[559] For a recipient like a State, a showing of a fundamental alteration would require showing "that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State [or local government] has taken for the care and treatment of a large and diverse population of persons [with disabilities]."[560]

When section 504 was enacted in 1973, Congress recognized the shift to provide services to people with disabilities in the community instead of in institutions and to integrate people with disabilities into society. Congress' express goal was, in part, "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society."[561] The interpretive guidance to the existing regulation explains that the phrase "most integrated setting appropriate" was added to existing § 84.4(b)(2), contained in § 84.68(d) of the proposed rule, to reinforce the concept that the provision of unnecessarily

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[558] *Olmstead v. L.C.*, 527 U.S. at 603 (1999) (quoting 28 CFR 35.130(b)(7)).
[559] 28 CFR 35.130(b)(7)(i)("A public entity shall make reasonable modifications . . . *unless the public entity can demonstrate* that making the modification would fundamentally alter the nature of the service, program, or activity.") (emphasis added). *See also Brown v. D.C.,* 928 F. 3d 1070, 1077 (D.C. Cir. 2019) ("Although the *[Olmstead]* Court did not expressly declare that the State bears the burden of proving the unreasonableness of a requested accommodation. . . we believe it does. . ."); *Steimel v. Wernert,* 823 F. 3d 902, 914-16 (7th Cir. 2016) ("It is the state's burden to provide that the proposed changes would fundamentally alter their programs.").
[560] *Olmstead v. L.C.*, 527 U.S. at 604-07. A public entity raising a fundamental alteration defense based on an Olmstead plan must show that it has developed a comprehensive, effectively working Olmstead plan and that it is implementing the plan.
[561] 29 U.S.C. 701(b)(1).

separate or different services is discriminatory.[562] The only qualification to be covered by the HHS section 504 regulations is that an entity be a recipient of Federal financial assistance from HHS. Accordingly, a number of individual providers who are not public entities are covered by section 504.

For example, in the 2016 "Guidance and Resources for Long Term Care Facilities," the Department described application of section 504's integration mandate to these recipients:

> Long-term care facilities receive Federal financial assistance by participating in programs such as Medicare and Medicaid. Section 504 prohibits discrimination based on disability, including the unnecessary segregation of persons with disabilities. Unjustified segregation can include continued placement in an inpatient facility when the resident could live in a more integrated setting. This concept was set forth in the Olmstead decision, which interpreted the same requirements in the Americans with Disabilities Act.[563]

- *Integration Question 2: We seek comment on what may constitute a fundamental alteration for recipients who are not public entities, for example, an individual skilled nursing facility responsible for identifying and preparing individuals who can and want to be discharged to available community-based services.*

Subpart H - Communications

Communication failures in the context of the receipt of health and human services can be life-altering or even life-ending.[564] Ensuring that communications with individuals with disabilities are as effective as communications with others (commonly referred to as "effective communication") helps to avoid such communication failures and protect the health of individuals with disabilities. Over the years, OCR has received numerous complaints alleging

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[562] 45 CFR part 84, app. A (addressing § 84.4(b)(2)).
[563] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance and Resources for Long Term Care Facilities: Using the Minimum Data Set to Facilitate Opportunities to Live in the Most Integrated Setting (May 20, 2016).
[564] The Joint Commission on Accreditation of Healthcare Organizations found that communication failures were involved in over 70 percent of patient safety events that result in death, permanent harm, or severe temporary harm. Katherine Dingley et al., *Improving Patient Safety Through Provider Communication Strategy Enhancements*, Advances in Patient Safety: New Directions and Alternative Approaches (Vol. 3: Performance &Tools) (2008), https://www.ncbi.nlm.nih.gov/books/NBK43663/. When asked to select contributing factors to patient care errors, nurses cited communication issues with physicians as one of the two most highly contributing factors, according to the National Council of State Boards of Nursing reports.

that recipients have failed to ensure effective communication to individuals with disabilities or failed to provide appropriate auxiliary aids and services to individuals with disabilities in both the health care and social services context.[565] In many of these cases, OCR identified compliance concerns with Federal nondiscrimination laws and entered into agreements with recipients to address these concerns.

One such example is the VRA between OCR and a health system, that OCR announced on January 16, 2020.[566] In this case, OCR initiated a compliance review following receipt of a complaint that the health system's clinic and hospital failed to provide adequate or timely American Sign Language (ASL) interpreter services despite multiple requests. This complaint, combined with allegations from additional patients, led OCR to conduct a review of the health system's policies and procedures regarding its obligations to ensure effective communication under section 504 and section 1557. The VRA led to the health system strengthening its provision of auxiliary aids and services while placing additional emphasis on effective communication.

Similarly, OCR reached a VRA with a health institute following a 2017 complaint alleging that it failed to provide a qualified ASL interpreter to a deaf six-year-old child requiring physical therapy, in violation of both section 504 and section 1557.[567] The complaint was one of five alleging that the health institute had failed to provide effective communication to individuals

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[565] For example, since 2015, OCR has received 523 self-identified effective communication complaints. These numbers are based on allegations made by complainants in OCR's system of record, not findings by OCR on the merits after investigations.

[566] Examples of these resolution agreements appear on OCR's website. U.S. Dep't of Health & Human Servs., Off. For Civil Rts., Recent Civil Rights Resolution Agreements & Compliance Reviews, https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/index.html (last visited Feb. 13, 2023). *See e.g.,* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., HHS OCR Secures Voluntary Resolution with CHRISTUS Trinity Mother Frances Health System to Strengthen its Provision of Auxiliary Aids and Services to Individuals Who Are Deaf or Hard of Hearing (Jan. 16, 2020), https://www.hhs.gov/about/news/2020/01/16/hhs-ocr-secures-voluntary-resolution-with-christus-trinity.html?language=en.

[567] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Maryland Orthopedic Practice Agrees to Provide Deaf 6-year-old a Qualified Interpreter (July 24, 2019), https://www.hhs.gov/about/news/2019/07/24/maryland-orthopedic-practice-agrees-provide-deaf-6-year-old-qualified-interpreter.html?language=en.

who are deaf or hard of hearing. As a result of the resolution, the health institute agreed to take steps to improve its review and assessment of sign language interpreters, provide staff training with OCR's technical assistance, and submit reports to OCR regarding its ongoing compliance activities.[568]

Notwithstanding OCR's extensive enforcement activities in this area, including through complaint resolutions, compliance reviews, and the provision of technical assistance, ineffective communication with individuals with disabilities remains a persistent and significant discrimination issue.[569] Many of the complaints OCR receives involve the denial of or limited access to HHS-funded services for individuals who are deaf or hard of hearing or who are blind or have low vision. Data from the Centers for Disease Control and Prevention indicates that individuals with disabilities comprise more than 26 percent of adults in the nation, over 10% of whom have a hearing or vision disability.[570]

The Department is proposing to remove a limitation that currently appears in § 84.52(d) (a subsection being replaced by this Communications subpart, the auxiliary aids provision in the Health, Welfare, and other Social Services subpart. That subsection contains special rules for recipients with less than 15 employees.

Section 84.52(d) directs that the obligation to provide auxiliary aids is mandatory for recipients with 15 or more employees, but indicates that Departmental officials may require

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[568] These examples are illustrative of some of the enforcement activities OCR has undertaken concerning allegations of effective communication discrimination. OCR periodically receives hundreds of complaints alleging discrimination based on effective communication. For examples of additional enforcement activities regarding effective communication, *see* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Effective Communication in Hospitals – Disability; Enforcement Success Stories Involving Persons who are Deaf or Hard of Hearing, https://www.hhs.gov/civil-rights/for-individuals/special-topics/hospitals-effective-communication/selected-complaint-investigations-resolution-agreements/index.html.

[569] *See, e.g.,* Nicole D. Agaronnik et al., *Communicating with Patients with Disability: Perspectives of Practicing Physicians*, 34 J. of Gen. Internal Med. 34(7),1139–45 (2019), https://doi.org/10.1007/s11606-019-04911-0; *see also* Tyler G. James et al., *Communication Access in Mental Health and Substance Use Treatment Facilities for Deaf American Sign Language Users*, 41 Health Aff. 1417 (Oct. 2022), https://doi.org/10.1377/hlthaff.2022.00408.

[570] U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Disability Impacts All of Us (Sept. 16, 2020), www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html.

recipients employing fewer than 15 persons to comply with this requirement "when [compliance] would not significantly impair the ability of the recipient to provide its benefits or services." The Department is proposing to remove this limitation for several reasons. First, this limitation is of minimal consequence because the vast majority of recipients of Federal financial assistance from the Department are already required by either title II or title III of the ADA to provide auxiliary aids or services in order to ensure effective communication. Second, all recipients, regardless of size, are not required, in providing effective communication, to take any action that the recipient can demonstrate would result in a fundamental alteration to the program or activity or pose undue financial and administrative burdens. Third, the Department already has the discretion whether to impose these obligations on recipients with fewer than 15 employees, and as of December 19, 2000, has required all recipients with fewer than fifteen employees to provide auxiliary aids to individuals with disabilities where the provision of such aids would not significantly impair the ability of the recipient to provide its benefits or services.[571] Finally, given that Congress specifically intended that the principles of the ADA guide the policies, practices, and procedures developed under the Rehabilitation Act, the Department believes the removal of this limitation better serves the purpose shared by both the ADA and Rehabilitation Act to enable individuals with disabilities to "enjoy full inclusion and integration into the economic, political, social, cultural, and educational mainstream of American society."[572]

The Department has investigated and resolved numerous complaints regarding effective communication over the decades by recipients with fewer than fifteen employees. The importance of ensuring that individuals with disabilities are able to understand and engage in health and human services programs and activities drives this proposed change.

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[571] 65 CFR 79368.
[572] 29 U.S.C. 701(a)(3).

The current regulations implementing section 1557 require certain covered entities to ensure effective communication for individuals with disabilities.[573] Because noncompliance in this area is so harmful to individuals with disabilities, OCR included provisions setting out specific and comprehensive standards relating to effective communication and the provision of auxiliary aids and services in the section 1557 final rule,[574] which incorporated the effective communication and auxiliary aids provisions from the ADA title II regulation.[575] In particular, the section 1557 final rule recognized that effective communication helps ensure equal opportunities in the health care setting, leading to better health outcomes for individuals with disabilities.[576] Likewise, this proposed section recognizes the important role that effective communication plays in ensuring equal opportunities in both health and human service programs and activities.

Part of effective communication is ensuring that individuals with disabilities, including those with cognitive, neurological, and psychiatric disabilities, have the appropriate information necessary to make health care decisions. Communication between a person seeking medical treatment and their health care provider is a basic component of health care and in some circumstances leads to a formal process of granting of permission for treatment, usually referred to as informed consent. The information being provided may include information on the names and details of procedures or treatment that the health care provider recommends, other available alternatives, and the risks and benefits of the treatment and other options, including foregoing any treatment. The success of this process requires the person seeking treatment to understand

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[573] *See* 45 CFR 92.102, requiring that health programs or activities receiving FFA from the Department, programs or activity administered by an Executive agency, and entities established under Title I of the ACA, provide appropriate auxiliary aids and services irrespective of size.
[574] *See* 45 CFR 92.102. For a discussion of how adults with communication disabilities experience poorer health outcomes, *see* Michelle L. Stransky et al., *Adults with Communication Disabilities Experience Poorer Health and Healthcare Outcomes Compared to Persons Without Communication Disabilities*, 33 J. of G. Internal Med. 33(12), 2147–55 (2018), http://dx.doi.org/10.1007/s11606-018-4625-1.
[575] *See* 85 FR 37160, 37213-215 (preamble addressing comments on effective communication provisions).
[576] 85 FR 37160, 37213.

the options and make an informed choice in determining the course of treatment. Research suggests that methods of communication, along with the quality of the interactions between the provider and the patient with a cognitive disability, play more important roles in the patient's ability to make informed decisions than intellectual and adaptive functioning.[577] The Department is concerned that some providers erroneously believe that certain patients with disabilities, especially those with cognitive, neurological, or psychiatric disabilities, are unable to understand discussions concerning their health care, and instead of communicating directly with the patient, communicate only with family members or companions. In instances where providers base these communication decisions on stereotypes or misconceptions about the patient's ability to understand or make medical decisions, they deny the patient autonomy and control over their health care. Fundamental concepts of Federal disability rights laws, including rights to effective communication and reasonable modifications, require that individuals with disabilities, including those with cognitive, neurological, and psychiatric disabilities are afforded the information needed to have an equal opportunity to make informed health care decisions.[578]

Effective communication for patients with cognitive, neurological, and psychiatric disabilities may require auxiliary aids and services or strategies different from those employed with patients with other disabilities. For example, while an individual who is deaf or hard of hearing may require an ASL interpreter to effectively communicate with a provider, an individual with a cognitive disability may require additional time with the provider to ask questions and receive plain language answers about a specific health care decision.

