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DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 84

RIN 0945-AA15

Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance

AGENCY: U.S. Department of Health and Human Services.

ACTION: Final 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 is making a number of revisions to update and amend its section 504 regulation.

DATES: *Effective date*: This rule is effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Incorporation by reference: The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. Overview of the Final Rule
III. Response to Public Comments on the Proposed Rule
IV. Executive Order 12866 and Related Executive Orders on Regulatory Review

I. Background

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in programs and activities that receive Federal financial assistance as well as in programs and activities conducted by any Federal agency.[1]

The Office for Civil Rights (OCR) in HHS enforces section 504 as well as 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.[2] OCR also enforces section 1557 (section 1557) of the Patient Protection and Affordable Care Act (ACA) 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 contracts 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.[3]

Congress passed the Rehabilitation Act in 1973, and what was then the U.S. Department of Health, Education, and Welfare issued regulations to implement section 504 in 1977. Those regulations have rarely been amended.[4] In the more than 40 years since enactment of the regulations, 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), passage of the ACA, and Supreme Court and other significant court cases. In addition, the Department is aware of specific manifestations of

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[1] 29 U.S.C. 794.
[2] 42 U.S.C. 12132.
[3] 42 U.S.C. 18116.
[4] 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).

disability-based discrimination in recent years, for example, in the area of accessibility of information and communications technology.

Section 504 must 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 clarity for recipients and beneficiaries and to promote compliance, the Department is amending its existing section 504 regulation on nondiscrimination obligations for recipients of Federal financial assistance (part 84).[5]

II. Overview of the Final Rule

On September 14, 2023, the Department published a proposed rule to amend 45 CFR part 84, Discrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance (88 FR 63392). The 60-day comment period ended on November 13, 2023. The final rule adopts the same structure and subparts as the proposed rule. We have made some changes to the proposed rule's provisions based on comments received. As discussed in the notice of proposed rulemaking (NPRM), to fulfill Congress's intent that title II of the ADA and section 504 be interpreted consistently, the rule contains provisions that mirror the corresponding provisions in the title II ADA regulation.

No substantive difference is intended, aside from denoting the singular or plural, when using the terms "individual with a disability," "people with disabilities," and "person with a disability" throughout this rule.

The Department is retaining several sections from the existing section 504 rule. Many of those retained sections contain terminology revisions. The current rule can be found at: https://www.ecfr.gov/current/title-45/subtitle-A/subchapter-A/part-84.

III. Response to Public Comments on the Proposed Rule

[5] 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.

This section focuses on the provisions of the rule that are relevant to comments received, and the explanations necessary to address those comments. For a fuller explanation of the background and intended meaning of regulatory language in the final rule that remain unchanged from the NPRM, please refer to the discussion in the NPRM.

Subpart A—General Provisions

Subpart A sets forth the general provisions that apply to all recipients. Four of the sections from the existing regulation are retained without any changes, §§ 84.5 through 84.7 and 84.9. The remainder of the sections in this subpart are identical or similar to the ADA title II regulations.

Purpose and broad coverage (§ 84.1)

Proposed § 84.1(a) provided that the purpose of this regulation is to implement section 504, which prohibits discrimination on the basis of disability in any program or activity receiving Federal financial assistance.

Proposed § 84.1(b) stated that the definition of "disability" shall be construed broadly in favor of expansive coverage to the maximum extent permitted by section 504. The primary objective of attention in cases should be whether recipients have complied with their obligations and whether discrimination occurred, and not whether the individual meets the definition of "disability." The question of whether an individual meets the definition of "disability" should not demand extensive analysis.

The comments and our responses regarding § 84.1 are set forth below.

Comment: The Department received many comments applauding the inclusion of this section. Commenters expressed appreciation for the Department's commitment to construing the protection of the law broadly in favor of expansive coverage.

Response: The Department appreciates the commenters' input.

SUMMARY OF REGULATORY CHANGES

We are finalizing § 84.1 as proposed with no modifications.

Application (§ 84.2)

Proposed §84.2(a) provided that this part applies to each recipient of Federal financial assistance from the Department and to the recipient's programs and activities that involve individuals with disabilities in the United States. This part does not apply to the recipient's programs and activities outside the United States that do not involve individuals with disabilities in the United States.

Proposed § 84.2(b) provided that 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.

Proposed § 84.2(c) provided that 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 this provision to other persons not similarly situated or to other dissimilar circumstances.

The comments and our responses regarding proposed § 84.2 are set forth below.

Comments: The Department received several comments asking for clarification of the types of entities covered by section 504. Many mentioned specific entities and asked whether they are covered. Others requested that the Department provide a list of all covered entities.

Response: Most of these commenters were essentially asking for a more detailed explanation of what constitutes "Federal financial assistance," the prerequisite to section 504 coverage, than what appeared in the proposed rule's definition. The Department's interpretation of Federal financial assistance and the types of entities covered by this rule can be found in the discussion of Federal financial assistance contained at § 84.10, the definitions section of the rule.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering comments received, we are finalizing § 84.2 as proposed with no modifications.

Relationship to other laws (§ 84.3)

Proposed § 84.3 provided an explanation of the relationship of the proposed regulation to existing laws. The section provided that this part does not invalidate or limit remedies, rights, and procedures of any other Federal law, State, or local law that provides greater or equal protection for the rights of individuals with disabilities and individuals associated with them.

The comments and our responses to § 84.3 are set forth below.

Comments: The Department received many comments, including from multiple disability rights organizations, concerning the relationship of this regulation to other laws. Several commenters mentioned the importance of ensuring that laws providing more protection such as the ADA are not affected by this regulation. One commenter remarked that the principle encompassed in this section is fundamental to maintaining a comprehensive support system for individuals with disabilities as it recognizes that laws are layered and work together. Another commenter urged the Department to adopt this section to ensure that any new Federal requirements offer a floor, but not a ceiling, for the protection of disability rights. Many organizations representing individuals with disabilities asked the Department to clarify how this regulation interacts with section 1557.

Another commenter asked about the relationship of section 504 to State laws and whether Federal law always supersedes State law.

Response: The Department appreciates commenters' support for this provision. In developing this regulation, we have been closely coordinating within the Department on the section 1557 rule, and we will continue this close coordination on the impact of the 504 rule and its relationship to other applicable laws, including section 1557, in the future. We will consider developing guidance and technical assistance as needed on these topics in the future.

As for whether Federal laws always supersede State laws, we note that standard principles of preemption apply under section 504.

SUMMARY OF REGULATORY CHANGES

For the above reasons and considering comments received, we are finalizing § 84.3 as proposed with no modifications.

Disability (§ 84.4)

Proposed § 84.4 provided a detailed definition of disability implementing the ADAAA, which amended section 504 to adopt the ADAAA definition of disability. The proposed rule largely incorporated the definition contained in the ADA title II regulation and was intended to ensure consistency between the ADA and section 504. The only differences between the definition of disability in § 84.4 and the definition of disability in the ADA title II regulation were updates in terminology and the addition of long COVID, a condition that did not exist when the ADA regulation was published, to the list of physical and mental impairments.

Proposed § 84.4(a)(1) stated that, with respect to an individual, disability means a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. Proposed § 84.4(a)(2) stated that the definition of disability shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of section 504.

Proposed § 84.4 provided detailed definitions of the terms used in § 84.4(a)(1). It defined physical or mental impairment (§ 84.4(b)), major life activities (§ 84.4(c)), substantially limits (§ 84.4(d)), has a record of such an impairment (§ 84.4(e)), is regarded as having such an impairment (§ 84.4(f)), and it included a list of conditions excluded from the definition (§ 84.4(g)). At § 84.4(d)(2), it provided a list of predictable assessments, circumstances where the inherent natures of the specific impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity, and for which the necessary individualized assessment should be particularly simple and straightforward (e.g., deafness substantially limits hearing).

At proposed § 84.4(b)(2), the rule included long COVID as a physical or mental impairment. This inclusion follows guidance issued on July 26, 2021, from the Department of Justice (DOJ) and HHS on how long COVID can be a disability under the ADA, section 504, and section 1557.[6]

When the Department proposed section 84.4(g), it addressed exclusions from section 504 coverage by taking language directly from the text of the Rehabilitation Act.[7] Section 84.4(g) now states that the term "disability" does not include the terms set forth at 29 U.S.C. 705(20)(F). That statutory text excludes gender identity disorders not resulting from physical impairments from the definition of disability. The Department noted in the preamble of the proposed rule that an individual with gender dysphoria may have a disability under section 504 and 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.

The comments and our responses to § 84.4 are set forth below.

Comments: Commenters expressed strong support for the Department's revised definition of disability, for complying with the ADAAA, and for ensuring consistency with the Department of Justice's ADA regulatory definition of disability. Commenters also expressed approval for the specific inclusion of long COVID as a physical or mental impairment.

Response: Accordingly, the Department has retained the approach and language of its proposed rule in this final rule and has retained the inclusion of long COVID as a physical or mental impairment.

Physical and Mental Impairments (§ 84.4(b))

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[6] *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.

[7] 29 U.S.C. 705(20)(F).

Comments: Although expressing support for the Department's expansion of its definition of disability, a number of commenters suggested adding specific conditions to the text of § 84.4(b). These commenters suggested specifically including in the regulatory text a number of conditions as impairments, including, for example: obesity, hepatitis B, hepatitis C, endometriosis, developmental disabilities, intersex variations, and chemical and electromagnetic hypersensitivities (including allergies to fragrances). One commenter noted that "autism" was not included in the list of impairments, but that Autism Spectrum Disorder was included in § 84.4(d)(2)(iii)(E). The comments included descriptions of the discrimination faced by persons with these conditions and how inclusion in the Department's section 504 regulation would provide a vehicle for their active participation in programs and activities funded by the Department.

Response: The Department notes that the list of disorders and conditions in § 84.4(b) is non-exhaustive and illustrative. The preamble to the DOJ's title II ADA regulation explains why there was no attempt to set forth a comprehensive list of physical and mental impairments. That preamble states "[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."[8] The Department shares this view. Failure to include any specific disorder or condition does not mean that that condition is not a physical or mental impairment under section 504 or the rule. No negative implications should be drawn from the omission of any specific impairment in the list of impairments in § 84.4(b). In fact, the Department notes that its rule of construction for the definition of disability is 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.

[8] 28 CFR part 35, appendix B.

As a result, the Department has decided not to add any further specific disorders or conditions to the regulatory text of § 84.4(b). This approach has the added benefit of ensuring a consistent interpretation of this important statutory term that is shared by both section 504 and both titles II and III of the ADA and avoids any confusion that might result from having related Federal disability rights regulations with different language for the same term.

The Department wishes to make clear, however, that the conditions proffered by commenters may constitute a physical or mental impairment as that term is used in section 504. For example, obesity, without any accompanying comorbidities, may be included in the phrase "any physiological disorder or condition" and thus constitute a physical impairment for higher-weight individuals. Similarly, intersex variations may result from physical conditions that are structured or function differently from most of the population and affect the endocrine, reproductive, and/or genitourinary systems of an individual, or may be evidenced by anatomical loss affecting one or more of the body's systems, and thus be included within the phrase "any physiological disorder or condition." The Department received comments asking that we add other, specific conditions to the list of physical and mental impairments. While many conditions may constitute a physical or mental impairment as that term is used in section 504, it is not necessary for the Department to add these conditions to the rule as the Department's list is not an exhaustive list.

Of course, being included as a physical or mental impairment does not mean that a particular individual has a disability covered by section 504. To be covered by section 504 and Department's final rule, the impairment must then substantially limit one or more of the person's major life activities. In addition, section 504 coverage could be established for a particular individual if that person has a record of the impairment that substantially limited one of more of their major life activities; or if they were 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.

Gender Dysphoria

Comments: The preamble of the Department's NPRM included in its analysis of § 84.4(g), Exclusions, a discussion of section 504's exclusion of gender identity disorders not resulting from physical impairments, and a recent Fourth Circuit case, *Williams v. Kincaid*,[9] concluding that gender dysphoria can be a disability under section 504 and the ADA. In the NPRM, the Department agreed with the Fourth Circuit's recent holding that gender dysphoria may constitute a disability under section 504 and 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.

The inclusion of this discussion in the preamble elicited a robust discussion from commenters. Comments from civil rights and patient advocacy organizations representing persons with disabilities supported the concept of coverage of gender dysphoria in the section 504 rule but sought changes that would strengthen the Department's inclusion of gender dysphoria by including specific regulatory text (e.g., by making clear that gender dysphoria is not included within the scope of gender identity disorders) and by expanding and clarifying protections.

Commenters representing certain religious organizations and some State officials, among others, objected to the Department's conclusion that gender dysphoria can be a disability covered under section 504. The comments asserted that the *Kincaid* decision is only one court decision, that the dissent in the case was more compelling, and that the Department has ignored contrary court decisions.[10] These commenters stated that the Department's view could adversely impact

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[9] *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022, cert. denied, 600 U.S. ____(June 30, 2023) (No. 22-633).

[10] *See, e.g.*, *Duncan v. Jack Henry & Assocs., Inc.*, 617 F. Supp. 3d 1011, 1055-57 (W.D. Mo. 2022); *Lange v. Houston Cnty.*, 608 F. Supp. 3d 1340, 1362 (M.D. Ga. 2022); *Doe v. Northrop Grumman Sys. Corp.*, 418 F. Supp. 3d 921 (N.D. Ala. 2019); *Parker v. Strawser Constr. Inc.*, 307 F. Supp. 3d 744, 754-55 (S.D. Ohio 2018); *Gulley-Fernandez v. Wis. Dep't of Corr.*, 2015 WL 7777997, at *3 (E.D. Wis. Dec. 1, 2015); *but see Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403 (D. Mass. Jun. 14, 2018); *Blatt v. Cabela's Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. May 18, 2017); *Guthrie v. Noel*, 2023 WL 8115928, at *13 (M.D. Pa. Sept. 11, 2023).

them because section 504 does not have an exemption for religious entities. In the alternative, the commenters sought significantly more detail regarding what actions will be prohibited or required by inclusion of the language.

Response: As noted above, the Department's section 504 NPRM preamble noted that gender dysphoria may constitute a disability under section 504 and 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.

In the *Williams* case, the only Federal appellate court to consider the issue of coverage for gender dysphoria under section 504 and the ADA concluded that the language excluding gender identity disorders from coverage did not encompass gender dysphoria. 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."[11] 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 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. The court reasoned that gender dysphoria is not included in the scope of the exclusion for "gender identity disorders," but that even if gender dysphoria were such a disorder, plaintiff's complaint "amply supports [the] inference" that her gender dysphoria "result[s] from a physical impairment."[12]

Recognizing "Congress' express instruction that courts construe the ADA in favor of maximum protection for those with disabilities,"[13] the court said that it saw "no legitimate reason

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[11] *Id.* at 780.
[12] *Id.* at 773–74 (citing 42 U.S.C. 12211(b)); *see also id.* at 770–72.
[13] *Id.* at 769–70.

why Congress would intend to exclude from the ADA's protections transgender people who suffer from gender dysphoria."[14] The Department agrees with the court's holding 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.[15]

The Department will approach gender dysphoria as it would any other disorder or condition. If a disorder or condition affects one or more body systems, or is a mental or psychological disorder, it may be considered a physical or mental impairment. The existing section 504 rule includes the following as body systems: "neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine." The issue before the Department then is whether gender dysphoria is a condition that can affect any bodily system or is a mental or psychological condition. Such an inquiry is necessarily a fact-based, individualized determination but the Department agrees with the Fourth Circuit that gender dysphoria can satisfy this standard. A determination in an individual situation that gender dysphoria is a physical or mental impairment is, of course, not the end of the question. It must then be determined whether the impairment substantially limits any major life activity. Depending on that analysis, gender dysphoria may rise to the level of a disability under section 504 and would provide protection against discrimination in programs or activities funded by HHS that is prohibited by section 504.

As to the lower court cases that held that gender dysphoria is included within the definition of gender identity disorders, the Department believes that the conclusion the Fourth Circuit reached in the *Williams* case and the view expressed in the United States' Statement of

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[14] *Id.* at 773.

[15] The Department's interpretation is also consistent with the position taken by the Department of Justice's Civil Rights Division on the proper interpretation of "gender identity disorders" under the ADA and section 504. *See* Statement of Interest, *Doe v. Ga. Dep't of Corr.*, No. 23-5578 (N.D. Ga. Jan. 8, 2024), ECF No. 69.

Interest in *Doe* v. *Georgia Department of Corrections* reflect the more compelling reading of the statute. That interpretation is that, when Congress enacted the ADA in 1990, "gender identity disorders" referred to a person's mere identification with a different gender than the sex they were assigned at birth, a condition that is not a disability. Gender dysphoria, by contrast, may be a disability, one that is characterized by clinically significant distress or impairment in social, occupational, or other important areas of functioning; thus gender dysphoria does not fall with the statutory exclusions for gender identity disorders.[16]

As to concerns about religious freedom and conscience, the section 504 rule does not contain provisions on those issues. However, the Department does have other statutes and regulations that apply protections in these areas. For example, in January 2024, the Department finalized a rule clarifying the Department's enforcement of the Federal health care conscience statutes, including that OCR receives and handles complaints regarding these statutes.[17] The Department will comply with all applicable law. We decline to make changes to this rule.

Major Life Activities (§ 84.4(c))

Comments: In the Department's NPRM, proposed § 84.4(c) significantly expanded the range of major life activities in the current rule in response to the ADAAA and DOJ's ADA rules, specifically including major bodily functions and providing an expanded non-exhaustive list of examples of major life activities. It also indicated that "major" should be interpreted in a more expansive fashion than previously. Commenters supported the Department's approach to defining and interpreting the term "major life activities," but suggested that the Department should add to the list. One commenter suggested that the major life activity of "caring for oneself" was too narrow in scope and that should be expanded to address caring for other family members, taking care of pets or service animals, and caring for guests or visitors to the home, noting that caring for others, no matter what the relationship, is a common major life activity.

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[16] *See also* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. text rev. 2022), https://perma.cc/U4KQ-HA98.

[17] 89 FR 2078 (Jan. 11, 2024).

Another commenter suggested including recognition of mental health and cognitive abilities in this section.

Response: The Department appreciates these comments but has determined it is not necessary to add these or any other new terms to the list of major life activities in § 84.4(c). This list is, by its own terms, not exhaustive and thus other activities can certainly be considered major life activities. The Department also wants to avoid any confusion that may be caused by including terms in this regulatory language that are different than those found in the parallel sections defining disability under the ADA and titles II and III of the ADA regulations of DOJ and under title I of the ADA and the regulations of the Equal Employment Opportunity Commission (EEOC).

As for the coverage of mental health issues, the Department notes the inclusion of learning, concentrating, and thinking as major life activities in § 84.4(c)(1)(i) and the operation of neurological systems as a major bodily function in § 84.4(c)(1)(ii). Further, because mental health and cognitive capability are central to functioning and well-being, impairment in either may significantly impact major life activities such as working, sleeping, and caring for oneself or others.

Predictable Assessments

Comments: Commenters noted that the list of examples in § 84.4(d)(2)(iii), when referring to the Human Immunodeficiency Virus (HIV) infection, did not include the phrase "whether symptomatic or asymptomatic" even though that phrase was included in the list of physical or mental impairments in § 84.4(b)(2) and requested that the phrase be added in the final rule.

Response: The Department agrees with the commenters that persons who have HIV are substantially limited in their immune function, whether or not they present with symptoms of the disease. Section 84.4(d)(2)(iii)(J) of this rule includes HIV, and the provision of predictable assessments presumptively covers persons who have HIV, whether or not they are

symptomatic. The Department also recognizes the need to have its regulatory provision here be consistent with the ADA's parallel regulation on the definition of disability, which does not include the phrase "whether symptomatic or asymptomatic" in the provision on predictable assessments. As a result, the Department will not add this phrase to the paragraph on predictable assessments to avoid any confusion that may result from having Federal regulations with different terminology on the same issue.

Outdated and Offensive Terminology

Comments: Commenters were uniformly supportive of changing the terminology in the Department's existing section 504 rule from the use of "handicap" and "handicapped individual" to "disability" and "individual with a disability." One comment noted that this change from "handicap" to "disability" was more than just terminology and that it reflected issues overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Commenters were also uniformly supportive of changing the terminology in the list of physical and mental impairments in § 84.4(b)(2), and throughout the rule, from "drug user" to "individual with a substance use disorder" and "alcoholic" to "individual with an alcohol use disorder." Some commenters, however, objected to use of the phrase "emotional or mental illness" because it carries significant stigma, and suggested the use of more neutral terminology, such as "person with a mental health condition." Other commenters objected to the terminology used in § 84.4(g) on exclusions from coverage and suggested that the section be removed in its entirety.

Response: The Department is aware that some of the terms used in its regulation have come to be understood, in common parlance, as having negative connotations or being pejorative.

The terms that the Department proposed in the regulatory provision on exclusions, § 84.4(g), are taken verbatim from the Rehabilitation Act at 29 U.S.C. 705(20)(F). Those terms had specific meanings when Congress added them to the statute decades ago and the Department is bound by these statutory exclusions. However, the Department appreciates that the

terminology used in this section of the statute is now considered offensive to many communities. As such, we are revising the final section at § 84.4(g) to cite to the relevant statutory text. This is a non-substantive change; the Department is still bound by the statutory exclusions cited at § 84.4(g).

With regard to the use of the terms "emotional or mental illness" in § 84.4(b)(1)(ii) and "emotional illness" in § 84.4(b)(2), the Department is substituting the neutral term "mental health condition." Both the terms "emotional or mental illness" and "emotional illness" are used in the definition of impairments contained in the definition of "disability" in § 84.4(b). These terms are found in the ADA titles II and III regulations as well as in the EEOC regulations for title I of the ADA. Because these terms are regulatory, not statutory, the Department believes it appropriate in these circumstances to change the language to address usage concerns. The term "mental health condition" is neutral terminology that may help to reduce the negative connotations for people experiencing mental health conditions. The Department itself now uses the phrase "mental health condition" instead of emotional or mental illness in other contexts. The Department intends no difference in meaning with this new term and it will be interpreted consistently with the terms "emotional or mental illness" or "emotional illness" in the parallel ADA titles II and III regulations.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.4 as proposed with three modifications. First, we are replacing the phrase "emotional or mental illness" with "mental health condition" in § 84.4(b)(1)(ii). Second, we are replacing the phrase "emotional illness" with "mental health condition" in § 84.4(b)(2). Third, we are replacing a list of terms at § 84.4(g) with a citation to the relevant passage of the statute that enumerates exclusions.

Notice (§ 84.8)

Proposed § 84.8 required recipients to make available to employees, applicants, participants, beneficiaries, and other interested persons information about this part and its applicability to the recipient's programs and activities, and to make the information available to them in such manner as the head of the agency or their designee finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

The comments and our responses regarding § 84.8 are set forth below.

Comment: A commenter asked whether a statement on a website about both the ADA and section 504 is enough and whether this notice requirement is different from the current requirements. Another commenter asked whether recipients are required to prominently post the notice and provide information about filing a complaint.

Response: This notice requirement is identical to the notice requirement in the ADA title II regulations. Recipients are required to disseminate sufficient information to applicants, participants, beneficiaries, and other interested persons to inform them of the rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public, including online material, to describe a recipient's programs and activities; the display of informative posters in service centers or other public places; or the broadcast of information by television or radio. In providing the notice, the recipient must comply with the requirements for effective communication in § 84.77. The preamble to that section, along with the preamble from the NPRM, gives guidance on how to effectively communicate with individuals with disabilities.

In response to the question of whether the existing notice requirements in § 84.8 are different than those in this final rule, the biggest difference is that the existing regulations only apply to recipients with fifteen or more employees. In addition, the existing notice provisions provide more detailed requirements than are contained in this final rule. For example, the existing notice section requires an identification of the responsible employee designated pursuant

to § 84.7(a). It also sets forth requirements for when the notice must be published, methods of publishing, and the types of documents that must contain the notice requirement.

There is another notice provision at § 84.52(b) in subpart F, Health, Welfare, and Social Services, which we are retaining. That section states that a recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified individuals with disabilities, including those with impaired sensory or speaking skills, are not denied effective notice because of their disability.

Section 84.7, Designation of responsible employee and adoption of grievance procedures, is retained in the final rule. Section 84.7(a) requires that recipients with fifteen or more employees designate at least one person to coordinate their efforts to comply with this part. Section 84.7(b) requires those recipients to adopt grievance procedures that incorporate due process standards and that provide for the prompt and equitable resolution of complaints. Although not required, we recommend that notices contain information about the coordinator and about the grievance procedures.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.8 as proposed with no modifications.

Definitions (§ 84.10)

In § 84.10 of the proposed rule, we set out proposed definitions of various terms. The comments and our responses are set forth below. Unless otherwise indicated, the definitions are retained as proposed.

Auxiliary Aids and Services

Discussion of this term can be found at § 84.77.

Archived Web Content

The proposed rule defined "archived web content" as "web 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."

Comment: Some commenters requested clarity on the definition of archived web content. Some of these commenters stated that the word "maintain" could have multiple meanings, such as simply continuing possession or engaging in repair and upkeep.

Response: The Department added a new part to the definition to help clarify the scope of content covered by the definition and associated exception. The new part of the definition, the first part, specifies that archived web content is limited to three types of historic content: web content that was created before the date the recipient is required to comply with subpart I; web content that reproduces paper documents created before the date the recipient is required to comply with subpart I; and web content that reproduces the contents of other physical media created before the date the recipient is required to comply with subpart I.

In addition to adding a new first part to the definition of archived web content, the Department made one further change to the definition from the NPRM. In the NPRM, what is now the second part of the definition pertained to web content that is "maintained" exclusively for reference, research, or recordkeeping. In the final rule, the word "maintained" is replaced with "retained." The revised language is not intended to change or limit the coverage of the definition. Rather, the Department recognizes that the word "maintain" can have multiple meanings relevant to this rule. In some circumstances, "maintain" may mean "to continue in possession" of property, whereas in other circumstances it might mean "to engage in general repair and upkeep" of property.[18] In contrast, the third part of the definition states that archived web content must not be altered or updated after the date of archiving. Such alterations or updates could be construed as repair or upkeep, but that is not what the Department intended to

[18] *Maintain*, Black's Law Dictionary (11th ed. 2019).

convey with its use of the word "maintained" in this provision. To avoid confusion about whether a recipient can alter or update web content after it is archived, the Department instead uses the word "retained," which has a definition synonymous with the Department's intended use of "maintain" in the NPRM.[19]

Additional discussion of this term can be found at § 84.85(a).

Companion

The proposed rule defined 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 same definition is contained in the general section of the communications subpart at § 84.77(a)(2).

Comments: Representatives from many disability rights organizations commented that the definition needs greater clarity. They said that it is critical that recipients confirm the companion's role and, as appropriate, obtain consent from the individual with a disability that they want the companion to participate in their care. Some commenters noted that this concern is discussed somewhat in the communications section, but they suggested that it be made clear that these standards apply in all situations.

A disability rights organization asked that we clarify that the determination as to who is an appropriate companion must rest with the individual with a disability (or their designated decision-maker pursuant to State law) and not with the recipient. They expressed the view that that this is critically important because to not do so might violate privacy laws and may also undermine the autonomy of people with disabilities. They requested that the clarification language be added to the text of the regulation.

Another disability rights organization similarly requested changes to the regulatory text. They objected to the use of the term "companion," which they believed is based on the

[19] *See Retain*, Black's Law Dictionary (11th ed. 2019) ("To hold in possession or under control; to keep and not lose, part with, or dismiss.").

stereotype that treats all individuals with disabilities as eternal children who must have a companion to communicate with recipients. They also objected to the term because it implies that the companion is communicating with the recipient independently rather than revoicing or repeating what the person with disabilities wants to be expressed and understood. According to the organization, this perpetuates an endemic and unhealthy form of disability-based discrimination expressed in all facets of society, but especially in health care. Commenters suggested replacement of the term "companion" with the term "communication intermediary" or an equivalent term that more accurately describes the role. Their suggested definition for the new term is a person who assists an individual with a disability to effectively communicate, to be understood, and to understand others. The role of this person is to relay information. Recipients must communicate with the individual with a disability directly and respectfully, and they may not use the presence of the other person as a reason to evade that obligation.

Response: We decline to revise the regulatory text, which is the same that appears in the ADA title II regulations at 28 CFR 35.160(a)(2). While we appreciate commenters' concerns, the definition makes clear that the companion must be "an appropriate person with whom the public entity should communicate." Consistent with the title II regulation, this means the companion must be "someone with whom the public entity normally would or should communicate" in the situation at hand.[20] This requirement ensures that companions with disabilities receive effective communication even if the person that the companion accompanies is not an individual with a disability. As to the commenter who wanted a change in the word "companion" and provided language to describe the duties of that person, we do not believe that revisions in the text are needed, and it is beyond the scope of the Department's responsibility as the person with a disability will determine the appropriate duties for their companion. Accordingly, we decline to revise the definition of companion.

Conventional Electronic Documents

[20] 28 CFR part 35, appendix A at 668 (2023).

Discussion of this term can be found in subpart I. The Department is deleting "database file formats" from the definition.

Current Illegal Use of Drugs

The proposed rule said that "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. This definition is identical to the one in the ADA title II regulations.

Comments: The Department received many comments on this definition. They uniformly had the same concern about the meaning of "current." Many commenters said that the definition, which comes from ADA regulations, is antiquated and does not take into account the importance of understanding that for people with substance use disorders, recurrence of use is common and it does not mean the treatment is not or will not be successful. Instead, in many cases it may mean that the current treatment plan is not working and should be revisited and revised. Commenters maintained that without an expansive and nuanced consideration of the non-linear nature of treatment and recovery, including possible recurrent use, protections for people with substance use disorders (SUD) are incomplete and inappropriately distinguished from other forms of disability.

Response: The Department appreciates all commenters' feedback. The Department acknowledges commenters' concerns. However, the phrase "illegal use of drugs" is used in both the ADA and the Rehabilitation Act. Congress' intended meaning for the phrase is clear. As explained in the preamble to the title II ADA regulations, the definition of "current illegal use of drugs" is based on the report of an ADA Conference Committee, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 64 (1990). That Report says that "current illegal use of drugs" is use "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." Both the ADA and the Rehabilitation Act define

"individual with a disability" as not including an individual who is currently engaging in the illegal use of drugs when a covered entity or recipient acts on the basis of such use.

We therefore decline to revise the definition of "current illegal use of drugs."

Direct Threat

The proposed rule said that "direct threat" means 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. With respect to employment, the term is as defined by the Equal Opportunity Commission's regulation implementing title I of the Americans with Disabilities Act of 1990, at 29 CFR 1630.2(r) (https://www.ecfr.gov/current/title-29/section-1630.2#p-1630.2(r)).

Comment: The Department received comments from many disability rights organizations recommending revisions to the term "direct threat" as defined by the EEOC pursuant to its authority under title I of the ADA. In addition, they objected to the statement in the proposed rule's preamble that a person who poses a direct threat is not "qualified."

Many commenters said that whether an individual is qualified is a threshold question for a person with a disability to establish, whereas whether an individual poses a direct threat is an affirmative defense for a recipient to establish. They recommended that we apply the direct threat analysis as set out in the ADA title II regulations and they provided a sentence that they would like inserted in the preamble.

Response: We appreciate the commenters' feedback. We note, however, that the Department has no authority to change the definition in EEOC regulations promulgated under title I of the ADA.

The definition of "direct threat" set forth in proposed paragraph (1) was added to be consistent with the ADA title II regulation and with the Supreme Court case of *School Board of Nassau County v. Arline*.[21] As to the request that we insert the commenters' suggested language

[21] 480 U.S. 273 (1987).

into the commentary, we reiterate the statement in the NPRM preamble, which also mirrors appendix B to the ADA title II regulation, that "[a]lthough 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 that risk." It is important that the interpretation of "direct threat" in paragraph (1) of this rule and its interpretation in the ADA title II regulations be consistent. Accordingly, we decline to revise the definition of "direct threat."

Facility

The proposed rule defined "facility" as "all or any portion of buildings, structures, sites, complexes, 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."

Comment: A commenter representing persons with disabilities suggested adding language to address drive-through services. The comment notes that courts have resisted accessibility requirements for drive-through services and that drive-throughs are an important point of access for obtaining prescription medication and were a first line of service at the start of the COVID pandemic. The comment recommended including "product or service dispersing facilities and drive-throughs" in the list of items that constitute a facility.

Response: The Department believes it is not necessary to include any new regulatory text because the facility housing drive-through services is already included within the expansive text of the existing language. Facility includes buildings, structures, passageways, and equipment, which will cover all the areas that constitute the drive-through facility. In addition, if offered, drive-through services are a part of the recipient's program or activity and all the provisions of the section 504 rule will apply to this service, ensuring that persons with disabilities have access to this service.

We have retained the proposed definition of "facility."

Federal Financial Assistance

The proposed rule provided a detailed definition of "Federal financial assistance" as any grant, cooperative agreement, loan, contract (other than a direct Federal procurement contract or 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 funds, services of Federal personnel, real or personal property or any interest in or use of such property, or any other thing of value by way of grant, loan, contract, or cooperative agreement. This definition is consistent with the definition in the existing regulation, with addition of "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 from the existing definition.

Comment: Several commenters asked that the Department make clear that tax-exempt status is not "Federal financial assistance" and thus does not trigger the application of section 504. They noted that several recent cases brought under title IX have held that tax-exempt status is "Federal financial assistance."[22] They also state that most other cases that have addressed whether tax-exempt status constitutes Federal financial assistance for purposes of statutes triggered by the receipt of such aid have held that tax-exempt status is not Federal financial assistance and thus does not trigger coverage of the statute in question.

Response: Generally, tax benefits, tax exemptions, tax deductions, and most tax credits are not included in the statutory or regulatory definitions of Federal financial assistance.[23] While a few courts have held that tax-exempt status can constitute Federal financial assistance, most courts that have considered the issue have concluded that typical tax benefits are not Federal

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[22] *See E.H. v. Valley Christian Acad.*, 616 F.Supp.3d 1040 (C.D. Cal. 2022); *Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, No. RDB-20-3132, 2022 WL 2869041 (D. Md. Jul. 21, 2022) *E.H. v. Valley Christian Acad.*, 616 F.Supp.3d 1040 (C.D. Cal. 2022).

[23] *See, e.g.,* 42 U.S.C. 2000d-1; 28 CFR. 42.102(c); 31 CFR 28.105. *See also* U.S. Dep't of Justice, Title VI Legal Manual, sec. V.C.

financial assistance because they are not contractual in nature.[24] Accordingly, this Department generally does not consider tax exempt status to constitute Federal financial assistance. However, the definition of "Federal financial assistance" makes clear that Federal financial assistance that the Department plays a role in providing or administering is considered Federal financial assistance under this rule.

Comment: A commenter asked the Department to confirm that the definition of Federal financial assistance in this rule does not limit the scope of its proposed revision of regulations implementing section 1557. If finalized as proposed, the section 1557 regulations would, consistent with the ACA, define "Federal financial assistance" to include grants, loans, and other types of assistance from HHS, as well as credits, subsidies and contracts of insurance in accordance with the text of section 1557.[25]

Response: Section 1557 is a separate statute from section 504 and its regulation contains a more expansive definition of Federal financial assistance than section 504 does.[26] The definition of Federal financial assistance in this regulation does not constrain or otherwise limit the definition of Federal financial assistance under the Department's section 1557 regulations.

Comment: One commenter asked that the Department provide guidance on whether section 504 requirements apply to State Medicaid programs and managed care plans with which State agencies contract to administer Medicaid services to beneficiaries.

Response: When HHS provides Federal financial assistance, including grants, to an entity, section 504 obligations attach with the receipt of the funds. In essence this relationship is in the form of a contract between the Federal Government and the recipient, by which the recipient states that it will not discriminate on the basis of disability in its operation of its

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[24] *See, e.g.*, *Paralyzed Veterans of Am. v. Civil Aeronautics Bd*., 752 F.2d 694, 708–09 (D.C. Cir. 1985*); Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill.,* 134 F. Supp. 2d 965, 971-72 (N.D. Ill. 2001); *Chaplin v. Consol. Edison Co.*, 628 F. Supp. 143, 145-46 (S.D.N.Y. 1986); *Bachman v. Am. Soc'y of Clinical Pathologists,* 577 F. Supp. 1257, 1264-65 (D.N.J. 1983).
[25] *See* "Nondiscrimination in Health Programs and Activities," 87 FR 47824, 47912 (Aug. 4, 2022).
[26] *Id.* The existing 1557 regulation at 45 CFR 92.3(a)(1) (2020) also includes including credits, subsidies, or contracts of insurance provided by the Department.

programs or activities as a condition of the receipt of Federal funds.[27] When the recipient contracts out responsibilities under the grant program or disburses the funds to other subgrantees that will also operate the program or activity, these statutory and contractual obligations pass down to the subgrantee or subcontractor.

In the case of the Department's Medicaid program, State Medicaid programs receive Federal funds and are therefore covered by section 504.[28] When the State Medicaid agency provides Medicaid funds to managed care plans to manage and operate specific Medicaid programs or activities, those managed care plans are also subject to section 504.

We have retained the proposed definition of "Federal financial assistance."

Foster care

Comment: Commenters asked us to include the phrase "either directly or through contracts, agreements, or other arrangements with another agency or entity" to describe the covered recipients of Federal financial assistance who provide foster care.

Response: The language "recipient of Federal financial assistance made directly or through contracts, agreements, or other arrangements" is included in the child welfare section, § 84.60(b), to describe covered entities.

We decline to revise the definition of "foster care."

Individual with a Disability

The proposed rule said that an individual with a disability means a person who has a disability but the term 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."

Kiosk

Discussion of this term can be found at subpart I.

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[27] *See* 45 CFR 84.5 ("An applicant for Federal financial assistance to which this part applies shall submit an assurance, … that the program or activity will be operated in compliance with this part.")

[28] *See, e.g., U.S.* v. *Baylor Univ. Med. Ctr.,* 736 F.2d 1039, 1042 (5th Cir. 1984) (holding that "Medicare and Medicaid are federal financial assistance for the purpose of Section 504"), cert. denied, 469 U.S. 1189 (1985).

Most Integrated Setting

Discussion of this term can be found in Integration (§ 84.76).

Mobile Applications

The Department did not receive comments on the definition of this term and is finalizing it without modifications.

Other Power-driven Mobility Device

Discussion of this term can be found in Mobility Devices (§ 84.74).

Parents

Discussion of this term can be found in Child Welfare (§ 84.60).

Qualified Individual with a Disability

Comment: One group of commenters representing persons with disabilities asked that the Department clarify that paragraph (3) in the definition of qualified individual with a disability refers to both public and private recipients.

Response: That paragraph refers to childcare, preschool, elementary, secondary, or adult educational services and it encompasses both public and private entities that are recipients from HHS. The Department has revised paragraph (4) addressing postsecondary and career and technical education services to be consistent with the Department of Education regulations.

We decline to revise the definition of "qualified individual with a disability."

Qualified Interpreter

Comment: Some commenters requested that the Department change the definition of "qualified interpreter" to more closely align with the definition of qualified interpreter for individuals with limited English proficiency proposed by the Department in its recent NPRM for section 1557.[29]

Response: The Department believes that the proposed definition of qualified interpreter in this rulemaking accurately describes the requirements of a qualified interpreter for people with

[29] 87 FR 47824 (Aug. 4, 2022).

disabilities. Additionally, this definition is added for consistency with title II of the ADA. For the many reasons explained in the NPRM, the Department believes there is and should be consistency between the relevant provisions of section 504 and title II of the ADA. Many recipients under section 504 are also covered entities under the ADA and the Department does not wish to cause confusion or adopt different standards in those circumstances. Both recipients and individuals with disabilities benefit from establishing consistent regulations.

We acknowledge that many recipients under section 504 are also covered entities under the Department's recent final rule under section 1557. Recipients must meet their obligations under both laws. If an interpreter does not adhere to generally accepted interpreter ethics principles, including client confidentiality, as they are required to do under section 1557, such an interpreter may not be a qualified interpreter for purposes of section 504. A failure to adhere to ethics principles may compromise the interpreter's impartiality and could also prevent a recipient from providing communication that is as effective as the recipient's communication with others (who, in the medical context, are generally entitled to confidential communication). Similarly, an interpreter that does not demonstrate proficiency in communicating in, and understanding, (1) both English and any non-English languages necessary to communicate effectively with an individual with a disability, such as American Sign Language, or (2) another communication modality (such as cued-language transliterators or oral transliteration), is likely not a qualified interpreter under section 504 because they are unlikely to be able to interpret effectively and accurately, both receptively and expressively. In order to interpret effectively, as they are required to do under section 504, qualified interpreters should be able to interpret without changes, omissions, or additions and while preserving the tone, sentiment, and emotional level of the original statement. We decline to revise the definition of "qualified interpreter."

Section 508 Standards

Discussion of this term can be found in subpart I.

Service Animal

Discussion of this term can be found at Service animals (§84.73).

State

The definition of "State" has been revised to more closely track the definitions section of the Rehabilitation Act, 29 U.S.C. 705(34). This is a not a substantive change.

WCAG 2.1

Discussion of this term can be found at subpart I.

User Agent

The Department has added a definition for "user agent." The definition exactly matches the definition of user agent in WCAG 2.1.[30] WCAG 2.1 includes an accompanying illustration, which clarifies that the definition of user agent means "[w]eb browsers, media players, plug-ins, and other programs—including assistive technologies—that help in retrieving, rendering, and interacting [w]eb content."[31]

The Department added this definition to the final rule to ensure clarity of the term "user agent" now that the term appears in the definition of "web content." As discussed further at subpart I, the Department has more closely aligned the definition of "web content" in the final rule with the definition in WCAG 2.1. Because this change introduced the term "user agent" into the Department's section 504 regulation for recipients of Federal financial assistance, and the Department does not believe this is a commonly understood term, the Department has added the definition of "user agent" provided in WCAG 2.1 to the final rule.

Additional discussion of this term can be found at subpart I.

Web Content

Discussion of this term can be found at subpart I. The Department is editing this definition to more closely align with the definition included in WCAG 2.1.

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[30] *See* W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/ and https://perma.cc/UB8A-GG2F. Copyright © 2023 W3C®. As discussed below, WCAG 2.1 was updated in 2023, but this rule requires conformance to the 2018 version. The Permalink used for WCAG 2.1 throughout this rule shows the 2018 version of WCAG 2.1 as it appeared on W3C's website at the time the NPRM was published.

[31] *Id.*

Wheelchair

Discussion of this term can be found in Mobility Devices (§ 84.74).

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing this section with six changes. First, we are revising the definition of "archived web content"; second, we are revising the definition of "conventional electronic documents"; third, we are revising the term "most integrated setting"; fourth we are adding a definition of "Section 508 Standards"; fifth, we are adding a definition of "user agent"; and sixth, we are revising the definition of "web content."

Subpart B—Employment Practices

This subpart addresses the section 504 requirements in the area of employment.

Discrimination prohibited (§ 84.16)

Proposed § 84.16(a) prohibited discrimination on the basis of disability in employment under any program or activity receiving Federal financial assistance from the Department.

Proposed § 84.16(b) stated that the standards used to determine whether there has been discrimination in this context shall be the standards applied under title I of the ADA as they relate to employment, and, as such sections relate to employment, the provisions of sections 501 through 504 and 511 of the ADA as implemented in the EEOC's regulation at 29 CFR part 1630.

The comments and our responses regarding subpart B are set forth below.

Comment: Many organizations representing individuals with disabilities supported clarifying employment obligations and aligning the employment section of the rule with title I of the ADA. They noted that individuals with disabilities are more likely than individuals without disabilities to work in low paying jobs. Several commenters said that workforces should include individuals with disabilities in health care facilities, schools, and social work agencies to help parents and caregivers navigate the systems. They stated that a robust and disability aware

workforce is needed to realize an equitable and nondiscriminatory health care system. Several individuals described their personal experiences of discrimination in the workplace.

Response: The Department appreciates the commenters' feedback on the prohibitions against discrimination in employment and of the requirement that the employment standards be aligned with title I of the ADA. We agree that it is important for workforces to include individuals with disabilities.

The Department notes that individuals who have experienced discrimination in the workplace may file complaints with OCR, though certain cases of employment discrimination may not be within OCR's statutory jurisdiction and may result in a case referral to the appropriate agency. As such, any person who believes they or another party has been discriminated against on the basis of race, color, national origin, sex, age, or disability, can visit the OCR complaint portal to file a complaint online at ocrportal.hhs.gov/ocr/smartscreen/main.jsf. We also accept complaints by email at OCRcomplaint@hhs.gov and by mail at Centralized Case Management Operations, U.S. Department of Health and Human Services, 200 Independence Avenue, SW, Room 509F, HHS Building, Washington, D.C. 20201.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.16 as proposed with no modifications.

Subpart C—Program Accessibility

Subpart C addresses program accessibility. It provides standards for new construction and alterations and applies 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.

Discrimination prohibited (§ 84.21)

Section 84.21 proposed to require 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.

Existing facilities (§ 84.22)

Section 84.22 currently provides that a recipient shall operate its program or activity so that when viewed in its entirety, it is readily accessible to individuals with disabilities, but does not require a recipient to make each of its existing facilities accessible to and usable by individuals with disabilities. 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 structural changes.

We proposed in § 84.22(a)(2) to include language from the ADA title II regulation and from the section 504 regulations for federally conducted programs. It 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 in undue financial and administrative burdens. The provision further states that 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 provision also states that 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. We proposed to retain § 84.22(c). It provides that if a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consulting with a persons with a disability who is seeking services, that there is no method of providing physical access to its facilities other than making a significant alteration to its existing

facilities, the recipient may, as an alternative, refer the person with a disability to other providers of the services that the person seeks that are accessible.

New construction and alterations (§84.23)

Section 84.23(a) currently requires each facility (or part of a facility) constructed by, on behalf of, or for the use of a recipient, when such construction was begun after June 3, 1977, to be designed and constructed in such a manner that the facility (or part of a facility) is readily accessible to and usable by individuals with disabilities.

Section 84.23(b) similarly currently requires that alterations to a recipient's facility after June 3, 1977, that affect 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.

In the NPRM, § 84.23(c) proposed language that lays out accessibility standards and compliance dates for recipients that are public entities. Section 84.23(d) lays out accessibility standards and compliance dates for recipients that are private entities. The Department's proposal seeks to use the Standards currently used in the ADA: the 2010 ADA Standards for Accessible Design (2010 Standards).

Section 84.23(c) and (d) proposed to provide a series of compliance dates for all physical construction or alterations. Under this proposal:

If construction commences on or after one year from the publication date of the final rule, the construction must comply with the 2010 Standards.

If construction commences on or after the effective date of the rule, but before one year from the publication date of the final rule, the construction must comply either with the Uniform Federal Accessibility Standards (UFAS) or the 2010 Standards.

If construction commences on or after January 18, 1991, but before the effective date of the final rule, the construction will be deemed to be in compliance if it meets UFAS.

If construction commences after June 3, 1977, but before January 18, 1991, then the construction will be deemed to be in compliance if it meets ANSI, the American National Standard Institute's Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped (ANSI A117.1-1961(R1971)).

In § 84.23(e), we proposed to provide that newly constructed or altered facilities that do not comply with the section 504 accessibility standards that were in place at the time of construction shall be made accessible in accordance with the 2010 Standards. In addition, if the construction occurred on or after January 18, 1991, and before the date one year from publication date of this rule in final form the recipient has the option of using UFAS or the 2010 Standards as the accessibility standard.

In § 84.22(g) of the NPRM, we proposed to follow the lead established by DOJ in its ADA regulations and establish a safe harbor for specific building elements. It clarifies that, if a recipient in the past had constructed or altered an element in accordance with the specifications of the accessibility code in effect at the time of construction by HHS's section 504 rule (e.g., the specifications of UFAS or ANSI), such recipient is not required to retrofit that element to reflect incremental changes in this rule's accessibility standards. In these circumstances, the recipient would be entitled to a safe harbor for the already compliant elements until those elements are altered.

The comments and our responses regarding subpart C are set forth below.

Comments: Commenters were supportive of the Department's proposal to retain the basic construct of its existing section 504 rule, including strict compliance standards for new construction and alterations and a program accessibility approach for programs carried out in existing facilities. Many commenters, particularly individuals with disabilities, expressed dismay that physical barriers continue to exist so many years after the enactment of section 504, pointed out how these barriers limit or deny access to health care, and strongly urged the Department to take effective and vigorous action to enforce the regulations that are being developed. Other

commenters raised concerns about specific issues in the Department's individual regulatory sections and suggested alternative text and interpretations.

Response: The Department thanks those individuals who took the time to share their experiences and concerns with the Department. These comments provided support for the Department's decision to address problems that persons with disabilities face in getting access to health care and human services, particularly with respect to medical treatment, accessible medical equipment, participation in child welfare programs, and access to websites and kiosks. The Department remains committed to maintaining its active enforcement program and notes that persons who believe that they have been discriminated against in the receipt of health care and social services may choose to file complaints with the Department and the Department will review and investigate complaints and work to achieve compliance with section 504 in those instances where the investigation reveals that discrimination has occurred. The Department will respond to the additional points raised by commenters in the individual sections that follow.

Scope of Accessibility

Comments: Several commenters expressed concern that the Department's approach to program accessibility did not address a range of other important access concerns. One commenter noted that access was more than just building and that persons with environmental illness and other invisible disabilities are denied access because of barriers created by gases from carpeting and the use of air fresheners in buildings. Another commenter included in its list of barriers that the Department should be addressing the use of inaccessible shuttle services offered by or for hospitals and operational concerns, such as storage of items on wheelchair ramps, blocked doorways, or the use of narrow or constricting rope lines.

Response: The Department notes that subpart C on Program Accessibility is just one section 504 requirement and other provisions in the rule address other aspects of accessibility. For example, the list of general prohibitions against discrimination found at §§ 84.68,

particularly § 84.68(b)(7) on reasonable modifications, and 84.70 on maintenance of accessible features, address the accessibility concerns raised by these commenters.