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[577] William F. Sullivan, *Supporting Adults with Intellectual and Developmental Disabilities to Participate in Health Care Decision Making*, 64 Can. Fam. Physician (Suppl 2): S32–S36 (Apr. 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5906782/.

[578] *See* 28 CFR 35.160 (effective communication requirements for public entities); 28 CFR 35.130(b)(7) (requirement for public entities to make reasonable modifications); 45 CFR 84.52(d) (requirement to provide auxiliary aids in health, welfare, and other social services);45 CFR 92.105 (requirement for certain health programs and activities to make reasonable modifications); 45 CFR 92.102 (effective communication requirements for certain health programs and activities)..

A specific type of auxiliary aid or service may be the acquisition or modification of equipment or devices, including for augmentative and alternative communication, and the provision of training and assistance to the individual with a disability on how to use them. Augmentative and alternative communications devices include, but are not limited to, speech generating devices, single-message devices, computers, tablets, smartphones, amplification devices, telecommunications devices, voice amplifiers, artificial phonation devices, picture and symbol boards, paper-based aids, and other equipment or devices used to compensate for impairments to speech-language production or comprehension, including spoken and written modes of communication.

In some instances, the use of augmentative and alternative communication is necessary for individuals with certain disabilities that impair speech production and comprehension to access vital health and human services programs and activities. Often, the most effective way for recipients to ensure effective communication is to provide training on the use of this equipment.

Section 504 also requires recipients to provide reasonable modifications to policies, practices, or procedures to individuals with disabilities when necessary to avoid discrimination unless the modification would fundamentally alter the nature of the program or activity at issue. Reasonable modifications may include modifications to how a provider communicates with or delivers information to a patient with a disability. For example, a reasonable modification for a patient with a mental disability may be to allow a third-party support person to join the conversation and allow that person to assist the patient in understanding their options and coming to an independent decision on how to proceed. The person with a disability may be in a supported decision-making arrangement with the third-party support person, but no such formal role is required.

Another reasonable modification may be for the recipient to provide information in a format that is accessible to individuals with cognitive, developmental, intellectual, or neurological disabilities such as through plain language. NCD has urged the Department to issue

guidance to medical professionals requesting that they explain procedures and draft documents in plain language to better serve patients with disabilities.[579] Under some circumstances, plain language may be a reasonable modification to remove barriers between individuals with certain disabilities and the information necessary to make informed health and human services decisions. Information written in plain language may afford individuals with certain disabilities an equal opportunity to comprehend important service, program, or activity information. Sometimes, a plain language oral explanation, instead of a written one, may be a sufficient modification. However, in many circumstances, it may be a fundamental alteration of the nature of a recipient's program or activity to require extensive technical documents to be produced in plain language.

- *Communications Question 1: The Department requests comment on the importance of providing information in plain language for individuals with cognitive, developmental, intellectual, or neurological disabilities.*
- *Communications Question 2: Additionally, the Department requests comment on whether plain language is more appropriately considered a reasonable modification that an individual must request, or if it should be considered an auxiliary aid or service.*

§ 84.77 General.

The Department proposes to add a new subpart H to the section 504 implementing regulations to address ongoing communication issues. The new provisions reflect the same requirements concerning effective communication adopted by the Department in the 2020 section 1557 Final Rule, which are based on the effective communication requirements of title II of the ADA.[580] Proposed § 84.77(a)(1), requires that a recipient take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with

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[579] Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination (Mar. 22, 2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.
[580] 45 CFR 92.102, 28 CFR 35.160.

disabilities are as effective as communications with others in such programs or activities. Proposed § 84.77(a)(2), as well as the definition section at § 84.10, defines a companion as a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate. The proposed text at § 84.77(b)(1) requires that a recipient provide appropriate auxiliary aids and services to individuals with disabilities, where necessary to afford such individuals an equal opportunity to access the benefit or service in question. Section 84.77(b)(2) states that the type of auxiliary aid or services needed will vary in accordance with various factors. That paragraph further provides that, in determining what types of auxiliary aids and services are necessary, a recipient shall give primary consideration to the request of the individual with a disability. In addition, it states that to be effective auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.[581]

Proposed § 84.77(c) states that recipients are not allowed to require an individual with a disability to bring another individual to interpret for them and provides limited exceptions where accompanying adults or children may be used to interpret or facilitate communication.

Section 84.77(d) proposes requirements for recipients that choose to provide qualified interpreters via Video Remote Interpreting (VRI) services. These requirements set certain usability standards for the instances where VRI services are appropriate auxiliary aids and services for communication.

§ 84.78, Telecommunications.

This section contains requirements for recipients that communicate by telephone with applicants and beneficiaries with disabilities. Specifically, the section would require recipients to use telecommunications systems that ensure effective communication. When a recipient uses an

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[581] Section 1557 also requires that certain recipients and State Exchanges provide appropriate auxiliary aids and services. 45 CFR 92.102.

automated-attendant system, that system must provide effective real-time communication with individuals using auxiliary aids and services. In addition, a recipient must respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

§ 84.79 Telephone emergency services.

Proposed § 84.79 states that telephone emergency services, including 911 services, shall provide direct access to individuals who use TTY's and computer modems.

§ 84.80 Information and signage.

Proposed § 84.80 provides specific requirements for information and signage to ensure that interested persons can obtain information as to the existence and location of accessible services, activities, and facilities while also pointing users to accessible entrances.

§ 84.81 Duties.

Proposed § 84.81 provides that, in meeting its communication requirements, a recipient is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or undue financial and administrative burdens.

This paragraph does not establish an absolute defense; it does not relieve a recipient of all obligations to individuals with disabilities. Although a recipient is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the recipient.

It is the Department's view that compliance with the communications requirements in subpart H, like compliance with the corresponding provisions of the ADA title II regulation and the section 504 regulations for federally conducted programs, would in most cases not result in a fundamental alteration or undue financial and administrative burdens on a recipient. In determining whether financial and administrative burdens are undue, all recipient resources available for use in the funding and operation of the program or activity should be considered.

The burden of proving that compliance with any section in this subpart would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the recipient.

The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The Department recognizes the difficulty of identifying the official responsible for this determination, given the variety of organizational forms that may be taken by recipients and their components. The intention of this paragraph is that the determination must be made by a high level official or senior leader who has budgetary authority and responsibility for making spending decisions.

Subpart K – Procedures.

Subpart G is redesignated as subpart K. Section 84.61, Procedures, is retained and redesignated as § 84.98. That section states that the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. Those procedures are found at 45 CFR 80.6 through 80.10 and part 81. They include a requirement that recipients cooperate with the Department when it seeks to obtain compliance with this part (45 CFR 80.6(a)); keep records that the Department finds necessary to determine compliance (45 CFR 80.6(b)); permit access by the Department to sources of information necessary to determine compliance (45 CFR 80.6(c)); and provide information about the regulations to beneficiaries and participants (45 CFR 80.6(d)). The regulations also provide that the Department shall conduct periodic compliance reviews to determine compliance (45 CFR 80.7(a)) and will accept written complaints filed not more than 180 days from the alleged discrimination (45 CFR 80.7(b)). In addition, the Department will conduct a prompt investigation when any information indicates a possible failure to comply with this part. (45 CFR 80.7(a)(c)).

IV. Executive Order 12866 and Related Executive Orders on Regulatory Review

A. Regulatory Impact Analysis Summary

a. Statement of Need.

In this proposed rule, the Department proposes to revise its existing section 504 regulation on nondiscrimination obligations for recipients of Federal financial assistance. More than 40 years have passed since the Department originally issued regulations implementing section 504, with only limited changes in the decades since. During that time, major legislative and judicial developments have shifted the legal landscape of disability discrimination protections under section 504, including statutory amendments to the Rehabilitation Act, the enactment of the ADA and the ADAAA, the ACA, and Supreme Court and other significant court cases. Section 504 should be updated and interpreted consistently with these developments and overlapping laws in order to bring the regulations into conformity with current law and to protect against discrimination on the basis of disability.

b. Overall Impact.

We have examined the impacts of the proposed rule under Executive Order (E.O.) 12866, as amended by E.O. 14094; E.O. 13563; the Regulatory Flexibility Act (5 U.S.C. 601–612); and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). E.O. 12866 and E.O. 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). This proposed rule is a significant regulatory action under section 3(f)(1) of E.O. 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the costs of the proposed rule are small relative to the revenue of recipients, including covered small entities, and because even the smallest affected entities would be unlikely to face a significant impact, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (Section 202(a)) generally requires the Department to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $165 million, using the most current (2021) Implicit Price Deflator for the Gross Domestic Product. This proposed rule is not subject to the Unfunded Mandates Reform Act because it falls under an exception for regulations that establish or enforce any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.[582]

The Background and Reasons for the Proposed Rulemaking sections at the beginning of this preamble contain a summary of this proposed rule and describe the reasons it is needed.

Below is a summary of the results and methodology from our Regulatory Impact Analysis (RIA). A complete copy of this RIA will be available at https://www.hhs.gov/sites/default/files/sec-504-rehab-act-npr-ria.pdf as well the Federal Government's online rulemaking portal (www.regulations.gov). Interested parties are encouraged to review the full RIA, and to provide data and other information responsive to requests for comment posed in the RIA, also included in the Request for Comment section in this document.

c. Summary of Costs and Benefits.

Section 504 has applied to medical care providers that receive Federal financial assistance from the Department for approximately fifty years. The Department issued regulatory language detailing specific requirements for health care providers in 1977.[583] The health care

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[582] 2 U.S.C. 1503(2).

[583] For example, all recipients have been required to construct new facilities and alter existing facilities in an accessible manner, make changes to ensure program accessibility, provide alternate means of communication for persons who are blind, deaf, have low vision, or are hard of hearing (e.g., sign

sector in the United States is quite broad, encompassing about 490,000 providers of ambulatory health care services and 3,044 hospitals. It includes 168,459 offices of physicians; 124,384 offices of dentists; 141,853 offices of other health care practitioners; 7,192 medical and diagnostic laboratories; 24,619 home health care service providers; and 19,625 outpatient care centers. Most of these entities receive Federal financial assistance. For example, the Department estimates that approximately 92% of doctors, 43% of dentists, and all hospitals receive Federal financial assistance from the Department and are thus subject to section 504. The Department's section 504 NPRM applies to this universe of recipients, updating the Department's original regulation and adding new provisions in several areas. This section 504 NPRM does not apply to health care programs and activities conducted by the Department. Those programs and activities are covered by part 85 of section 504, which covers federally conducted (as opposed to federally assisted) programs or activities.[584] While a majority of the estimated costs associated with this proposed rule concern health care providers, the proposed rule covers all recipients of HHS funding.

The RIA considers the various proposed sections and quantifies several categories of costs that we anticipate recipients may incur. The RIA quantifies benefits people with disabilities are expected to receive due to higher percentages of accessible Medical Diagnostic Equipment (yielding improved health outcomes) at recipients' locations and discusses unquantified significant benefits and costs the proposed rule is expected to generate that could not be quantified or monetized (due to lack of data or for other methodological reasons). The RIA also quantifies benefits that will result from accessible web content and mobile applications while addressing unquantified benefits the proposed rule is expected to accrue.

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language interpreters, materials in Braille or on tape), and prohibited from denying or limiting access to their health care programs or from otherwise discriminating against qualified persons with a disability in their health care programs or activities.

[584] 45 CFR 85.

Table 1 below summarizes RIA results with respect to the likely incremental monetized benefits and costs, on an annualized basis. All monetized benefits and costs were estimated for a 10- year time horizon using discount rates of 7 and 3 percent.

TABLE 1— ANNUALIZED VALUE OF MONETIZED BENEFITS AND COSTS UNDER THE PROPOSED RULE OVER A FIVE-YEAR PERIOD, IN 2021 DOLLARS

ANNUALIZED VALUE OF MONETIZED COSTS AND BENEFITS UNDER THE PROPOSED RULE OVER A FIVE-YEAR PERIOD
[In 2021 dollars]

	7-Percent discount rate (in millions)	3-Percent discount rate (in millions)
Monetized Incremental Costs		
Subpart I – Web, Mobile, and Kiosk Accessibility	1,478.0	1,422.7
Subpart J – Accessible Medical Equipment	352.6	347.1
§ 84.56– Medical Treatment	12.4	12.1
§ 84.57 – Value Assessment Methods	0.1	0.1
§ 84.60 – Child Welfare	0.1	0.1
TOTAL Monetized Incremental Costs*	**1,843.2**	**1,782.0**
Monetized Incremental Benefits		
Subpart I – Web, Mobile, and Kiosk Accessibility	1,736.3	1,799.6
Subpart J – Accessible Medical Equipment	128.1	128.1
TOTAL Monetized Incremental Benefits*	**1,864.3**	**1,927.7**

(***Note:** Totals may not sum due to rounding.)

Quantified incremental costs concerning Accessible Medical Equipment under subpart J come from updating policies and procedures, acquiring accessible Medical Diagnostic Equipment (MDE), and ensuring staff are qualified to successfully operate accessible MDE. Quantified incremental costs concerning Web, Mobile, and Kiosk Accessibility under subpart I come from reviewing and updating existing web content and mobile apps while ensuring ongoing conformance with listed standards.

Additional costs for provisions under §84.56 – Medical Treatment, § 84.57 – Value Assessment Methods, and § 84.60 – Child Welfare, are calculated based on limited revisions to policies and procedures and training for employees on provisions that largely restate existing obligations and explicitly apply them to specific areas of health and human services. The RIA requests comment on more extensive transition and ongoing costs.

Concerning the proposed provisions to ensure consistency with the ADA, statutory amendments to the Rehabilitation Act, and Supreme Court and other significant court cases, the RIA finds that these proposed provisions will likely result in no additional costs to recipients.

Regarding costs, the RIA finds that the proposed rule would result in annualized costs over a 5-year time horizon of $1,782.0 million or $1,843.2 million, corresponding to a 3% or a 7% discount rate. The RIA separately reports a full range of cost estimates of about $1,615.5 million to $2,143.7 million at a 3% discount rate, and a range of cost estimates of about $1,674.5 million to $2,213.3 million at a 7% discount rate.

For quantified benefits, the RIA quantifies the benefits that people with disabilities are expected to receive due to higher percentages of accessible Medical Diagnostic Equipment (yielding improved health outcomes) at recipients' locations and more accessible web content, mobile apps, and kiosks. The RIA concludes that the proposed rule would result in total annualized benefits of $1,927.7 million at a 3% discount rate and $1,864.3 million at a 7% discount rate.

In addition to these quantified benefit estimates, the RIA includes discussions of potential unquantified benefits under the rule. Generally, the RIA anticipates that the proposed rule will result in a myriad of benefits for individuals with disabilities as a result of greater access to necessary health and human service programs and activities as well as limitations to discriminatory actions. Analogously, some costs have been quantified, while for others, the RIA requests comment that would facilitate more thorough estimation.

The RIA discusses both quantitatively and qualitatively the regulatory alternatives the Department has considered in an attempt to achieve the same statutory and regulatory goals while imposing lower costs on society.

B. Regulatory Flexibility Act – Initial Small Entity Analysis

The Department has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act. This analysis, as well as other sections in this

Regulatory Impact Analysis, serves as the Initial Regulatory Flexibility Analysis, as required under the Regulatory Flexibility Act.

The Department deems that a proposed rule has a significant economic impact on a substantial number of small entities whenever the rule generates a change in revenues of more than 3% for 5% or more of small recipients.

The U.S. Small Business Administration (SBA) maintains a Table of Small Business Size Standards Matched to North American Industry Classification System Codes (NAICS).[585] We have used SBA yearly revenues thresholds for 2019, which for recipients ranged between $8 million[586] and $41.5 million.[587]

As reported in the RIA, 97.4% of all firms in the Health Care and Social Assistance sector (NAICS 62) are small. With the exception of Hospitals (Subsector 622), at least 9 out 10 of all recipients within each Health Care and Social Assistance NAICS code are small.

Most firms — 98.3% — in the Pharmacies and Drug Stores (NAICS 446110) group are small as well. About 60% of Direct Health and Medical Insurance Carriers (NAICS 524114) are small. About 60% of Colleges, Universities, and Professional Schools (NAICS 611310) are small.

Hence, almost all non-government recipients (i.e., private firms), under the scope of the proposed rule are small businesses.

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[585] The most current version became effective on October 1, 2022. *See* U.S. Small Bus. Admin., Table of Size Standards, (last updated Oct. 1, 2022), https://www.sba.gov/document/support-table-size-standards. In our analyses, which pertain to 2019, we used the version effective in the 2019 calendar year. We note that CEs' distribution by SBA size—namely, the fraction of CEs that are small by SBA standards—did not change in any meaningful way in the past decades.

[586] The $8 million yearly 2019 revenue threshold applies to several NAICS, including 621340, Offices of Physical, Occupational and Speech Therapists and Audiologists, and 624410, Child Day Care Services. These $8 million yearly 2019 revenue thresholds have been increased for three NAICS: 621340, Offices of Physical, Occupational and Speech Therapists and Audiologists (to $11 million); 621399, Offices of All Other Miscellaneous Health Practitioners (to $ 9 million) and 624410, Child Day Care Services (to 8.5 million).

[587] The $41.5 million yearly 2019 revenue threshold applies to Hospitals (NAICS 622), Direct Health and Medical Insurance Carriers (NAICS 524114) and Kidney Dialysis Centers (NAICS 621492). These thresholds have not changed in SBA's October 1, 2022 update. The $41.5 million yearly revenue threshold remains the highest value for recipients considered in our analyses.

Moreover, the fraction of total small firms in each NAICS that falls under the smallest size group (fewer than 5 employees) is greater than 5% for all relevant NAICS.

As a consequence, it is sufficient to investigate the impact of the proposed rule on the average recipient in the smallest size group to determine whether the proposed rule may generate a change in revenues of more than 3%. We need to determine whether the average firm in the smallest size group will experience a reduction in revenues greater than 3%.

Below we discuss the two reasons for our conclusion that firms in the smallest groups will not experience a 3% reduction in revenues. Hence, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

As for the first reason, we note that, with the exception of a handful of HMO Medical Centers (NAICS 621491) and about 24,500 Child Day Care Services (NAICS 624410) firms, the yearly average revenues (in 2019 dollars) for a recipient belonging to the smallest size group — for each 6-digit NAICS separately — are $160,000 or more.

Three percent of this sum is about $5,000, which we deem is enough to finance purchase of the limited set of inexpensive MDE the smallest entities typically need and training.

The average yearly revenue for a Child Day Care Services firm in the smallest size group (fewer than five employees) is about $98,000. As we expect that recipients in this group will incur only Child Welfare training costs (less than 1 hour per year, or less than $60 in costs), we conclude that the impact of the proposed rule is less than 3% of revenues (about $3,000 for these small recipients) for recipients in this group.

Even among the smallest recipient groups within the 6-digit NAICS groups that private recipients belong to, the typical (median) yearly revenue is about $300,000 for podiatrists' offices (the maximum is $0.5 million for general hospitals, the lowest is $98,000 for Child Day Care Services), which signals that in many cases the 3% revenue threshold is about $10,000. Costs of the proposed rule are mostly proportional to the size of the recipient, and typical

recipients in the smallest size group (fewer than 5 employees) are not expected to incur $10,000 incremental costs.

In addition, we estimate that the obligation to ensure that web content and mobile applications for the Department's recipients that are small providers (those with fewer than fifteen employees) will be less than 3% of their revenues. We note that the vast majority of the Department's recipients are small providers and estimate that most of these small providers (approximately 85.9%) have websites. The websites of these small providers are typically one domain with up to a few thousand pages and limited visitors per month. Thus, the Department estimates that for a cost of approximately $440 per year these recipients will be able to ensure that their websites can be made accessible and kept accessible each year. The Department welcomes comments on the cost implications of subpart I for its recipients, particularly its small recipients.

As for the second reason, we stress that the proposed rule includes exemptions meant to ease the burden on small firms, including exemption when incremental compliance costs are an undue financial burden, and the ability to meet accessibility requirements via alternative, inexpensive methods (like reassignment of services to alternate accessible locations or home visits for MDE requirements).

C. Executive Order 13132: Federalism

As required by Executive Order 13132 on Federalism, the Department has examined the effects of provisions in the proposed regulation on the relationship between the Federal Government and the states. The Department has concluded that the proposed regulation has federalism implications but notes that State law will continue to govern unless displaced under standard principles of preemption.

The proposed regulation attempts to balance State autonomy with the necessity to create a Federal benchmark that will provide a uniform level of nondiscrimination protection across the country. It is recognized that the states generally have laws that relate to nondiscrimination

against individuals on a variety of bases. Such State laws continue to be enforceable, unless they prevent application of the proposed rule. The proposed rule explicitly provides that it is not to be construed to supersede State or local laws that provide additional protections against discrimination on any basis articulated under the regulation. Provisions of State law relating to nondiscrimination that are "more stringent" than the proposed Federal regulatory requirements or implementation specifications will continue to be enforceable.

Section 3(b) of Executive Order 13132 recognizes that national action limiting the policymaking discretion of states will be imposed only where there is constitutional and statutory authority for the action and the national activity is appropriate considering the presence of a problem of national significance. Discrimination issues in relation to health care are of national concern by virtue of the scope of interstate health commerce.

Section 4(a) of Executive Order 13132 expressly contemplates preemption when there is a conflict between exercising State and Federal authority under a Federal statute. Section 4(b) of the Executive Order authorizes preemption of State law in the Federal rule making context when "the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute." The approach in this regulation is consistent with these standards in the Executive Order in superseding State authority only when such authority is inconsistent with standards established pursuant to the grant of Federal authority under the statute.

Section 6(b) of Executive Order 13132 includes some qualitative discussion of substantial direct compliance costs that State and local governments would incur as a result of a proposed regulation. We have considered the cost burden that this proposed rule would impose on State and local government recipients and estimate State and local government annualized costs will be about $576.4 million per year (2021 dollars) at a 3% discount rate and $600.6 million at a 7% discount rate.