Program Accessibility

Comments: Disability rights organizations expressed concern with the Department's continued use of the program accessibility concept for existing facilities. One organization recommended deletion of the approach because of changes in the health care industry, i.e., the propensity for horizontal and vertical consolidation where hospitals merge, acquire smaller provider practices and specialty clinics, and are in turn acquired by larger regional and nation health care entities. The comment asserts that allowing accessible features in only some of these facilities under the guise of overall program access will deny persons with disabilities patient choice, care continuity, and stakeholder consultation. Other commenters, including organizations representing doctors and health care providers, expressed support for the use of program accessibility and the flexibility that it provides to small providers and approved of the Department's inclusion of the use of the defenses of fundamental alteration and undue financial and administrative burdens.

Others recommended that the Department maintain a high standard for these defenses, allowing persons with disabilities the opportunity to participate in and benefit from health care services and programs. They also suggested that the rule should include a prompt time frame for the decision by a recipient of the use of these defenses so that an individual is not delayed access because they must wait for a written decision. Another disability rights organization expressed concern that the expanded use of telemedicine, while necessary and important, should not replace regular in-person visits in lieu of making the recipient's facilities accessible.

Response: The program accessibility requirement has been a significant feature of the Department's section 504 regulation since 1977 and is, in fact, a part of other Federal section 504

regulations, both for federally assisted and federally conducted rules.[32] The Department notes that the program accessibility requirement is derived from the language of section 504 itself, which prohibits discrimination under any "program or activity." The Department's regulation here is also consistent with guidance from DOJ under E.O. 12250. DOJ's section 504 coordination regulation, which sets forth guidelines for Federal agencies to follow in issuing section 504 rules, includes language on program accessibility.[33] That provision serves as a foundation for the Department's section on program accessibility. Accordingly, the Department will continue with the concept of program accessibility as the basis for its treatment of how section 504 applies to existing facilities in its final rule. The Department notes, however, that it will continue to interpret the program accessibility concept broadly, ensuring that persons with disabilities have access to appropriate health care offered by recipients.

Section 84.22(a)(2) of the Department's proposed rule states 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 nature of its program or activity or in 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 in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services it provides.

It is the Department's view that this paragraph already sets a high bar and that compliance would in most cases not result in undue financial and administrative burdens for 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

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[32] *See, e.g.*, 34 CFR 104.21 and 104.22 (Education); 24 CFR 8.20, 8.21, and 8.2 (HUD); 29 CFR 32.26 and 32.27 (Labor).

[33] Pursuant to E.O. 12250, DOJ coordinates implementation of section 504. 28 CFR part 41. The program accessibility requirements can be found at 28 CFR 41.56 and 41.57.

considered. The burden of proving that compliance 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 to require this determination to be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions. The Department recognizes that its regulatory language does not contain any language about the timing of the decision that an action is a fundamental alteration or would cause an undue burden. Given the wide range of sizes and types of the Department's recipients, the Department believes that setting any specific timetable would be inappropriate. Of course, any person who believes that they or any specific class of persons has been injured by the recipient's decision or failure to make a decision may file a complaint under the compliance procedures established by §84.98 of this part, which incorporates procedural provisions applicable to the Department's title VI of the Civil Rights Act of 1964 regulations.

As to the comment concerning telehealth, the Department notes its discussion on this subject below at subpart H, Communications. The use of telehealth is an important advance in the provision of health care, but it is not the appropriate response for all situations and an in-office visit remains an important tool in the recipient's arsenal of health care solutions. Thus, telehealth in and of itself is not a solution to the existence of a health care provider's inaccessible facilities.

Small providers (§84.22(c))

Comments: The Department received numerous comments on this paragraph. Disability rights organizations expressed concern about the Department's continued inclusion of a

provision allowing a recipient with fewer than fifteen employees to refer a patient to alternative providers when the recipient finds, after consultation with a person with a disability seeking its services, that there is no method of complying with the program accessibility requirement other than making a significant alteration in its existing facilities. Some commenters suggested that this provision be deleted. Other commenters stated that if a recipient must use an alternative to making its services accessible, the recipient must take all steps necessary to provide the services in the most integrated setting, and give due consideration to the individual's preference after an individualized assessment of the person's needs, and provide accessible transportation at no cost to the patient. Organizations representing health care providers expressed support for the alternative referral provision, noting that it helps avoid circumstances in which complying with the rule's requirements would present an insurmountable burden for small practices and negatively impact a practice's resources for delivering care to all patients.

Response: The Department is retaining this provision in the final rule. It is necessary to keep this provision in the final rule because it implements section 504(c) of the Rehabilitation Act. Section 504(c), which Congress added to the statute in 1988, states that "[s]mall providers" "are not required by [section 504(a)] to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility" where "alternative means of providing the services are available."[34] The Department believes that this provision provides flexibility for the many very small providers that the Department funds. One comment suggested reducing the scope of the alternative referral to a smaller number of employees, perhaps five or fewer employees. The Department considered this proposal, but believes that changing this number here, when the fifteen or fewer number has been consistently used by the Department for its section 504 regulation since its inception, would likely cause confusion. In addition, the Department notes that, in fact, a significant percentage of the firms providing health care services (which includes doctors, dentists, and other health care providers) have fewer than five

[34] 29 U.S.C. 794(c).

employees (52%) and an additional 20.4% have between five and nine employees.[35] The Department also notes that the consequences feared by organizations representing persons with disabilities, i.e., that doctors' offices in large numbers would use this alternative referral provision to avoid making their offices accessible, has not been historically proven true, even though this provision has been in the Department's regulation since 1977.

Accessibility Standard

Comments: Comments from organizations representing persons with disabilities and a leader in the field of accessibility standards strongly recommended not using the ADA Accessibility Standards as the accessibility design standards in the final rule. They noted that the 2010 ADA Standards for Accessible Design is based on the U.S. Access Board's (Access Board) 2004 Accessibility Guidelines and is already out-of-date. They propose using the most current standard that exists because the standard in the Department's rule will likely apply into future decades. These groups recommend the use of the International Building Code (IBC) 2021 Chapter 11 and the International Code Council (ICC)/ANSI A117.1 in its entirety. They expressed the view that this approach will provide greater overall accessibility for people with disabilities and a higher level of buildings and facilities accessibility than the 2010 Standards. They also state that ICC/ANSI's A117.1 standards are the most current standards, have been developed by the private sector, and are already in use by many State and local jurisdictions. They state that these standards provide greater overall accessibility to people with disabilities and that the Department's proposed standards are based on knowledge and anthropometrics from 19 years ago (when the wheelchairs in use were smaller than those often used today). In addition, many individual commenters related stories of difficulties in accessing accessible health care and suggested that whatever standards that the Department is using should address a wide range of concerns (e.g., having an accessible front entrance to a health care facility, or locating accessible room in hospitals close to nursing stations and making their use convenient for the nursing staff).

[35] U.S. Census Bureau, Stat. of U.S. Bus. (2019), https://www.census.gov/programssurveys/susb.html.

Response: While there are definite advantages to updating the accessibility design standards in the final section 504 rule to the most current standards, the Department believes that having different standards for building accessibility for the ADA and section 504 would create confusion and uncertainty for our recipients, most of whom would be then subjected to two different standards for making their facilities accessible. The Department is also aware that not all jurisdictions in the United States have adopted the ICC/ANSI 117.1 requirements and adopting them in this rule would have significant cost implications for those recipients in jurisdictions that have not yet adopted the new ICC/ANSI standards. Further, the Department is aware that the IBC is in the process of an even further update of these standards that will address an important building block issue, the use of a wider turning radius for larger wheelchairs.

Most importantly, however, the Federal Government already has in place a process for updating its accessibility standards and the Department believes that it should follow the existing procedure in place. That process includes review of accessibility guidelines by the Access Board, the agency in the Federal executive branch with the necessary architectural expertise to determine the appropriate accessibility guidelines, after conferring with all necessary stakeholders through its own notice-and-comment process. Once the Access Board updates its accessibility guidelines, Federal agencies that enforce the ADA and section 504 (and other Federal laws requiring accessible facilities) can move forward to adopt new, updated accessibility standards, for both their federally assisted and federally conducted programs. This process ensures that the Federal Government will speak with one voice on the issue of accessible building design.

The Department recognizes that its standards development process can be a lengthy one and that the Federal process is slower and less dynamic than the process followed by the private sector. The private code process allows State and local jurisdictions to determine when, whether, and in what detail they will adopt the IBC's most current standards. Under the ADA and section 504, the Federal Government requires the development of its standards through its notice-and-

comment process, a process that allows a full consideration of the issue of costs and the needs for the latest approaches in accessible design.

Accordingly, the Department will retain its use of the 2010 ADA Standards for Accessible Design in its final section 504 rule. The Department, as a member of the Access Board, will bring these concerns to the full Board and will work toward an update of the Board's Accessibility Guidelines.

Subpart D—Childcare, Preschool, Elementary and Secondary, and Adult Education

Subpart D addresses requirements for childcare, preschool, elementary and secondary, and adult education. It retains with slight revisions the application section and the section dealing specifically with those types of recipients. Other sections dealing with elementary and secondary education are reserved.

Application of this subpart (§ 84.31)

Section 84.31 of the NPRM proposed to require the subpart to apply to childcare, preschool, elementary and secondary, and adult education programs or activities that receive direct or indirect Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities. The Department notes that childcare vouchers or certificates are considered indirect Federal financial assistance and, for the purposes of applying the Child Care and Development Block Grant (CCDBG) regulations, are assistance to the parent. Section 504 applies to both direct and indirect Federal financial assistance, including vouchers. This subpart reaffirms that section 504 applies to child care providers, but it does not change the conditions that apply to recipients of indirect Federal financial assistance under any other statute, such as the statute establishing the CCDBG program. For example, faith-based child care providers that receive vouchers or certificates through the Child Care and Development Fund (CCDF) are not barred by that statute from providing religious programming and materials, though section 504 applies to them. OCR will work with

the Administration for Children and Families to provide additional guidance and implementation assistance to child care providers receiving Federal financial assistance.

Childcare, preschool, elementary and secondary, and adult education (§ 84.38)

Section 84.38 proposed to prohibit these types of recipients, on the basis of disability, from excluding qualified individuals with disabilities and requires recipients to consider the needs of such persons in determining the aids, benefits, or services to be provided.

The comments and our responses regarding subpart D are set forth below.

Comment: Several commenters expressed support for the inclusion of the term "childcare" in the new regulation, which uses currently accepted terms and reduces unintended stigma related to references to parents and children with disabilities by removing outdated phrases such as "handicapped."

Response: The Department appreciates commenters' support and believes using current terms plays an important role in inclusive and accessible childcare programs.

*Comment***:** Several commenters requested clarification that the age range covered under § 84.38 of subpart D begins at birth and recommended this be made explicit in the final regulation.

*Response***:** The Department appreciates this comment. A "qualified individual," as defined under section 504, can be of any age, including from birth. Therefore, the Department declines to add further text in the regulation.

*Comment***:** Many commenters emphasized that childcare providers are currently unaware of their obligations under section 504 and the ADA. Commenters requested additional guidance from OCR and the Administration for Children and Families (ACF) in how these providers can meet their obligations, including assurance of availability of supports, training opportunities, and resources including in plain language and multiple languages. Additionally, some commenters asked for guidance on how this rule should be read in concert with the Department of Education's (ED's) section 504 rule in educational settings. Lastly, commenters asked for

clarification on how disciplinary policies and practices will be applied in a nondiscriminatory manner.

Response: The Department collaborates closely with our Federal partners on section 504, including DOJ and ED. In collaboration with ED, HHS recently updated a joint Policy Statement on Inclusion of Children with Disabilities in Early Childhood Programs, which discusses the legal foundation for inclusion and opportunities to improve inclusion in early childhood programs.[36] As explained in the NPRM, the Department believes there is and should be consistency between the relevant provisions of section 504 and title II of the ADA and its regulation[37] as well as ED's section 504 regulations.[38] We encourage recipients to consult DOJ's guidance titled "Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act," first issued in 1997 and updated in 2020, that describes providers' obligations under title III.[39] In addition to consistency in the relevant provisions, title II of the ADA and section 504 generally are interpreted consistently, as detailed in the NPRM.

Recipients should also be aware of the wealth of materials available free of charge from the HHS-funded ADA National Network at www.adata.org, including specific information about the provision of childcare services.[40] DOJ also provides guidance and resources at www.ada.gov.

HHS in coordination with ED, will work with childcare providers to provide guidance and technical assistance on implementation. Both Departments understand that providers will need information and technical assistance to understand their obligations to individuals with disabilities.

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[36] U.S. Dep't of Health & Human Servs., U.S. Dep't of Ed., Policy Statement on Inclusion of Children with Disabilities in Early Childhood Programs (updated November 2023). The guidance notes that "'early childhood programs' refer to those that provide early care and education to children birth through age five, including but not limited to childcare centers, family childcare, Early Head Start, Head Start, home visiting programs, and public and private pre-kindergarten in-school and community-based settings." *Id.* at 1.

[37] *See* 28 CFR part 35.

[38] *See* 45 CFR 84.4(b)(2) and 34 CFR104.4(b)(2).

[39] U.S. Dep't of Justice, Commonly Asked Questions About Childcare Centers and the Americans with Disabilities Act (2020), https://www.ada.gov/childqanda.htm.

[40] The ADA National Network receives funding from HHS to provide information, guidance and training on how to implement the Americans with Disabilities Act (ADA).

Comment: Several commenters expressed concern over discrimination in childcare settings and asked that OCR provide additional guidance regarding the criteria used to determine whether a modification is a "fundamental alteration" to a program or activity=or an "undue financial and administrative burden" for the purpose of responsibilities under section 504. For example, several commenters stated that modification requests for children with diabetes in childcare settings frequently result in denial or exclusion. Commenters asked for a non-exhaustive list of diabetes-related examples of what reasonable modifications in childcare settings may include.

Response: We appreciate the commenters' request for additional guidance on reasonable modifications. As throughout this regulation, which modifications are reasonable and necessary to avoid discrimination depends on the specific circumstances. Examples of common reasonable modifications for a child with diabetes may include providing or assisting with blood glucose checks, insulin administration, counting carbohydrates, and taking action in response to low and high blood glucose levels. DOJ's guidance titled "Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act," provides relevant examples of reasonable modifications under the ADA which also apply under section 504, such as the use of service animals, assistance with diapering and toileting, and assistance with orthotic devices.[41] These scenarios are illustrative examples of what reasonable modifications a covered entity may be required to make to ensure a child with a disability can participate in its programs. The Department will note the request for more examples of reasonable modifications in our continuing education and technical assistance efforts, including the issuance of possible further guidance.

SUMMARY OF REGULATORY CHANGES

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[41] U.S. Dep't of Justice, Commonly Asked Questions About Childcare Centers and the Americans with Disabilities Act (2020), https://www.ada.gov/childqanda.htm; *and see* U.S. Dep't of Educ., Section 504 Protections for Students with Diabetes (2024), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-diabetes-202402.pdf.

In light of the discussion above and considering the comments received, we are finalizing subpart D as proposed with no modifications.

Subpart E—Postsecondary Education

Subpart E addresses postsecondary education. The Department funds many health-related schools that are covered by this part including schools of medicine, dentistry, and nursing. This subpart is identical to the postsecondary education provisions in the existing section 504 regulations and in the ED regulations at 34 CFR 104.41 through 104.47. This subpart contains the following sections: Application, Admissions and Recruitment, Treatment of Students, Academic Adjustments, Housing, Financial and Employment Assistance to Students, and Nonacademic Services.

The comments and our responses regarding subpart E are set forth below.

Comment: Many commenters, including disability rights organizations, said that access to postsecondary education, adult education, and technical programs is critical for diversifying the medical field. Several stated that disability should be included in the curricula of all medical, nursing, and other health care professional schools. One commenter urged HHS to take any actions that it can to combat discrimination against individuals with disabilities at every level of education, especially with regard to students and practitioners in the fields of biomedical and behavioral research, medicine, and allied health and human services. They asserted that this is one of the most effective steps that can be taken to eradicate a leading cause of the most egregious and endemic forms of disability-based discrimination in the U.S. today.

Several other individuals similarly complained about the difficulty in obtaining modifications and urged that the burden be alleviated. One commenter said that recipients consistently require more than just a clinical diagnosis of disability. He noted that obtaining other documents is sometimes very difficult, especially for individuals who live in rural areas.

Response: We thank commenters for their feedback. We agree with those who commented on the importance of providing individuals with disabilities equal access to

educational programs and activities. We also agree that disability should be addressed in the curricula of postsecondary education programs. The Department currently has a Medical School Curriculum Initiative in partnership with the Association of American Medical Colleges.[42]

In addition, the Department has authority to enforce the provisions in subpart E which ensure that individuals receive equal access to postsecondary educational programs. We are committed to vigorous enforcement of those regulations. The Department notes that it proposes in this final rule to promulgate § 84.68(b)(7), which will be particularly important for educational institutions as it will require the provision of reasonable modifications to policies, practices, and 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. Postsecondary educational institutions must also comply with requirements specific to them contained in § 84.44, Academic Adjustments. That section requires postsecondary educational institutions to make modifications to academic requirements if necessary to ensure nondiscrimination on the basis of disability. Modifications may include changes in the length of time permitted for completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

In response to the concern that recipients consistently require more than just a clinical diagnosis of disability, we note that §84.4(d)(1)(vii) says that determining whether an impairment substantially limits a major life activity usually will require no scientific, medical, or statistical evidence. The preamble to that provision in the ADA title II regulations states that "in most cases, presentation of such evidence shall not be necessary."[43] Individuals who believe

[42] For more information on this initiative, *see* U.S. Dep't of Health & Human Servs, Off. for Civil Rts, Medical School Curriculum Initiative in partnership with the Association of American Medical Colleges, https://www.hhs.gov/civil-rights/for-individuals/special-topics/health-disparities/medical-school-curriculum-initiative/index.html.

[43] 35 CFR part 84, appendix C.

they have been unfairly denied reasonable modifications and/or academic adjustments can file complaints with OCR. The procedures for filing complaints are explained in § 84.98.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing subpart E as proposed with no modifications.

Subpart F—Health, Welfare, and Social Services

This subpart sets forth the requirements that apply to health, welfare, and social service providers.

Substance and alcohol use disorders (§ 84.53)

Proposed § 84.53 retained the section of the existing regulation with non-substantive terminology updates. The proposed version stated that 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.

We invited comment as to whether the application of this 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?

The comments and our responses regarding § 84.53 are set forth below.

Comment: Multiple commenters, including many disability rights organizations, responded to our request for comment. The commenters were uniformly supportive of the extension of coverage of this section beyond hospitals and outpatient facilities. A few listed specific health care facilities that should be included but most said that coverage should be extended to "all health care facilities."

Several commenters questioned how the prohibitions in § 84.53 are different from the prohibitions against discrimination in the medical treatment section, § 84.56. Another commenter was not clear as to why we said that this section must be read in conjunction with the illegal drugs provision at § 84.69(b). A few commenters pointed out a technical error in the text of the proposed rule where insertion of the phrase "or individual with an alcohol or substance use disorder" makes the sentence confusing.

Response: We thank commenters for their feedback and agree with their unanimous recommendation that we expand the application of the section to all health care providers.

There are many settings where individuals seek and receive care other than hospitals and outpatient facilities. These include rehabilitation centers, assisted living and residential care facilities, day treatment programs, home health care services, telehealth platforms, and specialty clinics. The current opioid crisis and increase in substance use disorders underscores the necessity for nondiscriminatory access to a wide range of health care facilities.

The Department believes that health care treatment should be as inclusive as possible and should not be limited to hospitals and outpatient facilities. Any health care facility receiving Federal financial assistance from the Department may not discriminate in admission or treatment against an individual with an alcohol or substance use disorder who has a medical condition because of that alcohol or substance use disorder. In response to a commenter's question about how this section is different than the nondiscrimination provisions in the medical treatment section, we note that this section provides specific protections for individuals with substance and alcohol use disorders but that the general prohibitions against discrimination contained in the medical treatment section at § 84.56 also apply to that situation.

With regard to the relationship of this section to the provisions about illegal use of drugs contained in § 84.69, we note that § 84.69(a) states that "[e]xcept as provided in paragraph (b) of this section, this part does not prohibit discrimination against individuals based on their current illegal use of drugs." The exception in paragraph (b) states that "a recipient shall not exclude an

individual on the basis of that individual's illegal use of drugs from the benefits of programs and activities *providing health services* . . . ." (emphasis added). The situation described in § 84.53 fits into that exception since it addresses individuals who are seeking health care services. Accordingly, recipients cannot deny health services on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

We note that §§ 84.69 and 84.53 differ in two key ways. First, § 84.53 protects people with both substance use and alcohol use disorders while § 84.69 only addresses individuals engaging in illegal use of drugs. Second, § 84.69(b) prohibits exclusion of individuals currently engaging in illegal use of drugs from health services and services provided under the Rehabilitation Act while § 84.53 does not address the illegal drugs issue. However, as noted above, both regulations prohibit the exclusion of individuals currently engaging in illegal use of drugs from health services although this is not specifically stated in § 84.53.

Please see the preamble discussion to § 84.69, Illegal Use of Drugs, for an explanation of how the ADA sections and Rehabilitation Act sections on illegal drugs differ.

We agree with the commenters' suggestion that the text be clarified by deleting the phrase "or individual with alcohol use disorder." In addition, we are making two technical changes — replacing the word "drug" with the word "substance" and replacing the phrase "who is suffering from a medical condition" to "who has a medical condition."

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering comments received, we are finalizing § 84.53 as proposed with several modifications. We are replacing the phrase "operates a general hospital or outpatient facility" with the phrase "operates a health care facility." In addition, we are deleting the phrase "or individual with an alcohol use disorder" the second time it is used, replacing the word "drug" with the word "substance, and replacing the phrase "suffering from a medical condition" to "has a medical condition." The section now says that "[a] recipient … who operates a health care facility may not discriminate in admission or treatment against an

individual with a substance or alcohol use disorder who has a medical condition, because of the person's substance or alcohol use disorder."

Education of institutionalized persons (§ 84.54)

Proposed § 84.54 was retained from the existing section 504 regulations with one revision. The existing regulation stated that recipients must ensure that qualified individuals with disabilities are provided an appropriate education as defined in § 84.33(b). That section set forth the requirements for a free appropriate public education. However, the proposed rule did not contain a § 84.33(b) as that section had been removed. Accordingly, we proposed to revise § 84.54 so that it refers instead to the ED section 504 regulations at 34 CFR 104.33(b). The comments and our responses regarding § 84.54 are set forth below.

Comment: Several disability rights organizations expressed concerns about the reference to 34 CFR 104.33(b), ED's section 504 regulation, since that Department has indicated their intent to amend their section 504 regulations. Their comments do not explain their concern; they simply suggest that the rule not reference a regulation that will be amended. The commenters proposed alternative language setting forth requirements for an appropriate education. They also suggested that the preamble state that this section is to be interpreted consistent with the requirements of ED's section 504 regulations and the ADA title II regulations.

Response: We appreciate the commenters' suggestions but decline to revise the text of the regulation. We note that recipients must comply with the current version of 34 CFR 104.33(b). If amendments to 34 CFR 104.33(b) are finalized, in whole or in part, following the effective date of this regulation, then recipients must follow the amended version in force at that time. The cross-reference to the ED regulation does not change that requirement. We agree with recipients' assertion that recipients must comply with both the ED and the ADA title II regulations.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above, we are finalizing § 84.54 as proposed without modifications.

Medical treatment (§ 84.56)

Proposed § 84.56(a) proposed a general prohibition against discrimination to be read in conjunction with the general prohibitions contained in proposed § 84.68.

Proposed § 84.56(b)(1) provided a non-exhaustive list of examples of conduct that would violate the section. It stated that 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; (ii) judgments that an individual will be a burden on others due to their disability; or (iii) a belief that the life of a person with a disability has lesser value than the life of a person without a disability, or that life with a disability is not worth living.

In § 84.56(b)(2), we proposed to provide that where an individual with a disability seeks or consents to treatment for a separately diagnosable symptom or medical condition, a recipient may not deny or limit clinically appropriate treatment if it would be offered to a similarly situated individual without an underlying disability.

The Department invited comment on the best way of articulating distinctions between underlying disabilities and separately diagnosable symptoms or medical conditions.

We proposed in § 84.56(b)(3) to provide that a recipient may not provide 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.

The Department invited comment on other examples of the discriminatory provision of medical treatment. Proposed § 84.56(c) articulated a rule of construction setting forth a series of principles guiding how proposed § 84.56 should be interpreted. We proposed in § 84.56(c)(1)(i) to provide 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.

Proposed § 84.56(c)(1)(ii) identified the circumstances when a recipient typically declines to provide treatment and proposed that the criteria in paragraphs (b)(1)(i) through (iii) would not be legitimate nondiscriminatory reasons for denying or limiting medical treatment and could not be a basis for determining that an individual is not qualified for treatment or that a treatment is not clinically appropriate.

The Department invited comment on the examples described in this section, whether additional examples were needed and on the appropriate balance between prohibiting discriminatory conduct and ensuring legitimate professional judgments.

Proposed § 84.56(c)(2) addressed the role of consent in evaluating obligations under § 84.56. We proposed in § 84.56(c)(2)(i) to make clear that nothing in the section requires a recipient to provide medical treatment to an individual where the individual does not consent to the treatment. We proposed in § 84.56(c)(2)(ii) to provide that nothing in the section allows a recipient to discriminate against a qualified individual with a disability in seeking to obtain consent.

We proposed in § 84.56(c)(3) to provide that nothing in the section precludes a recipient from providing an individual with a disability with information regarding the implications of different courses of treatment based on current medical knowledge or the best available objective evidence.

The comments and our responses regarding § 84.56 are set forth below.

Comments: Commenters expressed broad support for the medical treatment section, with many expressing particular support for the general prohibition against discrimination. Many people with disabilities shared experiences regarding the inappropriate denial of medical treatment, while many provider organizations expressed appreciation for the regulatory clarity and respect for professional judgment in the proposed provision.

Response: The Department appreciates the broad support for this section. We also thank all of the commenters who took the time to share their experiences with us.

Comments: Many commenters indicated that further guidance, public education, and technical assistance activities will be necessary to promote compliance and awareness of the obligations of the new medical treatment section. Examples include issuing supporting Frequently Asked Questions, guidance for health care providers and others on the use of supported decision-making and other reasonable modifications to support accessibility and nondiscrimination, guidance on what is and is not a legitimate, nondiscriminatory reason for denying or limiting a service, expectations for documentation of legitimate nondiscriminatory reasons, guidance on how the prohibition on discrimination in medical treatment interacts with other sections of the regulation, and other topics.

Response: The Department agrees that further efforts may be necessary to promote awareness of and compliance with the medical treatment sections of this rulemaking. The Department will consider a variety of options for such activities after the issuance of the final rule, including sub-regulatory guidance and technical assistance.

Definition of Medical Treatment

Comments: Multiple commenters suggested the final rule should include a definition of medical treatment. Many suggested changes to the description of medical treatment included in the NPRM. Some commenters suggested the Department include additional types of health conditions to the description of medical treatment, specifically suggesting additions such as intellectual, developmental, or behavioral health conditions to the language "physical and mental health conditions" in the proposed rule. Several commenters asked the Department to clarify if habilitative services would be covered medical treatment. Other commenters requested we use a new term entirely that they believed would better encompass the breadth of treatment, like "treatment options," "health care services," "comprehensive medical care," "medical services,"

or “goods, benefits, or services.” Another commenter requested that we clarify that the term is inclusive of services delivered in the context of clinical research.

Response: The Department has elected not to define the term “medical treatment” in the regulation, but instead uses the term in a generic, nonspecific manner. As stated in the preamble to the proposed rule, “medical treatment” is intended to be broad and inclusive. The Department interprets medical treatment to encompass habilitative services and services delivered as part of clinical research. The term physical or mental health condition in the description of medical treatment in the proposed rule is sufficiently broad to encompass the additional, suggested language referenced by the commenters, including intellectual, developmental, or behavioral health conditions, etc. We will retain the approach in the proposed rule, giving “medical treatment” its plain meaning, and reiterating that it is intended to be broad and inclusive.

Notice

Comments: Several commenters requested that the Department require all forms of medical treatment to include a notice of requirements under section 504 to familiarize people with disabilities receiving medical treatment from recipients with recipient obligations and patient rights pursuant to them.

Response: We decline to make this change. Section 84.8, Notice, requires all recipients to make available to beneficiaries and other interested persons information about the provisions of section 504 and its applicability to the programs or activities of the recipient. Recipients must take such steps as necessary to apprise individuals of the protections against discrimination assured them by section 504 and this part, however we decline at this time to regulate how and when recipients are required to do that.

Best and Promising Practices

Comments: Several commenters recommended best practices for addressing disability discrimination, including competency-based trainings on disability; a mechanism for allowing individuals with disabilities to appeal medical treatment denials or limitations; a structured

process for requesting a second opinion/professional consultation; and the availability of a specially trained, independent review board—with a composition that includes people with a wide range of disabilities—to consider patient appeals of medical treatment decisions and report publicly on the outcome of those decisions.

Response: While these ideas are potentially promising practices for assisting persons with disabilities as they seek health care, the Department believes it is unnecessary to include these requirements at this time to ensure compliance with section 504's nondiscrimination requirement. Recipients may consider them as potential options within a holistic strategy of providing health care to persons with disabilities.

Utilization Management Practices

Comment: A medical organization asked the Department to respond to an example under which "a drug that slows the progression of visual impairment is clinically appropriate only if a patient has a minimum level of visual acuity remaining based on the enrolled populations in the drug's clinical trials," leading "a Medicare Part D plan [to] place a prior authorization requirement that the patient have that minimum level of visual acuity for the drug to be covered by the plan." They ask the Department whether such a prior authorization that would only cover the drug for those with the minimum level of visual acuity would be viewed as discriminatory under section 504.

Response: As indicated elsewhere within the preamble, prior authorization and other utilization management activities are covered by section 504 and § 84.56. However, determining whether a particular prior authorization or other utilization management decision by a health plan may violate section 504 is a fact-specific inquiry that we do not address in this final rule.

Interaction with Medicare

Comment: A medical organization noted their obligation under Medicare Parts A and B and Medicare Advantage to allow coverage only for items and services that are "reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a

malformed body member" as well as their obligation under Medicare Part D to require that a drug be for a "medically accepted indication." They also ask that the Department include specific regulatory language in the final rule deeming the application of coverage restrictions in Federal health programs to meet the proposed rule's standard for being nondiscriminatory and, therefore, permissible.

Response: As the Department discusses elsewhere with respect to the interaction of section 504's integration mandate and Medicaid law, obligations under civil rights laws and program statutes, such as for Medicare, are separate and distinct. Recipients are not required to fundamentally alter their programs or activities to comply with section 504. However, recipients may be obligated to make reasonable modifications to programs or services in order to comply with section 504 even if they are fully in compliance with applicable program statutes in Federal health programs. As such, the Department has elected not to modify the regulatory text.

Scope of § 84.56

Comment: One commenter requested that we make clear that the general prohibitions on discrimination in proposed § 84.68 continue to apply in the context of medical treatment notwithstanding proposed § 84.56's more specific provisions on discrimination in medical treatment.

Response: The general prohibition against discrimination in proposed § 84.68 continues to apply in the context of medical treatment. While § 84.56 articulates more specific prohibitions, this does not preclude the application of § 84.68's more general requirements to medical treatment or any of the other areas in which the Department has included more specific regulatory provisions, nor should the omission of a specific regulatory provision on a particular topic be construed to suggest that the general prohibition against discrimination does not apply in that context.

Comments: Several commenters suggested modifying § 84.56(a) to clarify that its prohibition on discrimination encompasses offering, failing to offer, or denying a treatment.

Response: The Department agrees that § 84.56(a)'s prohibition on discrimination on the basis of disability can encompass instances where a recipient offers, fails to offer, or denies a treatment. Other provisions within the rule which provide further detail on the prohibitions within § 84.56(a) explicitly indicate this, such as § 84.56(b). We believe these prohibitions are covered by the rule already, and thus decline to change the regulatory text.

Comments: Several commenters asked the Department to clarify how § 84.56 applies to payers, including Medicaid managed care plans, Medicare Advantage plans, and other health systems payers receiving Federal financial assistance.

Response: Section 84.56 applies to all medical treatment provided by recipients receiving funds from HHS. The application of § 84.56 in such instances will depend on the specific facts and institutional context of each case.

Comments: Many commenters asked the Department to specifically clarify other forms of medical treatment that § 84.56 would apply to, including assisted reproductive technology treatment, suicide prevention services, mental health services, and others.

Response: As indicated previously, the Department intends § 84.56 to apply in a broad and inclusive fashion to a wide array of medical treatment services, including assisted reproductive technology treatment, suicide prevention services, mental health services, and others. "Medical treatment" is used in § 84.56 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, habilitative, rehabilitative, or palliative. Although it is not possible to provide an exhaustive list of such services, recipients should interpret the term medical treatment in the broad and inclusive fashion intended by the Department.

Comments: Some commenters requested the Department clarify that § 84.56 applies both to patients with disabilities that predate the provision of medical treatment in which

discrimination occurs, and patients whose prognosis during that episode of medical treatment includes disability.

Response: As discussed elsewhere in this rulemaking, the definition of disability under section 504 is intended to be interpreted in a broad and inclusive fashion. The definition of disability includes people with disabilities whose disability predates the provision of medical treatment in which discrimination occurs. As far as the question of patients whose prognosis during the episode of medical treatment includes disability, people with physical or mental impairments that substantially limit a major life activity, including a major bodily function, qualify as people with disabilities. As indicated elsewhere within the rule, "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. Where a person's prognosis is the result of impairments in a major bodily function, they would be considered a person with a disability under section 504. We note also that section 504 protects persons who are "regarded as" having such an impairment. In cases of illness or injury so severe that a person needs a ventilator and tube feeding, or where a person is regaining consciousness after brain injury, as raised in comments received on this issue, although it will be a fact-specific inquiry, the individuals in these scenarios would almost certainly be covered under the definition of disability and by the protections from discrimination on the basis of disability under section 504, including § 84.56.

Comments: Several commenters asked the Department to clarify the application of § 84.56 to newborn infants.

Response: As indicated within the NPRM, the Department considers section 504, including § 84.56, to apply to newborn infants. This includes the prohibitions against the denial of medical treatment under § 84.56(b)(1) and (2), and the prohibitions on the discriminatory provision of medical treatment under § 84.56(b)(3).

Comment: One commenter objected based on its understanding that the Department's proposed rule would not apply to decisions to withhold treatment from infants with disabilities in which the disabling condition is related to the condition to be treated, noting that § 84.56(b)(2) addresses treatment for a separately diagnosable condition or symptom and not for the underlying disability. The comment concerned infants with disability conditions such as meningomyelocele, hydrocephaly, microcephaly, or other anatomical anomalies. The comment noted that failure to treat these conditions represents discrimination against a child with a disability.

Response: The Department believes that this comment misconstrues the section 504 rule. The Department intends that this rule will generally apply to the provision of medical treatment for infants, including those seeking treatment for separately diagnosable symptoms or conditions related to their underlying disability, when medical treatment is provided to other similarly situated children. For example, an infant with microcephaly may experience seizures. This would constitute a separately diagnosable symptom or condition for which treatment would be subject to the protections of § 84.56(b)(2) despite the fact that the seizures are a symptom of the infant's microcephaly. As the Department's NPRM made clear, with respect to separately diagnosable conditions, the rule will not require that the condition be entirely unrelated to the underlying disability. "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." 88 FR 63405. In addition, § 84.56(b)(1) prohibits denying or limiting medical treatment to a qualified individual with a disability based on bias or stereotypes about that patient's disability, judgments that the individual will be a burden on others due to their disability, or a belief that the life of a person with a disability has a lesser value than the life of a person without a disability or that life with a disability is not worth living. Under such circumstances, the discrimination described by the commenter would also be covered under § 84.56(b)(1) even if the condition for

which the patient sought treatment was not a separately diagnosable symptom or condition from their underlying disability.

Medical Futility

The Department proposed § 84.56(b)(1)(iii) to prohibit recipients from 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.

Comments: The Department received a broad array of comments from disability organizations, civil rights organizations, and other stakeholders supporting this approach. We received stories from people with disabilities describing their own experiences or those of friends regarding the denial of life-sustaining treatment and the difficulties involved in accessing it after such denials. We also received similar stories from providers. For example, one provider association described a 25-year-old patient with a developmental disability who had been referred to an inpatient hospice unit after becoming poorly responsive with brain imaging demonstrating a shunt and severe abnormalities. After the provider learned from a family member of a recent sudden change in the patient's behavior, the patient received a second opinion, leading to the shunt being surgically revised, the patient's condition improving, and her enjoying her life for many more years. In the words of this commenter, the patient's "referral to hospice without sufficient exploration of other treatment options was inappropriate and may have been driven by a mistaken clinical assumption regarding her baseline quality of life."

Response: The Department will retain the provision as proposed. We respond to specific questions regarding the application of this requirement throughout this section.

Comments: Several commenters requested that the Department provide an example of the application of § 84.56(b)(1)(iii) to people with intellectual disabilities.

Response: The Department provided such an example within the NPRM. We noted an illustrative example in which 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).

Comment: A commenter asked for additional clarity regarding the permissibility of not offering treatment where doing so "does not align with the patient's wishes, does not take into account their overall prognosis, does not consider whether the risks would outweigh the benefits, or creates a situation where the treatment could cause more harm than good."

Response: The commenter raised multiple potential rationales for denying treatment, each of which has different legal implications under § 84.56 and section 504 more generally. As the Department indicates in § 84.56(c)(2), "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." As such, recipients will not be required to provide treatment that does not align with a patient's expressed wishes or advanced directive.

The permissibility of denial of treatment based on other potential rationales raised by the commenter are context- and fact-dependent. We indicate in § 84.56(c)(1)(i) 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. Where a patient's prognosis affects whether treatment

is likely to be effective, it may be permissible to consider prognosis in determining whether a treatment should be provided. Similarly, where a treatment is likely to have substantial side effects that may outweigh the likely benefits to the patient, it may be permissible to take these into account in determining whether a treatment should be provided as these risks are relevant to whether a treatment is medically effective. However, consideration of a patient's prognosis may not include a judgment that the life of a person with a disability is not worth living or will be a burden on others due to their disability, as these are prohibited criteria under § 84.56(b)(1)(i) through (iii). In short, while recipients may take into account potential harms to the patient, those harms may not include or be based on a belief that the patient would be better off dead than alive due to their disability.

Comments: In the NPRM, the Department provided an example involving a patient with Alzheimer's disease, covered as a disability under section 504, who has developed pneumonia and needs 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 a ventilator, 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. We indicated that under these circumstances 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 § 84.56(b)(1)(iii).

We received multiple comments specific to this example. Most commenters, particularly those representing aging and disability advocacy organizations, praised its inclusion, noting that it addressed an important issue facing both people with Alzheimer's and those with other cognitive disabilities, and requesting that it be incorporated within the final rule. A minority of commenters expressed concern with the use of Alzheimer's disease and suggested the Department consider the use of another diagnosis or specify that only "early and mild" Alzheimer's is covered in the circumstances described by the illustrative example.

Response: The example describes the denial of medical treatment due to the provider's belief that the patient has such poor quality of life due to their disability that life-sustaining treatment would not be of benefit to them. This is a denial of treatment based on a belief that life with the patient's disability is not worth living, a prohibited basis for a denial of medical treatment under § 84.56(b)(1)(iii) and not a legitimate nondiscriminatory reason to deny treatment, as specified under § 84.56(c)(1)(ii). The example also indicates that this occurs even though the attending physician normally would start ventilator support for a patient with pneumonia who needs assistance breathing. We note that if the physician reasonably determines based on current medical knowledge or the best available objective evidence that such medical treatment is not clinically appropriate for the patient due to their Alzheimer's disease, this would not constitute prohibited discrimination. However, such a determination cannot – consistent with § 84.56(c)(1)(ii) – be based on a judgment that the patient's life is not worth living due to their Alzheimer's disease.

We note that the prohibition against denying treatment due to a judgment that the patient's quality of life would be so low as to make their life not worth living does not mean that a physician cannot communicate this concern to the patient or their authorized representative to inform their decision-making, provided the physician does not discriminate on the basis of disability in the manner in which they seek permission to withdraw or encourage the declining of life-sustaining treatment (such as through pressuring the patient or their representative). This was

why we specified in this example that the patient's authorized representative had sought medical treatment for the patient with Alzheimer's disease and that this treatment would have been provided to a similarly situated person without Alzheimer's disease.

Comment: Organizations representing older adults and people with disabilities asked the Department to interpret the permissible application of medical futility narrowly and indicated that recipients must explicitly take into account disability accommodations when making determinations of medical futility. They also ask the Department to include examples of the consideration of reasonable modifications when making decisions regarding medical futility.

Response: In the NPRM, the Department noted 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." In the statement, 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 on controversial value judgments about quality of life or require a degree of prognostic certainty that is often not attainable."[44]

The Department considers the former description of medical futility – "treatments that have no chance of achieving the intended physiologic goal"– to represent a permissible instance of the denial of treatment under § 84.56 as a person with a disability for whom a treatment will not achieve the intended physiologic goal is not a qualified individual with a disability. In contrast, the denial of treatment due to "value judgments about quality of life" would likely constitute a prohibited denial of treatment under § 84.56(b)(1)(iii). Where futility is applied

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[44] 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).

based on "a degree of prognostic certainty that is often not attainable," whether this would constitute a prohibited denial of treatment would depend on if the level of prognostic certainty is less rigorous than that which would be applied to a similarly situated patient without a disability.

The Department agrees with the commenter that recipients must take into account reasonable modifications required under section 504 when evaluating whether a given patient with a disability meets this standard. For example, some clinical protocols have made use of "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, under which patients must meet a set threshold or trajectory for continued treatment to be deemed non-futile. However, as the Department previously noted within the NPRM, 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.

Comments: Several commenters asked the Department to clarify that the ongoing need for assistive technology, attendant care, or other physical assistance with activities of daily living, mechanical ventilation, supervision, or other disability support needs does not constitute sufficient reason to deny a qualified individual with a disability access to medical treatment. They also seek clarification that the fact that a person with a disability will not recover to their pre-treatment baseline is not sufficient basis to deny medical treatment that would succeed at prolonging a patient's life.

Response: The Department agrees. A recipient generally may not deny medical treatment to a qualified individual with a disability, including via a medical futility determination, simply because the patient will require ongoing support during or after receiving medical treatment. As indicated in the NPRM, 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. Similarly, the fact that a patient with a disability may not recover to their pre-treatment baseline is generally not sufficient basis to justify denying of medical treatment, including via a medical futility determination.

The Department noted in the NPRM that 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 or on medical equipment or technology.

Crisis Standards of Care

Comments: The Department received a broad array of comments on the application of § 84.56 to crisis standards of care.

Many comments asked the Department to confirm the application of section 504 and § 84.56 to crisis circumstances, provide additional examples of crisis standards of care obligations

within the preamble or regulatory text, and respond to inquiries regarding the application of § 84.56 to these contexts.

Response: The Department confirms that section 504 and § 84.56 apply during the planning, development, activation, and implementation of crisis standards of care.

Comments: Many commenters noted that during the COVID-19 public health emergency many State crisis standards of care plans included both categorical exclusions from crisis care on the basis of specific disabilities and other instances of unfavorable treatment against people with specific disabilities (such as relative de-prioritization for scarce critical care resources). These commenters asked the Department to clarify the obligations of section 504 with respect to categorical exclusions and other instances of unfavorable treatment on the basis of specific disability diagnoses (such as cancer, cystic fibrosis, dementia, or intellectual disability) or on the basis of functional impairments (such as difficulty with activities of daily living).

Response: As indicated under § 84.56(b)(2), when a qualified individual with a disability 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. When a crisis standards of care plan indicates that patients with specific disabilities will be categorically excluded, given lower priority, or otherwise will receive unfavorable treatment when seeking access to critical care resources, this may be a denial of treatment for a separately diagnosable symptom or medical condition that would be provided to a similarly situated individual without an underlying disability. If the patient with a disability is qualified to receive such treatment, this may constitute a violation of § 84.56(b)(2). This analysis applies both to unfavorable treatment on the basis of specific diagnoses and on the basis of functional impairments that constitute disabilities under section 504.

We discuss here some relevant considerations regarding qualification to receive treatment in the crisis standards of care context. Categorical exclusions on the basis of disability in crisis standards of care are prohibited when treatment would not be futile for all individuals with that type of disability i.e., that the treatment has no chance to achieve the intended physiologic goal for all persons with that particular type of disability. For example, a hospital is generally prohibited from having a categorical exclusion denying ventilator treatment to individuals with Down syndrome because ventilator treatment is not futile for all persons with Down syndrome. Deprioritization of people with disabilities compared to people without disabilities and other instances of unfavorable treatment can also constitute violations of § 84.56, if the disability receiving unfavorable treatment does not impact short-term mortality. A patient's disability should not form the basis for decisions regarding the allocation of scarce treatment for a separate medical condition or symptom, unless that underlying condition is so severe that it would prevent the treatment sought from being effective or prevent the patient from surviving until discharge from the hospital or shortly thereafter.

We note that there are instances where § 84.56 prohibits discriminatory treatment in crisis standards of care even where a patient is not seeking treatment for a separate symptom or condition but instead seeks treatment for their own underlying disability. For instance, § 84.56(b)(1) clarifies that unfavorable treatment, including categorical exclusions and deprioritization, 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 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 are violations of § 84.56 regardless of what type of medical treatment the patient is seeking.

Comments: Many commenters asked the Department to discuss the application of section 504 and § 84.56 to instances of denial of medical treatment on the basis of judgments of long-

term life-expectancy as a result of a patient's disability, a common feature of many crisis standards of care plans.

Response: As the Department has previously indicated in its February 2022 guidance, recipients may not deny or give lower priority to patients with disabilities because of a judgment that their long-term life expectancy may be lower than an individual without a disability after treatment.[45] Section 504 prohibits recipients, including those implementing crisis standards of care, from imposing or applying eligibility criteria that screen out or tend to screen out individuals with disabilities, or any class of individuals with disabilities, from fully and equally enjoying a program or activity, unless such criteria can be shown to be necessary for the provision of the program or activity being offered.[46] In the context of crisis standards of care implementation, which is designed to address resource shortages in a temporary emergency, a patient's likelihood of survival long after hospital discharge, which may depend upon many factors and may be difficult to predict, is unlikely to be related to the need to make allocation decisions about scarce resources on a temporary basis.[47] The further in the future a provider forecasts, the less likely survival has to do with the effectiveness of the medical intervention in the context of the public health emergency necessitating crisis standards of care. Judgments about long-term life expectancy are inherently uncertain and may screen out or tend to screen out individuals with disabilities from access to care without being necessary for the safe provision of the health care being offered. Given these concerns about long-term life expectancy calculations in the crisis standard of care context, denying or providing lower priority for access to scarce critical care resources based on a patient's disability impacting their long-term life expectancy

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[45] 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.

[46] *See* § 84.68(b)(8); 28 CFR 35.130(b)(8) (DOJ title II regulation).

[47] *See* 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 at question 7.

when such critical care resources would be provided to a patient without such a disability may also constitute a violation of § 84.56(b)(2), insofar as it would represent a denial of medical treatment for a separate symptom or condition that would be provided to a similarly situated person without a disability. This may also violate other provisions of the section 504 regulation, including the general prohibitions against discrimination in § 84.68 and the broad prohibition against discrimination in medical treatment in § 84.56(a).

Comments: Several commenters urged the Department to clarify that crisis standards of care protocols that deny, limit, or give lower priority to people with disabilities in accessing critical care resources based on anticipated resource utilization could constitute a violation of section 504 and § 84.56.

Response: The Department agrees that such denials, limitations, or lower priority for people with disabilities than other persons for critical care resources based on resource-utilization can constitute a violation of section 504 and § 84.56. As discussed in the NPRM, 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.[48]

Comments: Several commenters asked the Department to clarify that reasonable modifications may be required to assessment tools used to prioritize patients for access to critical care under crisis standards of care and to provide examples of such modifications.

Response: The Department has carefully considered the comments received and as discussed in the NPRM, recipients may be required to make reasonable modifications to prognostic scoring tools used to prioritize critical care resources under crisis standards of care, just as this obligation exists outside of crisis standards of care contexts. For instance, throughout

[48] 88 FR 63401.

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 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."[49] 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.

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[49] 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.

The general requirement that recipients 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 typically assess the inability of a person to articulate words, but it would likely be discriminatory to use that determination to indicate an actual mortality risk when assessing a person with cerebral palsy because that person's pre-existing speech impairments do not imply mortality risk in the context of the acute care episode the person is seeking care for. We also note that, in general, mortality risk screening should be linked to the event that led to the acute care episode rather than an individual's pre-existing disability.

Organ Transplantation

In the NPRM, the Department noted that organ transplant discrimination against people with disabilities remains an ongoing problem. 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 postoperative care needs and other aspects of transplantation. For example, in 2019, OCR resolved a case alleging discrimination against an individual with Autism Spectrum Disorder, in which the complainant alleged that a 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 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.

Comments: Many commenters praised the Department for addressing discrimination against people with disabilities in organ transplantation and urged the Department to clarify that section 504 and § 84.56 apply to the broad scope of the organ transplantation process, including the provision of information that transplantation was an option, referral to a transplant center, evaluation by the transplant center for clinical eligibility for transplantation, evaluation for ability to manage post-operative care needs, prioritization for access to organ transplants, and other aspects of organ transplantation. They also asked the Department to include additional information and examples regarding the application of § 84.56 to organ transplant discrimination and to respond to specific inquiries.

Response: The Department agrees that organ transplant discrimination against people with disabilities remains an ongoing problem and that section 504 and § 84.56 apply throughout the organ transplantation process, including the provision of information, referrals, evaluation, eligibility, prioritization and other aspects of the transplantation process. We respond to inquiries and provide further information on the application of § 84.56, including illustrative examples, throughout this subsection.