These costs represent the sum of costs for compliance with all provisions applying to State and local governments, namely those for subpart I (about 38% of costs for all recipients,

i.e., public and private entities altogether), subpart J (about 10% of costs for all recipients), section 84.56 - Medical Treatment (about 10% of costs for all recipients), 100% of costs for section 84.57 - Value Assessment Methods (only public entities – Medicaid agencies – bear these costs), and section 84.60 - Child Welfare (about 4 % of costs of all recipients).

In addition, the Department is aware that DOJ has issued a Preliminary Regulatory Impact Analysis to accompany its rule proposing requirements for public entities covered by title II of the ADA and that its requirements are consistent with this Department's subpart I. DOJ examined the costs of its proposal for all public entities covered by title II and stated that the rule will not be unduly burdensome or costly for public entities. Because this Department's rule is consistent with the DOJ proposed rule, we believe that the DOJ analysis provides further support for our belief that subpart I will not be unduly burdensome or costly for the Department's recipients that are public entities.

The Department welcomes comments about the potential federalism implications of the proposed rule and on the proposed rule's effects on State and local governments.

D. Paperwork Reduction Act

This proposed rule contains information collection requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA).[588] Under the PRA, agencies are required to submit to OMB for review and approval any reporting or record-keeping requirements inherent in a proposed or final rule and are required to publish such proposed requirements for public comment. The PRA requires agencies to provide a 60-day notice in the *Federal Register* and solicit public comment on a proposed collection of information before it is submitted to OMB for review and approval.

Section 3506(c)(2)(A) of the PRA requires that the Department solicit comment on the following issues:

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[588] 44 U.S.C. 3501 et seq.

1. Whether the information collection is necessary and useful to carry out the proper functions of the agency;
2. The accuracy of the agency's estimate of the information collection burden;
3. The quality, utility, and clarity of the information to be collected; and
4. Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

The PRA requires consideration of the time, effort, and financial resources necessary to meet the information collection requirements referenced in this section.

- *Paperwork Reduction Act Question 1: The Department invites public comment on its assumptions as they relate to the PRA requirements summarized in this section and explicitly invites comment from potential respondents regarding the burden estimate we ascribe to these requirements, including a discussion of respondents' basis for their computation.*

This Notice of Proposed Rulemaking does not modify several longstanding collections of information that have been required since 1977: § 84.5, (assurances); § 84.6(c) (self-evaluation); § 84.7(a)(designation of responsible employee and adoption of grievance procedures; § 84.22 (e) (existing facilities: transition plan); and § 84.61, redesignated as § 84.98 (Procedures). The Notice of Proposed Rulemaking slightly modifies one longstanding collection of information required since 1977 to align more closely with the requirement under title II of the ADA[589]: § 84.8 (notice). With regard to assurances, § 84.5, OCR has previously obtained PRA approval (OMB control # 0945-0008) for this reporting requirement via an updated HHS Form 690 (Consolidated Civil Rights Assurance Form), separate from this rulemaking. The requirement to sign and submit an assurance of compliance currently exists under section 504 and other civil rights regulations (Title VI, section 1557, Title IX, and the Age Act). Since the Department provides an online portal through which covered entities submit an attestation of

[589] *See* 28 CFR 35.106.

Assurance of Compliance, the Department has determined that this requirement imposes no additional reporting or recordkeeping requirements under the PRA.

Like the assurances section, all of the other sections listed above are being retained from the current section 504 rule issued in 1977. Section 84.61, redesignated as § 84.98, states that the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. The provision raising potential PRA issues is the requirement that recipients maintain records that the Department finds necessary to determine compliance. However, that section, like all of the others listed above, has existed since the original section 504 regulations were enacted in 1977. Accordingly, these sections impose no additional burden on recipients since they have been subject to this regulation since that time.

The notice requirement outlined in proposed § 84.8 implicates the third-party disclosure provisions of the PRA implementing regulations, which compels an agency to request comment and submit for OMB review any agency regulation that requires an individual "to obtain or compile information for the purpose of disclosure to members of the public or the public at large, through posting, notification, labeling or similar disclosure…."

Table 6 of the Regulatory Impact Analysis reports that there are about 453,084 recipients covered by this rulemaking. We estimate the burden for responding to the proposed § 84.8 notice requirement assuming a single response per recipient, and that administrative or clerical support personnel will spend 34 minutes (0.5667 of an hour) to respond.[590] The estimated total number of hours to respond is 256,763 (0.567 x 453,084).

Regulation Burden	Number of Recipients	Number of responses per recipient	Total responses	Burden hours per response	Total burden hours
§ 84.8	453,084	1	453,084	.5667	256,763

[590] We rely on the hourly estimate for a similar notice provision in the NPRM for 45 CFR 92.10. 87 FR 47824, 47908 (Aug. 4, 2022).

- *Paperwork Reduction Act Question 2: The Department invites public comment on burdens associated with the third-party disclosure requirement under proposed § 84.8, including a discussion of respondents' basis for their computation.*

E. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that "establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability." Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

F. National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (NTTAA) directs that, as a general matter, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private, generally nonprofit organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities.[591] In addition, the NTTAA directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources.[592]

The Department is proposing to adopt the Accessibility Standards for Accessible Medical Diagnostic Equipment issued by the U.S. Access Board to apply to the purchase and lease of medical equipment by recipients of HHS funds that provide health care services and programs.

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[591] Pub. L. 104-113, section 12(d)(1) (15 U.S.C. 272 Note).
[592] *Id*. at12(d)(1).

These Standards were adopted by the U.S. Access Board in 2017 after a five-year review period that included an Advisory Committee, composed of representatives from the health care industry, architects, persons with disabilities, and organizations representing a variety of interested stakeholders. The Standards were developed after extensive notice-and-comment. The development of these standards was required by Section 510 of the Rehabilitation Act of 1973, as amended, and were developed with the participation of the Food and Drug Administration. They have gained wide recognition in the United States. The Department is unaware of any privately developed standards created with the same wide participation and open process. As a result, the Department believes that it is appropriate to use these Standards for its section 504 rule.

- *NTAA Question 1: The Department seeks public comment on these standards [Accessibility Standards for Accessible Medical Diagnostic Equipment] and whether there are any other standards for accessible medical diagnostic equipment that the Department should consider.*

The Department is proposing to adopt the Web Content Accessibility Guidelines 2.1 Level AA as the accessibility standard to apply to web content and mobile apps of recipients. WCAG 2.1 was developed by the W3C®, which has been the principal international organization involved in developing protocols and guidelines for the web. The W3C® develops a variety of technical standards and guidelines, including ones relating to privacy, internationalization of technology, and accessibility. Thus, the Department believes it is complying with the NTTAA in selecting WCAG 2.1 as the applicable accessibility standard.

- *NTTAA Question 2: The Department seeks public comment on the selection of WCAG 2.1 as the accessibility standard applicable to web content and mobile apps of recipients and whether there are other standards that the Department should consider.*

Note that this question is similar to the questions asked in "Web Accessibility Question 4."

G. **Executive Order 12250 on Leadership and Coordination of Nondiscrimination Laws**

Pursuant to E.O. 12250, the Attorney General has the responsibility to ''review … proposed rules … of the Executive agencies'' implementing nondiscrimination statutes such as section 504 ''in order to identify those which are inadequate, unclear or unnecessarily inconsistent.''[161] E.O. 12250 does not apply to the 504 provisions relating to equal employment, which are reviewed and coordinated by the Equal Employment Opportunity Commission. *See* E.O. 12250 (DOJ Coordination authority) at 1-503 and E.O. 12067 (EEOC Coordination authority). The Attorney General has delegated the E.O. 12250 functions to the Assistant Attorney General for the Civil Rights Division for purposes of reviewing and approving proposed rules. 28 CFR 0.51. The Department will coordinate with DOJ to review and approve this proposed rule prior to publication in the *Federal Register.*

V. Effective Date

The Department proposes that the effective date be 60 days after publication of the Final Rule.

VI. Request for Comment

The Department seeks comment on all issues raised by the proposed regulation.

List of Subjects in 45 CFR Part 84

Adoption and foster care, Civil rights, Childcare, Child Welfare, Colleges and universities, Communications, Disabled, Discrimination, Emergency medical services, Equal access to justice, Federal financial assistance, Grant programs, Grant programs – health, Grant programs – social programs, Health, Health care, Health care access, Health facilities, Health programs and activities, Individuals with disabilities, Integration, Long term care, Medical care, Medical equipment, Medical facilities, Nondiscrimination, Public health.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 45 CFR part 84 as follows:

TITLE 45--Public Welfare

PART 84—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

1. The authority citation for part 84 is revised to read as follows:

Authority: 29 U.S.C. 794.

Subpart G also issued under 21 U.S.C. 1174; 42 U.S.C. 4581.

2. Revise the heading for part 84 to read as set forth above.

Subpart A—General Provisions

3. Revise § 84.1 to read as follows:

§ 84.1 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of disability in any program or activity receiving Federal financial assistance.

(b) *Broad coverage.* The definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of section 504. The primary object of attention in cases brought under section 504 should be whether entities receiving Federal financial assistance have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability." The question of whether an individual meets the definition of "disability" under this part should not demand extensive analysis.

4. Revise § 84.2 to read as follows:

§ 84.2 Application.

(a) This part applies to each recipient of Federal financial assistance from the Department and to the recipient's programs or activities that involve individuals with disabilities in the United States. This part does not apply to the recipient's programs or activities outside the United States that do not involve individuals with disabilities in the United States.

(b) The requirements of this part do not apply to the ultimate beneficiaries of any program or activity operated by a recipient of Federal financial assistance.

(c) Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances.

§ 84.10 [Removed]

5. Remove § 84.10.

§ 84.3 [Redesignated as § 84.10]

6. Redesignate § 84.3 as § 84.10.

7. Add new § 84.3 to read as follows:

§ 84.3 Relationship to other laws.

This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities, or individuals associated with them.

8. Revise § 84.4 to read as follows:

§ 84.4 Disability.

(a) *Definition*—(1) *Disability* means, with respect to an individual:

(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.

(2) *Rules of construction.* (i) The definition of "disability" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of section 504.

(ii) An individual may establish coverage under any one or more of the three prongs of the definition of "disability" in paragraph (a)(1) of this section, the "actual disability" prong in paragraph (a)(1)(i) of this section, the "record of" prong in paragraph (a)(1)(ii) of this section, or the "regarded as" prong in paragraph (a)(1)(iii) of this section.

(iii) Where an individual is not challenging a recipient's failure to provide reasonable modifications, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the "regarded as" prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the "actual disability" or "record of" prong regardless of whether the individual is challenging a recipient's failure to provide reasonable modifications.

(b) *Physical or mental impairment*—(1) *Definition*. (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.

(2) *Physical or mental impairment* includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, substance use disorder, alcohol use disorder, and long COVID.

(3) Physical or mental impairment does not include homosexuality or bisexuality.

(c) *Major life activities*—(1) *Definition*. Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) *Rules of construction.* (i) In determining whether an impairment substantially limits a major life activity, the term major shall not be interpreted strictly to create a demanding standard.

(ii) Whether an activity is a major life activity is not determined by reference to whether it is of central importance to daily life.

(d) *Substantially limits*—(1) *Rules of construction*. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of section 504. "Substantially limits" is not meant to be a demanding standard.

(ii) The primary object of attention in cases brought under section 504 should be whether recipients have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(iii) An impairment that substantially limits one major life activity does not need to limit other major life activities to be considered a substantially limiting impairment.

(iv) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(v) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(vi) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADAAA.

(vii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(viii) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(ix) The six-month "transitory" part of the "transitory and minor" exception in paragraph (f)(2) of this section does not apply to the "actual disability" or "record of" prongs of the definition of "disability." The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) *Predictable assessments.* (i) The principles set forth in the rules of construction in this section are intended to provide for generous coverage and application of section 504's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under section 504.

(ii) Applying these principles, the individualized assessment of some types of impairments as set forth in paragraph (d)(2)(iii) of this section will, in virtually all cases, result in a determination of coverage under paragraph (a)(1)(i) of this section (the "actual disability" prong) or paragraph (a)(1)(ii) of this section (the "record of" prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of

impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying these principles it should easily be concluded that the types of impairments set forth in paragraphs (d)(2)(iii)(A) through (K) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in this paragraph may substantially limit additional major life activities (including major bodily functions) not explicitly listed in paragraphs (d)(2)(iii)(A) through (K).

(A) Deafness substantially limits hearing;

(B) Blindness substantially limits seeing;

(C) Intellectual disability substantially limits brain function;

(D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(E) Autism Spectrum Disorder substantially limits brain function;

(F) Cancer substantially limits normal cell growth;

(G) Cerebral palsy substantially limits brain function;

(H) Diabetes substantially limits endocrine function;

(I) Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;

(J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.

(3) *Condition, manner, or duration.* (i) At all times taking into account the principles set forth in the rules of construction, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of "disability," the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (d)(2)(iii) of this section, which by their inherent nature should be easily found to impose a

substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(4) *Mitigating measures* include, but are not limited to:

(i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this part;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(e) *Has a record of such an impairment*—(1) *General*. An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction*. Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by section 504 and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of "disability" if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (d)(1) of this section apply.

(3) *Reasonable modification*. An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) *Is regarded as having such an impairment.* The following principles apply under the "regarded" as prong of the definition of "disability" in paragraph (a)(1)(iii) of this section:

(1) Except as set forth in paragraph (f)(2) of this section, an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, even if the recipient asserts, or may or does ultimately establish, a defense to the action prohibited by section 504.

(2) An individual is not "regarded as having such an impairment" if the recipient demonstrates that the impairment is, objectively, both "transitory" and "minor." A recipient may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the recipient must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both "transitory" and "minor." For purposes of this section, "transitory" is defined as lasting or expected to last six months or less.

(3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under section 504 only when an individual proves that a recipient discriminated on the basis of disability within the meaning of section 504.

(g) *Exclusions.* The term "disability" does not include —

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

§ 84.6 [Amended]

9. In § 84.6 remove the word(s) in the left column in the following table and add in its place the word(s) in the right column wherever it occurs:

handicap	Disability
handicapped persons	persons with disabilities

10. Revise § 84.8 to read as follows:

§ 84.8 Notice.

A recipient shall make available to employees, applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the programs or activities of the recipient, and make such information available to them in such manner as the head of the recipient or his or her designee finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

11. Amend newly redesignated § 84.10 as follows:

a. Remove the alphabetical paragraph designations and arrange the definitions in alphabetical order;

b. Add definitions in alphanumerical order for "2004 ADA Accessibility Guidelines (ADAAG)", "2010 Standards", and "ADA";

c. Remove the definition for "Applicant for assistance" and add in its place a definition for "Applicant";

d. Add definitions in alphabetical order for "Architectural Barriers Act", "archived web content", and "auxiliary aids and services";

e. Add definitions in alphabetical order for "companion", "conventional electronic devices", "current illegal use of drugs", "direct threat", "disability", and "drug";

f. Remove the definition of “Education of the Handicapped Act”;

g. Add a definition in alphabetical order for “Existing facility”;

h. Revise the definitions of “facility” and “Federal financial assistance”;

i. Add a definition in alphabetical order for “foster care”;

j. Remove the definitions of “handicap”, “handicapped person”;

k. Add definitions in alphabetical order for “illegal use of drugs” and “individual with a disability”, “kiosks”, “medical diagnostic equipment MDE”, “mobile applications (apps)”, “most integrated setting”, “other power-driven mobility device,” and “parents”;

l. Revise the definition of “program or activity”;

m. Add definitions in alphabetical order for “prospective parents”, “qualified individual with a disability”, “qualified interpreter”, and “qualified reader”;

n. Remove the definition of “qualified handicapped person”;

o. Revise the definition of “section 504”;

p. Add definitions in alphabetical order for “service animal”, “Standards for Accessible Medical Diagnostic Equipment (“Standards for Accessible MDE”)”, and “State”;

q. Remove the definition of “the Act”; and

r. Add definitions in alphabetical order for “ultimate beneficiary”, “video remote interpreting (VRI)”, “WCAG 2.1”, “web content”, and “wheelchair”.

The additions and revisions read as follows:

§ **84.10 Definitions.**

2004 ADA Accessibility Guidelines (ADAAG) means the requirements set forth in appendices B and D to 36 CFR 1191 (2009).

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in 28 CFR 35.151.

ADA means the Americans with Disabilities Act (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611), including changes made by the ADA Amendments Act of 2008 (Pub. L. 110-325), which became effective on January 1, 2009.

Applicant means one who submits an application, request, or plan required to be approved by the designated Department official or by a primary recipient, as a condition of eligibility for Federal financial assistance.

Architectural Barriers Act means the Architectural Barriers Act (42 U.S.C. 4151–4157), including the Architectural Barriers Act Accessibility Standards at 41 CFR 102–76.60 et seq.

Archived web content means web content that—

(1) Is maintained exclusively for reference, research, or recordkeeping;

(2) Is not altered or updated after the date of archiving; and

(3) Is organized and stored in a dedicated area or areas clearly identified as being archived.

Auxiliary aids and services include:

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Braille materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP);

large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Companion means a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

Conventional electronic documents means web content or content in mobile apps that is in the following electronic file formats: portable document formats (PDF), word processor file formats, presentation file formats, spreadsheet file formats, and database file formats.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

* * * * *

Direct threat means:

(1) Except as provided in paragraph (2) of this definition, 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 as provided in § 84.75.

(2) With respect to employment as provided in § 84.12, the term as defined by the Equal Employment Opportunity Commission's regulation implementing title I of the Americans with Disabilities Act of 1990, at 29 CFR 1630.2(r).

* * * * *

Disability means:

(1) Except as provided in paragraph (2) of this definition, the definition of *disability* found at § 84.4.

(2) With respect to employment, the definition of *disability* found at 29 CFR 1630.2:

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Federal financial assistance means any grant, cooperative agreement, loan, contract (other than a direct Federal procurement contract or a contract of insurance or guaranty), subgrant, contract under a grant or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel;

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government;

(4) Any other thing of value by way of grant, loan, contract, or cooperative agreement.

Foster care means 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, childcare institutions, and pre-adoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term illegal use of drugs does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term *individual with a disability* does not include an individual who is currently engaging in the illegal use of drugs, when a recipient acts on the basis of such use.

Kiosks means self-service transaction machines made available by recipients at set physical locations for the independent use of patients or program participants in health and human service programs or activities. They often consist of a screen and an input device – either a keyboard, touch screen, or similar device – onto which the program participant independently types in or otherwise enters information. In health and human service programs, recipients often make kiosks available so that patients or program participants can check in, provide information for the receipt of services, procure services, have their vital signs taken, or perform other similar actions.

Medical diagnostic equipment MDE means equipment used in, or in conjunction with, medical settings by health care providers for diagnostic purposes. MDE includes, for example,

examination tables, examination chairs (including chairs used for eye examinations or procedures, and dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological equipment commonly used for diagnostic purposes by health professionals.

Mobile applications (apps) means software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets.

Most integrated setting means a setting that provides individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible; is located in mainstream society; offers access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; and affords individuals choice in their daily life activities.

Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines — whether or not designed primarily for use by individuals with mobility disabilities — that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

Parents means biological or adoptive parents or legal guardians, as determined by applicable State law.

Program or activity means all of the operations of any entity described in paragraphs (1) through (4) of this definition, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of career and technical education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3) of this definition.

Prospective parents means individuals who are seeking to become foster or adoptive parents.

Qualified individual with a disability means:

(1) Except as provided in paragraphs (2), (3), and (4) of this definition, an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary

aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a recipient; and

(2) With respect to employment, an individual with a disability who meets the definition of "qualified" in the Equal Employment Opportunity Commission's regulation implementing title I of the Americans with Disabilities Act of 1990, 29 CFR 1630.2(m).

(3) With respect to childcare, preschool, elementary, secondary, or adult educational services, a person with a disability—

(i) Of an age during which nondisabled persons are provided such services;

(ii) Of any age during which it is mandatory under State law to provide such services to persons with a disability; or

(iii) To whom a State is required to provide a free appropriate public education under the Individuals with Disabilities Education Act; and

(4) With respect to postsecondary and career and technical education services, a person with a disability who with or without reasonable modifications to policies, practices, or procedures, or the provision of auxiliary aids and services, meets the academic and technical requirements for receipt of services or the participation in the recipient's program or activity;

Qualified interpreter means an interpreter who, via an on-site appearance or through a video remote interpreting (VRI) service, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

* * * * *

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with mental and neurological disabilities by preventing or interrupting impulsive or harmful behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

Standards for Accessible Medical Diagnostic Equipment ("Standards for Accessible MDE") means the standards at 36 CFR part 1195, promulgated by the Architectural and Transportation Barriers Compliance Board (Access Board) under section 510 of the Rehabilitation Act of 1973, as amended, in effect as of the date of promulgation of the final version of this rule, found in the appendix to 36 CFR part 1195.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Ultimate beneficiary means one among a class of persons who are entitled to benefit from, or otherwise participate in, a program or activity receiving Federal financial assistance and to whom the protections of this part extend. The ultimate beneficiary class may be the general public or some narrower group of persons.

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 84.77(d).

WCAG 2.1 means the Web Content Accessibility Guidelines (WCAG) 2.1, W3C® Recommendation 05 June 2018, https://www.w3.org/TR/2018/REC-WCAG21-20180605/ [https://perma.cc/UB8A-GG2F]. WCAG 2.1 is incorporated by reference elsewhere in this part (see §§ 84.84 and 84.86).

Web content means information or sensory experience—including the encoding that defines the content's structure, presentation, and interactions—that is communicated to the user by a web browser or other software. Examples of web content include text, images, sounds, videos, controls, animations, and conventional electronic documents.

Wheelchair means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

12. Revise subpart B to read as follows:

Subpart B – Employment Practices

Sec.

84.16 Discrimination prohibited.
84.17- 84.20 [Reserved]

Subpart B – Employment Practices

§ 84.16 Discrimination prohibited.

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any program or activity receiving Federal financial assistance from the Department.

(b) The standards used to determine whether paragraph (a) of this section has been violated shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 et seq., and, as such sections relate to employment, the provisions of sections 501 through 504 and 511 of the ADA of 1990, as amended (codified at 42 U.S.C. 12201–12204, 12210), as implemented in the Equal Employment Opportunity Commission's regulation at 29 CFR part 1630.

§§ 84.17- 84.20 [Reserved]

Subpart C—Program Accessibility

13. Revise § 84.21 to read as follows:

§ 84.21 Discrimination prohibited.

Except as otherwise provided in § 84.22, no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the programs or activities of a recipient, or be subjected to discrimination by any recipient.

14. Amend § 84.22 by:

a. Revising paragraphs (a) and (b);

b. Removing the words "handicapped person" and adding in its place the words "person with a disability" wherever they occur in paragraph (c);

c. Removing the words "handicapped persons" and adding in their place the words "persons with disabilities" wherever they occur in paragraphs (e) introductory text, (e)(1), and (f); and

d. Adding paragraph (g).

The revisions and addition read as follows:

§ 84.22 Existing facilities.

(a) *General.* A recipient shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not –

(1) Necessarily require a recipient to make each of its existing facilities accessible to and usable by individuals with disabilities; or

(2) Require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. In those circumstances where a recipient's personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the recipient has the burden of proving that compliance with this paragraph (a) would result in such an alteration or burdens The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee after considering all the recipient's resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient.