Comments: Many commenters highlighted discrimination against people with disabilities, particularly people with developmental disabilities, seeking access to organ transplantation on the grounds that they would not be able to manage their post-operative care needs. These commenters asked the Department to indicate that evaluation for suitability of transplantation must be done taking into account modifications the patient with a disability may use to manage their post-operative care regimen, including both formal and informal supports. A commenter also asked the Department to indicate that denying a person with a developmental disability, such as intellectual disability or autism, access to organ transplantation because the

recipient believes the person with a disability would not be able to maintain the strict regimen necessary to avoid organ rejection would constitute a violation of § 84.56(b)(1), which prohibits denial of medical treatment based on biases or stereotypes on the basis of a person's disability. Another commenter described a patient with a disability being denied access to transplantation due to concerns on the part of the transplant center that their supporter also had a disability and would not be able to provide the patient with adequate assistance after their operation due to the supporter's disability.

Response: The Department agrees that denying a person with a developmental disability access to organ transplantation because the recipient believes the person with a disability would not be able to manage their post-operative care needs may violate § 84.56(b) if this assessment did not take into account modifications the patient may make use of, such as reliance on formal and informal care and other supports. Such a denial could constitute a violation of § 84.56(b)(1), if motivated based on biases or stereotypes about the patient's disability. However, even where this denial is not the result of biases or stereotypes regarding a patient's disability, it may be prohibited by other provisions of this rule. For example, a transplant center that conducts an individualized evaluation of a patient with a developmental disability and concludes they would be unable to manage their post-operative care needs independently may not have done so as a result of biases or stereotypes. However, by not considering within their evaluation the patient's ability to manage their post-operative care needs with support from family, service-providers or others in the patient's circle of support, a recipient may violate § 84.68(b)(7), which requires reasonable modifications to policies, practices and procedures for people with disabilities, and § 84.56(b)(2), as evaluating whether a person with a disability is qualified to receive a transplant and/or similarly situated to a person without a disability who would receive an organ transplantation must be done taking into account the reasonable modifications the patient with a disability may utilize in order to meet qualification standards.

Clinical Research

Clinical research participation can offer considerable benefit to both the individuals participating 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. The unnecessary exclusion of people with disabilities from clinical research harms those who are denied the direct benefits of research participation. It also threatens 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 face systemic and unnecessary exclusion from clinical research.[50] Although study exclusions and other restrictions in eligibility criteria can be justifiable in appropriate cases based on the nature of the clinical research being conducted, they 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. It also may be the result of overly narrow eligibility 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 eligibility criteria be written in a way that does not unnecessarily screen out people with disabilities whose research

[50] 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.

participation would not alter the intended purpose of the program of clinical research being undertaken.

Similarly, overly narrow eligibility criteria that unnecessarily screen out people with disabilities 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 personnel, or by the failure to take into account the recipient's obligation to provide for effective communication or make reasonable modifications for people with disabilities.

Many commenters appreciated the specific application of section 504, including § 84.56, to clinical research activities in the proposed rule, and asked the Department to provide further examples and respond to queries regarding the application of section 504, including but not limited to § 84.56, to clinical research. Some commenters provided specific examples of discrimination on the basis of disability in clinical trials, including on the basis of leukemia, multiple sclerosis, HIV, obesity, muscular dystrophy and other neuromuscular diseases as well as other diagnoses. Many examples focused on the negative consequences of being denied access to clinical research on those people with disabilities turned away.

Other commenters focused on the adverse implications on society as a whole of excluding people with disabilities from clinical research. For instance, some commenters noted the impact of clinical research in value assessment activities that inform payer activities regarding utilization management and the coverage of particular medical interventions for specific patient populations. (We further discuss the intersection of clinical trial exclusions on the basis of disability and utilization management decisions by payers elsewhere within this subsection.) Others noted that the exclusion of people with disabilities from clinical research may contribute to a lack of information on differences in the efficacy, effectiveness, and side effects profiles of medical interventions being studied.

Response: As indicated elsewhere in this section, the Department considers § 84.56 to apply to clinical research activities of recipients. The provision of § 84.56 that is most likely to be relevant to clinical research is § 84.56(b)(2), which prohibits denying or limiting treatment for a separately diagnosable symptom or medical condition if it would be offered to a similarly situated individual without an underlying disability. In addition, section 504 regulations include other provisions that apply to clinical research activities. For example, § 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. However, the Department notes that application of each of these provisions is fact-dependent. As the Department noted within the NPRM, the use of eligibility criteria that screen out or tend to screen out people with disabilities from clinical research can constitute a violation of this provision.

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. 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 with diabetes-related visual impairments would be medically contraindicated from making use of the intervention. Potential study participants with any form of visual impairment are excluded, even if their blindness is not indicative of a stage of diabetes disease progression that would preclude treatment effectiveness. Prohibiting a qualified individual with a disability from participating in a clinical research program based on a broad-based categorical judgments related to a disability likely violates section 504, where such categorical exclusion criteria are not necessary for the implementation of the study, as doing so screens out individuals with disabilities from participating in a program of clinical research and is not necessary for the operation of the research program. In contrast, a researcher in similar

circumstances who excludes only patients with diabetes-related visual impairments that are likely to impact eligibility for the study because of the clinical appropriateness of receiving the treatment being studied is not likely to be unnecessarily screening out individuals with disabilities, as excluded patients are only those who are medically contraindicated for the treatment. In addition, the obligation articulated in § 84.68(b)(7) to make reasonable modifications to policies, practices, or procedures when necessary to avoid discrimination unless the modification would fundamentally alter the nature of the program or activity at issue also applies to clinical research.

In some instances, excluding people with disabilities from clinical research may implicate further provisions of the section 504 regulations. For example, a researcher who prohibits patients with cognitive disabilities from participating in a research study regarding cancer treatment based on a belief that they would not be able to provide informed consent could violate § 84.56(b)(1)(i), as it constitutes a denial of medical treatment to a qualified individual with a disability based on stereotypes regarding a patient's disability, § 84.56(b)(2), as it constitutes a denial of treatment for a separate symptom or condition that would be offered to a similarly situated person without a disability, and § 84.68(b)(7) as concerns about informed consent could be addressed through a reasonable modification permitting the prospective study participant with an intellectual disability to use supported decision-making by bringing a friend or family member to help study staff explain the study risks and benefits to them.

Comments: One comment from an academic research center focused on clinical trials requested the Department replace the phrase "exclusion criteria" for "eligibility criteria" as the exclusion of people with disabilities from clinical research may take place both through explicit exclusion criteria and through overly narrow inclusion criteria or other components of a study protocol that result in the unnecessary exclusion of people with disabilities. They ask the Department to clarify that the obligations of section 504 apply to the broad scope of a study protocol and clinical research activities, not just exclusion criteria. Another commenter noted

that people with disabilities are often excluded from clinical trials due to the use of clinical end points that are consistent with prior research studies but not necessary for the program of clinical research currently being undertaken.

Response: The Department agrees that the unjustified exclusion of people with disabilities from clinical research can take place through explicit exclusion criteria, overly narrow inclusion criteria, and through other aspects of a study protocol or clinical research activities that unnecessarily screen out people with disabilities. We have revised the preamble language throughout to clarify this point and include other information on potential ways in which section 504 applies to clinical research.

Comment: Another commenter requested that the Department require organizations conducting clinical research and the Food and Drug Administration (FDA) show the exclusion of individuals with disabilities within the study population is necessary for the success of the study and not simply a continuation of a previous practice chosen for simplicity.

Response: As indicated above, section 504 regulations require eligibility criteria to not screen out or tend to screen out people with disabilities from a clinical research program unless the criteria can be shown to be necessary for the provision of the program or activity being offered. Section 84.56 operationalizes this through multiple specific prohibitions, which we have articulated above. If recipients specifically exclude populations of persons with disabilities from their clinical research, they should articulate clear rationales for those populations of people with disabilities who are excluded to ensure that such exclusions are necessary for the provision of the program or activity of clinical research being conducted.

Comment: A commenter described a scenario in which a patient was denied access to a clinical trial for a mental health treatment they were otherwise qualified for because the program required periodic imaging and the imaging equipment affiliated with the program had a low weight capacity that could not accommodate the patient's obesity. They sought and were denied a reasonable modification of using other imaging equipment available to the medical center that

was not typically utilized in the clinical trial. They asked how section 504 would apply to this situation.

Response: Whether the scenario described by the commenter constitutes a violation of section 504 is fact-dependent.[51] Sections of the rule that would need to be considered would include § 84.56(b)(2), as the patient was seeking treatment for a separate medical symptom or condition and was denied it when it would have been provided to a similarly situated patient without a disability, and § 84.68(b)(7), which requires reasonable modifications for people with disabilities. Recipients conducting clinical trials have an obligation to make reasonable modifications for people with disabilities, including using available accessible equipment elsewhere within a facility, unless they would constitute a fundamental alteration of the program or activity being offered. As indicated within the NPRM, the exclusion of people with disabilities from clinical research may also constitute a violation of § 84.68(b)(8), which 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.

Comment: Some commenters asked the Department to clarify that unnecessarily excluding people with disabilities from clinical research not related to their disability may constitute discrimination.

Response: The Department agrees that section 504 applies to clinical research both relating to a patient's disability and not related to a patient's disability.

Comment: Several commenters asked OCR to consider issuing sub-regulatory guidance in collaboration with other parts of the Federal Government, including the National Institutes of Health and the FDA, regarding the application of section 504 to clinical research activities.

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[51] We encourage any person who believes they or another party has been discriminated against on the basis of race, color, national origin, sex, age, or disability, to visit the OCR complaint portal to file a complaint online at: https://www.hhs.gov/civil-rights/filing-a-complaint/index.html.

Response: The Department will consider issuing guidance and providing technical assistance regarding the application of section 504 to clinical research in the future.

Examples Regarding § 84.56(b)(1)

Many commenters requested the Department add additional prohibited rationales for discrimination to the regulatory text of § 84.56(b)(1), which provides a non-exhaustive list of prohibited rationales for denying or limiting medical treatment to a qualified individual with a disability and applies broadly (regardless of whether a patient is seeking treatment for their underlying disability or for a separate symptom or condition). The Department responds to these requests and for other clarifications regarding the application of § 84.56(b)(1) in this subsection.

Comment: One commenter requested that the Department add to § 84.56(b)(1) language prohibiting denying or limiting medical treatment to a qualified individual with a disability based on a belief that providing care for a patient with a disability would constitute a suboptimal use of recipient resources, unless the same judgment would be made about a patient who did not have a disability.

Response: The Department agrees that a denial or limitation of treatment based on a belief that providing care for a patient with a disability would constitute a suboptimal use of recipient resources, where the same judgment would not be made about a similarly situated patient who did not have a disability, would likely be prohibited discrimination under § 84.56. However, the Department believes that this conduct is already addressed under § 84.56(a) and other sections of § 84.56. Where the treatment being sought is for a separate medical symptom or condition, it is prohibited under § 84.56(b)(2). Such action would likely also be prohibited under § 84.56(b)(1)(iii), which prohibits discrimination based on 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.

Comment: Several commenters requested that the Department clarify that § 84.56(b)(1)(i) extends to the denial or limitation of medical treatment based on biases and stereotypes regarding

particular medical treatments for a disability because such biases and stereotypes originate with beliefs about a patient's disability.

Response: The Department agrees that biases and stereotypes regarding particular medical treatments can constitute biases and stereotypes regarding the disability of the patients that receive them. For example, biases and stereotypes regarding antiretroviral therapy may constitute discrimination against persons with HIV. Similarly, biases and stereotypes regarding Medication Assisted Treatment for Opioid Use Disorders could constitute discrimination against persons with Opioid Use Disorders.

Comment: Several commenters requested that the Department add to the regulatory text of § 84.56(b)(1) language prohibiting denying or limiting medical treatment to a qualified individual with a disability based on whether a patient has an advance directive.

Response: Where a recipient denies medical treatment to persons with disabilities because they do not have an advance directive, but does not do so for persons without disabilities who do not have an advance directive, such a denial or limitation would likely violate the general prohibition on discrimination on the basis of disability in § 84.56(a) and may also constitute prohibited discrimination under § 84.56(c)(2)(ii), which prohibits discrimination 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. We made this point explicitly in several examples in the NPRM, where we indicated that 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, we noted that 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.

As such, we believe the circumstances described by the commenter are already prohibited by the regulation and have elected not to modify the regulatory text of § 84.56(b)(1).

Comment: Several commenters asked the Department to clarify that prohibited discrimination under § 84.56(b)(1)(i) could emerge both from biases and stereotypes regarding a single disability diagnosis possessed by the patient or from the interaction of multiple diagnoses and perceived complexity of these diagnoses.

Response: The Department agrees that the phrase "a patient's disability" under § 84.56(b)(1)(i) describes both biases and stereotypes about a single disability diagnosis as well as biases and stereotypes about multiple disabilities.

Comment: Several commenters requested the Department include examples of denials or limitations due to fears about one's own health due to the treatment of the person with the disability as instances of prohibited discrimination under § 84.56(b)(1).

Response: The Department agrees that unfounded fears about one's own health due to the treatment of the person with the disability are already prohibited as biases or stereotypes about a patient's disability under § 84.56(b)(1)(i). Where such fears have a reasonable basis in fact, a recipient would only be permitted to deny or limit access to a program or service they offer if they meet the threshold for a direct threat articulated under § 84.75 (see that section for a more detailed discussion).

Comment: Several commenters requested the Department clarify that a refusal to provide a referral on the basis of disability status, including based on the factors articulated in § 84.56(b)(1), could constitute prohibited discrimination under § 84.56.

Response: The Department agrees that a refusal to provide a referral to a qualified individual with a disability could constitute prohibited discrimination, as such a refusal would be a limitation on the medical treatment provided to a qualified individual with a disability. The Department previously noted within the NPRM that when a 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 § 84.56.

Comment: Several commenters asked the Department to use the term "individual" rather than "patient" to clarify the broad application of § 84.56, as certain things that the Department has clarified are considered medical treatment under § 84.56 generally do not involve referring to consumers of services as "patients."

Response: While the Department has elected to retain the current regulatory text, we clarify here that the term "patient" is intended to be interpreted broadly to refer to any individual with a disability that seeks to access services included under the definition of medical treatment. We use the term "patient" and "individual" interchangeably throughout the final rule.

Comment: Several commenters requested that the Department clarify that the application of § 84.56(b)(1)(iii), which prohibits denying or limiting medical treatment to a qualified individual with a disability when the denial is based on "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," includes denials or limitations based on assumptions about a person with a disability's quality of life, as that terminology is more commonly used by health care providers.

Response: The Department agrees that treatment denials or limitations to qualified individuals with disabilities based on a provider's belief that a person with a disability's quality of life is such that their life is not worth living due to their disability would constitute a violation of § 84.56(b)(1)(iii). We do note, however, that people with disabilities retain their right to decline treatment for any reason and recipients that do not provide treatment declined by the person with a disability are not in violation of this section, provided that the acquisition of consent to decline such treatment was not acquired in a discriminatory fashion (as we discuss in § 84.56(c)(2)(ii)).

Comment: A commenter requested the Department clarify that § 84.56(b)(1) includes an additional instance of prohibited discrimination in the regulatory text, stating that discrimination is also prohibited on the basis of a belief that the extra accommodation, expense, or time required for treatment related to the individual's disability is not justified.

Response: The example cited by the commenter is covered by the existing regulatory text, as § 84.56(b)(1)(ii) clarifies that discrimination on the basis of judgments that an individual will be a burden on others due to their disability, including, but not limited to caregivers, family, or society are prohibited under section 504. Denying an extra accommodation, expense, or time required for treatment related to a person's disability because of the belief that the individual will be a burden to society would be covered as an instance of discrimination based on a judgment that an individual will be a burden on others due to their disability, as the additional accommodation, expense, or time required for treatment related to a person's disability constitutes an example of burden on others.

For example, a recipient that denies surgery to a person with a mobility disability that would typically be provided to a person without a mobility disability based on a belief that the additional expense required to accommodate a person with such a disability in ongoing medical treatment after their surgery would constitute a burden on the medical system as a whole would likely be in violation of § 84.56(b)(1)(ii). Similarly, the Department has previously indicated within the NPRM that § 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.

Comment: Several commenters requested that the Department clarify that denials or limitations of medical treatment that are seemingly based on nondiscriminatory rationales, but where evidence demonstrates they are actually motivated by discriminatory rationales, are prohibited under § 84.56.

Response: Proving the discriminatory intent of a recipient where a recipient offers a nondiscriminatory rationale is a fact-dependent proposition and requires nuanced judgment. Where a recipient offers a nondiscriminatory rationale for denying medical treatment, but that rationale is inconsistent with the evidence in the specific case, it may constitute discrimination under § 84.56.

Comment: Many commenters asked the Department to clarify that the prohibitions listed under § 84.56(b), including § 84.56(b)(1), are not exhaustive and that other instances of prohibited discrimination are encompassed under § 84.56(a).

Response: The Department agrees that the prohibitions listed under § 84.56(b), including § 84.56(b)(1), are not exhaustive and that other instances of prohibited discrimination are encompassed under § 84.56(a).

Separately Diagnosable Symptom or Medical Condition

As indicated within the NPRM, in order to align with what we believe to be the correct reading of the statute and the case law, the Department adopted distinct standards for circumstances under which a qualified person with a disability is denied medical treatment for the disability that triggers coverage under section 504 (referred to as an "underlying disability") or for a separately diagnosable symptom or condition for which the patient seeks treatment. As the general prohibition against discrimination against people with disabilities seeking medical treatment in § 84.56(a) applies broadly to both such instances, we provide specific examples of some of the instances of prohibited discrimination that do not require a separately diagnosable symptom or condition in § 84.56(b)(1), including biases or stereotypes about a patient's disability, judgments that the individual will be a burden on others due to their disability, and a belief that the life of a person with a disability has lesser value or that life with a disability is not worth living. While this is not an exhaustive list, we believe it provides a useful illustration of the types of discrimination that are prohibited regardless of whether a person with a disability is

seeking medical treatment for the underlying disability that triggers coverage under section 504 or for a separately diagnosable symptom or condition.

In § 84.56(b)(2), the Department prohibits denying or limiting clinically appropriate 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) if it would be offered to a similarly situated individual without an underlying disability. Examples of circumstances in which such denials could occur include when 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.

Instances of discrimination against people with disabilities in medical treatment contexts may violate multiple paragraphs of § 84.56, including paragraphs (b)(1) and (2). For example, should a recipient deny a referral for a medically indicated heart transplant to a patient with a mental health condition because of a biased belief that persons with mental health disabilities represent a danger to society and should thus not be permitted to access scarce medical resources, this would likely constitute a violation of both provisions. Because the recipient has denied access to medically indicated treatment based on biases or stereotypes about a patient's disability, they have likely violated § 84.56(b)(1), and because this treatment was for a separately diagnosable symptom or medical condition and would have been provided to a similarly situated person without schizophrenia, it likely constitutes a violation of § 84.56(b)(2).

The Department solicited comments on the distinction between a separately diagnosable symptom or condition and the underlying disability, noting that this line may be more difficult to draw than in these examples, and welcomed comment on the best way to clarify this distinction. Commenters expressed a variety of perspectives on this distinction.

Some commenters questioned the choice to have two provisions both relating to the denial of medical treatment, suggesting that doing so could create unnecessary challenges for

recipients and people with disabilities. Some commenters argued that attempts to distinguish between treatment for an underlying disability as opposed to for a separate condition is not the best or appropriate means of eliminating discrimination because a symptom or condition may not always be readily distinguishable from the underlying condition, particularly for persons with complex medical conditions that interact with each other and who are receiving medical treatment that is responsive to multiple different diagnoses, symptoms, or conditions. They suggested that the Department either avoid making this distinction or clarify it through future sub-regulatory guidance. Similarly, some commenters pointed out that separately diagnosable symptoms or medical conditions are not always readily distinguishable from underlying conditions. They expressed concern that disentangling different diagnoses from one another is at times impossible and often inadvisable, as the distinction between different diagnoses is often blurred in the clinical context and within the experiences of people with disabilities. Some felt that having two standards could lead to confusion and perhaps unnecessary litigation. Other commenters felt that the distinction made by the Department was appropriate and workable in order to both comply with applicable case law and protect people with disabilities from discrimination on the basis of disability in medical treatment. These commenters indicated that they did not believe that further efforts to distinguish between or define the different circumstances articulated between paragraphs (b)(1) and (2) of § 84.56 were necessary or useful.

Independent of their views on the distinction drawn by the Department in § 84.56(b)(2), many commenters provided examples of situations where individuals with underlying disabilities were denied treatment for separately diagnosable symptoms or conditions. They described denials of all types of treatment to individuals with mental health disorders, noting that some drug and alcohol treatment centers have a blanket policy of denying admission to individuals with mental health disabilities as well as to individuals with developmental disabilities. They also pointed to mental health facilities that routinely deny treatment to individuals with substance use disorders. Other examples included denial of routine eye exams, colonoscopies, braces and

other dental services, mental health treatment, and surgical services to individuals with developmental disabilities, including intellectual disability and autistic persons. One individual described the failure of physicians to perform hip dysplasia surgery on her brother who had Down syndrome. Another described her child being refused treatment for a broken bone because he had cerebral palsy. Others described the denial of preventative screening for sexually transmitted diseases, the failure to provide information on reproductive health options, and the failure to provide care for life threatening diseases on the basis of disability.

Response: After careful consideration, the Department has elected to maintain the distinction between paragraphs (b)(1) and (2) § 84.56, recognizing that applicable case law is most appropriately interpreted as requiring a different legal standard for circumstances where a person with a disability is seeking treatment for their underlying disability as compared to when they seek treatment for a separately diagnosable symptom or condition.[52]

The Department notes and appreciates the concerns raised by commenters who argue that distinguishing between an underlying disability and a separate symptom or medical condition may be very difficult for persons with complex medical conditions that interact with each other and who are receiving medical treatment that is responsive to multiple different diagnoses, symptoms or conditions. As such, we wish to clarify that the definition of a separately diagnosable symptom or condition should be interpreted in a broad and inclusive fashion. Patients who are receiving medical treatment that is at least in part due to a separately diagnosable symptom or condition qualify for the protections of § 84.56(b)(2), even if their medical treatment is also responsive to their underlying disability. For instance, a patient with both opioid use disorder and depression who seeks mental health treatment may seek counseling from a provider that will take into account both of these diagnoses. Should the provider

[52] The NPRM included a discussion of the case law concerning medical treatment decisions when the medical treatment may have been associated with the patient's disabling condition. *See* 88 FR 63403 (Sept. 14, 2023).

discriminate against this patient as a result of their diagnosis of opioid use disorder, this would implicate the protections of § 84.56(b)(2) as depression constitutes a separately diagnosable symptom or condition, despite the fact that the treatment sought would likely have taken into account and sought to treat both of the patient's diagnoses.

We reiterate that this provision does not require the separately diagnosable symptom or medical condition to 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. For example, 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. 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. As we indicated within the NPRM, it does not 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 the patient has the underlying disability of Down syndrome, or a refusal to treat depression because of a patient's underlying spinal cord injury, will likely violate this paragraph if treatment would be provided to a similarly situated person without an underlying disability.

We note also that it does not matter whether the symptom or condition for which the individual is seeking treatment is also a disability under section 504. Individuals with heart conditions, COVID–19, and depression could all meet the definition of an individual with a disability on the basis of these conditions in appropriate circumstances, but it is people who experience discriminatory treatment for these conditions based on an underlying disability who are entitled to the protections of § 84.56(b)(2).

Comment: Some commenters expressed that the prohibition against denying a person with a disability treatment for a separate symptom or condition does not adequately consider the complexity of caring for someone living with disability who also has multiple chronic conditions or from tailoring treatment plans to align to the patient's wishes in the interests of avoiding unnecessary suffering. One commenter put forward the example of someone who has diabetes, kidney disease, AFib, and osteoarthritis that has led to their using a walker or other assistive device who suffers from kidney failure. They indicate their view that "the appropriate first step would be to engage in discussions about what matters to the individual and their overall prognosis based on the totality of their disease burden. In instances where they lack capacity and there is no proxy, the case should be referred to an Ethics Committee or other decision-making body as organized by the health system where the patient is receiving care." Another commenter also expressed concern regarding patients who are incapacitated and lack advance directives. A pharmaceutical industry group requested that the Department provide additional guidance as to the definition of "similarly situated" in § 84.56(b)(2). They ask that the Department clarify if an individual would be considered "similarly situated" to another individual with the same symptom or condition if treatment for that symptom or condition is not clinically appropriate for individuals with a certain disability or a symptom or condition that is causally connected to that disability.

Response: Determining whether a denial of treatment would constitute a violation of § 84.56(b)(2) is a fact specific, individualized inquiry. Section 84.56(c)(1) 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, 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. However, this section also makes clear that the criteria articulated in § 84.56(b)(1), including a judgment that a patient's life with a disability is not worth living, is not a legitimate nondiscriminatory reason for denying or limiting treatment and cannot render a person with a disability not qualified for treatment.

As discussed elsewhere within this section, determinations that an individual with a disability's life is not worth living because of the need for ongoing support rest on judgments that do not properly relate to the individual's qualification for medical treatment under section 504. Similarly, an individual cannot be deemed not similarly situated because they require ongoing support during or after treatment that another individual does not need. 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. In the example cited by the commenter, while the patient or their authorized representative may make a decision to decline treatment, a decision by the recipient – including where such a decision is made via an Ethics Committee – to deny medically indicated treatment based on the patient's disabilities of diabetes, kidney disease, AFib, and osteoarthritis or their use of assistive technology would likely constitute discrimination on the basis of disability if it was motivated based on a belief that continued life would not be of benefit to the patient due to their disabilities (i.e., that life with their disability is not worth living).

In contrast, should a decision be made to deny treatment due to a patient's expressed wishes or those of their authorized representative, this would likely not constitute discrimination, provided that the recipient has not discriminated on the basis of disability in seeking consent to decline further treatment. Similarly, a decision to deny treatment because it would not be medically effective at prolonging the patient's life would not be in violation of this section, even if it was sought after by the patient or their authorized representative, as a patient for whom a treatment would not be medically effective is not similarly situated to a patient for whom a treatment would be medically effective.

Comments: Many commenters raised the issue of diagnostic overshadowing, in which physicians and other health care professionals attribute medical problems to a patient's underlying disability when they actually relate to a separate medical condition, resulting in underdiagnosis and a failure to diagnose or appropriately treat the separate condition. They ask the Department to clarify that diagnostic overshadowing can constitute a violation of § 84.56(b)(2) or other parts of § 84.56 when recipients depart from the standard of care by attributing all problems or symptoms of a patient with a disability to one diagnosis.

Response: Departures from the standard of care by attributing all problems or symptoms experienced by a patient with a disability to a single diagnosis could constitute discrimination under § 84.56(b)(2) under some circumstances. In the event that such diagnostic overshadowing is the result of biases and stereotypes, it could also violate § 84.56(b)(1)(i). Determining whether any individual instance rises to the level of discrimination is fact-dependent and will depend on the specific circumstances of a provider's behavior and the information available to them.

Comments: Many commenters described medical care providers, in particular mental health treatment providers, who refuse to serve patients with disabilities with comorbidities. They offer as an example drug and alcohol treatment centers that deny services to individuals with mental illness and mental illness providers that refuse to serve those with a history of drug

or alcohol use disorders. The commenters ask for clarification if this might constitute discrimination under § 84.56(b)(2).

Response: A blanket prohibition on serving persons with co-occurring disabilities may constitute a violation of § 84.56(b)(2). Recipients should generally seek to ascertain whether patients with co-occurring disabilities are qualified for the purposes of the program or service in question through an individualized determination. Determining whether any specific policy or denial rises to the level of discrimination is fact-dependent and will depend on the specific circumstances of a provider's policies and behavior.

Provision of Medical Treatment

Section 84.56(b)(3) proposed to address 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 – then § 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 likely violated § 84.56(b)(3) if the provider prescribes contraception for her other patients without disabilities. However, § 84.56(b)(3) does not prohibit a recipient from providing an individual with an underlying disability services or equipment 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 likely 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.

Similarly, 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 likely 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 likely not be qualified for that treatment under this part.

Comments: A group of commenters representing persons with disabilities and various civil rights groups said that our example of involuntary sterilization is too narrow. They suggested that the Department make clear that the prohibition in § 84.56(b)(3) extends to any procedures whose expected and actual effect is sterilization. They recommended including situations where individuals with disabilities are pressured to use contraceptives, particularly long-acting forms, that they do not want. A significant number of commenters said that individuals with disabilities must be offered comprehensive and non-coercive contraceptive counseling about all contraceptive options, consistent with that which is offered to individuals without disabilities. These commenters recommended that individuals with disabilities also be offered comprehensive and non-coercive access to assistive reproductive technology and other fertility treatments. Many commenters said that individuals with disabilities must be able to decide if when or how to become parents.

Multiple commenters raised questions regarding the application of § 84.56 to reproductive health services. Many commenters described experiences of discrimination in accessing reproductive health care, both through the denial of treatment and through the provision of or pressure to accept inappropriate or unwanted treatment on the basis of disability. Many commenters indicated greater difficulty getting access to screening for sexually

transmitted infections, mammograms, and other necessary preventative health screenings relating to reproductive health as a result of their disabilities. Other commenters reported pressure to accept sterilization or abortion as a result of their disabilities.

Response: The Department agrees that the listed examples could constitute violations of § 84.56(b)(3). For instance, requiring a patient with an intellectual disability to accept long-acting contraception, sterilization, or abortion as a result of their disability would likely constitute a violation of § 84.56(b)(3), if such a requirement would not be imposed on patients without disabilities. The Department notes that the discriminatory denial of these same treatments on the basis of a patient's disability could constitute a denial of § 84.56(b)(2), reinforcing the importance of understanding the preferences of patients with disabilities and being responsive to them, consistent with established norms for patient care for patients without disabilities. As discussed elsewhere, the Department's investigations of specific complaints regarding violations of § 84.56 will be fact-dependent.

-We agree that § 84.56(b)(3) would likely be violated when a procedure has an expected and actual effect of sterilization and the circumstances otherwise fit the language of paragraph (b)(3). This could include pressuring individuals to use unwanted contraception, particularly long-acting forms of contraception, which would also likely represent a violation of the broad based prohibition against discrimination articulated in § 84.56(a).

Failure to provide comprehensive information about and access to all forms of contraception and failure to provide comprehensive information and access to assistive reproduction technology and other treatments related to infertility to qualified persons with disabilities by a recipient that provides such treatment would likely violate § 84.56(a) or (b)(2) if the recipient provides or would provide the same information and access to an individual without a disability. Denial or limitation of treatment or accompanying comprehensive information (which we consider to be part of the broad service of medical treatment) based on disability by a recipient that provides such treatment would likely constitute a violation of the general

nondiscrimination in medical treatment requirement in § 84.56(a) as well as § 84.56(b)(2) which prohibits denials or limitations of treatment for a symptom or condition such as infertility that is separately diagnosable from the underlying disability motivating different treatment. For example, should a patient with an intellectual disability not be informed of the availability of infertility treatment when such information would be provided to a patient without an intellectual disability seeking treatment for infertility, this may constitute a violation of these provisions. We note that some of the described actions may also be a violation of the prohibition against sex discrimination contained in section 1557.[53]

We note that there may be instances where medical interventions which have the effect of sterilization may be medically necessary. Under such circumstances, the provision of a medical intervention that has the effect of sterilization to a person with a disability could nonetheless constitute a violation of this section if the patient with a disability has not provided informed consent to the procedure, as informed consent requirements would be applied and abided by for similarly situated patients without disabilities.

Other Laws

Comments: Several commenters asked that we state clearly that Federal laws and regulations supersede State laws including those allowing forced sterilization. They asked that the Department affirm that State laws such as those do not provide a defense to a recipient who has otherwise violated this provision or any other part of section 504.

Response: The Department agrees that compliance with State law does not necessarily provide a defense to a recipient that has violated § 84.56 or any other part of section 504. With regard to the commenters who asked us to state that Federal laws always supersede State laws, including those that sanction forced sterilization, we note that section 504, as implemented in § 84.3, Relationship to Other Laws, applies standard principles of preemption. Any analysis of a

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[53] 42 U.S.C. 18116(a) (prohibiting discrimination on the basis of sex, among other grounds, in health programs or activities that receive Federal financial assistance, programs or activities administered by an Executive Agency or any entity established under title I of the Affordable Care Act).

conflict between § 84.56, the medical treatment section of this regulation, and State laws permitting sterilization will depend on an analysis of the specific State law. It is not therefore possible to make a blanket statement describing circumstances in which section 504 would preempt State law.

Examples of Discriminatory Treatment

Comments: Another example of discriminatory treatment offered by many disability rights organizations is the overprescribing of anti-psychotic medication to individuals with developmental disabilities for purposes of chemical restraint rather than because of a well-supported reason to believe the medication is likely to have a therapeutic effect on mental health. Other disability organizations offered the example of the inappropriate provision of involuntary mental health treatment as a potential instance of the discriminatory provision of treatment.

Some commenters offered as an example of a violation of § 84.56(b)(3) the use of aversive interventions, such as electric stimulation devices (ESD) for behavior modification. They noted that this intervention is not imposed on people without disabilities and would be considered illegal and unethical. Other commenters pointed to unnecessary surgery being performed on people with disabilities.

Response: The Department agrees that the examples described above could constitute discriminatory provision of medical treatment under § 84.56(b)(3). For instance, the use of an intervention that seeks to modify behavior through the application of pain or other noxious stimuli, if not applied to people without disabilities, would likely violate § 84.56(b)(3), as it likely represents an instance of, on the basis of disability, providing medical treatment to an individual with a disability where a recipient would not provide the same treatment to an individual without a disability and where the disability does not impact the effectiveness, ease of administration, or have a medical effect on the condition to which the treatment is administered. As discussed elsewhere, the Department's investigations of specific complaints regarding violations of § 84.56 will be fact-dependent.

Informed Consent

Comments: Several commenters emphasized the importance of obtaining informed consent to any of these treatments, particularly those described above, from individuals with disabilities. -They asked that we emphasize that consent procedures are always subject to a section 504 nondiscrimination analysis. -Many said that requirements for informed consent could be improved if the reasonable modifications requirements are cross-referenced in this section.

Response: The Department notes that informed consent is essential. Cross-referencing the reasonable modification provision in particular sections is not necessary as it is a general requirement and already applies to all medical treatments and would apply to the informed consent process.

Individualized Judgment

Comments: Multiple commenters requested the Department specifically clarify that individualized judgment, rather than categorical judgments solely on the basis of a diagnosis, is necessary in evaluating whether a patient with a disability is qualified for a particular medical treatment. A request for clarifying the role of individualized judgment was made by both professional associations, which requested the Department ensure that clinical expertise and professional judgment was permitted to be used in individualized recommendations to patients, and organizations representing people with disabilities, which indicated that individualized judgment should be used in determining whether a person with a disability is not qualified for treatment.

Response: The Department agrees that it is important for providers to use individualized judgment when evaluating whether a person with a disability is qualified to receive a particular medical treatment and when communicating with people with disabilities about the implications of the different treatment options available to them. While we have not modified the regulatory text, we agree that individualized assessment will generally be required when evaluating whether a disability renders an individual not qualified for treatment or whether another legitimate

nondiscriminatory reason exists to deny a particular treatment to a person with a disability. Categorical judgments based on the presence of a specific diagnosis that do not entail an individualized assessment may violate § 84.56.

However, recipients are nonetheless permitted to consider the standard of care and applicable medical evidence in forming their judgments of whether treatment is necessary or appropriate for individual patients. In the vast majority of circumstances, where medically indicated care depends on the specific clinical circumstances of the patient seeking treatment, recipients must engage in an individualized inquiry when determining eligibility for treatment. For example, a recipient that engages in a categorical judgment that all patients with a prior history of substance use disorders are not qualified to receive medications for pain management would likely discriminate against persons with a record of a substance use disorder under § 84.56(b)(1)(i) if their denial with respect to a specific patient was based on such a categorical judgment rather than individualized assessment of the specific patient seeking pain management. Such a categorical judgment would not be protected under the professional judgment in treatment provision in § 84.56(c).

Other Issues Raised by Commenters

Comment: Some commenters asked the Department to carefully review the regulatory text to ensure that the language was as clear as possible to a broader audience.

Response: In response to this feedback, the Department has made non-substantive edits to § 84.56(c)(1)(ii) to improve clarity of language. Revised paragraph (c)(1)(ii) provides circumstances when medical treatment is not required, including when a recipient has a legitimate, nondiscriminatory reason for denying or limiting service or where the disability renders the individual not qualified for the treatment. We do not believe this changes the substantive meaning of the section from the NPRM, but have made the change in order to improve clarity of language.

Comment: Some commenters asked the Department to clarify that the criteria in § 84.56(b)(1)(i) through (iii) are not an exhaustive list of the circumstances that would be considered discriminatory reasons for denying or limiting medical treatment or determining that an individual is not qualified for treatment.

Response: As the Department previously indicated within the NPRM, the list of criteria in § 84.56(b)(1)(i) through (iii) is not an exhaustive list.

Comment: One provider group asked the Department to indicate whether the decision to place a feeding tube in an individual with advanced dementia instead of hand feeding could include considering the individual's prognosis and whether the potential benefit of a feeding tube outweighs the harms.

Response: Whether providing or denying any type of medical treatment to patients with disabilities when the provider would not do the same for patients without disabilities is discriminatory depends on the facts and context of the specific case and is beyond the ability of the Department to address in the abstract. Factors that may be relevant in the feeding tube decision, include: the wishes of a patient or their authorized representative, the inability of a patient to express their preference in the absence of an authorized representative, and a recipient's choice to avoid the use of physical restraints and/or the denial of the gratification of tasting preferred foods. In contrast, should the recipient opt to decline to place a feeding tube because they believe that continued life would not be of benefit to the patient with advanced dementia, this could violate § 84.56(b)(1)(iii) and (b)(2).

Comment: A commenter expressed concern with language under § 84.56(c)(1)(ii) indicating that a recipient is not obligated to provide a service if 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. They express concern that the phrase "best available objective evidence" may be too subjective, as "even experts may differ on the exact rank of certain information in a clinical evidence hierarchy or

even on the hierarchy itself." They ask that the Department modify this language to instead indicate that "a preponderance of evidence support the determination regarding what is or is not clinically appropriate."

Response: After consideration, the Department has elected to maintain the current regulatory text. While experts may differ on the relative strength of clinical evidence, it is incumbent upon each recipient to make use of the best available objective evidence within the context of their discipline, recognizing that in many instances a mixed clinical literature will result in different clinicians arriving at different decisions. Differences among experts or between studies may be relevant to whether a particular medical treatment decision is discriminatory. In such instances, the Department will consider whether a recipient's actions are consistent with the existing evidence base.

Comment: A medical organization requested that the Department clarify that if the clinical literature shows that the therapy is less effective for individuals with a characteristic or marker associated with a certain disability and as a result is not recommended for such individuals under clinical guidelines, it would not be discriminatory to limit coverage to those individuals who do not have the characteristic or marker.

Response: Information on efficacy and effectiveness in the clinical literature is relevant in assessing whether the provision of a drug or decision not to provide to a person with a disability is discriminatory. The specific application of § 84.56 may depend on a variety of factors, such as the relative strength of the evidence in the clinical literature, whether the evidence indicates a drug is ineffective for a particular subpopulation of patients with disabilities or merely less effective, and the standards the recipient applies for the provision of medical treatment to patients without the disability in question.

Comments: Several commenters asked the Department to modify § 84.56(c)(1)(ii) to clarify that the criteria in § 84.56(b)(1)(i) through (iii) may not be used as the basis for determining that an alternative course of treatment would be more likely to be successful.

Response: The Department has indicated that the criteria in § 84.56(b)(1)(i) through (iii) may not be used to determine that a treatment is not clinically appropriate for a particular individual. The determination of clinical appropriateness includes whether a treatment would be more likely to be successful than other treatments, and thus the circumstances described by the commenters is already incorporated in the existing text. We have elected not to modify the regulatory text.

Delays in Care Due to Difficulty in Locating an Interpreter

Comment: One commenter specifically asked the Department to clarify that delays or rescheduling of care due to a recipient's inability to locate a Certified Deaf Interpreter would not constitute a violation of § 84.56.

Response: The Department cannot provide categorical responses to issues that are dependent on facts. Relevant facts may include whether the patient's medical care is promptly rescheduled, the impact of the delay on the patient's receipt of effective medical care, whether the recipient's methods of administration (including rate of pay to interpreters) may be causing an unnecessary delay in accessing a Certified Deaf Interpreter, and whether the patient has received the option of receiving care using another means of effective communication that meets their needs.

Comment: A commenter requested that the Department replace the phrase "where the disability renders the individual not qualified for treatment" with the phrase "when a patient's disability may pose a legitimate medical contraindication for the treatment under consideration."

Response: The reference to whether a person with a disability is "qualified" for treatment reflects the statutory language of section 504. As a result, we will maintain the regulatory text as proposed.

Comments: Several commenters asked the Department to clarify that recipients may not mischaracterize the services that they ordinarily provide in their scope of practice to evade anti-discrimination protections. A commenter also asked us to clarify that a recipient may be required

to provide a service that it does not ordinarily offer as a reasonable modification for a qualified individual with a disability.

Response: The Department agrees that recipients may not manipulate their scope of practice as a pretext for discrimination against people with disabilities. For example, recipients may not define their scope of practice to preclude the provision of medical treatment offered to other patients to patients with disabilities. For example, an OB-GYN who indicates that their scope of practice excludes the provision of mammograms to women with Down syndrome, as they do not have requisite expertise in developmental disability, would likely be in violation of § 84.56. In addition, the OB-GYN may be obligated to make reasonable modifications consistent with § 84.68(b)(7) for a patient with Down syndrome in order to make a mammogram accessible, including providing additional time to explain the procedure, manage sensory sensitivities, or communicate with a designated supporter for purposes of supported decision-making.

Similarly, recipients who define their scope of practice to exclude the provision of medical services associated with a specific disability that are typically offered by comparable colleagues may be in violation of § 84.56. For example, a pharmacist who indicates that the filling of prescriptions for antiretroviral therapy for patients with HIV is outside their scope of practice when similar pharmacies do fill such prescriptions and there is no nondiscriminatory rationale for why filling such prescriptions would be outside their area of expertise and ability would likely be in violation of § 84.56.

Consent

Comments: Commenters asked the Department to provide additional examples regarding how discussions about limiting treatment would and would not be consistent with § 84.56(c)(3). One commenter specifically raised older adults with multiple chronic conditions who are on multiple drugs, some of which may interact in ways that harm the person, noting that review of the patient's medications will often result in discontinuation of certain drugs and/or changing

drugs in order to cause less harm. Another commenter raised an example under which a child is born with genetic condition resulting in cognitive impairment and a provider erroneously informs the family that patients with that condition never live to adulthood in order to convince them to withhold life-sustaining treatment, motivated by a belief that persons with cognitive impairment constitute a burden to others.

Response: Section 84.56(c)(3) addresses the information exchange between the recipient and the patient with a disability concerning potential courses of treatment and their implications, including the option of forgoing 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 on the implications of different courses of treatment based on current medical knowledge or the best available objective evidence. The Department interprets this as including the provider's own experiences with treatment options for any particular medical intervention. 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, the Department intends that the result of reading § 84.56(a) and (c)(2)(ii) together is that the recipient is prohibited from discriminating on the basis of disability in seeking consent for the decision to treat or to forgo treatment by, for example, unduly pressuring a person with a disability or their authorized representative to conform to the treating professional's position or by relying on the prohibited factors listed in § 84.56(b)(1)(i) through (iii). Consistent with the request of the commenters, we offer several illustrative examples below of circumstances where a recipient would likely be in compliance with or in violation of § 84.56, taking into account § 84.56(c)(3) and its interaction with § 84.56(c)(2)(ii).

A person with Type II Diabetes is diagnosed with Chronic Obstructive Pulmonary Disease. Their physician notes that medications for each of these conditions frequently interact, and discusses with the patient the need to change the drugs they are currently taking or offer

different drugs than would typically be provided for their new diagnosis, in order to avoid unintended side effects or other complications from drug interactions. Such discussion is generally consistent with § 84.56(c)(3). Similarly, discontinuing, changing, or offering different medications to such a patient in order to address side effects or complications from drug interactions would generally not present any conflict with other parts of § 84.56.

A person with advanced dementia is diagnosed with cancer. Their physician reviews their expected prognosis and concludes that chemotherapy would only extend their life for a brief period and would come with significant unpleasant side effects. They discuss with the patient or their authorized representative the implications of different courses of treatment, including whether treating the cancer is inconsistent with their preferences in light of anticipated complications. This is generally consistent with § 84.56(c)(3). In addition, the physician informing the patient of anticipated side effects from treatment and the patient choosing to decline further life-sustaining treatment based on the patient's belief that extending their life would not be of benefit to them is generally not in violation of § 84.56(c)(2)(ii).

In contrast, when a physician pressures the patient or their authorized representative to choose to decline life-sustaining treatment as a result of the patient's disability, such behavior is likely inconsistent with § 84.56(c)(2)(ii). If this is motivated by a belief that life with the patient's disability is not worth living or a belief that the patient's medical costs will be a burden on society, this would likely be a violation of § 84.56(b)(1).

Comments: Many organizations representing individuals with disabilities commented on § 84.56(c)(3). Some commenters noted that, as written, the paragraph focuses on the actions of the recipient when it says that nothing prohibits a recipient from providing information about all treatment options. -One commenter suggested that the paragraph be rewritten to focus on the right of individuals with disabilities to obtain complete information about treatment options. Almost all of the comments received by the Department discussed this right of individuals with disabilities to obtain complete information about treatment options.

A significant number of commenters said that without an open and candid discussion of all options, an individual is not able to give informed consent to treatments. Many noted that sometimes all options are not discussed because the provider has made assumptions about which options they think are best and, accordingly, they only provide information about those options. A professional medical organization stressed the importance of making patients aware of all possible options including risks and potential complications. -After making individuals aware of all possible options and the risks associated with each, the provider and the individual with disabilities should jointly come to a decision about which course of treatment will yield the best outcome. -Another organization said that it is crucial that the provider be aware of what matters most to patients; patients deserve to know whether a treatment provides clear and important benefits and is aligned with their care preferences.

Commenters were broadly in agreement about the importance of permitting reasonable modifications that will enable an individual with disabilities to understand and indicate consent or disagreement with what is being discussed, including allowing a supporter to help the individual make reasoned decisions in an accessible way through supported decision-making. Some commenters mentioned the importance of using plain, accessible language and, when not urgent, giving the individual time to discuss and think about the options without pressure. Sometimes a more in-depth discussion may be required than would be given to an individual without a disability and some mentioned that longer discussions may require breaks.

Many people with disabilities discussed experiencing discrimination as a result of their use of or request for reasonable modifications, including the use of accessible telehealth and medical devices, access to certified interpreters for the Deaf, the use of Augmentative and Alternative Communication (AAC) technology, the use of supported decision-making, and other reasonable modifications as well as auxiliary aids and services.

Response: We appreciate the commenters' feedback. This provision, when read in conjunction with the remainder of the section, focuses not only on what information a recipient

can provide but also on what the provider must provide. We agree with commenters who stressed the importance of providing all treatment options to individuals with disabilities.

The failure to offer information about all options could be a result of the provider's own assumptions about which option is the best. -When providers do not offer complete information because they have made an assumption based on bias, a judgment that an individual with a disability will be a burden on others, or that an individual with disability's life has a lesser value than that of an individual without a disability, they have likely violated § 84.56(b)(1). Such withholding of information in order to obtain consent to decline treatment would also likely violate § 84.56(c)(2)(ii), as would the withholding of information on the basis of disability for other rationales.

Section 84.68(b)(7) requires recipients to make reasonable modifications to policies, practices, and procedures when necessary to avoid discrimination unless the recipient can demonstrate that making the modifications would result in a fundamental alteration in the program or activity. Multiple commenters requested that we discuss supported decision-making in the medical treatment section and not just in the reasonable modifications section. We are including this discussion here, as requested, because the importance of permitting supported decision-makers to allow individuals with disabilities the means to make an informed decision about the best course of treatment is relevant to § 84.56(c)(2) as well as § 84.68(b)(7). Permitting individuals with disabilities to have a supported decision-maker with them to help facilitate effective communication and/or to help them decide on the best course of treatment can be crucial in ensuring that individuals with disabilities are able to give informed consent to medical treatments. Allowing a supported decision-maker may require other reasonable modifications such as changing visitor policies. More detailed information about supported decision-making as a reasonable modification can be found in the preamble to § 84.68(b)(7).

We also agree with commenters' suggestions of other types of reasonable modifications and other forms of effective communication that might be required, for example, by putting

certain materials in plain language, presenting information in a way that it can be understood, permitting people with disabilities to bring a trusted friend or family member into discussions as a supporter, and allowing breaks in long discussions.

Comments: In light of the clarification under § 84.56(c)(2)(i) that 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, some commenters sought additional clarification on the scope of authority of an authorized representative, in particular whether recipients may have an obligation to seek additional clarification or review of those decisions when they would do so for a similarly situated patient without a disability. One commenter asked the Department to clarify that nothing in the regulation should preclude Federal or State law from limiting the power of an authorized representative, including a parent, to refuse life sustaining care for an individual.

Response: With respect to distinguishing between decisions made by a patient's legally authorized representative and decisions made by the patient themselves or distinguishing between authorized representatives designated by the patient and those that were not so designated, recipient obligations are generally to not treat patients with disabilities differently from patients without disabilities in this regard. For instance, if recipients would seek additional clarification or ethics review in response to a request from an authorized representative to decline life-sustaining or otherwise medically indicated treatment to a person without a specific disability, then they are generally obligated to undertake the same steps for a similarly situated person with a disability under § 84.56. In contrast, if they would not seek additional clarification or review when a proxy made such a decision for a person without a disability, § 84.56 does not generally require them to do so for a person with a disability. Although some forms of authorized representation, such as guardianship or conservatorship, are typically applied only to people with disabilities, multiple comparators exist for authorized representatives that are also applied to people without disabilities. For example, patients without disabilities often designate medical

proxies or powers of attorney for health care decision-making. Similarly, parents often make decisions on behalf of minor children with and without disabilities. These may allow for an appropriate comparison for the treatment of proxy decision-making, including under circumstances where the expressed wishes of the patient seem to differ from that of the proxy or where the treatment decision in question is medically contraindicated.

In general, the Department agrees that the regulation does not preclude Federal or State law from limiting the power of an authorized representative, including with respect to decisions regarding refusing life-sustaining care. As noted previously in the preamble, section 504, as implemented in § 84.3, Relationship to other laws, applies standard principles of preemption.

Comment: A commenter requested the Department clarify that informed decision-making may appropriately result in patients electing hospice care.

Response: The Department agrees with the commenter that informed decision-making may appropriately result in patients electing a wide array of services and care, including hospice care. Such decision-making on the part of the patient is generally not a violation of § 84.56.

Comment: A commenter representing educators for the deaf indicated that some children's hospitals have a practice of requiring parents or guardians of deaf and hard of hearing children to commit during the evaluation process for a cochlear implant that they will not use sign language nor enroll their children in schools for the deaf, even if they currently use sign language and are enrolled at schools for the deaf at present. While they agree that the determination of clinical eligibility for a cochlear implant is best left to surgeons, they ask the Department to clarify that this would constitute prohibited discrimination under § 84.56 if patients are denied access to medically indicated treatment due to their refusal to commit to such terms.

Response: As indicated elsewhere, discrimination against patients with disabilities due to their use of a particular treatment or service associated with their disability can constitute discrimination on the basis of disability. As a determination that discrimination has occurred is

generally fact-specific, the Department would need to review the facts of a specific case to evaluate this question. However, we agree that a categorical requirement that patients with disabilities will be denied access to (or be led to believe they will be denied access to) medically indicated treatment if they do not commit to avoid use of assistive technology, reasonable modifications, or educational interventions associated with their disability could constitute a violation of § 84.56 if such a requirement was not medically indicated in order to receive the sought after treatment.

Comment: One commenter asked the Department to clarify that delays due to the engagement of an authorized representative would not constitute a violation of § 84.56. They describe a situation where a patient requires informed consent from an authorized representative to receive care, but the health care provider cannot reach the authorized representative to get informed consent in a timely manner.

Response: The Department agrees that delays due to the engagement of an authorized representative would generally not constitute a violation of § 84.56, provided that the patient requires a representative in order to provide informed consent and that this judgment is not made based on a categorical belief that all patients with a specific kind of disability (e.g., serious mental illness or a cognitive disability) require a representative in order to provide informed consent. We also note that there are circumstances where physicians would typically not wait for an authorized representative to make decisions for persons without disabilities who cannot provide informed consent (e.g., minor children or patients who are incapacitated on a short-term basis without a disability), such as for the provision of immediately required life-saving or life-sustaining treatment. Under such circumstances, the recipient must generally treat the patient with a disability with no more delay than they would apply to a similarly situated patient without a disability.

Comments: Multiple commenters asked the Department to speak to the intersection of disability with other types of discrimination.

Response: The Department acknowledges that disability discrimination frequently co-occurs with other types of discrimination and that the result of these different forms of discrimination can intersect, resulting in discrimination that is unique to the intersection of bases of discrimination. Section 504 prohibits discrimination on the basis of disability and, in addition to disability discrimination, OCR has been delegated authority under laws that prohibit discrimination on the basis of race, color, national origin, sex, and age. The Department agrees that simultaneous discrimination on multiple prohibited bases (including but not limited to intersectional discrimination) is important to account for. Section 1557, which OCR enforces, prohibits such simultaneous discrimination.

We continue to consider effective ways to address these issues within the existing statutory authorities delegated to OCR. For instance, OCR's proposed rulemaking on section 1557 would require covered entities to comply with uniform policies and procedures that apply across all prohibited bases of discrimination, rather than different procedural requirements depending on the alleged basis of discrimination. This accounts for claims of discrimination that are alleged to have occurred based on multiple protected bases discrimination and provides for more consistency regardless of whether an allegation of discrimination is based on race, color, national origin, sex, age, or disability—or some combination thereof.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.56 as proposed with one modification. We are changing § 84.56(c)(1)(ii) so that the first sentence provides that circumstances in which the recipient has a legitimate, nondiscriminatory reason for denying or limiting a service or where the disability renders the individual not qualified for the treatment may include 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.

Value Assessment (§ 84.57)

Proposed § 84.57 addressed the application of section 504 to value assessment. It stated that a recipient may not 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 any aid, benefit, or service, including the terms or conditions under which they are made.

The Department sought comment on how value assessment tools and methods may provide unequal opportunities to individuals with disabilities and on other types of disability discrimination in value assessment not already specifically addressed with the proposed rulemaking. We also sought comment on whether the provision would have a chilling effect on academic research.

The comments and our responses regarding § 84.57 are set forth below.

Comment: Many commenters, including entities engaged in value assessment, expressed broad support for the Department's proposal to include a provision relating to disability discrimination in value assessment. One comment from a prominent organization engaged in value assessment activities referred to the Department's proposed regulatory text as "very precise and appropriate" and indicated support for the provision in its current form.

Response: The Department appreciates comments on our proposed approach to addressing disability discrimination in value assessment, including comments that the proposed rule appropriately prohibits discriminatory uses of value assessment and permits the use of value assessment in a nondiscriminatory fashion.

Comment: Many commenters asked the Department to consider expanding the scope of § 84.57 to prohibit discounting the value of quality of life, in addition to life extension, on the basis of disability. Other commenters specifically asked the Department not to expand the provision in this way and requested the Department maintain the regulatory text proposed within the NPRM.

Response: While the Department has addressed disability discrimination on the basis of perceptions of quality of life in other aspects of the regulation, § 84.57 applies only to value assessment methods that discount the value of life extension on the basis of disability. As discussed in the NPRM, elements of value assessment methods that may violate § 84.57 in some contexts—such as for valuing life extension—may not violate it in other contexts. We have decided against adding a prohibition on measures that discount the value of quality of life on the basis of disability in § 84.57 because, within the context of value assessment, the use of measures that determine the value of a treatment based on the magnitude of quality of life changes are often beneficial to persons with disabilities. Such measures create a mechanism through which the relative degree of quality of life improvements a treatment provides compared to other similar treatments can be incorporated into a pricing strategy. However, we reiterate that the use of measures that also discount 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 any aid, benefit, or service, including the terms or conditions under which they are made available, would be prohibited. This remains the case even if the additional value assigned to a treatment due to quality of life improvements fully offsets any penalty assigned from discounting the value of life-extension. We also note that discounting the value of quality of life on the basis of disability for purposes of denying or limiting medical treatment to a qualified individual with a disability would likely violate § 84.56.

Other aspects of this rule may also be relevant when evaluating recipient value assessment activities. These include § 84.56, which prohibits discrimination on the basis of biases or stereotypes about a patient's disability, judgments that the individual will be a burden on others due to their disability, and a belief that the life of a person with a disability has lesser value or that life with a disability is not worth living. The Department will continue to monitor disability discrimination concerns in value assessment activities as the field develops.

Comment: Some commenters requested that the Department specifically clarify that the Department does not intend to prohibit nondiscriminatory uses of value assessment.

Response: As indicated in the NPRM, the rule does not prohibit nondiscriminatory uses of value assessment.

Comment: Many commenters asked the Department to indicate that certain specific methods of value assessment were permitted under § 84.57, while other commenters asked the Department to indicate that the same or similar methods were prohibited under § 84.57.

Response: As the Department indicated within the NPRM, we have elected not to identify the use of any specific method of value assessment, but instead to prohibit 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 have done so because the determination that a specific value assessment method will be prohibited depends on the specific context and purpose for which that method is utilized. For example, some methods that are impermissible for purposes of reimbursement or utilization management decisions are still permitted for purposes of academic research.

The use of a measure that does not discount the value of life extension on the basis of disability likely does not violate § 84.57. The Department notes, however, that composite measures that use methods that discount the value of life extension on the basis of disability as one component of a larger summary measure or pricing strategy could, depending on the particular facts of a specific case, be prohibited for use in 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 if the component that discounts the value of life extension contributes to the price set by the measure or any decision to determine eligibility, referral for, or provision or withdrawal of an aid, benefit or service. This is true even where other components of the summary measure or pricing strategy do not discount the value of life extension.

Comment: A commenter requested the Department prohibit all "cost-per-generic-health metric" methods of value assessment, encompassing a broad range of methodologies not prohibited under the current language of § 84.57.

Response: The Department declines to make this change. A prohibition as broad as the one proposed by the commenter would encompass alternative methods of value assessment that do not discriminate on the basis of disability under the Department's current understanding of section 504. We have elected to limit § 84.57 to 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.

Comment: Some commenters asked the Department to align the language of § 84.57 with the text of section 1182 of the Affordable Care Act, which prohibits "the use of a dollars-per-quality-adjusted-life-year (or similar measure that discounts the value of a life because of an individual's disability)" from being used to determine coverage, reimbursement, or incentive programs in certain program or activities.

Response: The Department has elected not to modify the regulatory text. The Department interprets recipient obligations under the current language of § 84.57 to be broader than section 1182 of the Affordable Care Act, because it prohibits practices prohibited by section 1182 (where they are 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) and prohibits other instances of discriminatory value assessment. As we have indicated elsewhere, section 504 is a civil rights statute rather than a program statute, and thus is not required to align precisely with requirements in program statutes. We decline to modify the regulatory text to use the same language as in section 1182.

Comment: Some commenters asked the Department to clarify that a recipient engaged in value assessment activities that is in compliance with § 84.57 might still violate other requirements under section 504 in such activities. For example, one State Attorney General

asked the Department to explicitly indicate that § 84.57 is not exclusive and does not preclude the application of other provisions of section 504 to value assessment activities. In the absence of such clarification from the Department, the commenter raised concerns that § 84.57 might inadvertently foreclose claims against recipients who use discriminatory algorithms or artificial intelligence tools that discriminate against people with disabilities.

Response: The Department agrees that compliance with § 84.57 – which prohibits only the use of value assessment methods that discount 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 – does not mean that a recipient has not violated other provisions of the section 504 rule.

Comment: Several commenters asked the Department to indicate whether the use of specific value assessment methods to develop health care policies, including drug formularies and utilization management strategies, could be discriminatory under § 84.57.

Response: The use of value assessment methods for developing health care policies, including drug formularies and utilization management strategies, could be discriminatory under § 84.57 if the method used discounts the value of life extension on the basis of disability and is used to determine eligibility or referral for, or provision or withdrawal of any aid, benefit, or service. This could include, for example, the use of value assessment methods for formulary construction, design, development, or refinement as well as other utilization management strategies of recipients.

Comment: Several comments asked the Department to provide additional clarity on the application of § 84.57 to academic research. One commentor asked the Department to specifically clarify that academic research, including research that references quality-adjusted life years (QALYs), can be used to inform multi-factor Medicaid agency decision making. Other commenters asked the Department to provide additional clarity with respect to how academic research may be used for purposes of value assessment.

Response: Within the NPRM, the Department explicitly indicated that it is the discriminatory use of a measure by a recipient that violates of § 84.57. 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 effect of different policy changes or medical innovations on national or global population health.

However, a recipient who makes use of academic research to determine eligibility, referral for, or provision or withdrawal of an aid, benefit, or service may violate section 504 if the use of the method in the research product is discriminatory when applied in the new context. A value assessment output used by a recipient that is derived from a method that discounts the value of life extension on the basis of disability is not made permissible because the recipient is using a research product, when it would not be permissible for the recipient to make use of that method directly.

As to the use of academic research in Medicaid agency decision-making, as discussed in the NPRM, the Department does not intend to reference any further specific value assessment methods as prohibited or permitted under § 84.57, as this determination will be the result of the specific context and purpose for which a value assessment method is utilized. However, recipients may make use of prices or other outputs from value assessment methods that do not discount the value of life-extension on the basis of disability within academic research. This remains the case even where that academic research also includes prices or other outputs determined via methods that do discount the value of life extension on the basis of disability, provided that the recipient is only making use of outputs that come from value assessment methods that do not discount the value of life extension on the basis of disability.

For example, consider a State Medicaid agency seeking to determine appropriate pricing for a new drug for purposes of negotiating drug prices with a manufacturer and subsequently making decisions regarding utilization management. In doing so, they refer to academic research

that calculates multiple potential pricing options for that drug, using multiple different value assessment methods for purposes of comparing pricing under different methods. Some of these methods discount the value of life extension on the basis of disability, whereas others do not. The State Medicaid agency would generally not violate § 84.57 if it uses pricing from methods that do not discount the value of life extension on the basis of disability to inform their negotiations with a manufacturer. In contrast, should the State Medicaid agency use prices or other outputs from a value assessment method that does discount the value of life extension on the basis of disability presented within the same academic research, this could violate § 84.57.

Comment: One commenter expressed concern that the Department's explanation of § 84.57 in the NPRM was inconsistent with language in § 84.56(b)(2) prohibiting discrimination only in instances where an individual experiences discrimination on the basis of an underlying disability distinct from the separately diagnosable symptom or medical condition they are seeking treatment from. They asked the Department to clarify its discussion of § 84.57 to align it with § 84.56(b)(2).

Response: This comment misunderstands the scope of section 504 and the referenced provisions. These are different provisions with different applications. The distinction between persons seeking treatment for their own underlying disability and persons seeking treatment for a separately diagnosable symptom or medical condition is made only with respect to the broad-based prohibition in § 84.56(b)(2) indicating 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. The medical treatment provision is not limited to that one part.

For example, even within § 84.56, the Department indicates that discrimination based on biases or stereotypes about a patient's disability, judgments that the individual will be a burden on others due to their disability, or a belief that the life of a person with a disability has lesser value or that life with a disability is not worth living is prohibited regardless of whether treatment is sought for a separately diagnosable medical condition or symptom or for a patient's

underlying disability. These obligations apply to recipient activities without regard to whether the potential discrimination in the use of a value assessment method is on the basis of an underlying disability or separately diagnosable symptom or medical condition. Similarly, other provisions implementing section 504 – such as § 84.57 – are also not subject to this limitation.

Comment: One commenter argued that the use of the QALYs and other methods of value assessment that frequently entail discounting the value of life extension on the basis of disability are not discriminatory because they are "only one step" in a process of decision-making, noting that policymakers also take into account other factors in their ultimate decision-making.

Response: Although recipients may make use of multiple factors to influence their decision-making, the use of a measure of value that assigns lower value to extending the lives of people with disabilities to determine eligibility, referral, or provision or withdrawal of an aid, benefit, or service can be nonetheless discriminatory.

Comment: One commenter requested that the Department not take a stance on utility weight generation. They specifically asked that we not require the use of direct patient utilities. They noted that concerns that value assessment "quantifies stereotypic assumptions about persons with disabilities" relate "less to the application of cost-per-QALY analyses, and more to the underlying elicitation approach used to generate utility weights called time-trade-off exercises." The commenter argued that there is value in "both general population preferences and patient preferences" in generating utility weights and that relying exclusively on patient preferences might serve to undervalue treatments as compared to using utility weights from the general population.

Response: The Department agrees that it would not be appropriate to require the use of direct patient utilities. Methods of utility weight generation are subject to section 504 when they are used in a way that discriminates. They are subject to § 84.57 and other provisions within the rule, such as § 84.56's prohibition of discrimination based on biases or stereotypes about a

patient's disability, among others. However, the Department does not take a position on specific methods of utility weight generation at this time.

Comment: One commenter asked the Department to modify the language reading "value of life extension" to "value of treatments that extend life." They indicate that this would better reflect their view that "the objective of value assessment is not to value the life of individuals, rather, estimate the value of treatments that may extend life."

Response: We decline to make this change, as the proposed text "value of treatments that extend life" would substantially alter the meaning of the regulation, prohibiting a far broader scope of value assessment activities than the current text. Furthermore, we believe that the current language accurately describes the discriminatory uses of value assessment prohibited by this provision.

Comment: One commenter asked the Department to avoid banning the QALY in academic research, expressing concern for unintended consequences of such a step.

Response: Section 84.57 does not prohibit the use of any value assessment method, including the QALY, in academic research. As mentioned in the NPRM, 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. In addition, we reiterate that the discriminatory use of a measure by a recipient violates this provision, but other uses may not. Nor does the rule outright ban the use of specific measures such as QALYs.

Comment: Some commenters argued that the use of the QALY and other similar measures that discount the value of life extension on the basis of disability for purposes of resource allocation is not discriminatory because it yields a higher valuation for a given health care intervention than a cost-per-life-year calculation would, as the latter does not take into account quality of life improvements. They also reference other value assessment methods that

may, under certain circumstances, assign lower valuations than a cost-per-QALY framework. The commenters argue that because the QALY delivers a higher valuation than non-QALY methods under these circumstances it cannot be discriminatory to make use of it even where it discounts the value of life-extension on the basis of disability, as it assigns a higher valuation to quality of life improvements than the alternative methods they reference.

Response: The Department disagrees. It is true that for interventions that improve quality of life, a cost-per-QALY valuation will likely be higher than a cost-per-life-year valuation, because a cost-per-life-year approach assigns no value to quality of life improvements. We note the availability of other value assessment methods. However, compliance with § 84.57 does not require the use of a cost-per-life-year valuation, an approach that is relatively uncommon when evaluating interventions that improve patient quality of life. The use of other alternative value assessment methods may yield different results.

In addition, the discriminatory nature of assigning less value to extending the lives of people with disabilities remains the case even where other factors in a value assessment system result in a higher valuation. In short, discounting the value of life-extension on the basis of disability to deny or afford an unequal opportunity to qualified individuals with disabilities is prohibited even if other aspects of a system of value assessment favor people with disabilities (though a recipient could incorporate such favorable treatment into an approach that does not discount life-extension on the basis of disability for such purposes). Favorable treatment in one component of a program of value assessment does not permit discriminatory treatment in another context. Finally, we note that the Department does not take a position on which alternative measure of value assessment recipients should use.

Comment: The Department requested comment on how value assessment tools and methods may provide unequal opportunities to individuals with disabilities. Numerous commenters indicated that value assessment methods could limit people with disabilities' access to health care goods and services, including pharmaceutical interventions, and expressed concern

that the use of the QALY unfairly limited access to emerging pharmaceutical interventions that could extend the lives of people with disabilities.

Response: While the nondiscriminatory use of value assessment is an important tool for health care cost containment, the Department agrees that discriminatory usages of value assessment harm people with disabilities and provide unequal opportunities.

Comment: The Department requested comment on other types of disability discrimination in value assessment not already specifically addressed within the proposed rulemaking. In addition to the proposals already discussed, some commenters urged the Department to consider disability discrimination in clinical algorithms, automated decision-making and artificial intelligence. This was also raised in comments regarding § 84.56.

Response: The Department agrees that disability discrimination resulting from the use of algorithms, automated decision-making, and artificial intelligence is a serious issue. Section 504 prohibits a recipient from discriminating on the basis of disability. This encompasses discrimination through a recipient's use of algorithms, automated decision-making, and artificial intelligence. For example, during the COVID-19 public health emergency, OCR discovered that Crisis Standards of Care plans that States and hospital systems used to allocate scarce resources relied on clinical algorithms to determine the allocation of scarce critical care resources. Many of these algorithms discriminated against people with disabilities and older individuals by categorically excluding patients with certain types of disabilities or by considering other factors that can be discriminatory based on disability or age, such as long-term survival prospects or anticipated intensity of resource utilization. OCR worked extensively with several States during the public health emergency to help them revise their Crisis Standards of Care plans to remove

discriminatory bias[54] and issued guidance on that issue.[55] We note that other Federal agencies have also identified that disability discrimination through the use of algorithms and artificial intelligence violates existing Federal civil rights laws.[56] The Department is particularly interested in monitoring disability discrimination through the use of these tools in the context of child welfare, medical treatment, long-term services and supports, and alternative payment models. Section 504 already prohibits disability discrimination in these and other activities through recipients' use of clinical algorithms, automated decision-making, and artificial intelligence. A more tailored application of the framework outlined here to algorithms, automated decision-making, and artificial intelligence requires further information gathering.

As we discussed earlier in the preamble, §§ 84.56 and 84.57 are not exhaustive with respect to recipient obligations regarding medical treatment and value assessment, respectively. A recipient's compliance with §§ 84.56 and 84.57 does not preclude liability for violations of other sections.

OCR has taken additional and will consider further actions to clarify recipients' obligations under Federal civil rights laws regarding the use of algorithms, automated decision-making, and artificial intelligence. For example, the Department's section 1557 final rule on Nondiscrimination in Health Programs and Activities prohibits a covered entity from

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[54] U.S. Dep't of Health & Human Servs., Off. for Civil Rts., Civil Rights and COVID-19, https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/index.html#:~:text=NON%2DDISCRIMINATION%20IN%20CRISIS%20STANDARDS%20OF%20CARE (last reviewed May 11, 2023).

[55] 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, https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html#footnote3_2brd1au; Press release, Dep't of Health & Human Servs., Off. for Civil Rts., HHS Issues New Guidance for Health Care Providers on Civil Rights Protections for People with Disabilities (Feb. 4, 2022), https://www.hhs.gov/about/news/2022/02/04/hhs-issues-new-guidance-health-care-providers-civil-rights-protections-people-disabilities.html.

[56] *See, e.g.*, U.S. Dep't of Justice, Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring (2022), https://www.ada.gov/resources/ai-guidance/; U.S. Equal Emp't Opportunity Comm'n, EEOC-NVTA-2022-2, The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (2022), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence.

discriminating on the basis of race, color, national origin, sex, age, or disability in its health programs or activities through the use of patient care decision support tools, which include algorithms, automated and non-automated tools, and artificial intelligence used to support clinical decision-making.

The Department is interested in the public's views regarding disability discrimination that occurs through the use of algorithms, automated decision-making, and artificial intelligence. We are also interested in the public's views on whether OCR should issue guidance or consider future rulemaking related to the application of section 504 to disability discrimination that results from the use of algorithms, automated decision-making, and artificial intelligence. Anyone interested in sharing views or comments on these issues should do so by sending the information by letter to the Office for Civil Rights at U.S. Department of Health and Human Services, Office for Civil Rights, Attention: Disability Information, RIN 0945–AA15, Hubert H. Humphrey Building, Room 509F, 200 Independence Avenue SW, Washington, DC 20201or by email to the Office for Civil Rights at 504@hhs.gov.

Comment: The Department sought comment on the extent to which, despite indicating that § 84.57 would not apply to academic research alone, the provision would have a chilling effect on academic research. The majority of commenters indicated their belief that, rather than chill academic research, § 84.57 would spur an expansion in research making use of nondiscriminatory alternatives to the QALY and research further developing and refining such alternative measures. In contrast, a commenter expressed concern that prohibiting methods of value assessment that discount the value of life extension on the basis of disability would chill academic research as researchers would be less likely to invest time and resources into generating research findings that cannot inform decision-making.

Response: The Department agrees that the proposed provision may spur an expansion in research making use of nondiscriminatory methods of value assessment and research further developing and refining such alternative measures. While we recognize that researchers may

orient their time and resources into generating research findings using nondiscriminatory methods that can inform health care resource allocation and decision-making and away from discriminatory methods that cannot be used for such purposes, we see this as a possible positive feature of this regulatory provision. Given the existence of nondiscriminatory options and the Department's carefully targeted approach to addressing disability discrimination in value assessment, we do not believe this represents a chilling of academic research into value assessment as a whole.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.57 as proposed with no modifications.

Children, Parents, Caregivers, Foster Parents, and Prospective Parents in the Child Welfare System (§ 84.60)

The Department proposed in § 84.60 to address the wide range of discriminatory barriers that individuals with disabilities face when accessing child welfare systems. These included a failure to provide reasonable modifications as required of all recipients in proposed § 84.68(b)(7). It also included the failure to place children in the most integrated setting appropriate to the needs of the child as required by existing § 84.4(b)(2), proposed § 84.68(d), and the specific integration requirements contained in proposed § 84.76. The preamble provided examples of the violation of the most integrated setting requirement in the child welfare setting.

The Department sought comment on additional examples of the application of the most integrated setting requirement to child welfare programs and welcomed comment on any additional points for consideration regarding integration of children with disabilities in child welfare contexts.

Proposed § 84.60(a)(1) prohibited exclusion of qualified individuals with disabilities in the child welfare system.

Proposed § 84.60(a)(2) provided that prohibited actions include discrimination based on speculation, stereotypes, or generalizations about whether parents and others with disabilities listed in the heading of the section can safely care for a child and decisions based on speculation, stereotypes, or generalizations about an individual with a disability.

Proposed § 84.60(b) set forth a non-exhaustive list of additional prohibitions.

The Department requested comment on the list of prohibited activities, especially on whether commenters believe it is complete.

Proposed § 84.60(c) would require recipients to establish referral procedures for individuals who need or are believed to need adapted services or reasonable modifications, and to ensure that tests, assessments, and other evaluation materials, are tailored to assess specific areas of disability-related needs.

The Department sought 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 evaluation.

The comments and responses regarding § 84.60 are set forth below.

General

Comment: Many commenters enthusiastically supported the revisions to the child welfare section, echoing the Department's explanation in the NPRM that children, parents, caregivers, foster parents, and prospective parents with disabilities encounter a wide range of discriminatory barriers when accessing critical child welfare programs and services. Some commenters submitted stories of discrimination against foster parents and caregivers with disabilities who could provide safe and proper care to a child, such as a prospective adoptive parent being denied solely on the basis of having spinal muscular atrophy, which required the prospective mother to use a wheelchair.

Response: The Department believes the experiences shared with the Department through public comments underscore the importance of eliminating discrimination in child welfare services.

Comment: Several commenters asked the Department to include explicit reference to other child welfare statutes, such as title IV-E of the Social Security Act of 1935 (Pub. L. 96-272, 94 Stat 500), the Family First Prevention Services Act (Pub. L. 115-123, 132 Stat 64), and the Indian Child Welfare Act (Pub. L. 95-608, 92 Stat 3069). Commenters asked that the Department elaborate on how section 504 interacts with the requirements of these laws.

Response: Compliance with section 504 is consistent with the Federal child welfare statutes, but the Department declines to incorporate their requirements by reference because those other laws are beyond the scope of this rulemaking. We note that § 84.3 makes clear that part 84 "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." We will continue to work with our sister agencies within HHS as questions or comments arise regarding various child welfare statutes and regulations, including section 504, and will provide guidance and technical assistance as appropriate.

Application of This Section

Comment: Several commenters requested that the term "youth" or "young people" be added wherever child or children is used to avoid unintentionally excluding individuals over the age of 18 who are receiving child welfare services. Commenters recommended that the word "youth" be used to replace the word "child" or "children," or that "child" be defined as "an individual under age 18 and young people aged 18 and over who are eligible for child welfare services pursuant to 42 U.S.C.A. 675 (8)."

Response: "Qualified individual with a disability" in paragraph (a) includes individuals of all ages eligible for child welfare services, including individuals over the age of 18. The age of

eligibility for State child welfare services is determined by State law, and may include youth up to age 21.[57] These individuals are covered under the existing language, and the proposed addition suggested by commenters could potentially create confusion, and could erroneously imply that these individuals were not already covered.

Comment: Several commenters asked that we elaborate on the different legal forms of parentage in the rule's definition of "parent," and referenced different legal structures such as including Voluntary Acknowledgements of Parentage (VAPs), court orders, marital presumptions, being an intended parent to a child born through assisted reproduction, and functional parenthood (such as de facto parentage).

Response: The Department appreciates commenters' feedback and notes that there are varied ways parents receive legal recognition under State law. However, our current definition of "parents," as "biological or adoptive parents or legal guardians as determined by applicable State law," encompasses the different ways individuals may be recognized by State law as parents.

Comment: Many commenters asked that the child welfare section explicitly reference other sections of the rule, such as the requirements for reasonable modifications and effective communication. For example, several commenters asked that the Department specify that parenting classes and their written materials, any forms or assessments parents are required to fill out, and any information provided to parents, must all be accessible to individuals with disabilities.

Response: The Department affirms that subparts A, B, C, §§ 84.51, 84.52, and 84.54 of subpart F, and subparts G, H, and K apply to all child welfare recipients. The child welfare-specific regulatory language in § 84.60 does not narrow or limit recipients' existing and long-standing obligations under section 504 or the ADA. Rather, specific provisions in this section address several aspects of discrimination that are common in child welfare programs and

[57] 42 U.S.C. 675 (8) (allowing States to extend services to individuals up to age 21).

services. Where an individual with a disability faces discrimination not addressed by these specific provisions, then the broader equal access, equal opportunity, reasonable modifications, and non-discrimination provisions of the regulation, along with the accompanying defenses, shall continue to apply.

Comment: Some commenters asked the Department to add discrimination based on substance use disorder to the list of prohibited activities. Commenters cited that parents and prospective parents, foster parents, and other caregivers in recovery from addiction are often discriminated against for using medications for opioid use disorder (MOUD).

Response: The Department recognizes that discrimination against parents and prospective caregivers in recovery from opioid use disorder and in recovery from other substance use disorders (SUD) is widespread.[58] For example, in August 2023 the OCR settled an investigation resolving a complaint against a county-operated child welfare agency that denied an individual the opportunity to apply to be a foster parent because she receives medication for the treatment of substance use disorder and not based on an analysis of her ability to be an effective foster parent, a violation of her rights under section 504. The Department has previously issued guidance related to MOUD and, as noted in the NPRM's preamble, continues to enforce cases of discrimination against individuals prescribed MOUD.[59] With limited exceptions, the ADA and section 504 do not protect individuals engaged in the current illegal use of drugs, including if an entity takes action against them because of that illegal drug use.[60]

Discriminatory Actions Prohibited (§ 84.60(a))

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[58] *See e.g.,* U.S. Dep't of Health & Human Servs., Off. for Civil Rts., HHS Office for Civil Rights Secures Agreement with Commonwealth of Pennsylvania to Advance the Rights of People in Recovery and Involved in Child Welfare Services (Aug. 8, 2023), https://www.hhs.gov/about/news/2023/08/08/hhs-office-civil-rights-secures-agreement-commonwealth-pennsylvania-advance-rights-people-recovery-involved-child-welfare-services.html.

[59] U.S. Dep't Health & Human 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.

[60] 42 U.S.C. 12210 (ADA); 29 U.S.C. 705(20)(C) (section 504).

Comment: Several commenters emphasized the importance of avoiding "speculation, stereotypes, or generalizations" in assessing whether a parent's disability poses a direct threat to the child. Commenters also asked that direct threat be added to the language of this section.

Response: This section does not use the language "direct threat," because it covers a broader category of decisions where a covered entity may determine that a parent, caregiver, foster parent, or prospective parent, because of a disability, cannot safely care for a child. These decisions may include but are not limited to, whether a parent poses a direct threat to the child. However, the Department emphasizes while child welfare agencies may make determinations to disqualify a parent or child from services on grounds that they may pose a direct threat to others, such determinations are subject to § 84.75. Child welfare agencies and providers are required by law to ensure the safety of children in the child welfare system, and a key priority of child welfare agencies is the wellbeing of children. The determination of whether a caregiver can provide for a child's safety and wellbeing must be based on facts regarding each individual and not based on stereotypes about people with disabilities. 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 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.

Child Welfare Question 1 Regarding "Most Integrated Setting"

Comment: The Department sought comment on additional examples of the application of the most integrated setting requirement to child welfare programs and welcomed comment on any additional points for consideration regarding integration of children with disabilities in child welfare contexts. In response, numerous commenters noted that the most integrated setting for

children is the family home with in-home supports and services. Commenters noted that child welfare settings exist on a continuum of integration, with the most integrated setting for a child being receiving services at home with their parents, followed by properly supported kinship placements, then foster care in a family setting, including when appropriate therapeutic foster care. Commenters noted that congregate care is the least integrated setting, yet it is often the default placement for children with disabilities, particularly disabilities related to mental and behavioral health. Many commenters urged that congregate care placements are only nondiscriminatory when the covered entity has made reasonable modifications to services and supports that could enable children to remain together in the family home. Several commenters asked that we include specific language in the regulatory text describing the criteria for congregate care placements.

Many commenters also noted that ensuring families can remain together at home potentially requires the coordination of multiple covered entities and associated services, including long-term services and supports, home modifications and assistive technology, employment supports and services, community-based mental health services and community resources or supports for people with substance use disorders. A commenter asked the Department to emphasize the harms of certain placements, such as out-of-state placements.

Response: While the Department declines to distinguish explicitly between different congregate care settings or list mandatory criteria for congregate care placements, we reiterate that all children with disabilities in foster care are entitled to receive services in the most integrated setting appropriate to their needs,[61] and congregate care is virtually never the most

[61] *See, e.g., G.K. by Cooper v. Sununu*, No. 21-cv-4-PB, 2021 WL 4122517 (D.N.H. Sept. 9, 2021), allowing a class action to proceed on claims filed by or on behalf of children in foster care alleging violations of the ADA and section 504 based on a State's failure to provide alternatives to congregate care for children with disabilities. *Id.* at *10 ("Unless [the State] could prevail on a fundamental-alteration defense, the State must administer its foster care services in a manner that enables plaintiffs to live in…integrated settings.").

appropriate long-term setting for children.[62] We agree with commenters that the most integrated setting appropriate for children with disabilities is almost always the family home or a family foster care setting.[63] Recipients should consider and facilitate the full range of services and supports a family may be eligible for to keep parents and children together.

Lastly, while this rule's provisions do affirm the child welfare system's requirements when it interacts with people with disabilities under section 504, the Department's position is that children should not be required to enter or remain in the child welfare system solely to receive disability-related services and supports. The Department notes that child welfare services may have limits based on legal requirements in judicial proceedings for child welfare system involvement. In the event that long term supports are needed outside of foster care, the

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[62] *See, e.g.,* U.S. Dep't of Health & Human Servs., Admin. for Child. & Fam., Children's Bureau, Reducing the Use of Congregate Care, https://www.childwelfare.gov/topics/permanency/reducing-use-congregate-care/ ("Congregate care settings, such as group homes and residential facilities, are not a substitute for family and should only be used on a time-limited basis when youth require services that are unavailable in a less restrictive environment to address psychological or behavioral needs."); U.S. Dep't of Health & Human Servs., Admin. for Child. & Fam., Children's Bureau, A National Look at the Use of Congregate Care in Child Welfare, (May 13, 2015) https://www.acf.hhs.gov/sites/default/files/documents/cb/cbcongregatecare_brief.pdf ("[T]here is consensus across multiple stakeholders that most children and youth, but especially young children, are best served in a family setting. Stays in congregate care should be based on the specialized behavioral and mental health needs or clinical disabilities of children. It should be used only for as long as is needed to stabilize the child or youth so they can return to a family-like setting.").

[63] *See, e.g.,* Sandra Friedman et al., *Out-of-Home Placement for Children and Adolescents With Disabilities—Addendum: Care Options for Children and Adolescents With Disabilities and Medical Complexity*. 138:6 Pediatrics: Official Journal of the American Academy of Pediatrics (2016), https://publications.aap.org/pediatrics/article/138/6/e20163216/52567/Out-of-Home-Placement-for-Children-and-Adolescents?autologincheck=redirected ("Children and adolescents with significant intellectual and developmental disabilities and complex medical problems require safe and comprehensive care to meet their medical and psychosocial needs. Ideally, such children and youth should be cared for by their families in their home environments. When this type of arrangement is not possible, there should be exploration of appropriate, alternative noncongregate community-based settings especially alternative family homes.); 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. Child. & Youth Servs. Rev. 9 (2014), http://dx.doi.org/10.1016/j.childyouth.2013.11.027. The United States has taken the position that even children with intensive behavioral needs have better outcomes in family settings. *See* 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 ("With 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.").

Department encourages transition planning to assist with continuity of supports and services.

Child Welfare Question 2 Regarding Additional Prohibitions

Comment: The Department requested comment on the list of prohibited activities in § 84.60(b), especially on whether commenters believe it is complete. Commenters offered specific examples of denial, termination, or abridgment of specific services, such as family preservation services, that should be prohibited. These are often short-term services designed to help families cope with significant stresses or problems that interfere with their ability to nurture their children. The goal of family preservation services is to maintain children with their families and may be distinct from reunification services. Several commenters asked that mandatory custody relinquishment, a policy in some jurisdictions where parents are required to relinquish custody of their child with disabilities so that the child may receive services, be added to the list of prohibited activities. Several commenters recommended that the language in § 84.60(b) include all child welfare services. Additionally, multiple commenters recommended that paragraph (b)(3) mirror the language of § 84.68(b)(1)(iii) in the general prohibitions against discrimination section.

Response: The Department appreciates commenters' identification of potential prohibited activities. While paragraph (b) lists additional prohibited activities, the list is not intended to be exhaustive. All child welfare recipients must comply with § 84.68, which prohibits discrimination in all of a recipients' programs and activities including aids, benefits, and services provided by the recipient.

In consideration of comments received, we have added "any and all services provided by a child welfare agency, including but not limited to..." to paragraph (b)(2) to underscore that no service may discriminate on the basis of disability. We have also added "family preservation services" to the paragraph, recognizing that these services help families avoid separation through loss of custody or foster care placement.

The Department noted in the NPRM that the practice of requiring parents to relinquish custody of a child with a disability, so that the child may receive disability-related services, is common in some jurisdictions. For example, a child welfare agency may require parents to relinquish custody so that a minor with a mental illness may receive intensive behavioral health supports in a group home, without any showing of abuse or neglect by the parent required to forfeit parental rights. Requiring a child to be removed from the family home, on the basis of the child's disability, in order to receive services is discrimination under section 504. To clarify the discriminatory nature of this practice, we have added a prohibition against it in paragraph (b)(5).

Parenting Evaluation Procedures (§ 84.60(c))

Comments: Several commenters asked for the elimination of the use of IQ scores in parental skills evaluation on the basis that IQ may also be discriminatory in the context of intellectual disability. Additionally, commenters suggested that the language regarding tests and assessments in paragraph (c) clarify that no test or assessment should be the sole metric by which to evaluate parenting capabilities. Further, commenters urged that we clarify that parental evaluations should center on assessing parenting capabilities rather than solely assessing or diagnosing parental disabilities.

Response: While the Department declines to prohibit the use of IQ testing, we reiterate that parenting evaluations shall not be based solely on a single general intelligence quotient or measure of the person's disability, rather than their parenting ability. Recognizing the critical role of parental evaluation in many child welfare services, we have added language to clarify that evaluations and risk assessments must be tailored to assess parenting capabilities and support needs, rather than solely evaluating a parent's disability. For greater clarity about the application of nondiscrimination requirements to parenting evaluations, we have revised the text of the section as described in the summary of regulatory changes for this section.

Comment: Many commenters urged parental assessments to consider the availability of natural supports, such as friends and family, who can help a parent with child-rearing

responsibilities. Many other commenters cited the importance of considering other supports, such as personal assistants, assistive technology, and parent education programs, in assessing parental capabilities.

Response: The Department agrees with commenters that a nondiscriminatory assessment of parenting capabilities may need to consider natural and paid supports as reasonable modifications that may be used in meeting evaluation criteria. For all recipients, the determination of whether parents are "qualified" must be consistent with the definition of "qualified individual with a disability" in § 84.10 which states that an individual with a disability may meet the essential eligibility requirements for programs or services with or without reasonable modifications.

Comment: Other commenters noted that functional parenting evaluations should be designed with input from parents with disabilities, who are familiar with the supports and adaptations that can help a parent succeed.

Response: The Department supports this suggestion of a potential best practice for child welfare recipients but declines to include it in the regulation in order to give recipients flexibility in how effective functional parenting evaluations are designed. We will consider future guidance on how child welfare recipients can incorporate the input and perspective of individuals with disabilities in their policies and procedures.

Algorithms

Comment: We received many comments about discrimination in algorithms used by child welfare services. Several commenters highlighted that the algorithms have the potential to discriminate on the basis of disability and other protected classes, and that algorithms can be discriminatory on their face or by producing unlawfully biased products or outcomes.

Response: The Department recognizes this rapidly evolving area of concern. As noted earlier above, section 504 prohibits a recipient from discriminating on the basis of disability, and this encompasses discrimination through a recipient's use of algorithms. This protection would

also extend to a child welfare agency's use of algorithmic decision-making tools. We continue to collect information and will consider developing additional guidance, consistent with Executive Orders related to algorithms and artificial intelligence.[64] We also requested information from the public on this issue above.

Training

Comment: Several commenters asked that the rule mandate training related to reasonable modifications, effective communications, and/or disability culture for child welfare staff and foster families. Commenters requested training from the Department for child welfare agencies on how to implement policies and practices in compliance with this section.

Response: Due to the administrative challenge of mandating a single set of training requirements for all recipients, and because doing so is beyond the scope of this rulemaking, we decline to impose specific training requirements and instead leave the details of the specific administrative procedures for ensuring recipient staff's compliance with this section to the discretion of the recipient. However, the Department acknowledges that training on compliance with section 504 and best practices to eliminate barriers for disabled parents and children may help agencies comply with the provisions in this final rule. The Department remains committed to providing technical assistance and education and will consider developing additional guidance as needed, in coordination with ACF.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering comments received, we are finalizing § 84.60 with the following changes: First, we are revising paragraph (b)(2) to clarify that all services offered or provided by the child welfare entity are covered. An additional example of "family preservation" is added as well as the clarifying phrase, "any and all services provided by a child welfare agency, including but not limited to…." The paragraph now reads: "Deny a

[64] *See, e.g.,* E.O. 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 FR 75191 (Nov. 1, 2023).

qualified parent with a disability an opportunity to participate in or benefit from any and all services provided by a child welfare agency, including but not limited to, family preservation and reunification services equal to that afforded to persons without disabilities." Second, we are adding a new paragraph (b)(5) to clarify that recipients may not require, on the basis of a child's disability, custody relinquishment, voluntary placement, or other forfeiture of parental rights in order for the child to receive services. The new paragraph reads: "Require children, on the basis on the disability, to be placed outside the family home through custody relinquishment, voluntary placement, or other forfeiture of parental rights in order to receive necessary services."

Third, we are revising paragraph (c) to clarify that evaluations and risk assessments must be tailored to assess parenting capabilities and support needs, rather than the disability itself. The new paragraph provides that a recipient to which the subpart applies shall establish procedures for referring to qualified professionals for evaluation those individuals, who, because of disability, need or are believed to need adapted services or reasonable modifications. A recipient shall also ensure that tests, assessments, and other evaluation tools and materials used for the purpose of assessing or evaluating parenting ability are based in evidence or research, are conducted by a qualified professional and are tailored to assess actual parenting ability and specific areas of disability-related needs. Parenting evaluations must be fully accessible to people with disabilities and shall not be based on a single general intelligence quotient or measure of the person's disability, rather than their parenting ability. Assessments of parents or children must be individualized and based on the best available objective evidence.

Subpart G—General Requirements

Subpart G contains general prohibitions and eight specific sections on various topics.

General Prohibitions against discrimination (§ 84.68)

Proposed § 84.68 retained several of the general prohibitions in the existing rule and added many provisions for consistency with the ADA title II regulations. Comments received on provisions contained in § 84.68 are set forth below.

General Prohibitions (§ 84.68(a))

Comment: Many commenters supported inclusion of this section to ensure that the section 504 regulations will be enforced in a fair and transparent manner. Others asked us to make clear that all of these prohibitions apply to the medical treatment section.

Response: We appreciate commenters' support for this provision. In fact, the general prohibitions in this section apply throughout the rule and we have added a statement to that effect specifically in the medical treatment section.

Meaning of solely (§84.68(a))

In its section 504 NPRM, the Department proposed to add "solely" in the language stating section 504's general prohibition against discrimination at §84.68(a). That word is not included in the parallel provision of the Department's existing section 504 rule at §84.4(a). The Department noted that this addition was a technical change to make the regulation's language consistent with the general nondiscrimination language of the statute, and that the language does not exclude the forms of discrimination delineated throughout the rule.

Comments: A number of commenters, including disability rights and civil rights legal organizations, a State Attorney General's office, and a member of Congress, expressed concern with the Department's proposed approach. Some asked that, because the word "solely" in section 504 has become a battleground in court cases that threaten to limit disability rights protections, HHS should provide additional regulatory language and guidance to reflect case law, statutory purpose, and congressional action, and to clarify that "solely" does not limit prohibited conduct to intentional discrimination. Commenters noted that the Department's preamble language is helpful but suggested that the Department should include regulatory text to ensure that its interpretation has the full force and effect of law. Some commenters referenced a brief filed by the United States in the Supreme Court[65] and, using that brief as a template, suggested that the

[65] U.S. Dep't of Justice, Brief for the United States as Amicus Curiae, *CVS Pharmacy, Inc. v. Doe*, No. 20-1374 (U.S. Oct. 28, 2021).

Department should state that "solely on the basis of disability" refers to a causal relationship between the discrimination alleged and the disability, and includes discrimination that results from "benign neglect," indifference, and unintentional disparate-impact discrimination.

Response: The Department agrees that the addition of the word "solely" in §84.68(a) should not limit section 504 to intentional discrimination claims, and the Department did not intend to impose such a limitation in the proposed rule. The Department understands commenters' concern that making that change in the manner intended by the Department without including language in the regulatory text itself invites confusion and possible misinterpretation. We want to ensure the addition of the word "solely" does not alter the Department's 46-year history of interpretation of the reach of its section 504 rule.

There is considerable support for the view that section 504 is not limited to intentional discrimination. Almost forty years ago, the Supreme Court "assume[d] without deciding" that section 504 prohibits both intentional discrimination based on disability, as well as actions that have a discriminatory impact on people with disabilities, notwithstanding a lack of invidious intent.[66] The Court in *Alexander v. Choate* looked to the statements by members of Congress at the time of section 504's enactment and the experience of Federal agencies that found that some types of discrimination against people with disabilities, like those resulting from architectural barriers, were "primarily the result of apathetic attitudes rather than affirmative animus."[67] The Court noted that "[i]n addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[68] In the years following *Choate*, the Circuits have uniformly agreed that the failure to reasonably accommodate the disability of an

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[66] *Alexander v. Choate*, 469 U.S. 287, 295 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect.").
[67] *Id*. at 296.
[68] *Id.* at 296-97.

otherwise qualified individual is a form of discrimination prohibited by section 504,[69] and a majority of those courts have also applied or expressed support for a disparate impact theory as well.[70]

The Department also finds support for this approach in the recent position of the United States its amicus brief in the Supreme Court in *CVS Pharmacy, Inc. v. Doe*.[71] That brief notes that the language in section 504 is written in the passive voice and makes no reference to any specific actor and accordingly no reference to any actor's intent. Thus, the use of "solely" "is most naturally read to focus on the causal link between the plaintiff's disability and particular undesired effects, rather than on the motives or intent of the defendant."[72]

In determining the Department's interpretation of the meaning of "solely," the Department looks to the types of discriminatory practices that have been part of the Department's section 504 regulation since 1977, including intentional discrimination, as well as practices that have discriminatory effects. Thus, the section 504 regulation would cover the denial of health care services to a patient who uses a wheelchair and is unable to reach their doctor's office because it is only accessible by stairs, or a person who is deaf who is unable to

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[69] *See, e.g.*, *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 23-26 (1st Cir. 1991); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276-77 (2d Cir. 2003); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999); *Basta v. Novant Health Incorp.*, 56 F.4th 307, 315 (4th Cir. 2022); *J.W. v. Paley*, 81 F.4th 440, 450 (5th Cir. 2023); *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 243 (6th Cir. 2019); *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 847 (7th Cir. 1999); *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076-77 (8th Cir. 2006); *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016); *Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City*, 685 F.3d 917, 919 (10th Cir. 2012) (Gorsuch, J.)*; L.E. by and through Cavorley v. Superintendent of Cobb Cty. Sch. Dist.*, 55 F.4th 1296, 1301 (11th Cir. 2022); *Chenari v. George Washington Univ.*, 847 F.3d 740, 746-47 (D.C. Cir. 2017).

[70] *See, e.g.*, *Ruskai v. Pistole*, 775 F.3d 61, 78-79 (1st Cir. 2014); *Nathanson v. Medical Coll. of Pa.*, 926 F.2d 1368, 1384 (3d Cir. 1991); *Brennan v. Stewart*, 834 F.2d 1248, 1261-1262 (5th Cir. 1988); *McWright v. Alexander*, 982 F.2d 222, 228-229 (7th Cir. 1992); *Mark H. v. Lemahieu*, 513 F.3d 922, 936-937 (9th Cir. 2008); *Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003); *American Council of the Blind v. Paulson*, 525 F.3d 1256, 1268-1269 (D.C. Cir. 2008). *But see Doe v. BlueCross BlueShield of Tenn.*, Inc., 926 F.3d 235, 241 (6th Cir. 2019).

[71] U.S. Dep't of Justice, Brief for the United States as Amicus Curiae, *CVS Pharmacy, Inc. v. Doe*, No. 20-1374 (U.S. Oct. 28, 2021).

[72] *Id.* at 6-7.

communicate his symptoms to emergency room personnel at the county hospital because of the absence of sign language interpreters.

The Department finds compelling the position taken by the United States in its *CVS* amicus brief which focused on the causal link between the plaintiff's disability and nature of the alleged discriminatory practice, "rather than on the motives or intent of the defendant."[73] The United States provided the following explanation in its brief in *CVS Pharmacy, Inc. v. Doe*:

> If a pharmacy requires customers to fill out a paper form to obtain in-network prices for a drug, a blind customer who is otherwise eligible for in-network prices but is unable to complete the form is "being denied the benefit solely by reason of her disability." The causal link that the statute requires is a link between the customer's disability and her lack of access to program benefits. That causal connection can exist, and can reliably be established, even if the pharmacy adopted the paper-form requirement for reasons unrelated to its exclusionary effect on blind persons.[74]

The Department shares this view as to the meaning of "solely" in the section 504 regulation. In light of this explanation of our interpretation of the word "solely," as discussed in the NPRM, we find it unnecessary to make any changes in the regulatory text.