(b) *Methods.* A recipient may comply with the requirements of this section through such means as redesign or acquisition of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its programs or activities

readily accessible to and usable by individuals with disabilities. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A recipient shall, in making alterations to existing buildings, meet the accessibility requirements of § 84.23. In choosing among available methods for meeting the requirements of this section, a recipient shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

* * * * *

(g) *Safe harbor.* Elements that have not been altered in existing facilities on or after [EFFECTIVE DATE OF FINAL RULE], and that comply with the corresponding technical and scoping specifications for those elements in the American National Standard Specification (ANSI A117.1-1961(R1971) for facilities constructed between June 3, 1977, and January 18, 1991) or for those elements in the Uniform Federal Accessibility Standards (UFAS), appendix A to 41 CFR 101–19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984), for those facilities constructed between January 18, 1991, and [EFFECTIVE DATE OF FINAL RULE] are not required to be modified to comply with the requirements set forth in the 2010 Standards.

15. Revise § 84.23 to read as follows:

§ 84.23 New construction and alterations.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after June 3, 1977.

(b) *Alterations.* Each facility or part of a facility altered by, on behalf of, or for the use of a recipient in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion

of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after June 3, 1977.

(c) *Accessibility standards and compliance dates for recipients that are public entities.* (1) The accessibility standards and compliance dates in this subsection apply to recipients that are public entities. Public entities are any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act). (45 U.S.C. 541.)

(2) If physical construction or alterations commenced after June 3, 1977, but before January 18, 1991, then construction and alterations subject to this section shall be deemed in compliance with this section if they meet the requirements of the ANSI Standards (ANSI A117.1-1961(R1971) (ANSI). Departures from particular requirements of ANSI by the use of other methods are permitted when it is clearly evident that equivalent access to the facility or part of the facility is provided.

(3) If physical construction or alterations commence on or after January 18, 1991, but before [EFFECTIVE DATE OF FINAL RULE], then new construction and alterations subject to this section shall be deemed in compliance with this section if they meet the requirements of the Uniform Federal Accessibility Standards (UFAS). Departures from particular requirements of UFAS by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(4) For physical construction or alterations that commence on or after [EFFECTIVE DATE OF FINAL RULE] but before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE FEDERAL REGISTER], then new construction and alterations subject to this section may comply with either UFAS or the 2010 Standards. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(5) If physical construction or alterations commence on or after [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE FEDERAL REGISTER], then new construction and alterations subject to this section shall comply with the 2010 Standards.

(6) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation do not commence physical construction or alterations.

(d) *Accessibility standards and compliance dates for recipients that are private entities.* (1) The accessibility standards and compliance dates in this subsection apply to recipients that are private entities. Private entities are any person or entity other than a public entity.

(2) New construction and alterations subject to this section shall comply with ANSI if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government between June 3, 1977 and January 18, 1991, or if no permit is required, if the start of physical construction or alterations occurs between June 3, 1977 and January 18, 1991.

(3) New construction and alterations subject to this section shall comply with UFAS if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after January 18, 1991, and before [EFFECTIVE DATE OF FINAL RULE], or if no permit is required, if the start of physical construction or alterations occurs on or after January 18, 1991, and before [EFFECTIVE DATE OF FINAL RULE].

(4) New construction and alterations subject to this section shall comply either with UFAS or the 2010 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those

jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after [EFFECTIVE DATE OF FINAL RULE], and before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE FEDERAL REGISTER], or if no permit is required, if the start of physical construction or alterations occurs on or after [EFFECTIVE DATE OF FINAL RULE], and before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE FEDERAL REGISTER].

(5) New construction and alterations subject to this section shall comply with the 2010 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE FEDERAL REGISTER], or if no permit is required, if the start of physical construction or alterations occurs on or after [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE FEDERAL REGISTER].

(6) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation do not commence physical construction or alterations.

(e) *Noncomplying new construction and alterations*. (1) Newly constructed or altered facilities or elements covered by paragraph (a) or (b) of this section that were constructed or altered between June 3, 1977, and January 18, 1991, and that do not comply with ANSI shall be made accessible in accordance with the 2010 Standards.

(2) Newly constructed or altered facilities or elements covered by paragraph (a) or (b) of this section that were constructed or altered on or after January 18, 1991 and before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE FEDERAL REGISTER], and that do not comply with UFAS shall before [DATE ONE YEAR FROM PUBLICATION DATE

OF FINAL RULE IN THE FEDERAL REGISTER], be made accessible in accordance with either UFAS, or the 2010 Standards.

(3) Newly constructed or altered facilities or elements covered by paragraph (a) or (b) of this section that were constructed or altered before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE FEDERAL REGISTER] and that do not comply with ANSI (for facilities constructed or altered between June 3, 1977, and January 18, 1991) or UFAS (for facilities constructed or altered on or after January 18, 1991) shall, on or after [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE FEDERAL REGISTER], be made accessible in accordance with the 2010 Standards.

(f) *Public buildings or facilities requirements*. New construction and alterations of buildings or facilities undertaken in compliance with the 2010 Standards will comply with the scoping and technical requirements for a "public building or facility" regardless of whether the recipient is a public entity as defined in 28 CFR 35.104 or a private entity.

(g) *Compliance with the Architectural Barriers Act of 1968*. Nothing in this section relieves recipients whose facilities are covered by the Architectural Barriers Act, from their responsibility of complying with the requirements of that Act and any implementing regulations.

(h) *Mechanical rooms*. For purposes of this section, section 4.1.6(1)(g) of UFAS will be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of individuals with physical disabilities.

16. Revise the heading of subpart D to read as follows:

Subpart D—Childcare, Preschool, Elementary and Secondary, and Adult Education

17. Revise § 84.31 to read as follows:

§ 84.31 Application of this subpart.

Subpart D applies to childcare, preschool, elementary and secondary, and adult education programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

§§ 84.32 through 84.37 [Removed and Reserved]

18. Remove and reserve §§ 84.32 through 84.37.

19. Revise § 84.38 to read as follows:

§ 84.38 Childcare, Preschool, Elementary and Secondary, and Adult Education.

A recipient to which this subpart applies that provides childcare, preschool, elementary and secondary, or adult education may not, on the basis of disability, exclude qualified individuals with disabilities and shall take into account the needs of such persons in determining the aids, benefits, or services to be provided.

§ 84.39 [Removed and Reserved]

20. Remove and reserve § 84.39.

Subpart E – Postsecondary Education

§ 84.42 [Amended]

21. Amend § 84.42 by:

a. Removing the word "handicap" and adding in its place the word "disability' in paragraphs (a) and (b)(3)(i);

b. Removing the words "handicapped persons" and adding in their place the words "individuals with disabilities" in paragraphs (a), (b)(1), and (b)(2) introductory text (two times);

c. Removing the words "handicapped person" and adding in their place the words "individual with a disability" in paragraph (b)(4); and

d. Removing the word "handicapped" and adding in its place the word "disabled" in paragraph (c) introductory text.

§ 84.43 [Amended]

22. Amend § 84.43 by:

a. Removing the words “handicapped student” and adding in its place the words “student with disabilities” in paragraphs (a) and (c);

b. Removing the word “handicap” and adding in its place the word “disability” in paragraphs (a) and (c); and

c. Removing the words “handicapped persons” and adding in their place the words “individuals with disabilities” in paragraph (b).

§ 84.44 [Amended]

23. Amend § 84.44 by:

a. Removing the word “handicap” and adding in its place the word “disability” in paragraphs (a) and (c);

b. Removing the word “handicapped” and adding in its place the word “disabled” in its place in paragraph (a);

c. Removing the words “handicapped students” and adding in their place the words “students with disabilities” in two places in paragraph (b); and

d. Removing the words “handicapped student” and adding in its place the words “student with disabilities” in paragraph (d)(1).

§ 84.45 [Amended]

24. Amend § 84.45 by:

b. Removing the words “nonhandicapped students” and adding in their place two times the words “students without disabilities” in paragraph (a);

c. Removing the words “handicapped students” and adding in their place the words “students with disabilities” in paragraph (a);

d. Removing the words “handicapped students’ ” and adding in their place the words “students with disabilities’ ” in paragraph (a); and

e. Removing the word “handicap” and adding in its place the word “disability” in paragraph (b).

§ 84.46 [Amended]

25. Amend § 84.46 by:

a. Removing the word “handicap” and adding in its place the word “disability” wherever it occurs in paragraph (a);

b. Removing the words “handicapped persons” and adding in its place the words “ individuals with disabilities” in two places in paragraph (a)(1);

c. Removing the words “nonhandicapped persons” and adding in their place the words “individuals without disabilities” in paragraph (a)(1).

§ 84.47 [Amended]

26. Amend § 84.47 by:

a. Removing the word “handicap” and adding in its place the word “disability” in paragraphs (a)(1) and (b);

b. Removing the words “handicapped students” and adding in their place the words “students with disabilities” in paragraphs (a)(1) and (2) and paragraph (b);

c. Removing the words “handicapped student” and adding in their place the words “student with disabilities” in paragraph (a)(2);

d. Removing the words “handicapped persons” and adding in its place the words “individuals with disabilities” in paragraph (b); and

e. Removing the words “nonhandicapped students” and adding in their place the words “students without disabilities” in paragraph (b).

Subpart F—Health, Welfare, and Social Services

§ 84.52 [Amended]

27. Amend § 84.52 by:

a. Removing the words “handicapped person” and adding in its place the words “individual with a disability” in paragraphs (a)(1) through (3);

b. Removing the words “handicapped persons” and adding in its place the words “individuals with disabilities” in paragraphs (a)(2) and (4), in two places in paragraph (a)(5), and in paragraph (b); and

c. Removing paragraphs (c) and (d).

28. Revise § 84.53 to read as follows:

§ 84.53 Individuals with substance and alcohol use disorders.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against an individual with a substance or alcohol use disorder or individual with an alcohol use disorder who is suffering from a medical condition, because of the person's drug or alcohol use disorder.

29. Revise § 84.54 to read as follows:

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that provides aids, benefits, or services to persons who are institutionalized because of disability shall ensure that each qualified individual with disabilities, as defined in § 84.10, in its program or activity is provided an appropriate education, consistent with the Department of Education section 504 regulations at 34 CFR 104.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under subpart D of this part.

§ 84.55 [Amended]

30. Amend § 84.55 by:

a. Removing the words “handicapped infants” and adding in their place the words “infants with disabilities” in paragraph (a); and

b. Removing and reserving paragraphs (b) through (e).

31. Add §§ 84.56 and 84.57 to read as follows:

§ 84.56 Medical treatment.

(a) *Discrimination prohibited.* No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in medical treatment under any program or activity that receives Federal financial assistance, including in the allocation or withdrawal of any good, benefit, service.

(b) *Specific prohibitions.* The general prohibition in paragraph (a) of this section includes the following specific prohibitions:

(1) *Denial of medical treatment.* A recipient may not deny or limit medical treatment to a qualified individual with a disability when the denial is based on:

(i) Bias or stereotypes about a patient's disability;

(ii) Judgments that the individual will be a burden on others due to their disability, including, but not limited to caregivers, family, or society; or

(iii) A belief that the life of a person with a disability has lesser value than the life of a person without a disability, or that life with a disability is not worth living.

(2) *Denial of treatment for a separate symptom or condition.* Where a qualified individual with a disability or their authorized representative seeks or consents to treatment for a separately diagnosable symptom or medical condition (whether or not that symptom or condition is a disability under this part or is causally connected to the individual's underlying disability), a recipient may not deny or limit clinically appropriate treatment if it would be offered to a similarly situated individual without an underlying disability.

(3) *Provision of medical treatment.* 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 impacts the effectiveness, or ease of administration of the treatment itself, or has a medical effect on the condition to which the treatment is directed.

(c) *Construction*—(1) *Professional judgment in treatment*. (i) Nothing in this section 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.