Specific Prohibitions

Proposed § 84.68(b)(1)(i) through (vii) listed a series of prohibitions that apply to recipients directly or through contractual, licensing, or other arrangements. Discussed below are comments that we received on the provisions in this section.

Contractual Arrangements (§ 84.68(b)(1)(i))

This section states that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangement, on the basis of disability, deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service.

Comment: Several commenters asked about the applicability of section 504 when a recipient contracts out certain activities to another entity and the activities of that other entity are

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[73] *Id.*
[74] *Id.* at 14.

not in compliance with section 504. Some requested that we make it clear that recipients cannot contract away their obligations when overseeing large programs such as Medicaid. Others asked us to clarify that recipients have affirmative responsibilities to ensure nondiscrimination by agencies with whom they contract.

Response: We proposed in § 84.68(b)(1) to make clear that when a recipient contracts out activities, that recipient remains responsible for ensuring that the entity with whom it contracts complies with section 504. The size of that entity is irrelevant; the requirements are the same. For more information about Federal financial assistance and contracts, please see the discussion of Federal financial assistance in § 84.10, the Definitions section.

Significant Assistance (§ 84.68(b)(1)(v))

We proposed in this section to provide that a recipient may not aid or perpetuate discrimination by providing significant assistance to an entity that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program.

Comment: A commenter noted that many recipients of Federal financial assistance from the Department provide significant financial support to entities that engage in unlawful disability-based discrimination. The commenter requested additional guidance on the recipient's obligations in this instance.

Response: Section 84.68(b)(1)(v) makes clear that recipients retain responsibility for ensuring that entities to which they provide significant assistance comply with section 504.

Methods of Administration (§ 84.68(b)(3))

This section provides 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 on the basis of disability or (2) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals with disabilities 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.

Comments: Many commenters strongly supported this section. One commenter noted the importance of this prohibition as applied to clinical trial participants who should be provided with continuing care and, where possible, to continued access to study products. That commenter said that methods of allocation of those products and scarce resources should be subject to this provision. Another commenter said that they strongly support § 84.68(b)(3) because it emphasizes the prohibition of discriminatory methods in the allocation of scarce medical resources. An organizational commenter said that this provision, along with the reasonable modifications section in § 84.68(b)(7), represent commendable steps toward safeguarding the rights of individuals in allocating resources. Another commenter mentioned that this regulation should prohibit the provision of separate gowns and visiting procedures for individuals with substance use disorders.

Comment: We appreciate the commenters' support and agree with the importance of applying the prohibition against methods of administration that discriminate in the clinical studies field as well as throughout this rule. With regard to the organizational commenter who suggested that there not be separate gowns and visiting procedures for individuals with substance use disorders, the Department declines to make that change because under certain circumstances, using different gowns or visiting procedures may not constitute discrimination. However, we note that pursuant to § 84.68(b)(7), recipients must make reasonable modifications in policies, practices, or procedures when 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.

Licensing and Certification (§ 84.68(b)(6))

This section states that 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, although the programs or activities that are licensed or certified by the recipient are not, by themselves, covered by this part.

Comment: A commenter said that many health care licensing entities discriminate against individuals who use prescribed medicines to treat SUD.

Response: Individuals must generally be permitted to take licensing or certification exams if they are qualified as defined in § 84.10. That section defines a qualified individual with a disability as an individual who, with or without reasonable modifications, removal of barriers, or provision of auxiliary aids and services, meets the essential eligibility requirements to take the exam. In the event of noncompliance, individuals can file complaints with the Department if they see discrimination occurring even if they have not personally experienced discrimination. Procedures for filing complaints are set forth in § 84.98.

Reasonable Modifications (§ 84.68(b)(7))

Section 84.68(b)(7) states that recipients must 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.

Most of the comments that we received on this section fall into one of two categories: masks and other infection mitigation measures and supported decision-making. We discuss each topic separately.

Masks and Other Infection Mitigation Measures

Comment: We received many comments on this issue. Multiple commenters said that the discontinuation of some measures used to prevent COVID-19 discriminates against those individuals with disabilities who are particularly vulnerable to severe disease. Many commenters only discussed masks and many commenters requested that the Department provide clear

guidance as to what is required with regard to masks and other infection mitigation measures. Various commenters described the response received when they asked health care staff to wear masks, including having their requests denied, and being met with shaming. The Department also received a few comments from individuals with hearing impairments who said that the masks discriminated against them because they prevented lip reading.

Multiple commenters argued that the failure to provide mitigation measures constitutes a violation of § 84.56, which prohibits discrimination in medical treatment. Several commenters suggested possible reasonable modifications, including allowing individuals at risk of infection to wait in their cars for appointments, providing separate waiting rooms and separate entrances, scheduling appointments before or after hours or as the first appointment of the day, providing alternate spaces to wait for appointments, and using telehealth where appropriate.

Response: We appreciate the many commenters who shared their experiences. Regarding infection mitigation measures in general, individuals may be able to obtain reasonable modifications to policies, practices, and procedures such as those mentioned above if such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that the modifications would fundamentally alter the nature of the program or activity.

Supported Decision-making

Comments: The Department received many comments, mostly from disability rights organizations, that were appreciative and supportive of the preamble discussion of the reasonable modification of supported decision-making. Commenters pointed out that individuals with disabilities are routinely subjected to overly restrictive guardianships where someone appointed by a judge makes decisions on behalf of the individual with a disability. Many noted that supported decision-making allows the individual with disabilities to understand, make, and communicate their preferences and choices in consultation with their supporter. Others described supported decision-making as a powerful tool that allows for self-determination. One commenter

mentioned that the implementation of supported decision-making processes does not pose an undue obstacle for recipients but, rather, it increases a person's ability to participate through informed choice.

Several commenters asked that supported decision-making be mentioned in the preamble to the medical treatment section and throughout the preamble, particularly as it relates to consent, while others requested that it be included in the text of the regulation.

One organization requested that the Department develop training materials so that supported decision-making is more accessible and affordable for recipients. They suggested that the training materials address privacy issues and the different ways that a recipient can recognize a supported decision-maker as the personal representative or otherwise authorized third party who can directly receive information. They also suggested development of a template for use by recipients.

Response: We appreciate the uniformly positive input that we received on the reasonable modification of supported decision-making. The Department has explained how the concept of supported decision-making may apply to medical treatment in the discussion of medical treatment and in other places as appropriate. The preamble to § 84.56(c), the consent paragraph in the medical treatment section, discusses examples of how supported decision-making applies to medical treatment decisions, noting that it can be crucial in ensuring that individuals with disabilities are giving informed consent. Although we generally agree with the points made by the commenters in support of supported decision-making, we decline to add mention of this reasonable modification in the regulatory text of the consent provision. We note that the reasonable modification provision is in subpart G, General Requirements and, as such, already applies to the consent provision. It would be duplicative to add another reference to the reasonable modification concept in other provisions of the final rule. Accordingly, we are finalizing § 84.68(b)(7) as proposed without modifications.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering comments received, we are finalizing § 84.68 as proposed with no modifications.

Illegal use of drugs (§84.69)

In § 84.69(a)(1), we proposed to state that except as provided in paragraph (b), this part does not prohibit discrimination based on current illegal use of drugs.

In § 84.69(a)(2), we proposed to prohibit discrimination based on illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully; is participating in a supervised rehabilitation program; or is erroneously regarded as engaging in such use.

In § 84.69(b), we proposed to prohibit a recipient from excluding an individual based on illegal use of drugs from the benefit of programs and activities providing health services and services provided under subchapters I, II, and III of the Rehabilitation Act, which includes, among other things, vocational rehabilitation programs. This provision comes directly from the statute, 29 U.S.C. 705(20)(C). This provision differs from a similar provision in the ADA title II statute and regulations, which prohibit denial of health services or services provided in connection with drug rehabilitation, at 42 U.S.C. 12210(C) and 28 CFR 35.131(b).

Proposed § 84.69(c)(1) addressed drug testing. It proposed to make clear that this part does not prohibit a recipient from adopting or administering reasonable policies or procedures including drug testing designed to ensure that an individual who formerly engaged in illegal use of drugs is not now engaging in illegal use of drugs.

In § 84.69(c)(2), we proposed to provide that nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

The comments and our responses regarding § 84.69 are set forth below.

Comment: Many commenters had concerns about this proposed section. As discussed under the definition of "illegal use of drugs" in § 84.10, they said that the regulation's definition

of "current" represents an outdated view of substance use disorder. Similarly, they believe that the definition of a "supervised drug rehabilitation program" in § 84.69(a)(2) has changed over the years. They urged that the term be interpreted broadly to include treatment for a substance use disorder received under the supervision of a medical provider or licensed professional. They noted that since the Rehabilitation Act was enacted in 1973, treatment for individuals with SUD has changed radically and no longer comports with how many individuals receive their treatment. Treatment is often provided in primary care, psychology, and other clinical practices as well as, increasingly, online. Some of these are not stand-alone drug rehabilitation programs, and many involve continuation of treatment on an outpatient basis. Commenters asked that we make explicit that the term "supervised rehabilitation program" means any setting where SUD treatment is received under the supervision of a medical provider or other licensed professional. Some suggested that the term be defined in the regulation. Others recommended that the preamble make it clear that the term is to be read broadly and inclusively, reflecting modern day SUD treatment.

Response: Congress has not amended 29 U.S.C. 705(20)(C)(ii), on which the current regulatory text is closely modelled. Because the Department remains bound by the current statutory text, we decline to revise the regulatory language. Although the Department agrees that treatment for SUD has evolved since the enactment of the Rehabilitation Act, we agree with commenters that the best reading of the statutory terms "supervised drug rehabilitation program" and "supervised rehabilitation program" generally encompass these modern day treatments of substance use disorders.

Comment: Many commenters expressed concerns about § 84.69(b)(2). That section states that a drug rehabilitation program may deny participation to individuals who engage in current illegal use of drugs while they are in the program. As with the meaning of "supervised rehabilitation program" and "current" illegal use of drugs, they believe this section is similarly outdated and does not comport with modern understanding of drug treatment and recovery.

Several commenters noted the irony that the provision allows health care providers to deny treatment to an individual because they are experiencing symptoms of the very disease for which they are seeking help. Some commenters suggested that before denying entrance to a program, recipients should be required to make an individualized determination about whether participation in the program is warranted.

Response: Section 504 provides that the term "individual with a disability" "does not include an individual who is currently engaging in illegal use of drugs, when a covered entity acts on the basis of such use."[75] We have retained this language, consistent with the statutory language.

Comment: Several commenters expressed concerns about discriminatory treatment of individuals with SUD, whether the substances are legal or illegal, who are being denied myriad health services. Many provided examples of individuals who were excluded from, for example, nursing homes and emergency rooms at hospitals because of SUD as well as denials of life-saving surgery and organ transplantation. Others said that mental health centers sometimes have blanket policies of denying treatment to all individuals with SUD.

Response: A denial of treatment to individuals with SUD would violate the medical treatment requirement, § 84.56(b)(1), if it is based on biases or stereotypes or any of the other prohibited bases listed in that paragraph. It would also violate § 84.56(b)(2), denial of treatment for a symptom or condition separate from an underlying disability, if a recipient is refusing to provide admission or treatment because of the underlying disability as an individual with SUD. If the denial of treatment was based on or motivated by the fact that the individual is currently engaged in illegal use of drugs, it would violate § 84.69(b), which provides that an individual currently engaged in illegal use of drugs shall not be excluded from the benefits of health services on the basis of their illegal use of drugs if he or she is otherwise entitled to such services.

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[75] 29 USC 705(20)(C).

However, that section must be read in conjunction with § 84.53 which provides in this final rule that recipients who operate any type of health care facility may not discriminate in admission or treatment against an individual with a substance or alcohol use disorder. This prohibition applies to all individuals with SUD, whether engaged in illegal use of drugs or not. See §84.69(b), prohibiting the denial of health services and services provided under the Rehabilitation Act and discussion of § 84.53 for more information about that section.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.69 as proposed with no modifications.

Maintenance of accessible features (§ 84.70)

This proposed section tracks the ADA title II and title III regulations on maintenance of accessible features.

Proposed § 84.70(a) required that recipients 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.

Proposed § 84.70(b) stated that the section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

Proposed § 84.70(c) stated that 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.

The comments and our responses regarding § 84.70 are set forth below.

Comment: We received many comments, including from several organizations representing individuals with disabilities, requesting that this section be revised to encompass all accessibility features and disability modifications, including auxiliary aids and services.

Commenters also requested a statement in the regulation that repeated mechanical failures for any reason constitutes a violation of section 504.

One commenter expressed concerns that the rule appears to focus only on mechanical failures. The commenter urged us to emphasize that the maintenance requirement applies not only to mechanical failures but also to interruptions in service or access caused by weather events such as fires, floods, and excessive heat.

Still another commenter said that the regulation should address recipients' responsibilities to continue to provide access to services while interruptions persist. The commenter suggested that language be added to the text of the regulation to clarify that whenever a temporary interruption might deny individuals with disabilities' access to programs and activities, the recipient must provide advance notice of the temporary interruption and must also provide reasonable modifications to individuals with disabilities until the maintenance or repairs are resolved.

Response: The Department appreciates all the commenters' feedback. However, we respectfully disagree with the commenters who suggested that the maintenance requirement be extended to include auxiliary aids and services. Requirements concerning auxiliary aids are contained in § 84.77(b) of the communications subpart. That section requires that recipients provide auxiliary aids and services where necessary to afford an equal opportunity to participate in a program or activity. A recipient would likely be in violation of that section if it were to fail to provide an appropriate auxiliary aid or service or if it were to provide one that was not in working order. Accordingly, it is not necessary to add a reference to auxiliary aids and services in § 84.70.

Comment: Some commenters requested a statement in the rule that repeated mechanical failures for any reason violate section 504.

Response: Section 84.70(b) states that isolated or temporary interruptions in access or service would not be considered violations of this part. Implicit in that statement is that repeated

interruptions could still violate the requirements of this part. 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.

In response to the concern that the regulation is focused on mechanical failures and does not recognize other causes for temporary interruptions such as those that are weather-related, we note that the preamble to the proposed rule makes clear that the requirement goes beyond mechanical failures. The preamble gives the following examples of situations that would violate the rule and that do not involve mechanical failures: storing excess furniture or supplies in the larger, accessible toilet stall; putting potted plants in front of elevator buttons; and placing ploughed snow in an accessible parking spot.

With regard to the commenter who asked that the rule require advance notice of temporary interruptions and provision of reasonable modifications in such instances, we agree that reasonable modifications can be requested in the event of temporary interruptions. Section 84.68(b)(7) requires that recipients provide reasonable modifications whenever necessary to provide an equal opportunity to benefit from its programs or activities unless the recipient can demonstrate that making the modifications would result in a fundamental alteration of the program or activity. For example, an individual with a mobility disability arrives at a building for a meeting with someone whose office is on the fifth floor and discovers that the one accessible elevator is out of service. A reasonable modification might be for the person on the fifth floor to come downstairs and meet the individual somewhere on the ground floor or in a nearby building. Providing notice of a temporary interruption whenever possible is a best practice, but not a requirement of section 504. For example, if a recipient knows that an elevator will not be working during a certain time in the future, it would be a good practice to put up a sign to that effect. However, there may be times when advance notice is not possible such as when an individual with a disability attempts to use a wheelchair lift and a mechanical problem is discovered. In the event the recipient knows in advance that there will be a temporary

interruption in service, is aware that an individual with a disability is scheduled to come to the building, and has that person's contact information, it would be helpful for the recipient to notify that individual in advance. However, we decline to revise the rule to require such notice since it is not always possible to do.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above we are finalizing § 84.70 as proposed with no modifications.

Retaliation or coercion (§ 84.71)

This section is identical to the retaliation provision in the ADA title II regulations.

Section 84.71(a) proposed to prohibit a recipient from discriminating 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.

Section 84.71(b) proposed to prohibit a recipient from coercing, intimidating, threatening, or interfering 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.

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. The proposed regulation had another prohibition against intimidatory or retaliatory acts. Section 84.98 adopts the procedures of title VI of the Civil Rights Act of 1964. Section 80.7 of the title VI regulations (45 CFR 80.7) contains a provision that is similar to § 84.71(a) but includes a mandate that the identity of complaints be kept confidential except to the extent necessary to carry out the purposes of this part.

The comments and our responses to them regarding § 84.71 are set forth below.

Comment: We received supportive comments on this section. One disability rights organization said that retaliation should be prohibited in the strongest terms possible because it is very common and very difficult to prove. Several individuals described their experiences with retaliation when their complaints about alleged discrimination were ignored.

Response: We appreciate the commenters' support of the section and agree that protection against retaliation is crucial. We note that the final rule retains in subpart K the adoption of title VI procedures. As noted above, those procedures include another prohibition against retaliation.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.71 as proposed without modification.

Personal services and devices (§ 84.72)

Proposed § 84.72 was identical to the provision in the ADA title II regulations, 28 CFR 35.135. It stated that this rule does not require recipients to provide individuals with disabilities with personal devices, such as wheelchairs; individually prescribed devices such as prescription eyeglasses or hearing aids; readers for personal use of study; or services of a personal nature, including assistance in eating, toileting, or dressing. The NPRM also noted that where personal services are customarily provided as part of a recipient's programs or activities, then these personal services should also be provided to persons with disabilities.[76]

The comments and our responses to them regarding § 84.72 are set forth below.

Comment: Several commenters expressed concern that this provision was written so broadly that it would interfere with the requirements in other parts of the proposed rule, including the requirement to provide reasonable assistance to persons using accessible medical equipment, for example, including helping a person who uses a wheelchair to transfer from their

[76] 88 FR 63478.

wheelchair to the exam table or diagnostic chair, as well as the variety of obligations to provide auxiliary aids. An organization representing persons who need communication tools and supports noted that devices used for communication are often not treated as covered auxiliary aids or services but as personal devices and, as a result, are not provided to persons with communication needs who require them to receive, for example, health care not as effective as that provided to others. This comment suggested adding regulatory text that, where personal devices and services are customarily provided as part of a recipient's program or activities, then these personal devices and services should also be provided to persons with disabilities.

Response: The Department is aware that many programs funded by the Department include, as a regular feature of the program, the provision of personal care services. Hospitals, nursing homes, child welfare services, and home and community-based services (HCBS), by their very nature, routinely provide assistance in eating, dressing, and toileting, the type of personal care services specifically not required by this provision. The Department reiterates its statement from the NPRM that where personal devices and services are customarily provided as part of a recipient's program or activities, then these personal devices and services should also be provided to persons with disabilities. However, it is important to preserve parity with the ADA regulations given Congress's intent that the ADA and section 504 be interpreted consistently and to reduce confusion for both recipients and individuals with disabilities. Therefore, the Department declines to add this statement to the regulatory text but emphasizes that this provision should not be interpreted as a blanket allowance for recipients to deny personal devices and services to individuals with disabilities that the recipient would customarily provide to individuals without disabilities as part of its programs and activities. The supplementary information accompanying DOJ's title III ADA regulation includes this interpretation as well.[77]

[77] 28 CFR part 36, appendix C (1991) (addressing § 36.306) ("Of course, if personal services are customarily provided to the customers or clients of a public accommodation, *e.g.*, in a hospital or senior citizen center, then these personal services should also be provided to persons with disabilities...").

Comment: Another commenter on § 84.72 noted that the rule should be changed to make clear that recipients cannot require persons with disabilities to be separated from their own personal devices and to then function without their devices, for example, prohibiting persons who use wheelchairs from being told that they cannot take their own wheelchairs with them when being transported to the hospital.

Response: The Department does not believe it is necessary to add regulatory text to address this situation, but notes that there are circumstances in which recipients are prohibited from separating persons with disabilities from their personal devices that they need to function. For example, an ambulance company that receives Federal funds from HHS is called to the scene of an automobile accident and is going to take a person with a disability who uses a wheelchair to the emergency room of a hospital. The ambulance service, a recipient subject to the general prohibitions against excluding individuals with disabilities in § 84.68, generally cannot pick up the person and leave the wheelchair, an expensive piece of accessible personal equipment, behind at the scene of the accident and expect the person with the disability to recover their wheelchair. The Department recognizes that there may be room or other limitations in the ambulance itself, but that does not relieve the ambulance service of any responsibility to assist in returning the wheelchair to the person with a disability, which may be needed at the site where the person with the disability is being transported. As a recipient, the ambulance service is subject to all of the general prohibitions in § 84.68 which states that individuals with disabilities may not be excluded from participation in or be denied the benefits of their programs or activities. In situations like this, the ambulance company can have a policy or agreement in place to deal with the transport of a wheelchair that might not fit into the ambulance itself.

Similarly, in situations where a person with a speech disability enters a hospital or a nursing home with their personal communication device that they use because they cannot rely on speech alone to be heard and understood by others, the recipient hospital or nursing home must not separate the person from their device, which would deprive the person with a disability

of the ability to communicate with others. The Department notes that DOJ has followed a similar policy in addressing concerns where, for example, police may make an arrest of a wheelchair user and must transport both the person and their accessibility equipment to the police station.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering comments received, we are finalizing § 84.72 as proposed with no modifications.

Service animals (§84.73)

Proposed § 84.73 addressed service animals and tracks the ADA title II regulations.[78] Proposed § 84.73(a) stated that generally recipients shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability. The rule, in proposed § 84.10, defined a service animal as any dog that is individually trained to do work or perform tasks for the benefits of an individual with a disability.

Proposed § 84.73(b) contained detailed requirements for recipients and handlers of service animals, including when a recipient may ask an individual with a disability to remove the service animal from the premises (§ 84.73(b)), that the service animal shall be under the control of its handler (§ 84.73(d)), that the recipient is not responsible for the care and supervision of a service animal (§ 84.73(e)), that the recipient shall not ask about the nature or extent of a person's disability, but may ask if the animal is required because of a disability and what work or task the animal has been trained to perform (§ 84.73(f)), 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 go (§ 84.73(g)), and that recipients are not allowed to require an individual with a disability to pay a surcharge (§ 84.73(h)). Proposed § 84.73(i) stated 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 and it provided assessment factors to

[78] 28 CFR 35.136.

determine whether reasonable modifications can be made to allow a miniature horse into a specific facility.

The comments and our responses regarding § 84.73 are set forth below.

General comment: The comments that the Department received on § 84.73 were uniformly supportive. Commenters noted that DOJ's ADA regulations were crafted through years of experience and a duly compassionate outlook and that having the same service animal regulation for section 504 as for title II of the ADA will provide necessary clarity for persons who work with service animals and health care and social service providers that receive Federal funding.

Comment: Some commenters recommended adding the example of "carrying an individual's speech-generating device" as an example of the type of work or service that a service animal could be trained to do.

Response: The Department agrees that service animals may be used to assist persons with communication disabilities and that recipients should be made aware of this possibility so that they do not unnecessarily inquire of persons with communication disabilities about the nature of the work that the service animal performs for the person. However, the Department is not adding language to the regulatory text, because adding phrases here that are not found in DOJ's ADA regulations on service animals may cause confusion.

Comment: The Department received several comments on the use of service animals in health care settings. An entity that operates a hotline providing guidance to service animal handlers and to recipients noted that over 70% of their callers addressed access challenges in health care facilities due to the presence of service dogs.

Response. The Centers for Disease Control and Prevention (CDC) notes there is no evidence that suggests that animals pose a more significant risk of transmitting infection than people; therefore, service animals should not be excluded from such areas unless a patient's situation or a particular animal poses risk that cannot be mitigated through reasonable

measures.[79] Thus, the Department notes that under the final rule, a health care facility generally must permit a person with a disability to be accompanied by a service animal in all areas of the facility in which that person would otherwise be allowed. There are some exceptions, however. Consistent with case law and CDC guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection-control measures, such as operating rooms and burn units. Usually, a service animal may accompany its handler to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, restrooms, and all other areas of the facility where health care personnel, patients, and visitors are permitted without added precaution.

Comment: Several commenters asked for clarification on issues related to the phrase "under the control of its handler." Commenters stated that this clarification should help prevent discrimination against minors and persons with severe disabilities who are sometimes viewed as incapable of acting as the handler of their own service dog due to age or false assumptions and stereotypes about their disability. Other commenters expressed concern about handlers who are not able to physically control their service dog. Commenters noted that people with mental and communication disabilities are increasingly using service dogs and their handlers may not be able to issue verbal commands but can control their service dog through gestures and nonverbal means.

Response: The Department agrees that the handler of a service animal is most often an individual with a disability. The Department's rule at § 84.73(d) notes that one way for an individual with a disability to exercise control over their service animal is by "voice control, signals, or other effective means." This language encompasses gestures and nonverbal means of controlling a service dog.

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[79] Ctrs. for Disease Control & Prevention, Environmental Infection Control Guidelines, Animals in Health-Care Facilities (Nov. 5, 2015). https://www.cdc.gov/infectioncontrol/guidelines/environmental/background/animals.html.

Comment: Some commenters noted that some court decisions have applied the concept of reasonable modification to § 84.73(e), which states that the recipient is not responsible for the care and supervision of a service animal. The comments seek clarification that providing some assistance to a person with a disability while they handle or care for their service dog may be required as a reasonable modification as long as it does not rise to the level of a fundamental alteration and is consistent with the type of assistance provided to other people with or without disabilities.

Response: The Department notes that DOJ in its "Frequently Asked Questions about Service Animals and the ADA," states that the handler is responsible for caring for and supervising the service animal, which includes toileting, feeding, and grooming.[80] However, a school or similar entity operating in the K-12 context may be required to provide some assistance, which is short of care or supervision, to enable an individual with a disability to handle their service animal.[81]

Recipients are not obligated to supervise or otherwise care for a service animal. This guidance specifically addresses patients in hospital care who have service animals with them in their hospital room. It states that, if the patient is not able to care for the service animal, the patient can make arrangements for a family member or friend to come to the hospital to provide these services, as it is always preferable that the service animal and its handler not be separated.[82] In addition, the CDC has stated that care of the service animal remains the obligation of the person with the disability, not the health care staff.[83]

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[80] U.S. Dep't of Justice, *Frequently Asked Questions about Service Animals and the ADA* (2020), Question 9, https://www.ada.gov/resources/service-animals-faqs/.
[81] U.S. Dep't of Justice, *Frequently Asked Questions about Service Animals and the ADA* (2020), Question 27, https://www.ada.gov/resources/service-animals-faqs/.
[82] U.S. Dep't of Justice, *Frequently Asked Questions about Service Animals and the ADA* (2020), Question 15, https://www.ada.gov/resources/service-animals-faqs/
[83] *See* Ctrs. for Disease Control & Prevention, *Environmental Infection Control Guidelines, Animals in Health-Care Facilities* (Nov.5, 2015) https://www.cdc.gov/infectioncontrol/guidelines/environmental/background/animals.html.

Comment: Several commenters noted that the use of miniature horses as a form of reasonable modification of policy has worked well with ADA title II rules and should be added to the Department's section 504 rule. A trade organization noted that, while miniature horses can serve persons with disabilities, they are legally recognized as livestock and should be included as a separate entity from service animals. A legal rights advocacy organization stated that miniature horses may work best for higher weight or tall individuals, and stated the importance of including obesity as covered by section 504, as that would help ensure that higher weight individuals will be determined to be persons with disabilities and entitled to reasonable modification.

Response: The Department agrees that miniature horses, under § 84.73(i), are not included in the definition of service animal, which is limited to dogs, and that they are legally recognized as livestock. However, the regulatory text 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. In the discussion of the definition of disability above at § 84.4, the Department noted that obesity could be considered a physical or mental impairment and that, if it substantially limited one or more of a person's major life activities, would qualify as a disability. In this case, a qualifying higher weight individual may be able to avail themselves of the use of miniature horses as a form of reasonable modification of polices, practices, or procedures.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.73 as proposed with no modifications.

Mobility devices (§ 84.74)

This section in the section 504 NPRM was identical to the ADA title II regulation.[84] Proposed § 84.74(a) provided that recipients 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.

Section 84.74(b) proposed to require a recipient to 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. The rule, in proposed § 84.10, defined other power-driven mobility device to mean any mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobilities disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion.

Proposed § 84.74(b)(2) listed the factors that recipients would be required to consider in determining whether to permit other power-driven mobility devices on their premises, including the type, size, weight, dimensions, and speed of the device; the volume of pedestrian traffic; the facility's design; whether the facility is indoors or outdoors; the availability of storage space if requested; and whether the use of the device creates a substantial risk of serious harm to the environment or natural and cultural resources.

Proposed § 84.74(c)(1) would prohibit a recipient from asking an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability. Proposed § 84.74(c)(2) would permit a recipient to 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, including a valid, State-issued parking placard or

[84] 28 CFR 35.137.

other State-issued proof of disability, or in lieu of such documents, a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability.

The comments and our responses to them regarding § 84.74 and related terms are set forth below.

Comment: Commenters were generally appreciative of the Department's decision to adopt the approach taken by DOJ on mobility devices in § 84.74. Some commenters expressed concern that the phrase "other power-driven mobility devices" in § 84.74(b) could be interpreted to include scooters and power chairs commonly used by persons with disabilities, so they recommended that the Department clarify that higher capacity wheelchairs and scooters are covered in § 84.74(a), and not in § 84.74(b). A commenter providing health care made the case that the Department should exempt health care facilities from having to admit devices like Segways®, golf carts, and other motorized devices because allowing them into the facility will put patients in harm's way. One commenter noted that some recipients, including nursing homes, use blanket bans of power wheelchairs to exclude individuals with disabilities from programs and services.

Response: The Department notes that proposed § 84.74(a) specifically concerns "wheelchairs" and that the definition of "wheelchair" in § 84.10 includes a "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 includes scooters and power wheelchairs that are specifically designed for the use of persons with mobility disabilities. It contrasts with the definition of other power-driven mobility devices, which are not necessarily designed primarily for the use of persons with mobility disabilities. This definition of other power-driven mobility devices encompasses golf carts and electronic personal assistance mobility devices such as the Segway®. Thus, § 84.74(a) includes scooter and power wheelchairs designed for the use of persons with mobility disabilities, and § 84.74(b) includes golf carts,

Segways®, and other similar motorized devices that have not been primarily designed for persons with mobility disabilities.

The Department believes that the processes established by § 84.74 will allow hospitals and other recipients to make reasonable and reasoned decisions about whether and how to allow other power-driven mobility devices into their facilities. Section 84.74(b)(1) provides that recipients 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 the recipient can demonstrate that the class of such devices cannot be operated in accordance with legitimate safety requirements. Section 84.74(b)(2) provides a list of assessment factors that recipients can use to consider in making determinations concerning whether and how the recipient will allow different types or classes of other power-driven mobility devices into its facilities. The Department believes that this process will allow hospitals and others to develop and issue policies that balance the need for patient safety with the needs of persons with disabilities who use other power-driven mobility devices in their facilities.

For example, using these assessment factors, a county hospital may decide that it can allow electronic personal assistance mobility devices (EPAMDs), which are other power-driven mobility devices under proposed § 84.10 in any areas open to pedestrian use, including the cafeteria and general patient rooms, but not in other specified areas of the hospital (e.g., the emergency room or other areas with high traffic and cramped quarters), as long as operators do not operate the device faster than pedestrians are walking. A recipient might also decide, using the assessment factors, that due to air quality concerns, for example, gas-powered devices would not be allowed in the hospital's indoor facilities; or that certain classes of devices, such as golf carts, could not be allowed for safety reasons, because the facility's corridors or aisles are not wide enough to accommodate those vehicles and are heavily trafficked. Because § 84.74 establishes a procedure and sets forth appropriate assessment standards for recipients, the Department does not view it as necessary to exempt health care facilities from the requirements

of this section in its final rule. In addition, the Department notes that health care facilities, both public and private, have already been subject to this same provision since 2010 under DOJ's ADA regulations for titles II and III.

As to the comment on blanket bans on the use of motorized wheelchairs in nursing homes, the Department notes that such bans may violate section 504. The Department's final rule requires recipients to allow the use of wheelchairs, including power-driven ones, and contains several disability-related provisions that require a recipient to tailor its approach based on the specific circumstances rather than apply blanket bans. For example, recipients need not allow an individual to participate in or benefit from the programs or activities of that recipient if it concludes, after an individualized assessment, that the individual poses a "direct threat" as set forth in § 84.75. Similarly, "a recipient may impose legitimate safety requirements necessary for the safe operation of its programs or activities" in § 84.68(h). 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." In addition, § 84.68(b)(8) provides that 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 program or activity, unless such criteria can be shown to be necessary for the provision of the program or activity being offered."

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.74 as proposed with no modifications.

Direct threat (§ 84.75)

Proposed § 84.75(a) stated that nothing in this part requires a recipient to permit an individual to participate in or benefit from programs or activities when that individual poses a direct threat.

Proposed § 84.75(b) stated that except as provided in paragraph (c), 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.

Proposed § 84.75(c) provided that in the area of employment, the individualized assessment must be made according to the ADA title I regulations of the Equal Employment Opportunity Commission.

The comments and our responses regarding § 84.75 are set forth below.

Comments: The Department received many comments, including from multiple organizations representing individuals with disabilities, stating that the direct threat defense has been misunderstood, overused, and misconstrued and has been used to justify blanket bans on wheelchairs, power wheelchairs, and other mobility assistive devices based on generalizations and stereotypes. The commenters asked that we clarify that the direct threat analysis should be focused on the individual and requires a fact-specific, individualized assessment.

Response: As set forth in the definition of direct threat in § 84.10, the standard to apply when determining whether a situation poses a direct threat is whether it is a significant risk to the health and safety of others that cannot be eliminated by a modification of policies, practices, and procedures, or by the provision of auxiliary aids and services. In determining whether that standard has been met, the Department affirms the notion that the determination is a factual one that requires an individualized assessment and that it cannot be used to impose blanket bans on, for example, mobility devices without consideration of the appropriate factors.

Comment: An organization representing an association of State government agencies highlighted the potential unintended consequences of the direct threat text. They focused on a subgroup of individuals with disabilities who have impulsive and explosive behaviors that can

sometimes result in injury to themselves or others. The commenter noted that in these types of situations, many States have developed small community service settings for those individuals rather than providing services in more restrictive settings such as State institutions. The commenters were afraid that if the Department were to keep the direct threat language as in the proposed rule, individuals who need extraordinary measures will be permanently assigned to institutional care. They suggested the addition of a paragraph in the text indicating that if all reasonable modifications have been made to mitigate the risk and the probability of potential injury still exists, the recipient must structure the program with sufficient staff well trained to disarm and defend against the threatening behavior.

Response: The Department thanks the commenters for their thoughtful suggestions for additions to the direct threat text. Section 84.68(b)(7) contains the Department's reasonable modifications requirement. That section requires recipients to provide reasonable modifications to policies, practices, and 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. And § 84.76 contains the Department's integration requirement. These regulations require "reasonable" modifications but commenters want the mandate to include "extraordinary" modifications. The Department is unable to change the direct threat text to require more of recipients than is required by the reasonable modifications and integration provisions. Recipients can certainly decide to provide more than is required by section 504 to serve particular individuals but we cannot mandate that they do so. Accordingly, we decline to change the regulatory text.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering comments received, we are retaining § 84.75 as proposed with no modifications.

Integration (§ 84.76)

Proposed § 84.76 expanded upon the integration mandate in the existing section 504 regulations at § 84.4(b)(2) and the integration requirement in proposed § 84.68(d).

Proposed § 84.76(a) addressed the application of the section.

Proposed § 84.76(b) prohibited administering a program or activity in a manner that results in unnecessary segregation of individuals with disabilities.

Proposed § 84.76(c) defined a segregated setting as one where individuals with disabilities are unnecessarily separated from people without disabilities. Such settings are populated exclusively or primarily with individuals with disabilities, and may be characterized by regimentation in daily activities; lack of privacy or autonomy; or policies limiting visitors or limiting individuals' ability to engage freely in community activities and to manage their own activities of daily living.

The Department invited comment on whether the definition of "segregated setting" should be expanded.

Proposed § 84.76(d) provided a non-exhaustive list of specific prohibitions.

Proposed § 84.76(e) stated 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.

The Department invited 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.

The comments and our responses regarding § 84.76 are set forth below.

General

Comments: Most commenters enthusiastically supported the clarification of integration requirements in this section. We received supportive comments from individuals, advocacy organizations, State government and provider associations, and managed care plans, among

others. Commenters emphasized the importance of integrated services to ensure individuals with disabilities can live, work, and engage in the community like people without disabilities.

Response: The Department appreciates support for this section and intends for the new provisions to clarify the existing requirements of covered entities.

Comments: Several commenters, including parents of adult children with disabilities and parent advocacy organizations, expressed concerns related to the legitimacy of the integration provision and shared the opinion that institutional settings are the only appropriate option for some individuals with disabilities. Further, these commenters alleged that failure to ensure the availability of institutional placements is discrimination against individuals with disabilities.

Response: While this section elaborates on the prior rule's language requiring programs and services to be administered in the most integrated setting, the additions are intended to codify longstanding case law and Federal guidance with respect to the obligations of covered entities to serve individuals with disabilities in the most integrated setting appropriate to their needs.[85] The Department recognizes several commenters' opposition to the integration mandate. We note that contrary to some parent advocacy groups' position, the integration mandate in section 504 or title II does not require recipients or public entities to offer services, programs, or activities in institutional settings.[86] We reiterate this section clarifies existing obligations under Federal law to help recipients deliver services in the most integrated setting appropriate to a person's needs.

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[85] *See, e.g., Olmstead v. L.C.*, 527 U.S. 581 (1999); 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.

[86] *See e.g., Richard C. ex rel. Kathy B. v. Houstoun*, 196 F.R.D. 288, 292 (W.D. Pa. 1999) ("[I]t does not logically follow that institutionalization is required if any one of the three *Olmstead* criteria is not met."); *Ball v. Kasich*, 520 F. Supp. 3d 979, 984-85 (S.D. Ohio 2021) ("These courts find that failure to provide facility-based services does not constitute discrimination under the ADA or Rehabilitation Act." *citing D.T. v. Armstrong*, 2017 U.S. Dist. LEXIS 91725 *20-21, 2017 WL 2590137 *7–8 (D. Idaho 2017), *Sciarrillo v. Christie*, 2013 U.S. Dist. LEXIS 175178, 2013 WL 6586569, * 4 (D. N.J. Dec. 13, 2013) (citing *Richard S. v. Dep't of Developmental Servs. of the State of Cal.*, 2000 U.S. Dist. LEXIS 22750, 2000 WL 35944246, *3 (C.D. Cal. Mar. 27, 2000)); *Richard C. ex rel. Kathy B. v. Houstoun*, 196 F.R.D. 288, 292 (W.D. Pa. 1999); *Ill. League of Advocates for the Developmentally, Disabled v. Quinn*, 2013 U.S. Dist. LEXIS 86637, 2013 WL 3168758, *5 (N.D. Ill. June 20, 2013)).

Comment: A commenter suggested that the Department's integration mandate discriminates against those persons with severe or multiple disabilities who may need the services of institutional settings. Another commenter representing State government stated that the proposed rule violates the constitutional principle of separation of powers.

Response: The Department does not agree that its integration requirement in § 84.76(b) discriminates against persons with severe disabilities. That section requires providing a person with a disability with the most integrated setting "appropriate to the needs of a qualified persons with a disability." This language by its own terms recognizes the possibility that there may be situations where an appropriate placement may be in an institutional setting.

As to the comment on the separation of powers, the Department disagrees with the comment's assertion that its regulation removes political judgment from the hand of the States or supplants States' authority or discretion in this area. The Department is following the precedent set in the *Olmstead* decision. The regulation recognizes that, when States already have programs in place providing services to persons with disabilities, those programs must comply with two Federal civil rights requirements: section 504's and the ADA's requirement not to operate programs or activities in a manner that discriminates on the basis of disability. For reasons discussed elsewhere in our responses to comments about § 84.76 (d) (discussion of the "at serious risk" standard and the *U.S. v. Mississippi* decision) and the discussion of Executive Order 13132 and federalism, the rule's integration mandate, including the prohibition on failure to provide community-based services that results in "serious risk of institutionalization," does not exceed statutory authority under section 504 and the ADA and therefore does not implicate separation of powers concerns by improperly intruding on State policymaking discretion.

Further, the rule requires only "reasonable modifications," and codifies the "fundamental alteration" limitation, two additional features that respect the role of federalism.

Application (§ 84.76(a))

Comments: Several commenters asked the Department to clarify whether this section applies to specific programs, such as day programs for individuals with dementia or programs for individuals with mental illness. Additionally, some commenters asked for elaboration on how this applies to programs funded through Medicare Advantage. These commenters argued that the failure to provide Medicaid and Medicare beneficiaries with needed services, including mental health services, treatments, and equipment, quickly leads to decreased health and function that can put both Medicaid and Medicare enrollees at serious risk of unnecessary institutionalization.

Response: The integration requirements apply to all programs or activities that receive Federal financial assistance from the Department without exception. The rule clarifies recipients' existing obligations under section 504 and does not create new obligations regarding integration. For example, managed care organizations and Medicare Advantage entities are obligated to provide services in the most integrated setting if doing so does not fundamentally alter the program or service. Similarly, hospital systems receiving Federal financial assistance from the Department must ensure their discharge planning processes facilitate HCBS when appropriate, rather than defaulting to coordinating placements for congregate care facilities.

We note that the "most integrated setting" depends on what is appropriate for the individual with a disability.

Comments: Several commenters highlighted the importance of the availability of key resources like accessible, affordable housing; transportation; and assistive technology, that individuals with disabilities need to engage fully in the community. Shortages in these programs and services create barriers to community integration. Commenters encouraged the Department to include access to these services in the rule.

Response: The Department agrees that many federally funded services are necessary to help eliminate barriers to community living and engagement. We note that this rule's coverage extends only to recipients of Federal financial assistance through this Department, and does not reach many transportation, housing, education, or other programs that do not receive HHS funds.

However, we collaborate frequently with our Federal partners who do fund these services and have issued joint guidance about how these programs support community integration for disabilities.[87] We will consider additional joint guidance to advance coordination as appropriate.

Applicability of the Integration Requirement in a Public Health Emergency

Comments: Several commenters noted that Public Health Emergencies and natural disasters are critical junctures where people with disabilities are institutionalized. They cited the National Council on Disability (NCD) report, "Preserving Our Freedom: Ending Institutionalization of People with Disabilities During and After Disasters," which found that people with disabilities are often transferred to nursing facilities or segregated shelters during emergencies, without proper assessment, transition planning or discharge planning.[88] Commenters highlighted that, during the COVID-19 pandemic, people were often placed in congregate care settings with extreme levels of uncontrolled infection and resulting high mortality rates.

Response: The Department has consistently stated that section 504 and other civil rights obligations apply during a public health emergency.[89] Further, even if a practice is allowed through an administrative policy such as a Public Health emergency waiver, such a waiver does not obviate the covered entity's responsibility to meet their obligations under section 504.

Obligations under the Medicare Program

Comments: Several commenters noted that the integration mandate has substantial implications for the Medicare program and requested that the Department clarify obligations of

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[87] *See e.g.,* U.S. Dep't of Health & Human Servs. & U.S. Dep't of Housing & Urban Dev., Fact Sheet: Advancing Community Living Through Coordination Between Housing and Voluntary Community Services (Dec. 8, 2021), https://acl.gov/sites/default/files/ada/HHS-HUD_HousingFactSheetpdf.pdf.

[88] Nat'l Council on Disability, *Preserving Our Freedom: Ending Institutionalization of People with Disabilities During and After Disasters*, (May 24, 2019), https://ncd.gov/publications/2019/preserving-our-freedom.

[89] *See* 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/civilrights-covid19/disabilty-faqs/index.html; U.S. Dep't of Health & Human Servs., Off. for Civil Rts., Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19) (Mar. 28, 2020), https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf.

recipients operating Medicare-financed programs under section 504's integration mandate, including with respect to home health and other Medicare benefits.

Response: The Department agrees that section 504's integration mandate applies to Medicare programs, including Medicare Advantage plans, Medicare Part D plans, and other entities that receive Medicare funding (such as the Program of All-inclusive Care for the Elderly (PACE) programs or health plans operating under the Centers for Medicare & Medicaid Services' (CMS's) dual eligible demonstrations).

Discriminatory action prohibited (§ 84.76 (b))

Comments: Several commenters found the phrasing "unnecessary segregation," in § 84.76 (b), to be an extraneous and potentially confusing term. They expressed concern that the addition of the term may lead to the assumption that there is a second standard distinct from "most integrated setting appropriate to the needs of a qualified person with a disability," that determines whether segregation is unnecessary. Other commenters objected to the proposed phrase, stating that segregation of people with disabilities is never necessary.

Response: Recipients have a longstanding, affirmative obligation under the integration requirement of section 504 to administer a program or activity "in the most integrated setting appropriate to the needs of a qualified person with a disability."[90] Failing to do so may violate section 504. We appreciate comments that the second sentence may confuse recipients about the applicable standard. To clarify the requirements, we are deleting the second sentence. In doing so, the Department intends only to clarify the requirement of this section and does not mean to narrow the obligation to provide services in the most integrated setting appropriate to the needs of the individual with a disability.

Responses to Integration Question 1

Comments: In the discussion in the preamble of the proposed definition of "most integrated setting," we solicited comments on whether the definition should be expanded. Many

[90] 45 CFR 84.4(b)(2).

commenters from disability advocacy organizations suggested a definition: "The most integrated setting is a setting that enables people with disabilities to live as much as possible like people without disabilities." Commenters said this definition was supported in a 2014 disability coalition statement "Community Integration for People with Disabilities."[91] Commenters also suggested that this definition avoids imposing concrete secondary standards distinct from the "most integrated setting," such as determining what is "mainstream society." Some commenters also found the phrase "mainstream society" to be pejorative or biased against groups not identified as "mainstream."

Comments: Many commenters supported the importance of the individual's right to choose how and when they engage in the broader community. Some also emphasized the importance of informed choice, that an individual receives adequate information about available and programs and resources available to support services in the community.

Response: We appreciate the commenters' thoughtful responses to our request for comment on whether the definition of "most integrated setting" should be expanded, and we note disability advocacy groups' preference for a more streamlined definition. We have modified the NPRM's definition of "most integrated setting" to align more closely with the description of "most integrated setting" in title II *Olmstead* guidance.[92] To mirror the guidance, we are adding the clause *"*these settings provide opportunities to live, work, and receive services in the greater community, like individuals without disabilities," to the definition published in the NPRM.

Segregated settings (§ 84.76(c))

Comments: Several commenters objected to the use of the word "unnecessarily" in the rule's proposed language: "A segregated setting is one in which people with disabilities are unnecessarily separated from people without disabilities," on the basis that segregation is

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[91] ADAPT et al., *Community Integration for People with Disabilities: Key Principles* (2014), https://www.bazelon.org/wp-content/uploads/2017/10/Key-Principles.pdf (stating that "individuals with disabilities should have the opportunity to live like people without disabilities.").

[92] 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. 21, 2024).

inherently stigmatizing and thus never necessary. Many commenters emphasized that segregated settings are defined by a lack of informed, individual choice or autonomy for participants in how and when they interact with the broader community. These characteristics can be present even in settings such as group homes physically located in integrated communities.[93]

Many commenters suggested a paragraph describing segregated settings that provides features of segregated settings but is not a definitive list, in a style mirroring that of DOJ's *Olmstead* guidance.[94] Several commenters suggested that the definition include "practices" as well as "policies," as the relevant restrictions or limitations on individual autonomy are not limited to those in formally adopted policies but also include those reflected in the setting's practices.

Response: We appreciate the robust comments on segregated settings. We agree that the list of qualities of segregated settings should be inclusive of examples, rather than defined by any one characteristic. We also agree that a covered entity's practices, in addition to its policies, can result in segregation. Accordingly, we revised § 84.76(c) by deleting the first sentence of the section. Paragraph (c) now provides that segregated settings include, but are not limited to, congregate settings populated exclusively or primarily with individuals with disabilities, and may be characterized by regimentation in daily activities, a lack of privacy or autonomy, or policies or practices limiting visitors or limiting individuals' ability to engage freely in community activities and to manage their own activities of daily living.

Relationship to Medicaid Statutes and Funding

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[93] *See, e.g.*, *Pashby v. Delia*, 709 F.3d 307, 323 (4th Cir. 2013) (finding adult care homes institutional in nature and that the "goals often fall short of reality" of the facilities); *H.A. by L.A. v. Hochul*, 2022 WL 357213, at *6 (W.D.N.Y. 2022) (finding that engagement in community living activities misses the point that their schedules are circumscribed due to limited caregiver availability); *Murphy v. Harpstead*, 421 F. Supp. 3d 695, 716 (D. Minn. 2019) (community integration issues found when plaintiffs showed isolation, limited choice, and lesser quality of life in group homes than independent housing).

[94] 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).

Comments: Several commenters expressed concern that the integration mandate is perceived to conflict with the title XIX of the Social Security Act requirements. Title XIX requires Medicaid services be funded through an approved waiver or State plan program when the State elects to provide those services in the community instead of the mandatorily funded long-term care facilities, a requirement sometimes referred to as Medicaid's "institutional bias." Other commenters raised concern about the need for increased Medicaid funding and rebalancing available Medicaid funds to prioritize community-based services. Some commenters asked that the definition of segregated settings mirror the CMS HCBS settings rule,[95] which sets the requirements for HCBS settings funded by Medicaid waivers. The Settings Rule lists several qualities of home and community-based settings, centered on rights of privacy, dignity and respect, and freedom from coercion and restraint, as well as promoting independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.

Response: As noted in the preamble to the NPRM, the civil rights obligations created by section 504 are separate and distinct from the requirements of Medicaid and the Social Security Act.[96] Compliance with Medicaid requirements does not necessarily mean a recipient has met the obligations of section 504. Further, implementation of title XIX or other Federal statutes is beyond the authority of this regulation to address.

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[95] Ctrs. for Medicare & Medicaid Servs., Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers, 79 FR 2948 (Jan. 16, 2014).

[96] *See, e.g.,* U.S. Dep't of Health & Human 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_226.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.").

Acknowledging comments desiring the same framework of "integrated setting" as the HCBS settings rule, we note that, while the HCBS settings rule can help States fulfill their obligations under section 504, a State's obligations under section 504 are independent of a State's compliance with the HCBS settings rule.[97]

Additionally, the Department appreciates commenters' feedback about the need for increased HCBS funding and rebalancing available Medicaid funds to prioritize community-based services. However, these concerns are beyond the scope of the Department's rulemaking under section 504.

Specific prohibitions (§ 84.76(d))

Comments: State officials objected to the proposed rule's inclusion in the list of specific prohibitions "[f]ailure to provide community-based services that results in … serious risk of institutionalization" (§ 84.76(d)(4)). These commenters cited the Fifth Circuit's decision in *United States v. Mississippi*, 82 F.4th 387 (5th Cir. 2023), to support their position. Commenters also took issue with the reference to DOJ's *Olmstead* guidance in the proposed rule's discussion of integration requirements. Several courts of appeals have found DOJ's *Olmstead* guidance to reflect the best reading of the statute and the then-applicable regulations,[98] whereas the Fifth Circuit declined to follow the guidance on the facts before it.[99]

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[97] U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs, Letter to State Medicaid Directors (Olmstead Update #4) (Jan. 10, 2001) ("...because Medicaid HCBS waivers affect the ability of States to use Medicaid to fulfill their obligations under the ADA and other statues, we have included these answers as an Olmstead/ADA update.") *See, e.g.,* 88 FR 63486; and U.S. Dep't of Health & Human 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/hhsguidance-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.").

[98] *See, e.g., Steimel v. Wernert*, 823 F.3d 902, 911 (7th Cir. 2016); *Davis v. Shah*, 821 F.3d 231, 263 (2d Cir. 2016); *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013)

[99] *United States v. Miss*., 82 F.4th 387, 393-394 (5th Cir. 2023).

Response: Based on the Supreme Court's decision in *Olmstead*,[100] decades of consensus in circuit courts, and the unambiguous requirements of existing title II and section 504 regulations, the Department affirms its decision to codify the "at serious risk of institutionalization" principle set forth in case law and guidance.

In the more than twenty years since *Olmstead,* courts have repeatedly held that individuals may bring nondiscrimination claims under section 504 and the ADA by showing a covered entity's actions place them at serious risk of unnecessary institutionalization. As noted in *Fisher v. Oklahoma*, the integration mandate's "protections would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation."[101] To this point, the title II and section 504 regulations create an unambiguous, affirmative obligation to *avoid* discrimination through unjustified isolation, as discussed below.

Thus, the overwhelming weight of authority supports robust protection for individuals at serious risk of unnecessary institutionalization. Of the seven circuits to consider the issue, the Fifth Circuit stands apart as the only one to question the long-standing application of "serious risk" in *Olmstead* cases.[102] Further, the Fifth Circuit did not reach the question of whether the other six circuits erred in their interpretations, noting that it "need not say" that the decisions of the other six circuits were "wrong."[103] And even the Fifth Circuit did not definitively reject *Olmstead*'s application to "at risk" cases in all circumstances. "[104] The other circuits' at-risk decisions, by contrast, involved circumstances in which class-wide risks of institutionalization were "susceptible of quantification and, indeed, generalization."[105] Despite some broadly

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[100] *Olmstead v. L.C.,* 527 U.S. 581 (1999).
[101] *Fisher v. Okla. Health Care Auth,* 335 F.3d at 1181.
[102] *See Davis v. Shah,* 821 F.3d 231, 263 (2d Cir. 2016); *Pashby v. Delia,* 709 F.3d 307, 322 (4th Cir. 2013); *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 460-461 (6th Cir. 2020*); Steimel v. Wernert*, 823 F.3d 902, 914 (7th Cir. 2016); *Fisher v. Okla. Health Care Auth.,* 335 F.3d 1175, 1181–82 (10th Cir. 2003).
[103] *U.S. v. Miss.,* 82 F.4th at 396.
[104] *Id.* at 392, 396.
[105] *Id.* at 396.

worded *dicta*, the Fifth Circuit's liability holding in *Mississippi* ultimately rests on what the court saw as the breadth of the claim in that case."[106] The court favored a narrow reading in part because of the doctrine of ripeness.[107] That doctrine, which reflects Article III limitations on judicial power, is not relevant to the proper scope of the Department's regulations. That holding does not compel us to reject the longstanding principle, adopted by six other circuits, that a policy or practice that places individuals at serious risk of unnecessary institutionalization violates the integration mandate in appropriate cases.

The title II and section 504 regulations create an unambiguous, affirmative obligation to *avoid* discrimination through unjustified isolation. As legislatively authorized regulations, both carry the "force and effect of law."[108] 28 CFR 35.130(d) requires that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." The Department has long interpreted section 504 to impose the same requirement on recipients of Federal funding in 45 CFR 84.4(b)(2). Further, the regulation interpreting the reasonable modification component of title II, which is located at 28 CFR 35.130(b)(7)(i), requires public entities to "avoid discrimination." Courts have held this creates a duty to address the risk of prohibited harm.[109] The proposed section 504 regulation, 45 CFR 84.68(d), adopts the same language, codifying the longstanding obligation under section 504. Mitigating serious risk of institutionalization is necessary to avoid discrimination in the form of unjustified isolation. In addition, it would still be appropriate for courts to grant injunctive relief to those at serious risk in order to prevent the unnecessary institutionalization prohibited by law. The potential scope of a judicial remedy only further highlights why it is

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[106] *Id.* at 398.
[107] *Id.* at 397 (quoting *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 470 (6th Cir. 2020) (Readler, J. concurring in part and dissenting in part)).
[108] *See, e.g., Ramsay v. Nat'l Bd. of Med. Examiners*, 968 F.3d 251, 257 n.6 (3d Cir. 2020) ("The ADA authorizes DOJ to issue regulations implementing the public accommodations provisions of the ADA. Such regulations have the force and effect of law.") (Internal quotation omitted).
[109] *See, e.g.*, *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006) ("By requiring measures that are 'necessary to avoid discrimination on the basis of disability,' 28 C.F.R. § 35.130(b)(7), the regulation clearly contemplates that prophylactic steps must be taken to avoid discrimination.").

appropriate for the Department to interpret section 504 to require recipients to avoid unnecessary institutionalization.[110]

Comments: Several commenters asked us to elaborate on the meaning of "at serious risk," noting that courts have evaluated the risk of institutionalization for both probability of institutionalization and timing, to conclude that individuals at risk are likely to be institutionalized in the foreseeable future.

Response: We agree with commenters that the determination of "serious risk" is a fact-based inquiry, which is why the courts of appeals to have considered the question have provided only general guidance on determining risk rather than an exhaustive test.[111] Likewise, the Department declines to codify parameters of the inquiry into "serious risk."

Comment: Several commenters argued the Department failed to adequately estimate the costs of integration provision as proposed in the Regulatory Impact Analysis, citing the Unfunded Mandates Reform Act (UMRA). Further, some State officials worried about the impact of the integration provision, specifically the "at serious risk" on States. Some commenters also asked that that the integration provision's implementation be delayed in order for States to plan for additional costs.

Response: The final integration provision codifies existing responsibilities for recipients, as explained in our responses to comments about § 84.76(d). Due to the existing nature of recipients' obligations, and the same preexisting obligations under title II for public entities, the final rule's integration provision places no additional costs on recipients. For the reasons discussed in that section, we find the "at serious risk" principle to be a well-established, central

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[110] *See, e.g., United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953) (explaining that "[t]he purpose of an injunction is to prevent future violations" and that such relief is appropriate where there is a "cognizable danger of recurrent violation.").

[111] For example, in *Davis v. Shah*, 821 F.3d 231, 262-63 (2d Cir. 2016), 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." *See also*, *Waskul v. Washtenaw Cnty. Cmty. Mental Health,* 979 F.3d 426, 462 (6th Cir. 2020) finding "declines in health, safety, or welfare" as to sufficient to show plaintiffs were at serious risk of institutionalization.

tenet of the integration requirement and part of enforcement of statutory rights that prohibit discrimination on the basis of disability. The rule is thus exempted from and not subject to the UMRA, from which Federal regulations that enforce statutory rights that prohibit discrimination on the basis of disability are exempted.[112]

Fundamental alteration (§ 84.76(e))

Comments: In response to our request for comment on what may constitute a fundamental alteration for recipients who are not public entities, various commenters proposed that the creation or offering of a new service would be a fundamental alteration for non-public entities. Several commenters raised questions about what services a covered entity must provide to comply with this section, and whether entities, particularly private providers, would be required to create new services to support individuals in more integrated settings.

Response: We note that a recipient is not required to create "new" programs to assist people with disabilities, nor is it required to provide a particular standard of care or level of benefits. However, recipients must comply with section 504's nondiscrimination requirements—including the integration requirement—for the services they in fact provide. When a covered entity chooses to provide a service, it must do so in a nondiscriminatory fashion by ensuring access to that service in the most integrated setting appropriate to the needs of the qualified individual.[113]

Recipients may be required to offer services in an integrated setting that they have only been offering in segregated settings; that is generally not offering a "new service," but instead is ensuring the service is offered in integrated settings and not just in segregated settings.[114]

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[112] 2 U.S.C. 1503(2).

[113] *See Olmstead v. L.C.*, 527 U.S. at 603; *see also Radaszewski v. Maram*, 383 F.3d 599, 609 (7th Cir. 2004) (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.'").

[114] *See* U.S. Dep't of Justice, Civil Rights Div., 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

However, the expansion of a service to different settings or offering a substantially similar service may be a fundamental alteration. To the extent that a benefit, including an optional benefit, is already provided in institutions or other segregated settings as part of the recipient's program, the same or a substantially similar[115] benefit must be offered in an integrated setting in a manner that does not incentivize institutional or other segregated services over community services, unless extending the benefit would constitute a fundamental alteration of the program.

For example, if a managed care plan offers a Medicaid-funded respite care benefit through the temporary placement of an individual with a disability in an institutional setting, such as a nursing home or Intermediate Care Facility,[116] but does not offer a comparable respite benefit available in an individual with a disability's home, that would likely be prohibited discrimination under the rule, unless the plan could prove that adding a home-based benefit would be a fundamental alteration. Similarly, a hospital system that facilitates discharge planning to skilled nursing facilities but does not facilitate discharge planning for people with disabilities who wish to receive nursing services in their own home may constitute "[a]dministering a program or activity that results in unnecessary segregation," which would violate § 84.76(b) of the final rule. This approach is consistent with the existing integration requirement under current case law, section 504, and title II of the ADA.[117]

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8 (June 22, 2011), https://archive.ada.gov/olmstead/q&a_olmstead.htm (stating that (p)ublic entities cannot avoid their obligations under the ADA and *Olmstead* by characterizing as a "new service" services that they currently offer only in institutional settings.). *See also Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003) ("Here, the precise issue is not whether the state must provide the long term care services sought by Mr. Townsend and the class members—the state is already providing these services—but in what location these services will be provided.").

[115] A substantially similar service is one that is similar in substance to the institutional service, even if the service "might vary in format depending on whether it is provided … in an institution or a community-based setting." *Radaszewski ex. rel. Radaszewski v. Maram*, 383 F.3d 599, 610 (7th Cir. 2004).

[116] Please note, these are facilities that require an individual to meet eligibility requirements for a certain level of care for admission.

[117] *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 8 (2020), https://www.ada.gov/olmstead/q&a_olmstead.htm; *Steimel v. Wernert*, 823 F.3d 902, 914 (7th Cir. 2016).

Because what constitutes a "fundamental alteration" is fact-specific, the Department has not modified the proposed regulatory text.

Comments: Several commenters asked that the Department address the "workforce crisis" as a basis for a fundamental alteration defense. Commenters wrote that national workforce shortages among nursing staff and direct care workers create challenges for public and private providers. In addition, commenters noted that State budgetary decisions constrain public and private providers in their ability to offer services, recruit and retain staff, and otherwise provide services to all eligible individuals with disabilities, noting that available funds and reimbursement rates may be beyond the control of individual providers or networks. Commenters also asked that OCR make explicit that a determination of whether something constitutes a fundamental alteration is fact and context-specific. Some commenters asked for an explanation of how an "effectively working" *Olmstead* plan could show that a requested modification would require fundamental alteration of the covered entity's existing programs or services.

Response: States and other recipients cannot dismiss their obligation to provide community services on the basis that services may require changes to the recipients' methods of administration. Reimbursement rates, direct workforce pay rates, and network adequacy are "methods of administration" under § 84.68(b)(3) as well as "planning, service system design, funding, or service implementation practices" under § 84.76(d)(4). A recipient might be in violation of this section if it adopts reimbursement practices or other methods of administration that result in individuals with disabilities only being able to receive residential, employment, day habilitation, or other necessary support services in segregated settings.[118]

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[118] Public entities may raise a fundamental alteration defense by showing that they have developed, and are implementing, a comprehensive, effectively working *Olmstead* plan. To avail themselves of such a defense, the entity's plan must have specific and reasonable timeframes and measurable goals for which the public entity may be held accountable, and the plan must have demonstrated success in actually moving individuals to integrated settings in accordance with the plan. *See, e.g., Brown v. District of Columbia*, 928 F.3d 1070, 1084 (D.C. Cir. 2019); *Frederick L. v. Dep't of Pub. Welfare*, 422 F.3d 151, 157 (3d Cir. 2005); *Jensen v. Minn. Dep't of Human Servs.*, 138 F. Supp. 3d 1068, 1072 (D. Minn. 2015).

We restate that fundamental alteration is a fact-specific inquiry and that increased cost alone is not necessarily a fundamental alteration.[119] Further, we note that cost and reimbursement decisions may be made by multiple entities, including State agencies, managed care plans, and private providers. As the Department noted in the proposed rule for section 1557, 87 FR 47873, recipients taking on financial risk for the delivery of HHS-funded services should scrutinize their capitation, reimbursement, quality measurement, and incentive structures to ensure that they do not result in the unjustified segregation of individuals with disabilities or place individuals with disabilities at serious risk of institutionalization or segregation. Under circumstances where responsibility for segregated and integrated services is shared across multiple entities, for example, under a managed care contract, both the State Medicaid agency and the contracted entity have obligations under this provision if they are both recipients of Federal financial assistance.

This shared responsibility means, for example, that recipients cannot assert that a staffing shortage, in and of itself, demonstrates that provision of services would be a fundamental alteration. If the recipient can address staffing shortages through pay rates, recruitment and retention incentives, flexible scheduling such as split shifts, or other actions, it may be required to do so as a reasonable modification.[120]

The availability of the fundamental alteration defense is clear as drafted and so we decline to change the language in the regulation text. In this final rule, we clarify a program is not required to provide coverage for a service in the most integrated setting appropriate to an individual's needs if it would fundamentally alter the program to do so.

Technical assistance

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[119] *Fisher v. Okla. Health Care Auth*., 335 F.3d 1175, 1183 (10th Cir. 2003).

[120] *See United States v. Fla.,* No. 12-CV-60460, 2023 WL 4546188, at *59 (S.D. Fla. July 14, 2023) (requiring Florida to increase private duty nursing services for medically fragile children and requiring the State to address the shortage of nurses "by requiring that managed care plans raise PDN reimbursement rates, ensuring that the managed care plans comply with network adequacy standards, or utilizing any other tool at its disposal.") (under appeal in *United States v. Florida*, No. 23-12331 (11th Cir.)

Comments: Several commenters requested the Department provide technical assistance addressing the differences between compliance with Medicaid and adherence to civil rights laws, with practical examples and best practices. Other commenters suggested that the Department provide additional guidance to recipients on how the integration provision applies to transitions in care and effective community-based supports for those discharged from hospitals, skilled nursing facilities, and other institutional settings. Additionally, a few commenters recommended the Department offer technical assistance on how this regulation will address unfair practices in system design and funding.

Response: We appreciate the comments requesting clarification through sub-regulatory guidance. We will consider future guidance after this rule has been finalized and remain committed to our continued partnership with DOJ and CMS in developing shared guidance on civil rights requirements.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering comments received, we are revising § 84.76(b) and (c). Paragraph (b) requires a recipient to administer a program or activity in the most integrated setting appropriate to the needs of a qualified person with a disability. Paragraph (c) discusses integrated settings as settings that include (but are not limited to) congregate settings that are populated exclusively or primarily with individuals with disabilities, and may be characterized by regimentation in daily activities, lack of privacy or autonomy, or policies or practices limiting visitors or limiting individuals' ability to engage freely in community activities and to manage their own activities of daily living.

Subpart H—Communications

Proposed subpart H addressed requirements related to providing effective communication for individuals with disabilities. The Department requested comment on the importance of providing information in plain language for individuals with cognitive, developmental,

intellectual, or neurological disabilities. Additionally, the Department requested comment on whether plain language is appropriately considered a reasonable modification that an individual must request, or if it should be considered an auxiliary aid or service.

The proposed requirements of this subpart are nearly identical to the requirements of subpart E, Communications, in the ADA title II regulations.[121]

General (§ 84.77)

Proposed §84.77(a)(1) required recipients to take appropriate steps to ensure that communications with individuals with disabilities, and companions with disabilities, are as effective as communications with individuals without disabilities.

Proposed § 84.77(1)(2) defined "companion."

Proposed § 84.77(b)(1) required recipients to provide appropriate auxiliary aids and services to individuals with disabilities where necessary to afford those individuals an equal opportunity to benefit from the recipient's program or activity. Proposed § 84.77(b)(2) provided criteria for determining which auxiliary aid is appropriate. It stated that in order for auxiliary aids to be effective, they 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.

Proposed § 84.77(c) provided specifics regarding interpreters. It stated that recipients cannot require an individual with a disability to bring another individual to interpret. Nor can a recipient rely on an adult accompanying an individual with a disability to interpret or facilitate communication except in an emergency or when an individual with a disability specifically requests that the adult interpret, the adult agrees, and reliance on the adult is appropriate. Minor children cannot interpret except in an emergency when there is an imminent threat and no interpreter is available.

Proposed § 84.77(d) set forth specific standards that a recipient must meet if it chooses to provide qualified interpreters via video remote interpreting services.

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[121] 28 CFR 35.160 through 35.164.

The comments and our responses regarding § 84.77 are set forth below.

Comment: Almost all of the commenters supported ensuring that recipients communicate effectively with people with disabilities. Disability rights organizations, recipient organizations, and individuals acknowledged that in the absence of appropriate auxiliary aids and services, people with disabilities are denied access to recipient programs and activities, including health care.

Response: The Department agrees that effective communication with people with disabilities is a critical right that benefits members of the public and recipients. The provision of sign language interpreters, Braille documents, and other appropriate auxiliary aids and services helps people with disabilities fully participate in and enjoy the benefits of recipient programs and activities from which they would otherwise be excluded on the basis of their disability. The importance of effective communication cannot be overstated in the context of health and human services, which is why the Department proposed the updates in subpart H of this rulemaking.

Comment: Many commenters described the importance of effective communication and provided firsthand accounts of instances where they were unable to receive health care because recipients did not provide them with auxiliary aids or services or reasonable modifications. For example, commenters relayed instances where American Sign Language interpreters were not provided even after a patient request, information was not provided in plain language for people with intellectual disabilities, and staff denied patients appropriate auxiliary aids and services due to appointment time constraints. Many of these commenters also discussed the importance of providing effective communication for companions.

Response: Unfortunately, the Department is aware of many instances where people with disabilities were discriminated against because recipients denied them effective communication. The Department has investigated and resolved many such instances and is aware that other

Federal agencies have done likewise.[122] The Department and other Federal agencies have issued numerous guidance documents to attempt to further educate recipients on their effective communication responsibilities.[123] The Department added subpart H to the proposed rule because despite existing communication requirements for people with disabilities, it is apparent that some recipients are not providing effective communication to people with disabilities.

Comment: The majority of the commenters voiced support for requiring that all recipients, regardless of employee size, provide appropriate auxiliary aids and services to people with disabilities. Previously, § 84.52(d)(2) only required recipients with fewer than fifteen employees to provide auxiliary aids and services when the Director of OCR required those recipients to do so. Commenters stated that advancements in technology have made auxiliary aids and services affordable and attainable for recipients regardless of their size, eliminating the need for any exception. Those commenters also stated that the absence of appropriate auxiliary aids and services among small health care practices leads to disproportionate harm to patients with disabilities who are denied health care. One commenter requested that the Department maintain an exception for recipients with fewer than fifteen employees due to concerns that providing appropriate auxiliary aids and services would be too costly for small recipients.

Response: The Department agrees with the majority of commenters that effective communication is critical for people with disabilities, and that harm from a denial of effective communication for a person with a disability is the same regardless of the size of a recipient. Additionally, the Department expects that auxiliary aids and services are affordable and attainable for many recipients. All recipients, regardless of size, are not required, in providing

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[122] *See e.g.*, U.S. Dep't of Health & Human Servs., Off. for Civil Rights, HHS Office for Civil Rights Takes Action to Ensure Effective Communication for Those Who Are Deaf or Hard of Hearing (Nov. 9, 2022), https://www.hhs.gov/about/news/2022/11/09/hhs-office-for-civil-rights-takes-action-to-ensure-effective-communication-for-those-who-are-deaf-or-hard-of-hearing.html; U.S. Dep't of Justice, Justice Department Secures Agreement with Hospital to Ensure Effective Communication with Deaf Patients and Companions (Jan. 4, 2022), https://www.justice.gov/opa/pr/justice-department-secures-agreement-hospital-ensure-effective-communication-deaf-patients.

[123] *See* U.S. Dep't of Health & Human Servs., Off. for Civil Rights, Disability Resources for Effective Communication, https://www.hhs.gov/civil-rights/for-individuals/special-topics/hospitals-effective-communication/disability-resources-effective-communication/index.html.

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. In addition, 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. Further, on December 19, 2000, the Department issued a notice in the Federal Register that it was exercising its authority under § 84.52(d)(2) to require 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.[124] Accordingly, recipients with fewer than fifteen employees have been on notice since December of 2000 that the Department interprets section 504 to require all recipients, regardless of size, to provide appropriate auxiliary aids and services. The Department is incorporating this obligation to provide appropriate auxiliary aids and services in the final rule.

Plain Language

Comment: Many individuals and organizations submitted comments on the importance of providing plain language in health and human service programs and activities. Many commenters stated that plain language is a necessity that benefits all individuals, regardless of whether they have a disability. Some commenters stated that other groups, including individuals with limited English proficiency and people with lower education levels, would also benefit from the increased use of plain language. Through plain language, people with disabilities will have a better understanding of the services they are eligible for and may even be able to avoid unnecessary outcomes such as guardianships or the removal of children. Some commenters stated that plain language alone will not ensure effective communication for all people with disabilities and asked the Department to also require that recipients provide information through other means, such as audio or visual versions of certain standard language.

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[124] 65 FR 79368 (Dec. 19, 2000).

Response: The Department agrees that plain language may benefit individuals seeking to access a recipient's programs and activities, including individuals with disabilities. The Department also agrees that plain language alone will not be sufficient to ensure effective communication for people with disabilities in all circumstances, including for some people with intellectual or developmental disabilities. This Communications subpart provides detailed measures that should be taken to ensure effective communication for individuals with disabilities.

Comment: Many commenters recommended that the Department emphasize that plain language is a reasonable modification that can be made available to people with disabilities upon request when necessary to avoid discrimination. These commenters reasoned that while plain language may be vitally important for people with certain disabilities to understand important health or human service information, it will not be necessary or even beneficial in every circumstance. Alternatively, many commenters recommended that the Department specify that plain language is an auxiliary aid that a recipient must provide, when appropriate, to ensure effective communication for people with disabilities. One commenter stated that plain language should only be a recommended best practice and should not be an auxiliary aid or reasonable modification under this rulemaking because of the cost for recipients. One commenter recommended requiring specific standards to define plain language. Finally, some commenters requested additional technical assistance and guidance from the Department on what constitutes plain language and what recipients are required to provide to people with disabilities.

Response: As noted in the preamble to the NPRM, and consistent with title II of the ADA, providing information in plain language under some circumstances may be a reasonable modification a recipient may have to provide to avoid discrimination. It may also be a strategy recipients could use to improve their communications with people with disabilities. The Department appreciates the range of comments on this important issue and recognizes there are benefits and limitations to both methods of characterization.

Because of the wide range of situations in which the need for plain language could arise, the Department wants to preserve flexibility for both individuals with disabilities and recipients while limiting burdens. The Department notes that the effective communication provision of § 84.77(a)(1) requires recipients to take steps to ensure that their communications with individuals with disabilities are "as effective as" communications with others. In addition, reasonable modifications in § 84.68(b)(7)(i) are required when necessary to avoid discrimination on the basis of disability. Whether plain language is a reasonable modification in any given case will depend on particular facts, including the cost to the recipient of providing plain language materials or information. Because plain language may already be required by other provisions, including § 84.68(b)(7)(i), the Department declines to adopt any additional regulatory text on plain language.

Accordingly, the Department will retain the current language in the preamble to the proposed rule that states plain language may be a reasonable modification to help ensure effective communication for people with disabilities.

Augmentative and Alternative Communication

Comment: Several commenters discussed augmentative and alternative communication (AAC) devices and voiced support for their inclusion in the rulemaking. Most of those commenters agreed that AAC may be an auxiliary aid or service to ensure effective communication for people with certain disabilities. Some also stated the Department should alter the definition of auxiliary aids and services to explicitly include AAC. Similarly, some commenters thought that the Department should provide a comprehensive definition of AAC in the rulemaking. One commenter stated a belief that the rulemaking should require recipients to provide training on the use of AAC devices for people with disabilities. One commenter stated that AAC may be a reasonable modification to provide effective communication.

Response: The Department appreciates the support for inclusion of language on AAC in the rulemaking and agrees that AAC may be an effective method for people with certain

disabilities to communicate with recipients. The preamble to this section in the proposed rule noted that the definition for auxiliary aids and services is open-ended and allows for AAC as an appropriate auxiliary aid or service when necessary to ensure effective communication for people with disabilities. Because of this definition for auxiliary aids and services, it is not necessary at this time to edit the definition of auxiliary aids and services to explicitly include AAC, or to provide an extensive definition of AAC. The definition of auxiliary aids and services is purposefully drafted to ensure that it is inclusive of unnamed services and actions that provide effective communication. Whether training on the use of AAC devices would be a reasonable modification to policies, practices, or procedures, as required by this rulemaking, depends on specific facts.

Comment: One commenter recommended specific minor edits to the language of subpart H to make communication requirements more expansive and clarify how they apply to people with a variety of disabilities. Similarly, some commenters requested additional examples be added to the list of auxiliary aids and services, additional standards for measuring effective communication, and additional general requirements for communication with people with disabilities.

Response: The Department appreciates the recommendations from commenters concerning additional edits to effective communication requirements and the definition of auxiliary aids and services. We acknowledge the recommendations for additions to the language of the regulatory text for additional instances that would amount to effective communication or provide clarity that certain auxiliary aids and services are covered by the rulemaking, but we decline to incorporate the suggested changes. The current definition of auxiliary aids and services already adequately covers the recommendations from the commenters. The definition of "auxiliary aids and services" in the definitions section at § 84.10 contains a phrase that says that auxiliary aids and services include "other similar services and actions." The current definition allows for additional auxiliary aids not contained in the preceding lists. We will retain the

proposed language, which aligns with the communication requirements of the regulations under title II of the ADA.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.77 as proposed with no modifications.

Telecommunications (§ 84.78)

Proposed § 84.78 set forth the requirements that a recipient must meet when it communicates with applicants and beneficiaries by telephone or an automated-attendant system. Proposed § 84.78(a) stated that when a recipient communicates by telephone, 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.

Proposed § 84.78(b) stated that when an automated-attendant system is used, that system must provide effective real-time communication with individuals using auxiliary aids and services.

Proposed § 84.78(c) stated that 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.

Comment: An organization that represents individuals with disabilities said that they appreciated the requirement in § 84.78(b) that when a recipient uses an automated-attendant system, real-time communication must be provided. However, they asked us to underscore that when using such a system, individuals must be able to opt out of the system and speak with a live representative.

Response: The Department appreciates the commenters' feedback. In order to be consistent with the title II ADA regulations, we decline to add any requirements to this section. However, we strongly urge recipients to have a way to communicate with a live person when using automated-attendant systems.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.78 as proposed with no modifications.

Telephone emergency services (§ 84.79)

Proposed § 84.79 stated that telephone emergency services must provide direct access to individuals who use TTYs and computer modems.

Comment: The Department received some comments supportive of this section. One commenter suggested that, in addition to 911, the section should refer to 988 which is the national suicide and crisis hotline.

Response: The Department appreciates the commenter's suggestion. However, there are other hotlines funded by the Department that also could potentially be listed by name in addition to the regulatory reference to telephone emergency services. Any such list could quickly become outdated and could cause confusion if inconsistent with the analogous provision of the regulation implementing title II of the ADA. Rather than list every hotline, the Department will keep the section as written.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.79 as proposed with no modifications.

Information and signage (§ 84.80)

Proposed § 84.80(a) stated that recipients must ensure that interested persons including those with impaired vision or hearing can obtain information as to existence and location of accessible services, activities, and facilities. Section 84.80(b) stated that recipients must provide signage at all inaccessible entrances directing users to an accessible entrance or to a location where they can obtain information about accessible facilities. The international symbol for accessibility must be used at each accessible entrance of a facility.

Comments: The Department received a few comments on this section. One commenter asked that the section include a reference to individuals with language disorders such as aphasia. Another commenter asked whether the information and signage requirements apply to recipients' facilities that are not open to the public. The commenter noted the challenges of securing in-person Certified Deaf Interpreters and problems with relying on TTY State-operated phone lines.

Response: With regard to the request that we add language disorders to the text of the section, we note that coverage is not limited to individuals with impaired vision or hearing. The section requires that recipients ensure that all interested persons, *including* those with impaired vision or hearing, can obtain the information. We decline to add the requested language since the section already covers individuals with language disorders.

In response to the commenter's question about where signage must be placed, the requirement applies to all inaccessible entrances to each of a recipient's facilities. The Department recognizes the challenges that may be involved in complying with the regulations and notes that § 84.81 sets forth the duties of recipients when an action would result in a fundamental alteration or undue financial and administrative burdens.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.80 as proposed with no modifications.

Duties (§ 84.81)

Proposed § 84.81 stated that subpart H does not require recipients to take an action that would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. It sets forth details about how that determination is to be made.

The comments and our responses regarding § 84.81 are set forth below.

Comment: Many recipient organizations voiced their support for the proposed exceptions concerning fundamental alteration or undue administrative and financial burdens. Recipient organizations noted that some small providers may find it difficult to pay for auxiliary aids and

services and may rely on the exceptions. Many recipient organizations also requested that the Department provide additional guidance on instances where providing auxiliary aids or services would result in a fundamental alteration or undue burden. Some recipient organizations also requested that the Department provide additional funding or establish resource centers to provide auxiliary aids or services on behalf of recipients.

Response: As the commenters note, under proposed § 84.81, recipients would not be required to provide specific auxiliary aids or services, or take a specific action to ensure effective communication, if doing so would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. However, a recipient would still be required to take any other action that would not result in such an alteration or such burdens while providing effective communication to the maximum extent possible. For example, even if one type of auxiliary aid or service requested by the person with a disability would result in a fundamental alteration of the program or activity in question, if another appropriate auxiliary aid or service exists that would assist effective communication without fundamentally altering the program or activity, the recipient is required to offer that other auxiliary aid or service.

Effective communication, including provision of auxiliary aids and services, has been required for decades by the original section 504 implementing regulation, titles II and III of the ADA, and more recently the implementing regulation for section 1557 of the ACA, and numerous guidance documents on the topic already exist.[125] The Department remains committed to providing technical assistance and education to help recipients understand their legal obligations and so that individuals understand their rights.

SUMMARY OF REGULATORY CHANGES

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[125] *See* U.S. Dep't of Justice, ADA Requirements: Effective Communication (Feb. 28, 2020), https://www.ada.gov/resources/effective-communication/#auxiliary-aids-and-services; U.S. Dep't of Health & Human Servs., Off. for Civil Rights, Disability Resources for Effective Communication, https://www.hhs.gov/civil-rights/for-individuals/special-topics/hospitals-effective-communication/disability-resources-effective-communication/index.html.

For the reasons set forth above and considering the comments received, we are finalizing § 84.81 as proposed without modifications.

Subpart I—Web, Mobile, and Kiosk Accessibility[126]

Proposed subpart I addressed requirements related to providing accessible web content, mobile applications, and kiosks.

The Department proposed to add six definitions relevant to this subpart to the Definitions section in the newly redesignated § 84.10. We invited comment on the following questions regarding the definitions:

- *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

[126] The Department of Justice recently promulgated new regulations implementing title II of the ADA to establish specific requirements, including the adoption of specific technical standards, for making accessible the web content and mobile apps that public entities provide or make available. *See* regulation to be codified at 28 CFR part 35, subpart H. The Department has made every effort to align its regulations on the accessibility standards in subpart I with DOJ's regulations, to maximize consistency in the obligations for web and mobile apps for recipients covered under section 504 and public entities covered under title II. Please refer to DOJ's rule, including Appendix D to the regulation implementing title II, for additional guidance related to this subpart.

means of a user agent, including code or markup that defines the content's structure, presentation, and interactions." [127]

The comments and responses regarding the definitions are set forth below.

Comment: Many commenters stated that the proposed definition of "conventional electronic documents" should be non-exhaustive to allow for broader application, such as other video, audio, image, spreadsheet, data files, and new content that has not yet been developed. Some commenters objected to the possibility of an open-ended definition and prefer the proposed definition the Department provided because they are concerned that allowing too much flexibility will lead to confusion among recipients and the general public as to what is covered.

Some commenters opposed the inclusion of "database file formats" in the definition of conventional electronic documents because database files and some spreadsheet files may include data that are not primarily intended to be human-readable. The commenters stated that in many cases such content is intended to be opened and analyzed with other special software tools and that data that is not primarily intended to be human-readable is equally accessible for individuals with disabilities and individuals without disabilities.

Response: The Department declines to change its approach to defining conventional electronic documents. The Department expects that a more flexible definition would result in less predictability for both recipients and individuals with disabilities, especially because the Department does not currently have sufficient information about how technology will develop in the future. The Department seeks to avoid such uncertainty because the definition of conventional electronic documents sets the scope of two exceptions, § 84.85(b) and (d). The Department carefully balanced benefits for individuals with disabilities with the challenges recipients face in making their web content and mobile apps accessible in compliance with this final rule when crafting these exceptions, and the Department does not want to inadvertently

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[127] W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/ and https://perma.cc/UB8A-GG2F.

expand or narrow the exceptions with a less predictable definition of conventional electronic documents.

Based on the comments received, the Department has decided to delete database file formats from the definition of conventional electronic documents. Database files may be less commonly available through recipients' web content and mobile apps than other types of documents. To the extent that such files are provided or made available by recipients, the Department understands that they would not be readable by either individuals with disabilities or individuals without disabilities if they only contain data that are not primarily intended to be human-readable. Therefore, there would be limited accessibility concerns, if any, that fall within the scope of the rule associated with documents that contain data that are not primarily intended to be human-readable. Accordingly, the Department believes it could be confusing to include database file formats in the definition. However, the Department notes that while there may be limited accessibility concerns, if any, related to database files containing data that are not primarily intended to be human-readable, recipients may utilize these data to create outputs for web content or mobile apps, such as tables, charts, or graphs posted on a web page, and those outputs would be covered by the rule unless they fall into another exception. .

The Department declines to make additional changes to the list of file formats included in the definition of conventional electronic documents. After reviewing the range of different views expressed by commenters, the Department believes the current list strikes the appropriate balance between ensuring access for people with disabilities and feasibility for recipients so that they can comply with this rule. The list included in the definition is also aligned with the Department's intention to cover documents that recipients commonly make available in either an electronic form or that would have been traditionally available as physical printed output. If recipients provide and make available files in formats not included in the definition, the Department notes that those other files may qualify for the exception in § 84.85(a) if they meet the definition for archived web content, or the exception in § 84.85(e) for certain preexisting

social media posts if they are covered by that exception's description. To the extent those other files are not covered by one of the exceptions in § 84.85, the Department also notes that recipients would not be required to make changes to those files that would result in a fundamental alteration in the nature of a program or activity, or impose undue financial and administrative burdens, consistent with § 84.88.

Comment: Regarding the definition of "kiosks," many commenters stated that they support a broad definition of kiosks that goes beyond the Department's proposed definition. Specifically, some commenters stated that anything with a user interface in a health care setting should be considered a kiosk. Other commenters proposed including a variety of physical devices that provide a variety of services through both closed and open functionality.

Response: The comments received covered a wide range of responses on definitions for kiosks. We note that the Access Board is currently engaged in the early stages of rulemaking around self-service transaction machines and self-service kiosks.[128] In part because of the wide range of responses that generally do not agree on a single definition, the Department does not believe it is appropriate to make changes to the definition of kiosks in this rulemaking. A broader definition of kiosks runs the risk of overclassifying devices used in a health or human services setting as a kiosk, while identifying specific types of physical devices could leave out devices that otherwise perform all of the functions normally attributed to kiosks. Because of the range of comments received, and because the Access Board is currently working towards addressing this issue in its own rulemaking, the Department will finalize its definition of kiosks in this rule without change from the proposed rule. Once the Access Board has finalized its rulemaking, the Department may consider addressing any additional issues raised with the Access Board's guidelines.

Comment: Regarding the definition of "web content," some commenters opined that the definition should more closely align with the definition included in WCAG 2.1, especially since

[128] 87 FR 57662 (Sept. 21, 2022).

the proposed rule would include WCAG 2.1. Some of those commenters stated that a different definition would cause confusion among technical experts.

One commenter expressed approval of the proposed definition while another requested general clarification of what is covered and what specific content will have to be accessible under the proposed rule.

Response: The Department appreciates the comments and has decided to alter the definition of web content to more closely align with the definition in WCAG 2.1. The Department's definition in the NPRM was based on the WCAG 2.1 definition but was slightly less technical and intended to be more easily understood by the public generally. The Department decided to align the definition of "web content" with the definition in WCAG 2.1 in the final rule to avoid confusion, ensure consistency in application of WCAG 2.1, and assist technical experts in implementing this rule. Consistent with the suggestion of commenters, the Department believes this approach minimizes possible inadvertent conflicts between the type of content covered by the Department's regulatory text and the content covered by WCAG 2.1. Accordingly, the Department will use the WCAG 2.1 definition but also include the specific examples in a second sentence. This second sentence may be particularly useful for members of the public without a technical background.

Beyond the definition provided, as well as the preamble language explaining the definition, the Department remains committed to providing technical assistance and guidance to recipients so that they are able to fully comply with this rule. We also note that there is a period for recipients to become familiar with the web content compliance obligations before they come into effect, which will be two or three years depending on the size of the recipient.

The Department also added a definition for "user agent." The definition exactly matches the definition of user agent in WCAG 2.1.[129] WCAG 2.1 includes an accompanying illustration,

[129] *See* W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/ [https://perma.cc/R6KE-BX3U].

which clarifies that the definition of user agent means "[w]eb browsers, media players, plug-ins, and other programs—including assistive technologies—that help in retrieving, rendering, and interacting with web content."[130]

The Department added this definition to the final rule to ensure clarity of the term "user agent," which appears in the definition of "web content" requested by commenters and now adopted by the Department. As discussed, the Department has more closely aligned the definition of "web content" in the final rule with the definition in WCAG 2.1. Because this change introduced the term "user agent" into the section 504 regulation, and the Department does not believe this is a commonly understood term, the Department has added the definition of "user agent" provided in WCAG 2.1 to the final rule. The Department also believes adding this definition in the final rule is consistent with the suggestions of commenters who proposed aligning the definition of "web content" with the definition in WCAG 2.1.

Accordingly, we are finalizing the definition of "kiosks" with no modifications, editing "conventional electronic documents" and "web content," and adding the definition of "user agent," in §84.10. As further discussed in the preamble to subpart A and §84.85(a), we are also revising the definition of "archived web content."

Application (§ 84.82)

Proposed § 84.82 stated that this subpart applies to all programs and activities that receive Federal financial assistance from the Department.

The Department is finalizing § 84.82 as proposed.

Accessibility of kiosks (§ 84.83)

Proposed § 84.83 articulated a general nondiscrimination requirement for programs and activities provided through kiosks.

The comments and our responses regarding § 84.83 are set forth below.

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[130] *Id.*

Comment: Many commenters expressed support for the inclusion of kiosks in the proposed rule, noting that kiosks have become more prevalent in health care settings and that often these kiosks are not accessible for people with disabilities. Many of these same commenters stated that the Department should require specific accessibility standards for kiosks beyond the general accessibility requirement proposed. Some commenters proposed specific functional standards that they believe are important for kiosk accessibility. Some commenters expressed approval of allowing for recipients to provide alternate methods for people with disabilities to access the programs and activities typically offered through kiosks, such as personnel to check in patients in a waiting area.

Response: The expanded use of kiosks, especially in medical settings, has allowed for recipients to automate portions of their programs and activities, but recipients must take into account the needs of people with disabilities in order to comply with civil rights laws, including section 504. Current Federal laws and regulations require the accessibility of all programs and activities of recipients of Federal financial assistance, including those provided through kiosks.[131] However, the Department believes it is necessary to include a general nondiscrimination provision specific to kiosks in this rulemaking because of how prevalent they have become and because if they are not designed with people with disabilities in mind they may serve as barriers to recipient programs and activities. Accordingly, the Department is finalizing a provision highlighting the application of general nondiscrimination requirements to recipients that use kiosks in their programs and activities.

While there is support among commenters for the rulemaking to impose measurable accessibility standards for kiosks, similar to those required of web content, mobile applications,

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[131] *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.

and medical diagnostic equipment (MDE) in this rulemaking, the Department does not believe that is feasible at this time. While WCAG 2.1 and the Access Board's MDE Standards were both created after years of research, input, and testing, no comparable standard currently exists for kiosks, except to the extent that kiosks rely on web content or mobile apps as defined in §84.10. The Access Board submitted an advanced notice of proposed rulemaking that sought public comment on requirements for self-service transaction machines, but that rulemaking has not been finalized.[132]

Recipients that use kiosks must make their programs accessible to persons with disabilities and may do so 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.[133] 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.

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[132] 87 FR 57662 (Sept. 21, 2022).
[133] 45 CFR 84.22(b).

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.83 as proposed without modifications.

Requirements for web and mobile accessibility (§ 84.84)

Proposed §84.84(a) stated that recipients must ensure their web content and mobile applications made available to members of the public or used to offer programs or activities to members of the public must be readily accessible to and usable by individuals with disabilities.

Proposed § 84.84(b) required that recipients ensure their web content and mobile applications made available to members of the public or used to offer programs or activities to members of the public comply with the success criteria and conformance requirements of WCAG 2.1 Level A and Level AA within two or three years of the publication of this rule, depending on whether the recipient has fifteen or more employees, or fewer than fifteen employees, respectively. The section incorporated WCAG 2.1 by reference.

We invited comment on 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?*
- *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?*
- *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?*
- *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?*
- *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?*
- *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?*
- *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?*

The comments and our responses regarding § 84.84 are set forth below.

Comment: Some commenters expressed concern that, as written, the rule would not apply to third party vendors that recipients contract with to create and maintain web content or mobile apps. Commenters noted that many recipients rely on third parties to create or update their web content and mobile apps, and that any rulemaking that does not clearly address those third parties would risk causing confusion and noncompliance.

Response: As the Department made clear in the preamble of the proposed rule, its intent is that websites operated on behalf of a recipient by a third party be covered by the rule. Based on the comments it received, the Department has determined that it should edit §§ 84.84(a)(1) and (2) and (b)(1) and (2) and 84.85(c) to make clear that the general requirements for web

content and mobile app accessibility apply when a recipient, "directly or through contractual, licensing, or other arrangements," provides or makes available web content or mobile apps. These edits will dispel any doubt that recipients cannot delegate away their obligations under section 504.

The phrase "directly or through contractual, licensing, or other arrangements" comes from existing regulatory language in section 504. The section on general prohibitions against discrimination in the existing section 504 regulation says that "[a] recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability" engage in various forms of discrimination.[134] The Department intentionally used the same phrasing in this rule to indicate that where recipients act through third parties using contractual, licensing, or other arrangements, they are not relieved of their obligations under this subpart.

Further, the Department notes that the phrase "provides or makes available" in § 84.84 is not intended to mean that § 84.84 only applies where the recipient created or owns the web content or mobile app. The plain meaning of "make available" includes situations where a recipient relies on a third party to operate or furnish content. Section 84.84 means that recipients provide or make available web content and mobile apps even where recipients do not design or own the web content or mobile app, if there is a contractual, licensing, or other arrangement through which the recipient uses the web content or mobile app to provide a program or activity.

The Department made another minor revision to § 84.84(a)(1) and (2). In the NPRM, § 84.84(a)(1) and (2) applied to web content and mobile apps that a recipient "makes available to members of the public or uses to offer programs or activities to members of the public."[135] In the final rule, the Department revised § 84.84(a)(1) and (2) to apply to web content and mobile apps that a recipient "provides or makes available." The Department also made corresponding

[134] 45 CFR 84.4(b)(1) and (4).
[135] 88 FR 63392, 63509 (Sept. 14, 2023).

revisions to the language of § 84.84(b)(1) and (2). The Department notes that the revised language does not change or limit the coverage of the final rule as compared to the NPRM. Rather, this change ensures consistency between the regulations implementing section 504 and title II of the ADA, respectively, and the broad coverage that both regulatory frameworks provide. The Department's section 504 regulation, at § 84.2, applies to all programs or activities of recipients; the title II regulation, at 28 CFR 35.102, states that the regulation applies to all services, programs, and activities "provided or made available" by covered entities. The Department therefore employs the "provided or made available" language in the final rule to avoid introducing confusion as to scope of coverage for recipients covered by both frameworks and maintain consistency between section 504 and title II.

Comment: Almost all of the comments on subpart I supported the general concept of requiring that the web content, mobile applications, and kiosks used by recipients be accessible to people with disabilities. Commenters noted the importance of web content, mobile applications, and kiosks in the delivery of health care, including their expanded importance during the COVID-19 Public Health Emergency, and pointed out specific instances where the only way to access a recipient's programs and activities was through web content, mobile applications, and kiosks. Commenters also stated that there are severe consequences when recipients do not provide accessible web content, mobile applications, and kiosks, including barriers to access to necessary health care, poor health outcomes, and even death for people with disabilities. Many commenters noted that some current web content, mobile applications, and kiosks are not designed with accessibility in mind, meaning that people with certain disabilities are unable to use them. Many commenters also expressed their agreement with the concept of a set standard to provide recipients and individuals certainty when determining whether web content, mobile applications, and kiosks are accessible under the law.

Response: The Department appreciates the comments and agrees that ensuring web content, mobile applications, and kiosks that recipients provide or make available are accessible

to people with disabilities is necessary to avoid discrimination, health disparities, and poor outcomes. Recipients are increasingly using technology as part of their programs and activities, and unless that technology is accessible, people with disabilities will be left behind. The Department believes that adopting technical standards for web content and mobile app accessibility provides clarity to recipients regarding how to make accessible the programs and activities they offer via the web and mobile apps. Adopting specific technical standards for web content and mobile app accessibility also provides individuals with disabilities with consistent and predictable access to the web content and mobile apps of recipients. Web content, mobile apps, and kiosks already play a large role in the health and human services programs and activities offered by recipients, and that role will likely continue to grow in the future. This rulemaking is necessary given these realities.

Comment: A minority of commenters expressed displeasure with certain aspects of proposed subpart I, including a concern that any new requirements for web content, mobile app, and kiosk accessibility would result in financial burdens that would cause small clinics to shut down. One commenter also expressed opposition to preamble language that stated a phone line operated 24 hours a day, 7 days a week, would not be an acceptable alternative to providing accessible web content, mobile applications, and kiosks.

Response: The Department appreciates the concerns of these commenters and has taken steps to reduce burdens on small recipients. Under § 84.84(b)(2) of the final rule, small recipients, like all other recipients, need to conform to WCAG 2.1 Level AA,[136] but small

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[136] The Web Accessibility Initiative published some revisions to WCAG 2.1 on September 21, 2023. *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (Sept. 21, 2023), https://www.w3.org/TR/WCAG21/ [https://perma.cc/4VF7-NF5F]. However, this rule requires conformance to the version of WCAG 2.1 that was published in 2018. W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/ and https://perma.cc/UB8A-GG2F. The Department believes that recipients have not had sufficient time to become familiar with the 2023 version. Recipients also may not have had an adequate opportunity to comment on whether the Department should adopt the 2023 version, which was published after the NPRM was published. One recent revision to WCAG 2.1 relates to Success Criterion 4.1.1, which addresses parsing. W3C has described Success Criterion 4.1.1 as "obsolete" and stated that it "is no longer needed for accessibility." W3C, *WCAG 2 FAQ*, https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411 [https://perma.cc/24FK-V8LS] (Oct. 5, 2023). According to the 2023 version of WCAG, Success Criterion 4.1.1 "should be considered as always satisfied for any content using HTML or

recipients have three years, instead of the two years provided to larger recipients, to come into compliance. In addition, small recipients (like all recipients) can rely on the five exceptions set forth in § 84.85, in addition to the other mechanisms that are designed to make it feasible for all recipients to comply with the rule, as set forth in §§ 84.86, 84.87, 84.88, and 84.89. Recipients are not required to take action that would constitute a fundamental alteration in the nature of a program or activity or an undue financial or administrative burden. As discussed in the NPRM,[137] and consistent with DOJ's 2022 guidance on web accessibility[138] and DOJ's recent proposed title II rulemaking, "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities,"[139] the Department does not believe that a phone line, even if it is staffed 24 hours a day, can realistically provide equal opportunity to people with disabilities. Websites—and often mobile apps—allow members of the public to get information or request a service within just a few minutes, and often to do so independently. Getting the same information or requesting the same service using a staffed phone line takes more steps and may result in wait times or difficulty getting the information. In addition, a staffed telephone line may not be accessible to someone who is deafblind, or who may have combinations of other disabilities, such as a coordination issue impacting typing; and an audio processing disability impacting comprehension over the phone. However, such individuals may be able to use web content and mobile apps that are accessible.