(ii) These circumstances include those in which the recipient typically declines to provide the treatment to any individual, or reasonably determines based on current medical knowledge or the best available objective evidence that such medical treatment is not clinically appropriate for a particular individual. The criteria in paragraphs (b)(1)(i) through (iii) of this section are not a legitimate nondiscriminatory reason for denying or limiting medical treatment and may not be a basis for a determination that an individual is not qualified for the treatment, or that a treatment is not clinically appropriate for a particular individual.

(2) *Consent.* (i) Nothing in this section requires a recipient to provide medical treatment to an individual where the individual, or their authorized representative, does not consent to that treatment.

(ii) Nothing in this section allows a recipient to discriminate against a qualified individual with a disability on the basis of disability in seeking to obtain consent from an individual or their authorized representative for the recipient to provide, withhold, or withdraw treatment.

(3) *Providing information.* Nothing in this section precludes a provider 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 or the best available objective evidence.

§ 84.57 Value assessment methods.

A recipient shall not, directly or through contractual, licensing, or other arrangements, use any measure, assessment, or tool that discounts the value of life extension on the basis of disability 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 any aid, benefit, or service, including the terms or conditions under which they are made available.

32. Add § 84.60 to read as follows:

§ 84.60 Children, parents, caregivers, foster parents, and prospective parents in the child welfare system.

(a) *Discriminatory actions prohibited.* (1) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any child welfare program or activity that receives Federal financial assistance.

(2) Under the prohibition set forth in the previous subsection, discrimination includes:

(i) Decisions based on speculation, stereotypes, or generalizations that a parent, caregiver, foster parent, or prospective parent, because of a disability, cannot safely care for a child; and

(ii) Decisions based on speculation, stereotypes, or generalizations about a child with a disability.

(b) *Additional prohibitions.* The prohibitions in paragraph (a) of this section apply to actions by a recipient of Federal financial assistance made directly or through contracts, agreements, or other arrangements, including any action to:

(1) Deny a qualified parent with a disability custody or control of, or visitation to, a child;

(2) Deny a qualified parent with a disability an opportunity to participate in or benefit from reunification services is equal to that afforded to persons without disabilities;

(3) Terminate the parental rights or legal guardianship of a qualified individual with a disability; or

(4) Deny a qualified caregiver, foster parent, companion, or prospective parent with a disability the opportunity to participate in or benefit from child welfare programs and activities.

(c) *Parenting evaluation procedures*. A recipient to which this subpart applies shall establish procedures for referring individuals who, because of disability, need or are believed to need adapted services or reasonable modifications, and shall ensure that tests, assessments, and other evaluation materials, are tailored to assess specific areas of disability-related needs, and not merely those which are designed to provide a single general intelligence quotient.

§ 84.61 [Removed]

33. Remove § 84.61.

34. Revise subpart G to read as follows:

Subpart G—General Requirements

Sec.

84.68 General prohibitions against discrimination.
84.69 Illegal use of drugs.
84.70 Maintenance of accessible features.
84.71 Retaliation or coercion.
84.72 Personal devices and services.
84.73 Service animals.
84.74 Mobility devices.
84.75 Direct threat.
84.76 Integration.

Subpart G—General Requirements

§ 84.68 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, solely on the basis of disability, be excluded from participation in or be denied the benefits of the programs or activities of a recipient, or be subjected to discrimination by any recipient.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability —

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.

(iii) Provide a qualified individual with a disability an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the benefit or to reach the same level of achievement as that provided to others.

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A recipient may not deny a qualified individual with a disability the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration—

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(4) A recipient may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to individuals with disabilities.

(5) A recipient, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A recipient may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a recipient establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by the recipient are not, themselves, covered by this part.

(7)(i) A recipient shall make reasonable modifications in policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the program or activity.

(ii) A recipient is not required to provide a reasonable modification to an individual who meets the definition of "disability" solely under the "regarded as" prong of the definition of disability in this part.

(8) A recipient shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the program or activity being offered.

(c) Nothing in this part prohibits a recipient from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A recipient shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept a modification, aid, service, opportunity, or benefit provided under section 504 or this part which such individual chooses not to accept.

(2) Nothing in section 504 or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A recipient may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by section 504 or this part.

(g) A recipient shall not exclude or otherwise deny equal programs or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(h) A recipient may impose legitimate safety requirements necessary for the safe operation of its programs or activities. However, the recipient must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(i) Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

§ 84.69 Illegal use of drugs.

(a) *General.* (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A recipient shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who —

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) *Services provided under the Rehabilitation Act.* (1) A recipient shall not exclude an individual on the basis of that individual's current illegal use of drugs from the benefits of programs and activities providing health services and services provided under subchapters I, II, and III of the Rehabilitation Act, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) *Drug testing.* (1) This part does not prohibit the recipient from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in paragraph (c) of this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

§ 84.70 Maintenance of accessible features.

(a) A recipient shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by section 504 or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

(c) For a recipient, if the 2010 Standards reduce the technical requirements or the number of required accessible elements below the number required by UFAS, the technical requirements or the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the 2010 Standards.

§ 84.71 Retaliation or coercion.

(a) A recipient shall not discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge , testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under section 504 or this part.

(b) A recipient shall not coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of their having exercised or enjoyed, or on account of their having aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by section 504 or this part.

§ 84.72 Personal devices and services.

This part does not require a recipient to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

§ 84.73 Service animals.

(a) *General.* Generally, a recipient shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

(b) *Exceptions.* A recipient may ask an individual with a disability to remove a service animal from the premises if —

(1) The animal is out of control and the animal's handler does not take effective action to control it; or

(2) The animal is not housebroken.

(c) *If an animal is properly excluded.* If a recipient properly excludes a service animal under paragraph (b) of this section, it shall give the individual with a disability the opportunity to participate in the program or activity without having the service animal on the premises.

(d) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.*, voice control, signals, or other effective means).

(e) *Care or supervision*. A recipient is not responsible for the care or supervision of a service animal.

(f) *Inquiries.* A recipient shall not ask about the nature or extent of a person's disability but may make two inquiries to determine whether an animal qualifies as a service animal. A

recipient may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A recipient shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a recipient may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.*, the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(g) *Access to areas of the recipient.* Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of the recipient's facilities where members of the public, participants in programs or activities, or invitees, as relevant, are allowed to go.

(h) *Surcharges*. A recipient shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a recipient normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by their service animal.

(i) *Miniature horses*—(1) *Reasonable modifications*. A recipient shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(2) *Assessment factors*. In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a recipient shall consider —

(i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;

(ii) Whether the handler has sufficient control of the miniature horse;

(iii) Whether the miniature horse is housebroken; and

(iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(3) *Other requirements*. Paragraphs (c) through (h) of this section, which apply to service animals, shall also apply to miniature horses.

§ 84.74 Mobility devices.

(a) *Use of wheelchairs and manually-powered mobility aids.* A recipient shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.

(b) *Use of other power-driven mobility devices*—(1) *Requirement*. A recipient shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless a recipient can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that a recipient has adopted pursuant to § 84.68(h).

(2) *Assessment factors*. In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a recipient shall consider —

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics, e.g., whether its program or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user.

(iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility;

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations; and

(c) *Inquiry about disability*—(1) *Requirement*. A recipient shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

(2) *Inquiry into use of other power-driven mobility device.* A recipient may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. A recipient in permitting the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation of a valid, State-issued, disability parking placard or card, or other State-issued proof of disability as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a recipient shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the state of issuance's requirements for disability placards or cards.

§ 84.75 Direct threat.

(a) This part does not require a recipient to permit an individual to participate in or benefit from the programs or activities of that recipient when that individual poses a direct threat.

(b) Except as provided in paragraph (c) of this section, in determining whether an individual poses a direct threat, a recipient must make an individualized assessment, based on

reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

(c) In determining whether an individual poses a direct threat in employment, the recipient must make an individualized assessment according to the Equal Employment Opportunity Commission's regulation implementing title I of the Americans with Disabilities Act of 1990, at 29 CFR 1630.2(r).

§ 84.76 Integration.

(a) *Application.* This provision applies to programs or activities that receive Federal financial assistance from the Department and to recipients that operate such programs or activities.

(b) *Discriminatory action prohibited.* A recipient shall administer a program or activity in the most integrated setting appropriate to the needs of a qualified person with a disability. Administering a program or activity in a manner that results in unnecessary segregation of persons with disabilities constitutes discrimination under this section.

(c) *Segregated setting.* A segregated setting is one in which people with disabilities are unnecessarily separated from people without disabilities. Segregated settings are populated exclusively or primarily with individuals with disabilities, and may be characterized by regimentation in daily activities; lack of privacy or autonomy; and policies limiting visitors or limiting individuals' ability to engage freely in community activities and to manage their own activities of daily living.

(d) *Specific prohibitions.* The general prohibition in paragraph (b) of this section includes but is not limited to the following specific prohibitions, to the extent that such action results in unnecessary segregation, or serious risk of such segregation, of persons with disabilities.

(1) Establishing or applying policies or practices that limit or condition individuals with disabilities' access to the most integrated setting appropriate to their needs;

(2) Providing greater benefits or benefits under more favorable terms in segregated settings than in integrated settings;

(3) Establishing or applying more restrictive rules and requirements for individuals with disabilities in integrated settings than for individuals with disabilities in segregated settings; or

(4) Failure to provide community-based services that results in institutionalization or serious risk of institutionalization. This category includes, but is not limited to planning, service system design, funding, or service implementation practices that result in institutionalization or serious risk of institutionalization. Individuals with disabilities need not wait until the harm of institutionalization or segregation occurs to assert their right to avoid unnecessary segregation.

(e) *Fundamental alteration.* A recipient may establish a defense to the application of this section if it can demonstrate that a requested modification would fundamentally alter the nature of its program or activity.

35. Add subpart H to read as follows:

Subpart H - Communications

Sec.

84.77 General.
84.78 Telecommunications.
84.79 Telephone emergency services.
84.80 Information and signage.
84.81 Duties.

Subpart H - Communications

§ 84.77 General.

(a)(1) A recipient shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

(2) For purposes of this section, “companion” means a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

(b)(1) The recipient shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, beneficiaries, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a program or activity of a recipient.

(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a recipient shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(c)(1) A recipient shall not require an individual with a disability to bring another individual to interpret for him or her.

(2) A recipient shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except —

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) When the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(3) A recipient shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public when there is no interpreter available.

(d). When the recipient chooses to provide qualified interpreters via video remote interpreting services (VRI), it shall ensure that it provides —

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of their body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

§ 84.78 Telecommunications.

(a) Where a recipient communicates by telephone with applicants and beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

(b) When a recipient uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.

(c) A recipient shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

§ 84.79 Telephone emergency services.

Telephone emergency services, including 911 services, shall provide direct access to individuals who use TTY's and computer modems.

§ 84.80 Information and signage.

(a) A recipient shall ensure that interested persons, including persons with impaired vision or hearing can obtain information as to the existence and location of accessible services, activities, and facilities.

(b) A recipient shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

§ 84.81 Duties.

This subpart does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. In those circumstances where a recipient's personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the recipient has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee after considering all the recipient's resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of reasons for reaching that conclusion. If an action required to comply with this part would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the recipient.

36. Add subpart I to read as follows:

Subpart I — Web, Mobile, and Kiosk Accessibility

84.82 Application.
84.83 Accessibility of kiosks.
84.84 Requirements for web and mobile accessibility.
84.85 Exceptions.

84.86 Conforming alternate versions.
84.87 Equivalent facilitation.
84.88 Duties.
84.89 [Reserved]

Subpart I — Web, Mobile, and Kiosk Accessibility

§ 84.82 Application.

This subpart applies to all programs or activities that receive Federal financial assistance from the Department.