XML." W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (Sept. 21, 2023), https://www.w3.org/TR/WCAG21/ [https://perma.cc/4VF7-NF5F]. The Department believes that either adopting this note from the 2023 version of WCAG or not requiring conformance to Success Criterion 4.1.1 is likely to create significant confusion. And although Success Criterion 4.1.1 has been removed from WCAG 2.2, W3C, *WCAG 2 FAQ*, https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411 [https://perma.cc/45DS-RRYS] (Oct. 5, 2023), the Department has decided not to adopt WCAG 2.2 for the reasons described herein. Therefore, conformance to Success Criterion 4.1.1 is still required by this rule. Recipients that do not conform to Success Criterion 4.1.1 would nonetheless be able to rely on § 84.89 to satisfy their obligations under this rule if the failure to conform to Success Criterion 4.1.1 would not affect the ability of individuals with disabilities to use the recipient's web content or mobile app in the manner described in that section. The Department expects that this provision will help recipients avoid any unnecessary burden that might be imposed by Success Criterion 4.1.1.

[137] 88 FR 63392, 63420 (Sept. 14, 2023).

[138] U.S. Dep't of Justice, *Guidance on Web Accessibility and the ADA*, ADA.gov (March 18, 2022), https://www.ada.gov/resources/web-guidance/ [https://perma.cc/WH9E-VTCY] (this guidance did not include 24/7 staffed telephone lines as alternatives to accessible websites).

[139] 88 FR 51948, 51953 (Aug. 4, 2023) (stating that DOJ "no longer believes 24/7 staffed telephone lines can realistically provide equal access to people with disabilities.").

While existing civil rights laws, including the ADA and section 1557, already require that many of the recipients covered by section 504 make their web content, mobile apps, and kiosks accessible to people with disabilities, the Department believes, and the majority of commenters agree, that a regulation with a set standard is the most effective method to ensure that recipients are fulfilling their civil rights obligations.

Comment: Many commenters noted that in October of 2023, W3C issued WCAG 2.2 and requested that the Department use WCAG 2.2 instead of WCAG 2.1 as the accessibility standard for web content and mobile apps in this rulemaking. Those commenters stated that WCAG 2.2 includes new success criteria and builds off of WCAG 2.1, providing additional accessibility for people with disabilities without undermining key provisions from WCAG 2.1. Some commenters stated that the appropriate standards for this rulemaking are those set forth under the regulations for section 508 of the Rehabilitation Act[140] since it applies to all information and communication technology (ICT) rather than just web content. Some commenters also want the Department to impose additional standards for specific file types, such as PDF/UA1 for pdfs. Some commenters requested that the Department establish an evolving standard that automatically upgrades to the most recently released WCAG version, reasoning that both technology and standards to make that technology accessible are constantly changing. One commenter stated that they hope the Department will adopt whatever standard DOJ adopts in its title II web content rulemaking to make compliance with multiple standards easier for recipients that are covered by both rulemakings (89 FR 31320, April 24, 2024). Some commenters requested that there be no standard for compliance and recipients would simply be encouraged to conform to WCAG and make sure that their web content and mobile applications are generally accessible.

Response: The Department appreciates the range of responses received and recognizes that there are various possible technical standards for this rulemaking. The Department has

[140] 36 CFR part 1194, appendix A.

determined that WCAG 2.1 Level AA[141] is the most appropriate standard for this rulemaking. As some commenters noted, WCAG 2.1 Level AA is a widely used and accepted industry standard for accessibility, and requiring conformance to WCAG 2.1 Level AA would result in a significant step forward in ensuring access for people with disabilities. In addition, because WCAG 2.1 Level AA was published in 2018, web developers and recipients have had time to familiarize themselves with it. The WCAG standards were designed to be "technology neutral."[142] This means that they are designed to be broadly applicable to current and future web technologies.[143] Thus, WCAG 2.1 also allows web and mobile app developers flexibility and potential for innovation. WCAG 2.1 Level AA also includes success criteria addressing the accessibility of mobile apps or web content viewed on a mobile device.

WCAG 2.2 was released on October 5, 2023, and adds six additional Level A and AA success criteria beyond those included in WCAG 2.1 while removing the success criteria for parsing.[144] The Department recognizes that WCAG 2.2 is a newer standard, but in crafting this final rule the Department sought to balance benefits for individuals with disabilities with feasibility for recipients making their content accessible in compliance with this rule. The Department believes there will be fewer resources and less guidance available to web professionals and recipients on the new success criteria in WCAG 2.2. Given the benefits of WCAG 2.2 highlighted by commenters, some recipients might choose to implement WCAG 2.2 to provide an even more accessible experience for individuals with disabilities and to increase customer service satisfaction. The Department notes that this rule provides for equivalent facilitation in § 84.87, meaning recipients could choose to comply with this rule by conforming their web content to WCAG 2.2 Level AA because WCAG 2.2 Level AA provides substantially

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[141] Conformance to Level AA requires satisfying the success criteria labeled Level A as well as those labeled Level AA, in addition to satisfying the relevant conformance requirements.
[142] W3C, *Introduction to Understanding WCAG* (June 20, 2023), https://www.w3.org/WAI/WCAG21/Understanding/intro [https://perma.cc/XB3Y-QKVU].
[143] *See* W3C, *Understanding Techniques for WCAG Success Criteria* (June 20, 2023), https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques [https://perma.cc/AMT4-XAAL].
[144] W3C®, Web Content Accessibility Guidelines 2.2 (Oct. 5, 2023), https://www.w3.org/TR/WCAG22/.

equivalent or greater accessibility and usability to WCAG 2.1 Level AA. This would be sufficient to meet the standard for equivalent facilitation in § 84.87, which is discussed in more detail later.

For several legal reasons, the Department is unable to adopt an evolving standard that continuously updates to the newest version of WCAG. First, the Department is incorporating WCAG 2.1 Level AA by reference into this rule and must abide by the Office of the Federal Register's regulation regarding incorporation by reference.[145] This regulation states that "[i]ncorporation by reference of a publication is limited to the edition of the publication that is approved [by the Office of the Federal Register]. Future amendments or revisions of the publication are not included."[146] Accordingly, the Department only incorporates a particular version of the technical standard and does not state that future versions of WCAG would be automatically incorporated into the rule. In addition, the Department has concerns about regulating to a future standard of WCAG that has yet to be created, of which the Department has no knowledge, and for which compatibility with section 504 and recipients' content is uncertain. The Department believes that adopting WCAG 2.1 as the technical standard for this final rule is more appropriate than adopting WCAG 2.0. WCAG 2.1 provides for important accessibility features that are not included in WCAG 2.0, and an increasing number of governmental entities are using WCAG 2.1. 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.[147] In countries that are part of the European Union, public sector websites and mobile apps generally must meet a technical

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[145] *See* 1 CFR 51.1(f).
[146] *Id.*
[147] *See, e.g.*, *Exploring WCAG 2.1 for Australian government services*, Austl. Gov't Digital Transformation Agency (Aug. 22, 2018), https://www.dta.gov.au/blogs/exploring-wcag-21-australian-government-services. A Perma archive link was unavailable for this citation; W3C, *Denmark (Danmark)* (updated Mar. 15, 2023), https://www.w3.org/WAI/policies/denmark/#bekendtg%C3%B8relse-om-afgivelse-af-tilg%C3%A6ngelighedserkl%C3%A6ring-for-offentlige-organers-websteder-og-mobilapplikationer [https://perma.cc/K8BM-4QN8]; *see also* W3C, *Web Accessibility Laws & Policies* (updated Dec. 2023), https://www.w3.org/WAI/policies/ [https://perma.cc/6SU3-3VR3].

standard that requires conformance with the WCAG 2.1 success criteria.[148] And WCAG 2.0 is likely to become outdated or less relevant more quickly than WCAG 2.1. As discussed above, WCAG 2.2 was recently published and includes even more success criteria for accessibility.

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. The Department understands that dozens of States either use or strive to use WCAG 2.0 or greater—either on its own or by way of implementing the section 508 technical standards—for at least some of their web content. It appears that at least ten States—Alaska, Delaware, Georgia, Louisiana, Massachusetts, Oregon, Pennsylvania, South Dakota, Utah, and Washington—already either use WCAG 2.1 or strive to use WCAG 2.1 for at least some of their web content. Given that WCAG 2.1 is a more recent standard than WCAG 2.0, adds some important criteria for accessibility, and has been in existence for long enough for web developers and recipients to get acquainted with it, the Department views it as more appropriate for adoption in this final rule than WCAG 2.0. In addition, even to the extent recipients are not already acquainted with WCAG 2.1, those recipients will have two or three years to come into compliance with a final rule, which should also provide sufficient time to become familiar with and implement WCAG 2.1. The Department also declines to adopt the Access Board's section 508 standards, which are harmonized with WCAG 2.0, for the same reasons it declines to adopt WCAG 2.0.

The Department has coordinated with DOJ and their rulemaking revising the regulation implementing title II of the ADA to establish specific requirements, including the adoption of specific technical standards, for making accessible the services, programs, and activities offered by State and local government entities to the public through the web and mobile apps, to

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[148] *Web Accessibility*, European Comm'n (updated 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 Telecomm. Standards Inst., 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].

eliminate or minimize instances where recipients that are also public entities under title II will be held to different standards. The goal of the Department is to issue clear and comprehensive rulemaking that requires accessibility for people with disabilities without causing unnecessary confusion among recipients.

The Department declines to adopt additional technical standards related to documents-. As discussed, the WCAG standards were designed to be "technology neutral"[149] and are designed to be broadly applicable to current and future web technologies. The Department is concerned that adopting multiple technical standards related to different types of web content and content in mobile apps could lead to confusion. However, the Department notes that this rule allows for equivalent facilitation in § 84.87, meaning that recipients could still choose to comply with additional standards or guidance related to documents to the extent that the standard or technique used provides substantially equivalent or greater accessibility and usability.

Finally, the Department does not intend to simply recommend that recipients make their web content and mobile apps accessible without requiring specific standards and methods of enforcement. As discussed in the NPRM, 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, the Internet Society 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 WCAG.

Many organizations, however, have indicated that voluntary compliance with these accessibility guidelines has not resulted in equal access for people with disabilities; accordingly,

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[149] W3C, *Introduction to Understanding WCAG* (June 20, 2023), https://www.w3.org/WAI/WCAG21/Understanding/intro [https://perma.cc/XB3Y-QKVU].

they have urged the Department to take regulatory action to ensure web content and mobile app accessibility.[150] 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.[151]

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 fully compliant with Web Content Accessibility Guidelines (WCAG) 2.1.[152] While WCAG 2.1 has been available to the general public, including web professionals, for over five years, and many of the success criteria it incorporates were available a decade prior in WCAG 2.0, it is likely that some recipients have not fully conformed with WCAG 2.1 AA in the absence of rulemaking requiring conformance. 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.[153]

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[150] *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 Justice. (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 Justice. (Mar. 23, 2022), https://www.c-c-d.org/fichiers/CCD-Web-Accessibility-Letter-to-DOJ-03232022.pdf [https://perma.cc/Q7YB-UNKV].

[151] 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).

[152] 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.

[153] *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

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.[154] In addition to the 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.[155]

The Department believes that adopting technical standards for web content and mobile app accessibility provides 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 content and mobile app accessibility also provides individuals with disabilities with consistent and predictable access to the websites and mobile apps of recipients.

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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.).

[154] *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.").

[155] *See, e.g.*, Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District (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. 13, 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 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].

Comment: Many commenters expressed their beliefs that the proposed time periods for compliance, two years for larger recipients and three years for smaller recipients, were too far in the future and should be shortened. These commenters expressed concern that the time recipients would spend making their web and mobile content accessible would be time that people with disabilities will not have access to their programs and activities, including necessary health care. Alternatively, some commenters stated they believed that the time periods for compliance should be extended to allow recipients, some of whom are small and have limited resources, additional time to come into compliance and ensure their web content and mobile apps comply with WCAG 2.1. These commenters stated that some small health care providers may decide to not accept funding from the Department, or go out of business altogether, if they are required to come into compliance within three years. Some commenters believe that the proposed time period for compliance is adequate and strikes the appropriate balance between providing recipients adequate time and ensuring people with disabilities do not have to wait too long for services.

Some commenters expressed confusion as to whether the proposed rule as drafted only meant that recipients had a one-time obligation to update their web content and mobile apps for WCAG 2.1 AA conformance at two years or three years, depending on their size.

Response: Much like determining the appropriate compliance standard, the Department recognizes that commenters have a spectrum of opinions on whether the proposed dates for compliance are too soon or too far in the future. The Department worked closely with its Federal partners to determine appropriate compliance timeframes. After carefully weighing the arguments that the compliance dates should be kept the same, shortened, or lengthened, the Department has decided that the compliance dates in the final rule—two years for large recipients and three years for small recipients—strike the appropriate balance between the various interests at stake.

Shortening the compliance dates would likely result in increased costs and practical difficulties for recipients, especially small recipients. Lengthening the compliance dates would prolong the exclusion of many people with disabilities from recipients' web content and mobile apps. Additionally, any change in compliance dates runs the risk of introducing inconsistency with other rulemakings[156] where recipients that are also covered by those rulemakings would be subject to different compliance dates. The Department believes that the balance struck in the compliance timeframe proposed in the NPRM was appropriate, and that there are no overriding reasons to shorten or lengthen these dates given the important and competing considerations involved by stakeholders.

Regarding whether the proposed rule only required recipients to make their web content and mobile apps accessible once, the Department wishes to clarify that under this rule, recipients have an ongoing obligation to ensure that their web content and mobile apps comply with this rule's requirements, which would include content that is newly added or created after the compliance date. The compliance date is the first time that recipients need to be in compliance with the rule's requirements; it is not the last. Accordingly, after the compliance date, recipients will continue to need to ensure that all web content and mobile apps they provide or make available comply with the technical standard, except to the extent another provision of this rule permits otherwise. To make this point more clearly, the Department revised the language of § 84.84(b)(1) and (2), respectively, to state that a recipient needs to comply with this rule "[b]eginning May 11, 2026" and "[b]eginning May 10, 2027," depending on the size of the recipient.

Comment: The Department received conflicting comments concerning the costs and challenges that small recipients will face in order to comply with the proposed rule. Some commenters believe that recipients with fewer than fifteen employees have budgets that will be significantly constrained by requirements to make the web content and mobile apps they use

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[156] *See, e.g.*, 88 FR 51948 (Aug. 4, 2023).

compliant with WCAG 2.1 in any amount of time. Some commenters also believe that because of their size, small recipients are less sophisticated and less aware of their obligations under Federal civil rights laws, and therefore should not be held to standards imposed on larger recipients. Alternatively, other commenters state that small recipients do not face insurmountable costs because advances in technology and the services offered to make web content accessible have made compliance much more attainable for even the smallest recipient.

Response: The Department believes that the final rule strikes the appropriate balance by requiring small recipients to comply with the same technical standard as larger recipients while giving small recipients additional time to do so. The Department believes this longer compliance time frame is prudent in recognition of the additional challenges that small recipients may face in complying, such as limited budgets, lack of technical expertise, and lack of personnel. The Department believes that providing an extra year for small recipients to conform to this section will give those recipients sufficient time to properly allocate their personnel and financial resources to make their web content and mobile apps comply with WCAG 2.1 Level AA, without providing so much additional time that people with disabilities have a reduced level of access to their resources for an extended period.

The Department appreciates the concerns of commenters and urges recipients to review the Regulatory Impact Analysis for the Department's full discussion of the costs and benefits of the proposed rulemaking. Small recipients in particular are much less likely to create their own web content and mobile apps and are more likely to contract with outside parties. Small recipients are also more likely to have smaller amounts of web content and mobile apps that would have to be compliant. Recipients will have the choice to remediate existing web content and mobile apps, or to create new accessible web content and mobile apps and may also decide whether to make changes themselves or contract with a third-party to make changes. Regarding sophistication and understanding of accessibility requirements, the Department is committed to issuing guidance and technical assistance for recipients on how to comply with accessibility

requirements, in addition to existing guidance on WCAG 2.1. Finally, a recipient may be able to show that full compliance with subpart I would result in a fundamental alteration or undue burdens as described in § 84.88.

Comment: Many commenters believe that all recipients, regardless of size, should be held to the same accessibility standard. Specifically, they believe that any deviation in accessibility standards between small and large recipients would lead to unacceptable differences in levels of care to the detriment of patients with disabilities, especially those in rural areas. Those commenters also stated that small recipients should either have to come into compliance within the proposed three years or at an earlier date. Some commenters supported more lenient standards for small recipients because they believed achieving full accessibility under WCAG 2.1 would be too difficult for the smallest recipients. One commenter stated that the accessibility standard should be the same regardless of recipient size, but small providers should have more than three years to come into compliance. One commenter recommended a principles-based approach where small recipients would be required to take steps to make their web content and mobile apps accessible, but there would be no standard or method for testing their accessibility. One commenter believed there should be a permanent exemption for small recipients and that they should not be held to any standards for web content and mobile app accessibility. Finally, some commenters requested additional guidance for small recipients so that they could comply with the Department's proposed standards.

Response: The Department appreciates the range of responses on standards for small recipients. The Department agrees that requiring more lenient standards for small recipients would lead to differences in the accessibility and effectiveness of health and human service programs and activities. Given the importance of small recipients in the delivery of health care, such gaps are incompatible with the Department's statutory mandate; a wholesale exception would therefore be inappropriate. Such an exception would mean that an individual with a disability who lives in a small, rural area, might not have the same level of access to a recipient's

web-based programs and activities as an individual with a disability in a larger, urban area. This would significantly undermine consistency and predictability in web accessibility. It would also be particularly problematic given the interconnected nature of many different websites. Furthermore, an exception for small recipients would reduce the benefits of the rule for those entities.

Requiring small recipients to comply with the same technical standards as all other recipients ensures consistent levels of accessibility for recipients of all sizes in the long term, which will promote predictability and reduce confusion about which standard applies. It will allow for individuals with disabilities to know what they can expect when navigating a recipient's web content; for example, it will be helpful for individuals with disabilities to know that they can expect to be able to navigate any recipient's web content independently using their assistive technology. It also ensures that individuals with disabilities who reside in rural areas that are mainly serviced by smaller recipients have comparable access to their counterparts in urban areas that are serviced by a range of smaller and larger recipients, which is critical given the transportation and other barriers that people in rural areas may face.[157]

The Department notes that under appropriate circumstances, small recipients may also rely on the exceptions, flexibilities, and other mechanisms described in §§ 84.85, 84.86, 84.87, 84.88, and 84.89 below, which the Department believes should help make compliance feasible for those recipients. Recipients are not required to take action that would constitute a fundamental alteration in the nature of a program or activity, or impose an undue financial or administrative burden.

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[157] *See, e.g.*, NORC Walsh Ctr. for Rural Health Analysis & Rural Health Info. Hub, *Access to Care for Rural People with Disabilities Toolkit*, (Dec. 2016), https://www.ruralhealthinfo.org/toolkits/disabilities.pdf [https://perma.cc/YX4E-QWEE] (noting geographic, transportation, and service barriers to care in rural areas); U.S. Dep't of Health & Hum. Servs., Health Rsch. & Servs. Admin., Strengthening the Rural Health Workforce to Improve Health Outcomes in Rural Communities, 13-14 (Apr. 2022), https://www.hrsa.gov/sites/default/files/hrsa/advisory-committees/graduate-medical-edu/reports/cogme-april-2022-report.pdf (stating that the healthcare workforce in rural communities is overall short staffed with fewer hospitals and critical care physicians than urban areas); *About Rural Healthcar*e, NHRA, https://www.ruralhealth.us/about-nrha/about-rural-health-care (last visited Mar. 19, 2024) (stating that family physicians comprise only 15% of U.S. outpatient physician workforce but provide 42% of care in rural areas).
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Finally, the Department remains committed to making guidance documents and technical assistance available to the general public so that recipients are aware of their obligations and how to comply with them.

New Social Media Exception

Comment: Many of the comments on recipient use of social media and how it should be addressed in this rulemaking stated that recipients use social media for a wide variety of purposes, including purposes central to the programs and activities they provide. Recipients may post important announcements, scheduling information, informational videos, or other general information that is of high importance to the public. Many comments proposed specific technical requirements to ensure that social media posts from recipients are accessible, including plain language, alternative text for images, and audio descriptions and captions for videos. Some commenters stated that social media posts made before the implementation date for this rulemaking should not be required to be accessible unless they contain important information related to recipient programs or activities or the content of the posts is changed. Some commenters stated that older social media posts should be made accessible upon request or if a recipient posts significant important content on a certain social media platform, like YouTube. Some commenters stated that no preexisting social media posts should be required to be accessible due to the burden on recipients and the forward-looking nature of the proposed rule. Many commenters expressed concern that social media posts from recipients should not be deemed to violate this proposed rule if the social media platform itself is responsible for the violation.

Response: The Department is including an exception for preexisting social media posts in the final rule because making preexisting social media posts accessible may be impossible or result in a significant burden. The benefits of making all preexisting social media posts accessible will likely be limited as these posts are generally intended to provide then-current updates on platforms that are frequently refreshed with new information. The Department

believes recipients' limited resources are better spent ensuring that current web content and content in mobile apps are accessible, rather than reviewing all preexisting social media posts for compliance or possibly deleting recipients' previous posts if remediation is impossible. As other commenters recommended, the Department believes this final rule should be more forward looking when determining which social media posts should be accessible.

The Department emphasizes that even if preexisting social media posts do not have to conform to the technical standard, recipients still need to ensure that their programs and activities offered using web content and mobile apps are accessible to people with disabilities on a case-by-case basis in accordance with their other obligations under section 504.

Based on these comments, the Department will include a new exception at § 84.85(e) that will state the requirements of § 84.84 do not apply to a recipient's social media posts that were posted before the date the recipient is required to comply with this rule.

The Department's final rule requires that web content and mobile apps that recipients provide or make available, directly or through contractual, licensing, or other arrangements, be made accessible within the meaning of § 84.84. This requirement applies regardless of whether that content is located on the recipient's own website or mobile app or elsewhere on the web or mobile apps. It therefore covers web content or content in a mobile app that a recipient makes available via a social media platform.

Many social media platforms that are widely used by members of the public are available to members of the public separate and apart from any arrangements with recipients to provide a program or activity. As a result, this rule does not require recipients to ensure that such platforms themselves conform to WCAG 2.1 Level AA. However, because the posts that recipients disseminate through those platforms are provided or made available by the recipients, they must conform to WCAG 2.1 Level AA. The Department understands that social media platforms often make available certain accessibility features like the ability to add captions or alt text. It is the recipient's responsibility to use these features when it makes web content available on social

media platforms. For example, if a recipient posts an image to a social media platform 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.

Comment: Many of the comments on recipients' use of mobile applications and how it should be addressed in this rulemaking stated that recipients use mobile apps for a wide range of services that are central to their programs and activities. For example, some recipients use mobile apps as the main method for making appointments, paying bills, and even communicating with the recipient. None of the commenters argued against addressing mobile applications in this rulemaking. Some commenters stated that WCAG 2.1 applies to mobile apps in addition to web content and the Department is correct in proposing to use the same standard for both. Some commenters recommended a different standard for mobile apps, like section 508 of the Rehabilitation Act, WCAG 2.2, or WCAG 2.0.

Response: The Department agrees that the same technical standard for accessibility should apply to both web content and mobile apps. The Department believes that applying the same technical standard to both web content and mobile apps will reduce confusion by ensuring consistent requirements and user experiences across web and mobile platforms.

One of the reasons the Department proposed WCAG 2.1 AA as the standard for web content and mobile apps is that the WCAG standards were designed to be "technology neutral."[158] This means that they are designed to be broadly applicable to current and future web technologies,[159] which will help ensure accessibility for mobile apps. Although the Section 508 Standards include some additional requirements like interoperability that are not required by WCAG,[160] WCAG 2.1 Level AA includes specific success criteria related to mobile app accessibility. These success criteria address challenges such as touch target size, orientation, and

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[158] W3C, *Introduction to Understanding WCAG* (June 20, 2023), https://www.w3.org/WAI/WCAG21/Understanding/intro [https://perma.cc/XB3Y-QKVU].
[159] *See* W3C, *Understanding Techniques for WCAG Success Criteria* (June 20, 2023), https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques [https://perma.cc/AMT4-XAAL].
[160] *See* 36 CFR 1194.1; 36 CFR part 1194, appendix C, ch. 5.

motion actuation, among others.[161] Therefore, the Department believes that WCAG 2.1 Level AA is a robust framework for mobile app accessibility.

Comment: Most of the comments on how the proposed compliance dates will affect individuals with disabilities noted that the longer that individuals with disabilities are forced to wait for accessible web content and mobile apps, the worse health outcomes they will face. Some commenters noted that retrofitting existing web content is always more difficult than creating accessible content, so recipients should begin making new web content accessible as soon as possible.

Response: The Department agrees that creating accessible content from the start, rather than trying to remediate after the fact, is generally an easier undertaking for recipients and results in lower costs and burdens over time. While recipients must begin complying with the rule on the applicable compliance date, the Department expects that recipients will need to prepare for compliance during the two or three years before the compliance date. In addition, recipients still have an obligation to meet all of section 504's existing requirements—both before and after the date they must initially come into compliance with this rule.

Comment: There were limited comments concerning how to define small recipients under the proposed rulemaking. Some commenters agreed that fifteen was the appropriate employee cut off for small recipients. Some commenters stated that there should be no distinction between small and large recipients because patients require the same level of care regardless of the size of a provider. Some commenters requested that instead of using the section 504 definition of small recipient that includes recipients with fewer than fifteen employees, the Department use the definition from the 2015 Medicare Access and CHIP Reauthorization Act which includes practices with fifteen or fewer professionals, effectively making more recipients small recipients, as the commenters characterized the requested change.

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[161] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/ and https://perma.cc/UB8A-GG2F (success criteria 2.5.5, 1.3.4, & 2.5.4).

Response: Since its publication over four decades ago, the Department's implementing regulation for section 504 of the Rehabilitation Act has recognized that there are practical differences between recipients with fewer than fifteen employees and recipients with fifteen or more employees. As a result, the Department limited the obligations of recipients with fewer than fifteen employees in certain areas. Maintaining this definition will significantly reduce the administrative complexity of enforcing this regulation and will improve predictability for recipients. The Department will not alter the definition of small recipient under a civil rights regulation to more closely align with a public law focused on physician payments.

Comment: Commenters agreed with the Department's proposed method for compliance for recipients that are also public entities covered by title II of the ADA.

Response: The Department agrees that its proposed method is appropriate. In instances where a recipient is also a public entity covered by title II of the ADA, the recipient will be required to comply with both this rulemaking and all title II regulations, including DOJ's rule establishing specific requirements, including the adoption of specific technical standards, for making accessible the services, programs, or activities offered by State and local government entities to the public through the web and mobile apps, and the associated compliance dates specified in that rulemaking.

Comment: Most commenters agreed that there should not be a separate standard or greater time period for captioning live audio. Many commenters agree that two or three years is adequate time to ensure captioning for live audio, especially given the current advances in automated captioning technology. One commenter asked whether captioning requirements would require captions in multiple different languages beyond English.

Response: As proposed in the NPRM, the final rule applies the same compliance date to all of the WCAG 2.1 Level AA success criteria, including live-audio captioning requirements. As stated in § 84.84(b), this provides three years after publication of the final rule for small recipients to comply, and two years for large recipients. The final rule takes this approach for

several reasons. First, the Department understands that live-audio captioning technology has developed in recent years and continues to develop. Additionally, the COVID-19 pandemic moved a significant number of formerly in-person 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. Further, the Department believes that requiring conformance with all success criteria by the same date (according to recipient size) will address the need for both clarity for recipients and predictability for individuals with disabilities.

This rulemaking is separate from other civil rights laws and regulations that prohibit discrimination based on race, color, or national origin and require meaningful access for individuals with limited English proficiency. Additional information on section 1557, which requires that certain health programs and activities take reasonable steps to provide meaningful access to individuals with limited English proficiency, can be found on the OCR website.

Comment: Some commenters noted that recipients post a variety of live audio content, including news blasts.

Response: The Department appreciates the responses.

SUMMARY OF REGULATORY CHANGES

While the Department believes that the comments concerning § 84.84 were overall positive and recognized the intent of the proposed rule, there is also concern that more clarity can be provided to define the scope of coverage. Accordingly, the Department will modify the text of § 84.84(a)(1) and (2) and (b)(1) and (2) to clarify that this rulemaking applies to web content and mobile apps that a recipient provides, either "directly or through contractual, licensing, or other arrangements." This approach is consistent with the NPRM, which clarified that 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. The Department also received

comments in other sections emphasizing the importance of such a distinction and believes it is a fundamental part of this rule that should be emphasized.

The Department will also modify the regulatory text of § 84.84 to remove the words "members of the public," which is more similar to the language in the application section of title II of the ADA but is not intended to change or limit the coverage of the final section 504 rule.

The Department will also edit the language at § 84.84(b)(1) and (2) to clarify that recipients have an ongoing obligation, not a one-time obligation, to make their web content and mobile apps accessible beginning two or three years after the publication of this final rule.

Exceptions (§ 84.85)

Proposed § 84.85 contained a number of exceptions to the requirements of § 84.84 including archived web content (§ 84.85(a)), preexisting conventional electronic documents (§ 84.85(b)), web content posted by a third party (§ 84.85(c)), linked third-party web content (§ 84.85(d)), password-protected course content for elementary, secondary, and postsecondary institutions (§ 84.85(e), (f)), and individualized password-protected documents (§ 84.85(g)).

The Department emphasizes that, even if certain content does not have to conform to the technical standard of this rulemaking, recipients still need to ensure that their programs and activities offered using web content and mobile apps are accessible to people with disabilities on a case-by-case basis in accordance with other obligations under this rulemaking. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the recipient's programs or activities.[162]

The Department sought comment on the following questions pertaining to archived web content (§ 85.85(a)):

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[162] *See* 45 CFR 84.68(b)(1)(ii), (b)(7), 84.77.

- *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?*

The comments and our responses on § 84.85(a) are set forth below.

Comment: One commenter stated that its content is stored in accordance with State administrative rules and made available to the public based on open records laws. Several commenters sought clarity on the definition of "archived web content." Some commenters provided their understanding of what constitutes archived web content, and offered suggestions for updating the Department's proposed definition. One comment stated that archiving content includes taking stock of all the material on a website, then the website may be overhauled in such a way that archived relationships or content types are no longer visible. Some commenters requested an edit to the proposed definition of "archived content" to remove the term "exclusively" as it limits archived web content to content maintained for reference, research or recordkeeping and the commenters did not want to limit the exception to specific types of content.

Response: The Department appreciates the comments about the archived web content definition and exception. Specifically, some commenters offered recommendations to broaden the definition of archived web content, which would increase the total web content covered by the proposed exception, while other comments recommended limiting the definition of archived web content, which would decrease the total web content covered by the proposed exception. In the proposed rule, "archived web content" was defined as "web content that (1) is retained

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."[163]

The Department made several revisions to the definition of archived web content from the NPRM. To clarify the scope of content covered by the definition and associated exception, the Department added a new first part to the definition. That new part specifies that archived web content is limited to three types of historic content: web content that was created before the date the recipient is required to comply with subpart I; web content that reproduces paper documents created before the date the recipient is required to comply with subpart I; and web content that reproduces the contents of other physical media created before the date the recipient is required to comply with subpart I.

Web content that was created before the date a recipient is required to comply with subpart I satisfies the first part of the definition. In determining the date web content was created, the Department does not intend to prohibit recipients from making minor adjustments to web content that was initially created before the relevant compliance dates specified in § 84.84(b), such as by redacting personally identifying information from web content as necessary before it is posted to an archive, even if the adjustments are made after the compliance date. In contrast, if a recipient makes substantial changes to web content after the date the recipient is required to comply with the rule, such as by adding, updating, or rearranging content before it is posted to an archive, the content would likely no longer meet the first part of the definition. If the recipient later alters or updates the content after it is posted in an archive, the content would not meet the third part of the definition of archived web content and it would generally need to conform to WCAG 2.1 Level AA.

Web content that reproduces paper documents or that reproduces the contents of other physical media would also satisfy the first part of the definition if the paper documents or the

[163] 88 FR 63392, 63509 (Sept. 14, 2023).

contents of the other physical media were created before the date the recipient is required to comply with this rule. Paper documents include various records that may have been printed, typed, handwritten, drawn, painted, or otherwise marked on paper. Videotapes, audiotapes, film negatives, CD-ROMs, and DVDs are examples of physical media. The Department anticipates that recipients may identify or discover historic paper documents or historic content contained on physical media that they wish to post in an online archive following the time they are required to comply with this rule. For example, a research hospital might move to a new building after the date it is required to comply with this rule and discover a box in storage that contains hundreds of paper files and photo negatives from 1975 related to a research study the hospital conducted at that time. If the hospital reproduced the documents and photos from the film negatives as web content, such as by scanning the documents and film negatives and saving the scans as PDF documents that are made available online, the resulting PDF documents would meet the first part of the definition of archived web content because the underlying paper documents and photos were created in 1975. The Department reiterates that it does not intend to prohibit recipients from making minor adjustments to web content before posting it to an archive, such as by redacting personally identifying information from paper documents. Therefore, the hospital could likely redact personally identifying information about participants in the research study from the scanned PDFs as necessary before posting them to its online archive. But, if the hospital were to make substantial edits to PDFs, such as by adding, updating, or rearranging content before posting the PDFs to its archive, the PDFs would likely not meet the first part of the definition of archived web content because, depending on the circumstances, they may no longer be a reproduction of the historic content. In addition, if the hospital later altered or updated the PDFs after they were posted in an archive, the content would not meet the third part of the definition of archived web content and it would generally need to conform to WCAG 2.1 Level AA.

The Department believes the first part of the definition sets an appropriate time-based limitation on the scope of content covered by the definition and exception that is consistent with

the Department's stated intent in the NPRM. In the NPRM, the Department explained that the definition of archived web content and the associated exception were intended to cover historic content that is outdated or superfluous.[164] The definition in the final rule, which is based on whether the relevant content was created before the date a recipient is required to comply with subpart I, is now more aligned with, and better situated to implement, the Department's intent to cover historic content. The Department believes it is appropriate to include a time-based limitation in the definition, rather than add new criteria stating that content must be historic, outdated, or superfluous, because it is more straight forward to differentiate content based on the date the content was created. Therefore, there will be greater predictability for individuals with disabilities and recipients as to which content is covered by the exception.

The Department declines to establish time-based limitations for when content may be posted to an archive or to otherwise set an expiration date for the exception. As discussed below, the Department recognizes that many recipients will need to carefully consider the design and structure of their web content before dedicating a certain area or areas for archived content, and that, thereafter, it will take time for recipients to identify all content that meets the definition of archived web content and post it in the newly created archived area or areas. The archived web content exception thus provides recipients flexibility as to when they will archive web content so long as the web content was created before the date the recipient was required to comply with subpart I or the web content reproduces such paper documents or the contents of other physical media created before the date the recipient was required to comply with subpart I. In addition, the Department does not believe it is necessary to establish a waiting period before newly created web content can be posted in an archive. New content created after the date a recipient is required to comply with this rule will generally not meet the first part of the definition of "archived web content." In the limited circumstances in which newly created web content could meet the first part of the definition because it reproduces paper documents or the contents of

[164] 88 FR 63392, 63464 (Sept. 14, 2023).

other physical media created before the date the recipient is required to comply with this rule, the Department believes the scope of content covered by the exception is sufficiently limited by the second part of the definition: whether the content is retained exclusively for reference, research, or recordkeeping.

After considering all the comments, the Department declines to change what is now the second part of the definition of archived web content. Given the wide variety of web content that recipients provide or make available, the Department does not believe it is advisable to try to use additional, more specific language in the definition about what types of content are covered. Whether web content is retained exclusively for reference, research, or recordkeeping will depend on the facts of the particular situation. The Department notes that if a recipient posts web content that identifies the current policies or procedures of the recipient, or posts web content containing or interpreting applicable laws or regulations related to the recipient, that web content is unlikely to be covered by the exception. This is because the content is notifying members of the public about their ongoing rights and responsibilities. It therefore is not, as the definition requires, being used exclusively for reference, research, or recordkeeping.

Also, the Department's revised definition of archived web content, and specifically the new first part of the definition, make clear that the definition only pertains to certain content created before the date the recipient is required to comply with this rule. Therefore, new content such as agendas, meeting minutes, and other documents related to meetings that take place after the recipient is required to comply with this rule would likely not meet all parts of the definition of archived web content.

In addition to adding a new first part to the definition of archived web content, the Department made one further change to the definition from the NPRM. In the NPRM, what is now the second part of the definition pertained to web content that is "maintained" exclusively for reference, research, or recordkeeping. In the final rule, the word "maintained" is replaced with "retained." The revised language is not intended to change or limit the coverage of the

definition. Rather, the Department recognizes that the word "maintain" can have multiple meanings relevant to this rule. In some circumstances, "maintain" may mean "to continue in possession" of property, whereas in other circumstances it might mean "to engage in general repair and upkeep" of property.[165]

Additionally, the Department will retain the word "exclusively" in the definition of archived web content. The Department is concerned that removing the word "exclusively" would result in less predictability for both recipients and individuals with disabilities about the scope of content covered by the definition. In addition, if the Department were to remove the word "exclusively," the exception for archived web content might cover important older web content that is still used for reasons other than reference, research, or recordkeeping. The purpose of the exception for archived web content is to help recipients focus their resources on making accessible the most important materials that people use most widely and consistently, rather than historic or outdated web content that is only used for reference, research, or recordkeeping.

Comment: Many commenters opposed the proposed archived web content exception because they believe it would result in people with disabilities being denied access in perpetuity to historical information. Several commenters noted that access to archived public documents is key to the public's right to know, petition, and engage in the American democratic process. These commenters said that these legal rights, such as access to public meeting information, should not be abridged on the basis of disability or any other exclusionary reason. Other commenters stated that if recipients do not respond to requests for accessible electronic documents in a timely manner, important information falls under this exception, and any essential documents should not be included in this exception. In addition, commenters said that individuals with disabilities may not know what content they are looking for to make such request for accessible versions. Several commenters stated there will be a negative impact on students, researchers, and other professionals with disabilities who frequently require access to

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[165] *Maintain*, Black's Law Dictionary (11th ed. 2019).

archived content for their studies and livelihoods. One commenter supported the exception, saying that recipients should be encouraged to accommodate people with disabilities so they can access content when requested.

Response: The Department understands the concerns raised by commenters about the burdens that people with disabilities may face because archived web content is not required to conform to WCAG 2.1 Level AA. The Department emphasizes that even if certain content does not have to conform to the technical standard, recipients still need to ensure that their programs and activities offered using web content are accessible to people with disabilities on a case-by-case basis in accordance with their other obligations under section 504. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the recipient's programs or activities.[166]

The Department emphasizes that web content that is not archived, but instead notifies users about the existence of archived web content and provides users access to archived web content, generally must still conform to WCAG 2.1 Level AA. Therefore, the Department anticipates that members of the public will have information about what content is contained in an archive. For example, a recipient's archive may include a list of links to download archived documents. Under WCAG 2.1 Success Criterion 2.4.4, a recipient would generally have to provide sufficient information in the text of the link alone, or in the text of the link together with the link's programmatically determined link context, so users could understand the purpose of each link and determine whether they want to access a given document in the archive. [167]

The Department continues to believe that the exception appropriately encourages recipients to utilize their resources to make accessible the critical up-to-date materials that are

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[166] *See* 45 CFR 84.68(b)(1)(ii), (b)(7), 84.77.
[167] *See* W3C, *Web Content Accessibility Guidelines 2.1, Link Purpose (In Context)* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/ and https://perma.cc/UB8A-GG2F.

most consistently used to access recipients' programs or activities. The Department believes the exception provides a measure of clarity and certainty for recipients about what is required of archived web content. Therefore, resources that might otherwise be spent making accessible large quantities of historic or otherwise outdated information available on some recipients' websites are freed up to focus on important current and future web content that is widely and frequently used by members of the public. However, the Department emphasizes that the exception is not without bounds. As discussed above, archived web content must meet all four parts of the archived web content definition in order to qualify for the exception. Content must meet the time-based criteria specified in the first part of the definition. The Department believes the addition of the first part of the definition will lead to greater predictability about the application of the exception for individuals with disabilities and recipients. In addition, web content that is used for something other than reference, research, or recordkeeping is not covered by the exception.

Comment: Many commenters pointed out that recipients already have the option to claim fundamental alteration or undue burdens limitations for the subpart. If a recipient cannot argue that making archived documents accessible would result in a fundamental alteration or undue burden, then they should provide access to archived documents via a schedule that prioritizes conversion based on the needs of their constituents. Some commenters suggested that priority should be based on which records are accessed more often, or those that are more chronologically recent. Some commenters mentioned that the burden of proving fundamental alteration or undue burden is on the recipient and the Department should provide clear guidelines on how to satisfy such defenses. One commenter asked about the consequences for noncompliance and encouraged the Department to give recipients ample time and opportunity to correct issues.

Several commenters pointed out that the status quo is that accessible documents are not provided in a timely manner upon request, and requested that if the Department does end up

allowing the exception for archived documents, then the Department should define "timely manner" to no longer than a few business days. Commenters said the Department should also require that recipients post processes and timelines for accessing inaccessible archived documents.

Some commenters requested that any documents archived after the effective date of this rule be kept in an accessible format.

One commenter said the Department should distinguish between archives that are themselves programs of a recipient (e.g., special digital collections and recordkeeping) versus any information that was originally web content and that may be archived solely for reference (e.g., old calendar events or time-oriented resources kept on an archives section of the website). This commenter stated that when an archive is itself a program, it should be required to be accessible.

Response: The Department's aim in setting forth exceptions was to make sure that individuals with disabilities have ready access to recipients' web content and mobile apps, especially those that are current, commonly used, or otherwise widely needed, while also ensuring that practical compliance with this rule is feasible and sustainable for recipients. The exceptions help to ensure that compliance with this final rule is feasible by enabling recipients to focus their resources on making frequently used or high impact content WCAG 2.1 Level AA compliant first. The Department was mindful of the pragmatic concern that should the final rule require actions that are likely to result in fundamental alterations or undue burdens for large numbers of recipients or large swaths of their content, the rule could in practice lead to fewer improvements for accessibility across the board as recipients encountered these limitations. The Department believes that such a rule could result in recipients prioritizing accessibility of content that is "easy" to make accessible, rather than content that is essential, despite the spirit and letter of the rule. The Department believes that clarifying that recipients do not need to focus resources

on certain content helps ensure that recipients can focus their resources on the large volume of content not covered by exceptions, as that content is likely more frequently used or up to date.

As discussed above, the Department has decided to keep the archived web content exception in the final rule. After reviewing the range of different views expressed by commenters, the Department continues to believe that the exception appropriately encourages recipients to utilize their resources to make accessible the critical up-to-date materials that are most consistently used to access recipients' programs or activities. The Department believes the exception provides a measure of clarity and certainty for recipients about what is required of archived web content. Therefore, resources that might otherwise be spent making accessible large quantities of historic or otherwise outdated information available on some recipients' websites are freed up to focus on important current and future web content that is widely and frequently used by members of the public.

The Department also declines to treat differently recipients whose primary function is to provide or make available what a commenter perceived as archived web content. The Department reiterates that whether archived web content is retained exclusively for reference, research, or recordkeeping depends on the particular facts and circumstances. The Department believes the exception and definition of archived web content together provide a workable framework for determining whether all types of recipients properly designate web content as archived.

The Department declines to require recipients to adopt procedures and timelines for how individuals with disabilities could request access to inaccessible archived web content covered by the exception. The Department reiterates that, even if content is covered by this exception, recipients still need to ensure that their programs and activities offered using web content are accessible to people with disabilities on a case-by-case basis in accordance with their other obligations under section 504. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with

disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the recipient's programs or activities.[168]

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.85(a) as proposed with no modifications and editing the definition of "archived web content" in § 84.10 by adding the following at paragraph (1): "was created before the date the recipient is required to comply with § 84.84, reproduces paper documents created before the date the recipient is required to comply with § 84.84, or reproduces the contents of other physical media created before the date the recipient is required to comply with § 84.84." The provision designated as paragraph (1) in the NPRM will be redesignated as paragraph (2) and the word "maintained" will be replaced with "is retained under." In addition, the provisions labelled paragraphs (2) and (3) in the NPRM will be redesignated as paragraphs (3) and (4), respectively.

The Department sought comment on the following questions pertaining to preexisting conventional electronic documents (§ 84.85(b)):

- *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*

[168] *See* 45 CFR 84.68(b)(1)(ii), (b)(7), 84.77.

consider, or additional limitations that should be placed on this exception? How would foreseeable advances in technology affect the need for this exception?

The comments and our responses on § 84.85(b) are set forth below.

Comment: Some commenters stated that preexisting conventional documents can easily be made accessible, such as by using .doc formats as opposed to .pdf or saving a .pdf in a more accessible manner. Some commenters wanted to broaden this exception to cover preexisting multimedia content and documents produced by government entities. Those commenters reasoned that documents provided by government entities may have statutory limitations that prevent changes and recipients would have no control over or ability to change the content of such documents. Another commenter appreciated the exception because they believe that without the exception recipients would be forced to delete a significant amount of helpful content from their websites. This commenter urged HHS to except content posted on platforms such as YouTube from coverage.

Commenters listed types of conventional electronic documents made available to the public such as PDF, brochures, announcements, and slides shows on web sites, cloud drives, file sharing sites, and cloud document platforms. Commenters said recipients use social media which allows the posting of links, which can include links to the recipient's own website. Conventional electronic documents can be attached to the social media post themselves in limited circumstances. One commenter recommended changing the wording of exception to include documents that have been posted to sites other than the recipient's website (such as cloud drives and social media).

A State governor said the exception is too broad and proposed limiting the exception to archived documents that are no longer in regular and ongoing use to avoid excessive inaccessible legacy content.

Response: The Department does not intend to broaden this proposed exception at this time, because the exception at § 84.85(a) covers archived web content, the definition of which is

not limited to documents.[169] Web content that recipients provide or make available must conform to WCAG 2.1 Level AA unless covered by an exception. That includes videos that a recipient creates.

The Department appreciates commenters' discussions of the types of conventional documents that recipients use and how to make them accessible. Preexisting conventional electronic documents are covered by this exception unless they are currently used to apply for, gain access to, or participate in a recipient's programs or activities.

The Department continues to believe that the exception provides an important measure of clarity and certainty for recipients as they initially consider how to address all the various conventional electronic documents provided and made available through their web content and mobile apps. The exception will allow recipients to primarily focus their resources on developing new conventional electronic documents that are accessible as defined under this rule and remediating preexisting conventional electronic documents that are currently used to apply for, gain access to, or participate in their programs or activities. In contrast, recipients will not have to expend their resources on identifying, cataloguing, and remediating preexisting conventional electronic documents that are not currently used to apply for, gain access to, or participate in the recipients' programs or activities.

The Department modified the language of this exception from the NPRM in ways that are relevant to the comment about the location of the conventional electronic documents, including social media sites and cloud drives. In the NPRM, the Department specified that the exception applied to conventional electronic documents "created by or for a recipient" that are available "on a recipient's website or mobile app." The Department believes the language "created by or for a recipient" is no longer necessary in the regulatory text of the exception itself because the Department updated the language of § 84.84 to clarify the overall scope of content generally covered by the rule. In particular, and, as explained above, to make clear that recipients cannot

[169] *See* § 84.10.

delegate away their accessibility responsibilities, the text of § 84.84(a)(1) and (2) now states that the rule applies to all web content and mobile apps that a recipient provides or makes available either "directly, or through contractual, licensing, or other arrangements." Section 84.85(b), which is an exception to the requirements of § 84.84, is therefore limited by the new language added to the general section.

In addition, the Department removed the phrase "members of the public" from the language of the exception in the proposed rule for consistency with the edits to § 84.84 of the section 504 regulation and title II of the ADA, as described above.

Comment: Several commenters pointed out that there may be a need for documents that fall under this exception because, while they are not used to apply for, gain access to, or participate in a recipient's programs or activities, they are important for understanding the recipient's programs, activities, and services. One commenter noted that "apply for, gain access to, or participate in a recipient's services, programs, or activities" may not be consistently interpreted among recipients, and that documents with information about understanding the recipient's overall programs and activities, research-related documents, directives on health care payment, coding, or coverage can govern medical decisions long after they are published. Commenters noted that disputes related to health care claims can take years to solve, making existing documents relevant for such claims. Commenters noted that even if updated, new documents may not replace older versions in all circumstances, and partial revisions to existing documents make it necessary for both versions to be accessible for comparison.

One commenter stated that the Department adequately addressed concerns about whether supporting information for conventional documents will be accessible with the statement "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."

Response: Whether a conventional electronic document is currently used to apply for, gain access to, or participate in a recipient's programs or activities is a fact-specific analysis. For example, one commenter questioned whether a document containing a recipient's directives on health care payments would be covered by the exception if the document did not otherwise discuss a particular program or activity. The Department anticipates that the exception would likely not cover such a document because the document is likely used as instructions for making payments to the recipient as part of the recipient's program and activity of collecting payments for health services it provides. The Department provides additional information about how the exception applies to documents that provide instructions or guidance below. Another example is an informational document containing a recipient hospital's description of the accessibility features available throughout its hospital building. The Department anticipates that the exception would likely not cover such a document. One of the recipient's programs and activities is maintaining its building, including the building's accessibility features. An individual with a disability who accesses the document to understand the hospital's accessibility features before going to the hospital to visit a relative receiving treatment there would be currently using the document to gain access to the hospital's building.