§ 84.83 Accessibility of kiosks.

No qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of a recipient provided through kiosks.

§ 84.84 Requirements for web and mobile accessibility.

(a) *General.* A recipient shall ensure that the following are readily accessible to and usable by individuals with disabilities:

(1) Web content that a recipient makes available to members of the public or uses to offer programs or activities to members of the public; and

(2) Mobile apps that a recipient makes available to members of the public or uses to offer programs or activities to members of the public.

(b) *Requirements*. (1) Effective [DATE TWO YEARS AFTER PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER], a recipient with fifteen or more employees shall ensure that the web content and mobile apps it makes available to members of the public or uses to offer programs or activities to members of the public comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the recipient can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.

(2) Effective [DATE THREE YEARS AFTER PUBLICATION OF FINAL RULE IN

THE FEDERAL REGISTER], a recipient with fewer than fifteen employees shall ensure that the web content and mobile apps it makes available to members of the public or uses to offer programs or activities to members of the public comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the recipient can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.

(3) WCAG 2.1 is incorporated by reference into this section with the approval of the Director of the *Federal Register* under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at HHS and at the National Archives and Records Administration (NARA). Contact HHS, OCR at: Phone line: (202) 545-4884; Email: 504@hhs.gov; Mail: Office for Civil Rights, U.S. Department of Health and Human Services, 200 Independence Ave., SW, Room 509F, HHH Building, Washington, D.C. 20201. For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov*. The material may be obtained from the World Wide Web Consortium (W3C®) Web Accessibility Initiative ("WAI"), 401 Edgewater Place, Suite 600, Wakefield, MA 01880; phone: (339) 273-2711; email: contact@w3.org; website: www.w3.org/TR/2018/REC-WCAG21-20180605/ [https://perma.cc/UB8A-GG2F].

§ 84.85 Exceptions.

The requirements of § 84.84 do not apply to the following:

(a) *Archived web content.* Archived web content as defined in § 84.10.

(b) *Preexisting conventional electronic documents*. Conventional electronic documents created by or for a recipient that are available on a recipient's website or mobile app before the date the recipient is required to comply with this rule, 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.

(c) *Web content posted by a third party.* Web content posted by a third party that is available on a recipient's website.

(d) *Linked third-party web content.* Third-party web content linked from the recipient's website, unless the recipient uses the third-party web content to allow members of the public to participate in or benefit from the recipient's programs or activities.

(e) *Postsecondary institutions: password-protected class or course content*. Except as provided in paragraphs (e)(1) and (2) of this section, course content available on a recipient's password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a postsecondary institution.

(1) This exception does not apply if a recipient is on notice that an admitted student with a disability is pre-registered in a specific course offered by a postsecondary institution and that the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific course must comply with the requirements of § 84.84 by the date the academic term begins for that course offering. New content added throughout the term for the course must also comply with the requirements of § 84.84 at the time it is added to the website.

(2) This exception does not apply once a recipient is on notice that an admitted student with a disability is enrolled in a specific course offered by a postsecondary institution after the start of the academic term and that the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the course must also comply with the requirements of § 84.84 at the time it is added to the website.

(f) *Elementary and secondary schools: password-protected class or course content*. Except as provided in paragraphs (f)(1) through (4) of this section, class or course content available on a recipient's password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course at an elementary or secondary school.

(1) This exception does not apply if the recipient is on notice of the following: a student with a disability is pre-registered in a specific class or course offered by an elementary or secondary school and that the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 by the date the term begins for that class or course. New content added throughout the term for the class or course must also comply with the requirements of § 84.84 at the time it is added to the website.

(2) This exception does not apply if the recipient is on notice of the following: a student is pre-registered in an elementary or secondary school's class or course, the student's parent has a disability, and the parent, because of a disability, would be unable to access the content available on the password-protected or otherwise secured website for the specific class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 by the date the term begins for that class or course. New content added throughout the term for the class or course must also comply with the requirements of § 84.84 at the time it is added to the website.

(3) This exception does not apply once a recipient is on notice of the following: a student with a disability is enrolled in an elementary or secondary school's class or course after the term begins and that the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific

class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the class or course must also comply with the requirements of § 84.84 at the time it is added to the website.

(4) This exception also does not apply once a recipient is on notice of the following: a student is enrolled in an elementary or secondary school's class or course after the term begins, and the student's parent has a disability, and the parent, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the class or course must also comply with the requirements of § 84.84 at the time it is added to the website.

(g) *Individualized, password-protected documents*. Conventional electronic documents that are:

(1) About a specific individual, their property, or their account; and

(2) Password-protected or otherwise secured.

§ 84.86 Conforming alternate versions.

(a) A recipient may use conforming alternate versions of websites and web content, as defined by WCAG 2.1, to comply with § 84.84 only where it is not possible to make websites and web content directly accessible due to technical or legal limitations.

(b) WCAG 2.1 is incorporated by reference into this section with the approval of the Director of the *Federal Register* under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at HHS and at the National Archives and Records Administration (NARA). Contact HHS, OCR at: Phone line: (202) 545-

4884; Email: 504@hhs.gov; Mail: Office for Civil Rights, U.S. Department of Health and Human Services, 200 Independence Ave., SW, Room 509F, HHH Building, Washington, D.C. 20201. For information on the availability of this material at NARA, visit ww*w.archives.gov/federal-register/cfr/ibr-locations.html o*r email fr.*inspection@nara.gov.* The material may be obtained from the World Wide Web Consortium (W3C®) Web Accessibility Initiative ("WAI"), 401 Edgewater Place, Suite 600, Wakefield, MA 01880; phone: (339) 273-2711; email: contact@w3.org; website: www.w3.org/WAI/; www.w3.org/TR/2018/REC-WCAG21-20180605/ [https://perma.cc/UB8A-GG2F].

§ 84.87 Equivalent facilitation.

Nothing in this subpart prevents the use of designs, methods, or techniques as alternatives to those prescribed, provided that the alternative designs, methods, or techniques result in substantially equivalent or greater accessibility and usability of the web content or mobile app.

§ 84.88 Duties.

Where a recipient can demonstrate that full compliance with the requirements of § 84.84 would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens, compliance with § 84.84 is required to the extent that it does not result in a fundamental alteration or undue financial and administrative burdens. In those circumstances where personnel of the recipient believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, a recipient has the burden of proving that compliance with § 84.84 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a recipient or their designee after considering all resources available for use in the funding and operation of the program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive

the benefits or services provided by the recipient to the maximum extent possible.

§ 84.89 [Reserved]

37. Add subpart J to read as follows:

Subpart J—Accessible Medical Equipment

Sec.

84.90 Application.
84.91 Requirements for medical diagnostic equipment.
84.92 Newly purchased, leased, or otherwise acquired medical diagnostic equipment.
84.93 Existing medical diagnostic equipment.
84.94 Qualified staff.
84.95 - 84.97 [Reserved]

Subpart J—Accessible Medical Equipment

§ 84.90 Application.

This subpart applies to programs or activities that receive Federal financial assistance from the Department and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

§ 84.91 Requirements for medical diagnostic equipment.

No qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of the programs or activities of a recipient offered through or with the use of medical diagnostic equipment (MDE), or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance because the recipient's MDE is not readily accessible to or usable by persons with disabilities.

§ 84.92 Newly purchased, leased, or otherwise acquired medical diagnostic equipment.

(a) *Requirements for all newly purchased, leased, or otherwise acquired medical diagnostic equipment.* All MDE that recipients purchase, lease, or otherwise acquire more than 60 days after the publication of this part in final form shall, subject to the requirements and

limitations set forth in this section, meet the Standards for Accessible MDE, unless and until the recipient satisfies the scoping requirements set forth in paragraph (b) of this section.

(b) *Scoping requirements*—(1) *General requirement for medical diagnostic equipment*. Where a program or activity of a recipient, including physicians' offices, clinics, emergency rooms, hospitals, outpatient facilities, and multi-use facilities, utilizes MDE, at least 10 percent of the total number of units, but no fewer than one unit, of each type of equipment in use must meet the Standards for Accessible MDE.

(2) *Facilities that specialize in treating conditions that affect mobility*. In rehabilitation facilities that specialize in treating conditions that affect mobility, outpatient physical therapy facilities, and other programs or activities that specialize in treating conditions that affect mobility, at least 20 percent, but no fewer than one unit, of each type of equipment in use must meet the Standards for Accessible MDE.

(3) *Facilities with multiple departments*. In any facility or program with multiple departments, clinics, or specialties, where a program or activity uses MDE, the facility shall disperse the accessible MDE required by paragraphs (b)(1) and (2) of this section in a manner that is proportionate by department, clinic, or specialty using MDE.

(c) *Requirements for examination tables and weight scales.* Within 2 years after [EFFECTIVE DATE OF FINAL RULE, recipients shall, subject to the requirements and limitations set forth in this section, purchase, lease, or otherwise acquire the following, unless the recipient already has them in place:

(1) At least one examination table that meets the Standards for Accessible MDE, if the recipient uses at least one examination table; and

(2) At least one weight scale that meets the Standards for Accessible MDE, if the recipient uses at least one weight scale.

(d) *Equivalent facilitation.* Nothing in these requirements prevents the use of designs, products, or technologies as alternatives to those prescribed by the Standards for Accessible

MDE, 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.

(e) *Fundamental alteration and undue burdens*. This section does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity, or in undue financial and administrative burdens. In those circumstances where personnel of the recipient believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, a recipient has the burden of proving that compliance with paragraph (a) or (c) of this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a recipient or their designee after considering all resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient.

(f) *Diagnostically required structural or operational characteristics.* A recipient meets its burden of proving that compliance with paragraph (a) or (c) of this section would result in a fundamental alteration under paragraph (e) of this section if it demonstrates that compliance with paragraph (a) or (c) would alter diagnostically required structural or operational characteristics of the equipment, and prevent the use of the equipment for its intended diagnostic purpose. This paragraph does not excuse compliance with other technical requirements where compliance with those requirements does not prevent the use of the equipment for its diagnostic purpose.

§ 84.93 Existing medical diagnostic equipment.

(a) *Accessibility.* A recipient shall operate each program or activity offered through or with the use of MDE so that the program or activity, in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not —

(1) Necessarily require a recipient to make each of its existing pieces of medical diagnostic equipment accessible to and usable by individuals with disabilities; or

(2) Require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity, or in undue financial and administrative burdens. In those circumstances where personnel of the recipient believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, a recipient has the burden of proving that compliance with this paragraph (a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee after considering all resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient.

(3) A recipient meets its burden of proving that compliance with § 84.92(a) or (c) would result in a fundamental alteration under paragraph (a)(2) of this section if it demonstrates that compliance with § 84.92(a) or (c) would alter diagnostically required structural or operational characteristics of the equipment, and prevent the use of the equipment for its intended diagnostic purpose.

(b) *Methods.* A recipient may comply with the requirements of this section through such means as reassignment of services to alternate accessible locations, home visits, delivery of services at alternate accessible sites, purchase, lease, or other acquisition of accessible MDE, or

any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. A recipient is not required to purchase, lease, or otherwise acquire accessible medical diagnostic equipment where other methods are effective in achieving compliance with this section. In choosing among available methods for meeting the requirements of this section, a recipient shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

§ 84.94 Qualified staff.

Recipients must ensure their staff are able to successfully operate accessible MDE, assist with transfers and positioning of individuals with disabilities, and carry out the program access obligation regarding existing MDE.

§§ 84.95 - 84.97 [Reserved]

38. Add subpart K, consisting of § 84.98, to read as follows:

Subpart K—Procedures

§ 84.98 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6 through 80.10 and 45 CFR part 81.

Dated: August 31, 2023.

Xavier Becerra,

Secretary,

Department of Health and Human Services.

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