Additionally, the Department notes that preexisting documents are also not covered by the exception if they provide instructions or guidance related to other documents that are directly used to apply for, gain access to, or participate in the recipient's programs or activities. Therefore, in addition to making a preexisting PDF application for benefits conform with WCAG 2.1 Level AA, a recipient would also have to make other preexisting documents conform with WCAG 2.1 Level AA if they may be needed to obtain the benefits, complete the application, understand the process, or otherwise take part in the program, such as application instructions, manuals, and guides, such as "Questions and Answers" documents.

The Department recognizes that there may be some overlap between the content covered by the archived web content exception and the exception for preexisting conventional electronic

documents. . The Department notes that if web content is covered by the archived web content exception, it does not need to conform to WCAG 2.1 Level AA to comply with this rule, even if the content fails to qualify for another exception, such as the preexisting conventional electronic document exception. For example, after the date a recipient college is required to comply with this rule, its health clinic website may still include PDF documents containing the schedules from academic year 2017-2018 that were posted in non-archived areas of the website in the summer of 2017. Those PDFs may be covered by the preexisting conventional electronic documents exception because they were available on the college's health clinic website prior to the date it was required to comply with this rule, unless they are currently used to apply for, gain access to, or participate in a recipient's programs or activities, in which case, as discussed in this rule, they would generally need to conform to WCAG 2.1 Level AA. However, if the college moved the PDFs to an archived area of its health clinic site and the PDFs satisfied all parts of the definition of archived web content, the documents would not need to conform to WCAG 2.1 Level AA, regardless of how the preexisting conventional electronic document exception might otherwise have applied, because the content would fall within the archived web content exception.

Also, because the exception only applies to preexisting conventional electronic documents, it would not cover documents that are open for editing if they are changed or revised after the date a recipient is required to comply with this rule. For example, a school may maintain an editable word processing file, such as a Google Docs file, that lists the dates on which the school held school board meetings. The school may post a link to the document on its website so members of the public can view the document online in a web browser, and it may update the contents of the document over time after additional meetings take place. If the document was posted to the school's website prior to the date it was required to comply with the rule, it would be a preexisting conventional electronic document unless the school added new dates to the document after the date it was required to comply with this rule. If the school made

such additions to the document, the document would no longer be preexisting. Nevertheless, there are some circumstances where conventional electronic documents may be covered by the exception even if copies of the documents can be edited after the date the recipient is required to comply with this rule. For example, a recipient may post a Microsoft Word version of a flyer on its website prior to the date it is required to comply with this rule. A member of the public could technically download and edit that Word document after the date the recipient is required to comply with the rule, but their edits would not impact the "official" posted version. Therefore, the official version would still qualify as preexisting under the exception. Similarly, PDF files that include fillable form fields (e.g., areas for a user to input their name and address) may also be covered by the exception so long as members of the public do not edit the content contained in the official posted version of the document. However, as discussed below, the exception does not apply to documents that are currently used to apply for, gain access to, or participate in a recipient's programs or activities. The Department notes that whether a PDF document is fillable may be relevant in considering whether the document is currently used to apply for, gain access to, or participate in a recipient's programs or activities. For example, a PDF form that must be filled out and submitted when submitting medical information to a health provider is currently used to apply for, gain access to, or participate in a recipient's programs or activities, and therefore would not be subject to the exception for preexisting conventional electronic documents.

Comment: Commenters mentioned several populations that would be affected, including participants in adult education programs that may need to use another recipient's document for tools, skills and programs for future employment training; citizens who will be unable to petition the government for redress of grievances due to inaccessible meeting presentation documents; and researchers who will not have access to research publications, public health reports, and reports about community health needs.

Several commenters pointed out that people with disabilities must disclose their disability in requests for accessible versions of preexisting conventional electronic documents and wait for the recipient to remediate the document. One commenter said that a recipient's time is better spent on making sure new conventional electronic documents are accessible rather than historical data.

Several commenters pointed out that small recipients will have an additional three years to publish inaccessible materials, many of which will not be archived for several years. These commenters believed that these timeframes could be interpreted by these recipients to mean that those documents do not need to be made accessible.

One commenter stated that documents that meet the preexisting conventional document exception but are no longer applicable to a current program or activity should be archived. The commenter wrote that the remaining documents included under this exception should be limited, if any. Another commenter said that documents that recipients provide are often "living" documents, meaning they will be edited often, but not archived for several years. A different commenter expressed appreciation of the Department's clarification that if a recipient updates an otherwise covered document after the effective date of this rule, it is no longer considered preexisting.

One commenter noted that there are already advances in technology that allow for modification of preexisting conventional electronic documents.

Response: The Department understands the concerns raised by commenters about the potential burdens that individuals with disabilities may face because some conventional electronic documents covered by the exception are not accessible. The Department emphasizes that even if certain content does not have to conform to the technical standard, recipients still need to ensure that their programs and activities offered using web content are accessible to people with disabilities on a case-by-case basis in accordance with their other obligations under section 504. These obligations include making reasonable modifications to avoid discrimination

on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the recipient's programs or activities.[170]

The Department agrees that recipients may choose to archive their existing conventional electronic documents if they meet the definition of archived web content in § 84.10. The Department also agrees that if a recipient changes or revises a preexisting document following the date it is required to comply with the rule, the document would no longer be "preexisting" for the purposes of the exception.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above, the comments received, and other changes throughout this rulemaking, the Department is making limited modifications to § 84.85(b). As discussed above, the Department is eliminating the phrase "created by or for a recipient" because such situations are now addressed by the "directly or through contractual, licensing, or other arrangements" language inserted into § 84.84(a) and (b). The Department is also replacing "on a recipient's website or mobile app" with "as part of a recipient's web content or mobile apps" to ensure consistency with other parts of the regulatory text by referring to "web content" rather than "websites." In addition, the Department removed the phrase "members of the public" from the language of the exception for consistency with the edits to § 84.84 of the section 504 regulation and title II of the ADA.

The Department sought comment on the following questions pertaining to web content posted by a third party (§ 84.85(c)):

- *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*

[170] *See* 45 CFR 84.68(b)(1)(ii), (b)(7), 84.77.

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?*

The comments and our responses on § 84.85(c) are set forth below.

Comment: Commenters stated that social media profiles of recipients allow for public comments from news about emergencies like disasters or shooters and can be more current than the local news coverage. Commenters describe social media as spaces used to complain about community conditions, get advice, and get organized. Commenters also stated that social media is used to understand new programs, health policy, public comments, and public contracts. Some commenters found that tools for accessibility provided on social media platforms may not be sufficient for accessibility. Another commenter recommended requiring training on how to use these third-party accessibility features and that such trainings should be documented.

Commenters mentioned situations, other than through social media, where web content is posted by a third party on a recipient's website such as when recipients post forums for public comments, promote individuals' rights to petition the government for redress of grievances, solicit real-time feedback during public meetings, or seek bids for contracts on third-party platforms. Other commenters mentioned teachers assigning work through a class message board that may require students to reply with video, essay, wiki page or other work. Another commenter mentioned scheduling tools, maps, calendars, and payment systems. One commenter said that third-party content could be uploaded to a case docket and the inaccessibility of such posting could deny the individual the right to a fair hearing as well as equal employment in the legal profession.

Some commenters said that if this exception is eliminated, recipients can take steps to make sure content is accessible by changing settings, setting rules, and prompting users to include alt text.

A few commenters said they are not able to control third-party content and supported this exception. Those commenters said it's up to the third-party to make content accessible. Some commenters said recipients often receive materials from third parties, including legal documents like signed contracts, that could be materially altered if the recipient makes them accessible. One commenter said that enforcing accessibility may force recipients to remove resources otherwise helpful to their enrollees such as population health management programs. Another commenter agreed with the exception but thought that the recipient should be able to provide an accessible system for the general structure and that text-only postings should be easy to make accessible and recommend that this level of accessibility be required.

One commenter requested clarification on (1) criteria for how recipients can distinguish among third-party content that may or may not allow members of the public to participate in or benefit from the recipient's programs or activities; and (2) whether the technical standard requirements would apply to third-party materials that are linked within a recipient's website such as other websites or non-text content. Some commenters voiced concerns with the challenge of meeting requirements in the proposed time frame as they have already procured most of their software for development. One commenter recommended that OCR conduct additional outreach and educational activities to software and other vendors to ensure that they know about technology accessibility standards.

Some other commenters requested that the Department edit part of the exception because while third-party content can be located on the recipient's website, it may not always be "posted" by the third-party entity.

Response: The Department appreciates the responses, particularly those that identified situations where a third party may post content on a recipient's website. The final rule includes

this exception in recognition of the fact that individuals other than a recipient's agents sometimes post content on a recipient's web content and mobile apps. 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 unmonitored, 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 to no control over the content that the third party 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 less frequently accessed than other content, there may be only limited benefit to requiring recipients to make this content accessible. An example would be a recipient website that includes a comment section that allows members of the public to post reviews or responses.

Based on the comments received, the Department believes there may be confusion, especially among recipients, as to what content would be excepted. The exception in § 84.85(c) does not apply to content posted by the recipient itself, or posted on behalf of the recipient due to contractual, licensing, or other arrangements, 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. Sometimes a third party might even build a recipient's website template on the recipient's behalf. To the extent a recipient chooses to rely on third-party content on its website in these ways, it must select third-party content that meets the requirements of § 84.84. This is because a recipient may not delegate away its obligations under section 504.[171] If a recipient relies on a contractor or another third party to post content on the recipient's behalf, the

[171] *See* 45 CFR 84.4, redesignated as § 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).

recipient retains responsibility for ensuring the accessibility of that content.

The Department has added language to the third-party posted exception in the final rule to make clear that the exception does not apply where a third party is posting on behalf of the recipient. The language provides that the exception does not apply if "the third party is posting due to contractual, licensing, or other arrangements with the recipient." The Department added this language to make clear that the exception only applies where the third-party posted content is independent from the actions of the recipient—that is, where there is no arrangement under which the third party is acting on behalf of the recipient. If such an arrangement exists, the third-party content is not covered by the exception and must be made accessible in accordance with this rule. This point is also made clear in language the Department added to the general requirements of § 84.84, which provides that recipient shall ensure web content and mobile apps that the recipients provide or make available, "directly or through contractual, licensing, or other arrangements," are readily accessible to and usable by individuals with disabilities. The Department decided to add the same clarification to the exception for third-party posted content because this is the only exception in the final rule that applies solely based upon the identity of the poster (whereas the other exceptions identify the type of content at issue), and the Department believes clarity about the meaning of "third party" in the context of this exception is critical to avoid the exception being interpreted overly broadly. The Department believes this clarification is justified by the concerns raised by commenters.

The majority of the comments received addressed instances in which a State or local government may receive third party posts on public forum matters from members of the public, not instances where health and human service providers receive third party posts on their own websites. Many of the comments also focused on the social media posts of recipients that may receive third party comments over which the recipients have no control.

The Department is committed to providing guidance on this rulemaking once finalized as appropriate.

Comment: Many commenters disagreed with this exception. These commenters said that people would lose access to time-sensitive information, employment opportunities, educational content, and robust opportunities to participate in public feedback sessions. They also said that people with disabilities would not be able to participate in discussions of shared grievances and concerns about their communities that will lead to lack of ability to seek redress for those grievances. One commenter said that ADA covered entities may be less mindful of their ADA obligations if they are under no pressure from recipients to make certain content accessible. A different commenter remarked on the web accessibility standard differences between ADA title III entities posting on section 504 third-party pages, saying that because title III does not have specific web accessibility standards, third-party pages are less likely to make their content accessible if the section 504 entity doesn't pressure them to do so.

Several commenters expressed support for this exception. One commenter thought it was unreasonable to ask the recipient to police third-party content. One commenter was not sure how to pose a solution to inaccessible third-party content being posted, but thought that posting accessibility guidelines on their websites for third parties to use could be feasible. Another commenter thought that lack of access to third-party content was merely an annoyance to people with disabilities that could potentially become problematic if the recipient relies on the public to provide their customer support.

Response: After reviewing the comments, the Department emphasizes at the outset the narrowness of this exception—any third-party content that is posted due to contractual, licensing, or other arrangements with the recipient would not be covered by this exception. The Department sometimes refers to the content covered by this exception as "independent" or "unaffiliated" content to emphasize that this exception only applies to content that the recipient has not contracted, licensed, or otherwise arranged with the third party to post. This exception would generally apply, for example, where the recipient enables comments from members of the public on its social media page and third-party individuals independently comment on that post.

The Department recognizes that the inclusion of this exception means web content posted by third parties may not consistently be accessible by default. The Department emphasizes that even if certain content does not have to conform with the technical standard, recipients still need to ensure that their programs and activities offered using web content and mobile apps are accessible to people with disabilities on a case-by-case basis in accordance with their existing obligations under section 504. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the recipient's programs or activities.[172]

Additionally, the Department wishes to clarify that while the exception for third-party posted content applies to that content which is posted by an independent third party, the exception does not apply to the authoring tools and embedded content provided by the recipient, directly or through contractual, licensing, or other arrangements. Because of this, authoring tools, embedded content, and other similar functions provided by the recipient that facilitate third-party postings are not covered by this exception and must be made accessible in accordance with the rule. Further, recipients should consider the ways in which they can facilitate accessible output of third-party content through authoring tools and guidance.

With respect to comments pertaining to title III of the ADA, the Department emphasizes that this proposed rulemaking only addresses recipients' obligations under section 504.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.85(c) with limited modifications to clarify that the exception does not apply where a third party is posting on behalf of the recipient due to contractual, licensing, or other arrangements. This point is also made clear in the general requirements of § 84.84, which provides that

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[172] *See* 45 CFR 84.68(b)(1)(ii), (b)(7), 84.77.

recipients shall ensure web content and mobile apps that the recipients, "directly or through contractual, licensing, or other arrangements" provide or make available are readily accessible to and usable by individuals with disabilities.

The Department sought comment on the following questions pertaining to linked third-party web content (§ 84.85(d)):

- *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 recipients' 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?*
- *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?*

The comments and our responses on § 84.85(d) are set forth below.

Comment: Many commenters opposed this exception. Several commenters believed it was important that third parties share some of the responsibility for making their content accessible. Commenters provided examples of recipients linking to third-party web content such as a public health department providing up to date information about a shortage of a certain medication and identifying which pharmacies still have a supply. Some commenters said that recipients should only link content that is accessible on their own website.

Several commenters were in favor of this exception. One commenter believed that enforcing accessibility may force recipients to remove resources otherwise helpful to their enrollees such as a population health management program tailored to certain enrollees.

Response: After consideration of the comments received, the Department believes that inclusion of this exception is unnecessary, would result in confusion, and that removing the exception more consistently aligns with the language of section 504 and the Department's intent in proposing the exception in the NPRM. The Department believes that the proper analysis is whether a recipient has "directly, or through contractual, licensing, or other arrangements," provided or made available the third-party content. This means that, for example, when a recipient posts links to third-party web content on the recipient's website, the links located on the recipient's website and the organization of the recipient's website must comply with § 84.84. Further, when a recipient links to third-party web content that is provided by the recipient, directly or through contractual, licensing, or other arrangements, the recipient is also responsible for ensuring the accessibility of that linked content. However, when recipients link to third-party websites, unless the recipient has a contractual, licensing, or other arrangement with the website to provide or make available content, those third-party websites are not covered by section 504, because they are not programs or activities provided or made available by recipients, and thus recipients are not responsible for the accessibility of that content. By deleting this exception, the Department will maintain its original intent without unnecessary confusion for recipients or members of the public.

Rather than conduct a separate analysis under the proposed exception in the NPRM, the Department believes the simpler and more legally consistent approach is for recipients to assess whether the linked third-party content reflects content that is covered under this rule to determine their responsibility to ensure the accessibility of that content. If that content is covered, it must be made accessible in accordance with the requirements of § 84.84. However, if the content is not provided or made available by a recipient, directly or through contractual, licensing, or other

arrangements, even though the recipient linked to that content, the recipient would not be responsible for making that content accessible. The recipient would still need to ensure the links themselves are accessible, but not the unaffiliated linked third-party content.

Comment: Commenters who opposed this exception expressed the view that if the Department moves forward with this exception, it will undermine recipients' attempts to bring their vendors and partners into compliance. One commenter said that only posting accessible third-party content will reduce the chance of adverse impact on people with disabilities. This commenter believes that the provider writing the third-party content will benefit financially from such linkage and that this is a negotiating aspect for accessibility. Several commenters said that contracts with third parties should include accessibility requirements.

One commenter proposed that if the linked content is important to understanding or providing context to users of the recipient's website, an alternate method of access should be provided. For example, the commenter suggested using a statement like "Please follow this link for relevant context or contact our customer support line if you need help understanding this information."

Response: The Department reiterates that rather than conduct a separate analysis under the proposed exception in the NPRM, the simpler and more legally consistent approach is for recipients to assess whether the linked third-party content reflects content that is covered under this rule to determine their responsibility to ensure the accessibility of that content. If that content is covered, it must be made accessible in accordance with the requirements of § 84.84. However, if the content is not provided or made available by a recipient, directly or through contractual, licensing, or other arrangements, even though the recipient linked to that content, the recipient would not be responsible for making that content accessible. The recipient would still need to ensure the links themselves are accessible, but not the unaffiliated linked third-party content. Whether third-party linked content is covered by the requirements of § 84.84 depends on the facts and circumstances. In instances where linked third-party content provides instructions or

guidance related to the recipient's programs and activities, the linked third-party content is likely subject to the requirements of § 84.84.

Comment: Most commenters thanked HHS for not including an exception for mobile apps. Commenters mentioned situations where external mobile apps would provide access to programs and activities, including but not limited to: telehealth, patient communication, appointment booking, bill payment, test results, medication information, tracking transit vehicles like non-emergency medical transportation, e-books, event announcements, tickets, food service ordering, media, and entertainment.

One commenter said the accessibility requirements should be included in the contracts between recipients and third-party app developers. Another stated that content created should also follow accessibility standards in apps. Another commenter said that people who are deaf, deafblind, deafdisabled, late-deafened, and hard of hearing are often unable to seek telehealth medical advice due to the inability of the conferencing platform to support sign language interpretation, video relay service, or captioning.

One commenter encouraged HHS to include an exception for external mobile apps.

Response: The Department appreciates the comments. As discussed above, the Department has removed the linked third-party web content exception from the final rule altogether.

The Department recognizes that 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 recipient's programs and activities. This part of the analysis refers to mobile apps that are developed, owned, and operated by third parties as "external mobile apps." In the final rule, external mobile apps are subject to § 84.84 in the same way as mobile apps that are developed, owned, and operated by a recipient. Accordingly, if a recipient, directly or through contractual, licensing, or other arrangements, provides or makes available an external mobile app, that mobile app must comply with § 84.84 unless it is subject to one of the exceptions outlined in § 84.85.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are deleting proposed § 84.85(d).

Proposed § 84.85(e) contained an exception for password-protected class or course content used by postsecondary institutions with limitations based on when the recipient knew or should have known that a student with a disability is preregistered for a course or has enrolled in a course after the start of the academic term and will be unable to access the password-protected class or course content due to disability.

The Department invited comment on the following questions pertaining to password-protected class or course content:

- *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?*
- *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) introductory text and (e)(1) and (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?*

The comments and our responses on § 84.85(e) are set forth below.

Comment: Several commenters mentioned that DOJ and ED provided guidance in early 2010 which led most public colleges and universities to develop universally designed courses using a framework that outlines methods of designing courses to make them accessible for all

students, including students with disabilities. Commenters stated that Federal agencies have also funded technical assistance resources for colleges and universities; such resources have included information about how to implement coordinated systems for the timely provision of accessible materials and technologies and some of these resources touch on improving access capabilities to Science, Technology, Engineering, Math (STEM) materials.

Many commenters commented on how difficult it is for a college to wait until a student enrolls in a course and then have to retroactively attempt to fix inaccessible courses. Others mentioned that several colleges and universities already have policies requiring that new digital content be made accessible subject only to fundamental alteration and undue burden limitations. One commenter stated that simple courses may take five days to remediate while more complex courses with visual materials, audio materials, or other inaccessible documents will take significantly longer. This commenter added that if more than one course needs to be remediated, then the five-day period will no longer be feasible for simple courses. One commenter said that remediating a textbook can take the same amount of time as designing a new course. That same commenter mentioned that large videos can take a lot of time to caption and provide audio content on, even when outsourcing. One commenter mentioned that planning and coordination of the conversion of accessible content can take two to three hours per course.

Another commenter mentioned that students may need access to the course prior to the official start of the semester. Several commenters talked about the impact of a student dropping and then adding a course during the beginning of the semester.

One commenter asked who the responsible party is when a high school student enrolls in college courses in situations of dual enrollment.

One commenter mentioned that when requirements for captioned television shows were first mandated, similar concerns were expressed about the difficulty of coming into compliance with new regulations, but now captioned television is part of the industry norm.

Some commenters supported the exception.

Response: Having reviewed the public comments, the Department believes it is appropriate, as many commenters suggested, not to include the previously proposed course content exceptions in the final rule. For many of the reasons noted by commenters, the Department concludes that the proposed exceptions would not meaningfully ease the burden on educational institutions and would significantly exacerbate educational inequities for students with disabilities. The Department concludes that the proposed exceptions would have led to an unsustainable and infeasible framework for recipients to make course content accessible, which would not have resulted in reliable access to course content for students with disabilities. As many commenters noted, it would have been extremely burdensome and sometimes even impossible for educational institutions to comply consistently with the rapid remediation timeframes set forth in the limitations to the proposed exceptions in the NPRM, which would likely have led to widespread delays in access to course content for students with disabilities. While extending the remediation timeframes might have made it more feasible for educational institutions to comply under some circumstances, this extension would have commensurately delayed access for students with disabilities, which would have been harmful for the many reasons noted by commenters. The Department believes that it is more efficient and effective for educational institutions to use the two- or three-year compliance timeframe to prepare to make course content accessible proactively, instead of having to scramble to remediate content reactively.

Accordingly, under the final rule, password-protected course content will be treated like any other content and will generally need to conform to WCAG 2.1 Level AA. To the extent that it is burdensome for recipients to make all of their content, including course content, accessible, the Department believes the rule contains a series of mechanisms that are designed to make it feasible for these institutions to comply, including the delayed compliance dates discussed in § 84.84, the other exceptions discussed in § 84.85, the provisions relating to conforming alternate versions and equivalent facilitation discussed in §§ 84.86 and 84.87, the fundamental alteration

and undue burdens limitations discussed in § 84.88, and the approach to measuring compliance with the rule discussed in § 84.89.

Comment: Many commenters said this exception would reduce a person with a disability's opportunity to change courses, exclude them from education, and give them fewer opportunities to succeed than their peers. Several commenters mentioned that this exception would put a student with a disability five days behind their peers and that for a January or summer-term course, a five-day delay could be a third of the course. Commenters also mentioned that due to the delays in graduation, students faced loss of earning from being unable to enter the workforce which was a cost that taxpayers took on through vocational rehabilitation funds, Federal student loans, and Pell grants.

Some of the commenters mentioned a case where two blind students were excluded from an educational program because of inaccessible classroom materials, textbooks, websites, and educational applications. These commenters pointed out that the two students could not independently enroll in courses, nor could they use library databases, and were forced to either drop classes or accept a lower grade.

A commenter discussed instances where most of the classes in a law school were not made accessible, but in one class where they were accessible, it took six to eight weeks for a student to receive them. This student had to extend her studies and the cost was split between the student and the State's vocational rehabilitation program.

Some commenters pointed to the DOJ's May 19, 2023, *Dear Colleague Letter on Online Accessibility at Postsecondary Institutions*, saying that postsecondary institutions are already required to make all course materials accessible under the ADA.

Response: The Department appreciates the comments and notes the important concerns for students with disabilities when postsecondary institutions do not make their courses accessible or do not provide accessible materials in a timely manner. As discussed, the Department has decided not to include proposed § 84.85(e) in the final rule.

The comments on this issue illustrate the challenges associated with setting remediation timeframes in this context. If the Department were to shorten the remediation timeframes, it would make it even harder for educational institutions to comply, and commenters have already indicated that the previously proposed remediation timeframes would not be workable for those institutions. If the Department were to lengthen the remediation timeframes, it would further exacerbate the inequities for students with disabilities that were articulated by commenters. The Department believes the better approach is to not include the course content exceptions in the final rule to avoid the need for educational institutions to make content accessible on an expedited timeframe on the back end, and to instead require recipients to treat course content like any other content covered by this rule.

Comment: Commenters mentioned a wide variety of communication vehicles including emails, website postings, social media, mobile apps, phone video calls, live orientation events, in-class announcements, and learning management systems, that postsecondary institutions use to communicate information to their students.

Response: The Department appreciates these comments and notes that the definitions of "web content" and "mobile apps" describe the content that is covered under this rule.

Comment: Concerning whether postsecondary institutions provide parents with access to course content, one commenter mentioned the Family Educational Rights and Privacy Act which gives students the ability to allow parents and guardians limited access to student information including mid-semester and final grades. The commenter was concerned about access for parents with disabilities given permission under this law to view such content.

Response: The Department appreciates these comments. As noted above, the Department will not adopt this proposed exception.

Comment: On whether postsecondary institutions combine and make available content for particular groups, several commenters mentioned the learning management systems for general groups of students and said that password-protected websites should be required to meet

WCAG guidelines.

Response: The Department appreciates these comments and notes that this final rule will not adopt the previously proposed exceptions for password-protected course content. Password-protected course content will therefore need to be accessible, in accordance with this final rule.

Comment: On how much and what content password-protected course websites contain, commenters listed electronic textbooks, slide decks, PDFs and digital articles, shared documents, video and audio recordings, announcements, message boards, discussion boards, blogs, spreadsheets, assignments, tables and graphs, interactive labs, links to education sites, and interactive web sites.

Response: The Department appreciates these comments and notes that the breadth of content that postsecondary institutions offer to students is one of the reasons that the Department will not include this proposed exception in the final rule.

Comment: One commenter stated that courses will likely take more than five days to remediate, especially if they rely on electronic textbooks and large videos.

Another commenter mentioned that students may need access to the course prior to the official start of the semester. Several commenters talked about the impact of a student dropping and then adding a course during the beginning of the semester.

One commenter asked who the responsible party is when a high school student enrolls in college courses in situations of dual enrollment.

Response: The Department appreciates these comments and, for the reasons already discussed, this rule will not adopt the previously proposed course content exceptions that included this five-day remediation period.

Comment: Some commenters supported applying the exceptions proposed at § 84.85(e) introductory text and (e)(1) and (2) to mobile apps. Other commenters disagreed saying that there should be no exceptions and that there are already federally funded resources and technical assistance that support the acquisition of software and applications that are accessible and

interactive with assistive technology.

Response: The Department appreciates these comments. For the reasons previously noted, the final rule does not include the exception previously proposed at § 84.85(e).

Comment: On alternatives for this exception, including making newly posted course content accessible on an expedited time frame, commenters stated that priority should be given to entry-level courses, high enrollment courses, courses of the majors that students with disabilities are currently enrolled in, and courses with high drop, withdrawal and failing grade rates. Others mentioned being proactive about providing accessibility training to students and employees.

One commenter encouraged HHS to hold third-party vendors accountable for creating accessible products and suggested funding staff positions for course compliance reviews and remediation work. One commenter said that postsecondary institutions should be required to make student-provided visual and audio content accessible to students with disabilities.

Response: The Department appreciates these comments. For the reasons discussed, the Department is not including the proposed exception in the final rule and will not adopt the alternative approaches suggested. Also, the Department notes that the definitions of "web content" and "mobile apps" as well as the rule's exceptions and limitations describe the content that is covered under this rule.

Comment: Many commenters said that digital books and textbooks should be accessible to people with disabilities. Several commenters specifically said that digital books and textbooks should conform to WCAG 2.2 accessibility standards, and that e-readers, learning management systems, and other technology that delivers digital books and textbooks must also be accessible.

Many commenters wanted HHS to clarify that while schools or libraries may ultimately be responsible for providing access to digital books and textbooks, the third-party publishers play a significant role in the accessibility of textbooks and digital books. Some commenters indicated that if all libraries and schools required publishers to deliver accessible versions, then this would

reduce the work that goes into converting them into accessible formats, often done by scanning pages and saving as PDF files. These commenters also said that schools and libraries are currently put into positions of having to procure, create, or break digital rights management protections to provide accessible textbooks and digital books.

One commenter mentioned a study that found that out of a random sampling of 355 Open Educational Resource materials, only two passed an accessibility test, and that the accessibility barriers were either caused by the author or creator or the authoring software and publishing tools.

One commenter mentioned additional challenges with STEM materials as they have complex equations, graphics, maps, and spatial educational materials and alt text may not be sufficient to convey the concept of these items.

Commenters suggested when a course is updated to use a new textbook (or a new edition of an existing textbook), the Department should require a recipient to select the most accessible option that meets the instructional goals. Commenters said educational institutions should be responsible for providing accessible alternatives to assigned homework and readings if the textbook is not accessible. These commenters remarked that educational institutions should report to students whether a textbook is accessible or not when the course is advertised, since this materially impacts the likelihood of timely access to the textbook. Commenters said that advertising this information about the accessibility status of a textbook also helps make the faculty members more aware for future decision making.

Response: The Department appreciates these comments and also recognizes the importance of the accessibility of digital textbooks for students regardless of disability status, and notes that the majority of commenters expressed concern with the possibility of lowered standards for the accessibility of digital textbooks. After weighing all the comments, the Department believes the most prudent approach is to treat digital textbooks, including EPUBs (electronic publications), the same as all other educational course materials, which are subject to

this rule's accessibility requirements. The Department believes that treating digital textbooks, including EPUBs, in any other way would lead to the same problems with respect to the proposed exceptions for password-protected class or course content. For example, if the Department created a similar exception for digital textbooks, it could result in courses being partially accessible and partially inaccessible for certain time periods while books are remediated to meet the needs of an individual with a disability, which could be confusing for both educational institutions and students with disabilities. Furthermore, it would be virtually impossible to set forth a remediation timeframe that would provide educational institutions sufficient time to make digital textbooks accessible without putting students with disabilities too far behind their peers. Accordingly, the Department did not make any changes to the rule to specifically address digital textbooks. The Department notes that if there are circumstances where certain aspects of digital textbooks cannot conform to WCAG 2.1 Level AA without changing the meaning of the content, recipients may assess whether the fundamental alteration or undue financial or administrative burdens limitations apply, as provided in §84.88. However, if an action required to comply with § 84.88 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.

The Department also recognizes that WCAG 2.2 is a newer standard but, as discussed, the Department is adopting WCAG 2.1 Level AA to balance benefits for individuals with disabilities with feasibility for recipients making their content accessible in compliance with this rule. In addition, the Department believes that digital textbooks should be subject to the same standards as other web content and mobile apps to reduce confusion and ensure a uniform experience and expectations for users with disabilities.

The Department also recognizes the importance of the accessibility of digital books for students regardless of disability status, and notes that the majority of commenters expressed

concern with the possibility of lowered standards for the accessibility of digital books. The Department agrees that third-party publishers will play an important role in making digital books accessible and appreciates the concerns expressed by commenters that educational institutions may have limited power to require third-party vendors to make content accessible. The Department believes that the delayed compliance dates in this rulemaking will help recipients establish contracts with third-party vendors with sufficient lead time to enable the production of materials that are accessible upon being created. In addition, if this rulemaking incentivizes publishers to produce accessible content, that decision may enable hundreds of educational institutions subject to this rule to obtain accessible content. The Department also expects that as a result of this rulemaking, there will be an increase in demand for accessible content from third-party vendors, and therefore a likely increase in the number of third-party vendors that are equipped to provide accessible content.

The Department also appreciates the suggestion of requiring an advertisement of whether a course's digital books are accessible, but believes that a more appropriate solution, based mainly on the overwhelming support for accessible digital books, would simply be to require all such content to be accessible.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, the Department has decided not to include proposed § 84.85(e) in the final rule.

Proposed § 84.85(f) contained an exception for password-protected class or course content used by elementary and secondary schools with limitations based on when the recipient knew or should have known that a student is preregistered for a course or has enrolled in a course after the start of the academic term, and the student or their parent will be unable to access the password-protected class or course content due to disability. The Department invited comment on the following questions pertaining to elementary and secondary schools:

- *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) introductory text and (f)(1) through (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?*

The comments and our responses on § 84.85(f) are set forth below.

Comment: Several commenters disagreed with implementing the exception for password-protected class or course content. Commenters said that this exception conflicts with ED's recommendations to States and school districts regarding the best ways to exemplify conditions and services for creating and sustaining a Statewide, high-quality accessible, educational materials (AEM) provision system that is also designed to meet statutory requirements under the Individuals with Disabilities Education Act (IDEA) and to assure students have access to the requisite assistive technology to access AEM. Commenters said if the exception remains, virtually every student with a relevant disability would be discriminated against in violation of both Federal and State statutes.

A couple of commenters mentioned that there have been legal actions that have resulted in schools directing significant financial and human power to accessibility. Commenters stated that by not including the exception and requiring accessibility of password-protected class or course content, the burden of making materials accessible would be taken off of teachers, who are already overburdened, and instead require action and investment from schools and districts.

Some commenters urged HHS to not sanction recipients that purchase inaccessible content and platforms. Several other commenters agreed with this exception.

Response: The Department appreciates these comments and recognizes that many commenters believe this proposed exception would have a negative impact on the education of elementary and secondary students with disabilities. For all of the reasons commenters have provided, in addition to the reasons discussed above regarding the Department's decision not to adopt § 84.85(e), the Department will not include this proposed exception in the final rule.

With respect to schools and districts redirecting funding and resources towards accessibility, the Department acknowledges that, while this rulemaking may unburden teachers from having to ensure accessibility, it would also impose costs on recipients. Full estimates of costs can be found in the accompanying RIA. While recipients will likely incur costs to comply with this final rule, the RIA indicates that in comparing annualized costs and benefits of this rule, the monetized benefits to society outweigh the costs. In addition, the Department reminds recipients that they are already required to ensure that their programs and activities, including the programs and activities of educational institutions, are accessible to people with disabilities.[173]

Comment: Several commenters stated that all technology used to deliver instruction in the classroom should be accessible to all individuals with disabilities from kiosks, websites, and applications; to third-party websites or apps used for class content; and to any form of information and communication technology, including virtual reality (VR).

Commenters mentioned that accessibility challenges were evident during the COVID-19 public health emergency, and that students and adults with disabilities experienced significant barriers to education, including not being able to access instruction because schools claimed they did not have the capacity to make inaccessible online curriculum programs and related digital materials accessible. Commenters noted that when digital devices (e.g., laptops and tablets) and materials (print, digital, audio, video, etc.) were provided for remote use in K-16 settings in

[173] *See* 45 CFR 84.4, redesignated as § 84.68.

particular, many were not accessible or interoperable (compatible) with the assistive technology used by the student, preventing equal access and opportunity to make the same academic progress as students without disabilities.

Some commenters said that five days to remediate is often unreasonable because schools may not have control over third-party platforms, and even if the school could meet the five-day deadline, it still puts the child with a disability at a disadvantage behind their peers. Some commenters mentioned an online science experiment without audio information that required that the student connect pieces by using finger gestures. One commenter provided an example where a student with a disability was given an exemption for that activity but missed out on the learning opportunity. Another example was given of a popular online mathematics curriculum which stated that third graders will encounter more than 300 math skills over the course of 47 lessons. A student could miss two or three lessons and 15 to 30 skills in a five-day period. Another commenter mentioned a situation where a school district had to buy a $12,000 textbook in Braille. While the other students were online playing games, the student with a disability was reading a textbook and was not included in the learning. The teacher also had to spend time figuring out how to align the textbook and online learning.

Some commenters said this exception leaves parents with disabilities out of meaningful participation in their child's education and makes it difficult for teachers with disabilities to stay employed.

Commenters pointed out that Federal law requires that students exhaust all remedies under the IDEA before pursuing an ADA complaint. These commenters stated that the proposed exception would only further delay student access to course materials in a timely way.

Response: The Department appreciates these comments and acknowledges the concerns about accessibility challenges during the COVID-19 pandemic, the proposed 5-day remediation period, and concerns about parents with disabilities not being able to participate in their child’s education. The education of children in elementary and secondary settings is of vital importance

and the Department does not intend to limit the educational opportunities, development, and future career potential for students with disabilities. Because, in part, of the issues raised in the comments above, as well as the reasons discussed earlier, the Department will not include this proposed exception in the final rule. The Department also appreciates the comments about the burden on teachers to provide accessible content and align the content with their lesson plans. The Department believes that rulemaking in this area will encourage schools and districts to create or acquire accessible content, removing this burden from teachers and spurring vendors to improve the accessibility of their offerings. With respect to the different technologies that recipients use to provide education, the Department again notes the definitions of "web content" and "mobile apps" describe the content that is covered under this rule.

Comment: On how elementary and secondary schools communicate with students and parents, commenters listed several methods including through emails, posts on school district websites, and posts on social media websites.

Response: The Department appreciates these comments and notes that the definitions of "web content" and "mobile apps" describe the content that is covered under this rule.

Comment: Some commenters remarked that content on a password-protected website should not be a part of this exception. They stated that content could be hosted by a third party such as a textbook publisher. These commenters said that when third parties ensure their content is accessible, it reduces the work that teachers have to do as the content is grouped by type of course.

Response: The Department appreciates these comments. While section 504 applies to recipients of Departmental financial assistance, recipients will have to ensure that any web content or mobile apps they provide or make available, directly or through contractual, licensing, or other arrangements, is accessible. This approach is consistent with the existing framework under section 504.[174] Under this framework, recipients have obligations in other section 504

[174] *See* 45 CFR 84.4(b)(1), redesignated § 84.68(b)(1).

contexts where they choose to contract, license, or otherwise arrange with third parties to provide programs or activities.

Comment: A few commenters said that most schools do not have a system for parents to notify the school of a need for access and that most do not provide access to their course content. Another commenter recommended that the Department require schools to inquire with parents about accessibility needs for both them and their students during the registration process. One commenter mentioned that special education services for students are not meant for parents with disabilities and that teachers and staff are usually the ones adapting materials for students.

Response: The Department appreciates these comments. In part because of issues with parents and students requesting accessible web content and mobile apps and elementary and secondary institutions providing that accessible web content and mobile apps, the Department does not intend to keep this proposed exception in the final rule.

Comment: One commenter said that password-protected course websites may merely contain supplemental information or all the information that the student needs to participate in class, and everything in-between. Another commenter listed types of documents that may be on a password-protected course website, including commercially produced curriculum, commercially produced e-books, teacher-created materials, materials purchased or otherwise obtained by the teacher from an external source, PDFs of passages from old books, and student-created materials.

Some commenters mentioned that content could be posted by third parties such as other students doing group work. One commenter said content posted by students or parents should also be required to be accessible.

One commenter suggested teaching children in 5th grade or above about how to make their own content accessible. This commenter argued that this could be a life skill that would be useful for future employment opportunities, otherwise, the school would have to remediate content posted by students.

One commenter asked the Department whether course content that can be accessed through a PIN authentication or the user's personal email login information would be considered password-protected course content under the NPRM.

Response: The Department appreciates these comments on the range of password-protected content on elementary and secondary websites. In part because of the wide range of content on password-protected course websites and its importance, the Department will not be including this exception in the final rule. Again, the Department notes that the definitions of "web content" and "mobile apps" describe the content that is covered, subject to the rule's exceptions and limitations.

Comment: Several commenters said that course content should be accessible on or before the first day of class for students and parents. One commenter mentioned that teachers sometimes require course work over the summer which means the content would need to be accessible earlier. One commenter said any delays should be minimal and offset by modifications in the meantime. Commentors pointed out that delays caused unnecessary stress and reduce learning outcomes.

One commenter stated that schools will take as long as the Department gives them to make the content accessible regardless of how long it actually takes them. The commenter stated that schools are juggling competing priorities, so if the Department makes this a priority, schools will follow.

Response: The Department understands these concerns and acknowledges there may be situations where providing remediated course content in five days would neither be possible or preferrable for the recipient, student, or parent. For the reasons already discussed, this final rule will not be adopting this exception.

Comment: Some commenters want the Department to adopt the same exceptions and limitations to the exceptions under § 84.85(f)(1) through (4) to mobile apps. Many commenters disagreed with applying the exception to mobile apps to enable access to password-protected

course content for parents and students. Several commenters mentioned that a large majority of digital interfaces used by schools have associated mobile apps which need to be accessible for students and parents with disabilities and can be interoperable with assistive technology.

One commenter mentioned that students as young as kindergarten use mobile devices to access course materials, complete course work, and communicate with teachers. Another commenter said that schools even require mobile app use for course work in some instances.

Response: The Department appreciates these comments. The Department recognizes the importance and growing ubiquity of mobile apps in a variety of areas, including elementary and secondary education. For the reasons previously noted, the final rule does not include the exception previously proposed at § 84.85(e).

Comment: On whether the Department should consider an alternate approach to this exception, such as requiring all newly posted course content to be made accessible on an expedited time frame, one commenter said priority can be given to newly posted course content and existing required reading with the goal that the rest of the content come into compliance as well. Another commenter thought the Department should not extend the 2-to-3-year implementation period. Instead, the commenter said that schools should create a plan for remediation on the fastest possible timeline with the option to apply fundamental alteration and undue burdens limitations if appropriate and necessary.

One commenter mentioned that school curriculums for K-12 are often purchased on either a district or State level every three-to-five years. While such planning gives teachers less autonomy over their curriculums, by purchasing curriculums on a district or State level, accessibility concerns have drastically reduced. The same commenter recommended that institutions prioritize their proactive accessibility efforts along three dimensions: (1) classes that are required for graduation or promotion to the next grade, (2) district-level curriculum and educational technology adoption, and (3) courses that move at an accelerated pace (e.g., honors, advanced placement).

Response: The Department appreciates these comments. While some commenters suggested requiring recipients to follow specific procedures to comply with this rule, the variety of proposals the Department received from commenters indicates the harm from being overly prescriptive in how educational institutions comply with the rule. The final rule provides educational institutions with the flexibility to determine how best to bring their content into compliance within the two or three years they have to begin complying with this rule.

Some commenters suggested that the Department should require all new course content to be made accessible more quickly, while providing a longer time period for recipients to remediate existing course content. There were a range of proposals from commenters about how this could be implemented. Some commenters suggested that the Department could set up a prioritization structure for existing content, requiring educational institutions to prioritize the accessibility of, for example, content for required courses; content for district-level courses; and content for honors-level courses.

The Department does not believe these approaches would be feasible. Treating new course content differently than existing course content could result in particular courses being partially accessible and partially inaccessible, which could be confusing for both educational institutions and students, and make it challenging for students with disabilities to have full and timely access to their courses. Moreover, even under this hybrid approach, the Department would presumably need to retain remediation timeframes for recipients to meet upon receiving a request to make existing course content accessible. For the reasons discussed above, it would be virtually impossible to set forth a remediation timeframe that would provide educational institutions sufficient time to make content accessible without putting students with disabilities too far behind their peers. In addition, given the wide variation in types of courses and educational institution structures, it would be difficult to set a prioritization structure for existing content that would be workable across all such institutions.

The Department believes the better approach is to not include the course content exceptions in the final rule to avoid the need for educational institutions to make content accessible on an expedited timeframe on the back end, and to instead require recipients to treat course content like any other content covered by this rule.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, the Department has decided not to include proposed § 84.85(f) in the final rule.

Proposed § 84.85(g) contained an exception for individualized, password-protected documents. The Department invited comment on following questions regarding this exception:

- *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?*
- *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?*

The comments and our responses regarding § 84.85(g) are set forth below.

Comment: Commenters provided many examples of individualized, password-protected conventional electronic documents, including, but not limited to: test results, clinical summaries, post-operative care instructions, current and past bills, determination letters, patient health summaries, patient letters, questionnaires, results and reports, appointments, past visits, immunization records, explanation of benefits, receipts, diagnoses, imaging results, and treatment plans.

Some commenters supported the individualized, password-protected conventional electronic document exception. Several others wanted the exception eliminated, saying that many documents are already being made accessible in accordance with public law, such as electronic health records. These commenters also mentioned that making such documents accessible can be done without much difficulty; one commenter said that this is achievable through automated generation of accessible PDFs from HTML with layouts that are not overly complex. Many commenters pointed to the fundamental alteration and undue burdens limitations already available to recipients. Commenters believed this exception was disincentivizing recipients making content accessible.

One commenter asked the Department for guidance on how to best support providing accommodations to the public for PDF documents and whether they would need to make any workflow undertaken by a patient after authenticating such as when a patient uses a patient portal to schedule an appointment with their provider.

Response: After reviewing the comments, the Department has decided to retain this exception in the final rule. The Department continues to believe that recipients often provide or make available a large volume of individualized, password-protected or otherwise secured conventional electronic documents, many of which do not pertain to individuals with disabilities, and it may be difficult to make all such documents accessible. Therefore, the Department believes it is sensible to permit entities to focus their resources on ensuring accessibility for the specific individuals who need accessible versions of those documents. If, as many commenters

suggested, it is in fact more efficient and less expensive for some recipients to make all such documents accessible by using a template, there is nothing in the rule that prevents recipients from taking that approach.

The Department notes that this exception applies only to password-protected or otherwise secured content. Content may be otherwise secured if it requires a member of the public to use 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 covered by the exception.

The Department recognizes that there may be some overlap between the content covered by this exception and the exception for certain preexisting conventional electronic documents, § 84.85(b). The Department notes that if web content is covered by the exception for individualized, password-protected or otherwise secured conventional electronic documents, it does not need to conform to WCAG 2.1 Level AA to comply with this rule, even if the content fails to qualify for another exception, such as the preexisting conventional electronic document exception. For example, a recipient might retain on its website an individualized, password-protected unpaid medical bill in a PDF format that was posted before the date the entity was required to comply with this rule. Because the PDF would fall within the exception for individualized, password-protected or otherwise secured conventional electronic documents, the documents would not need to conform to WCAG 2.1 Level AA, regardless of how the preexisting conventional electronic documents exception might otherwise have applied.

The Department understands the concerns raised by commenters about the potential burdens that people with disabilities may face if individualized password-protected or otherwise secured documents are not all made accessible at the time they are created and about the potential negative consequences for people with disabilities who do not have timely access to the documents that pertain to them. The Department reiterates that, even when documents are covered by this exception, the existing section 504 obligations require recipients to furnish

appropriate auxiliary aids and services where necessary to ensure an individual with a disability has, for example, an equal opportunity to enjoy the benefits of a service.[175] Such auxiliary aids and services could include, for example, providing PDFs that are accessible. In order for such an auxiliary aid or service to ensure effective communication, it must be provided in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability. Whether a particular solution provides effective communication depends on circumstances in the interaction, including the nature, length, complexity, and context of the communication, per § 84.77(b)(2). For example, the presence of an emergency situation or a situation where information is otherwise urgently needed would impact what it would mean for a recipient to ensure it is meeting its effective communication obligations. Recipients can help to facilitate effective communication by providing individuals with disabilities with notice about how to request accessible versions of their individualized documents.

Moreover, while individualized, password-protected or otherwise secured conventional electronic documents are subject to this exception, any public-facing, web- or mobile app-based system or platform that a recipient uses to provide or make available those documents or to allow the public to make accessibility requests, must itself be accessible as defined in § 84.84 if it is not covered by another exception. The recipient would need to ensure that that platform complies with § 84.84. In addition, web content and content in mobile apps that does not take the form of individualized, password-protected or otherwise secured conventional electronic documents but instead notifies users about the existence of such documents must still conform to WCAG 2.1 Level AA unless it is covered by another exception. For example, a hospital's health records portal may include a list of links to download individualized, password-protected PDF medical records. Under WCAG 2.1 Success Criterion 2.4.4, a recipient would generally have to provide sufficient information in the text of the link alone, or in the text of the link together with the

[175] *See* 45 CFR 84.68(b)(1)(ii), (b)(7), 84.77.

link's programmatically determined link context, so that a user could understand the purpose of each link and determine whether they want to access a given document.

The Department also reiterates that 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. For example, if a covered medical provider has a policy under which administrative support staff are in charge of uploading PDF versions of X-ray images into patients' individualized accounts after medical appointments, but the provider knows that a particular patient is blind, the provider may need to modify its policy to ensure that a staffer with the necessary expertise provides an accessible version of the information the patient needs from the X-ray. Also, at this time, the Department declines to provide guidance on PDF documents, but may provide future guidance, where appropriate.

The Department also understands that some of these documents, especially documents without complex layouts, may be made accessible relatively easily, including through automated generation. Even with the proposed exception, many recipients may decide that they will change their templates for individualized password-protected or otherwise secured conventional electronic documents to make them all accessible in order to avoid modifying individual documents after the fact for people with disabilities.

Comment: Many commenters said that the time that recipients spend on building a notification system would be better spent on making documents accessible from the start. Otherwise, commenters said that recipients generally do not provide a clear means of notification. One commenter wanted more robust requirements and enforcement. Several commenters suggested making methods of contact in easy-to-access location such as on a download index page, front page of a portal and throughout the online system in an accessible manner.

One State said it did not have ways for individuals to request access to documents on their main State webpages, but individual units and programs sometimes have an email for general questions and comments.

Commenters want HHS to establish timelines for providing accessible individualized, password-protected conventional electronic documents if this exception is implemented. Examples that commenters provided included same day for post-operative instructions and quickly for bills. One commenter recommended a maximum of five business days for remediation as delays in getting access to individualized, password-protected conventional electronic document can be inequitable or cause harm.

Several commenters mentioned that once such a request is made for an accessible individualized, password-protected conventional electronic document, then the recipient should apply that request to all documents and notices sent to the requester with a disability going forward.

Response: The Department appreciates the comments including those on notification systems and making all individualized password-protected or otherwise secured conventional electronic documents accessible from the start as well as methods of contact. The Department, however, believes it is more appropriate to give recipients flexibility in how they provide or make available individualized, password-protected or otherwise secured conventional electronic documents, so long as those recipients ensure that individuals with disabilities have timely access to the information contained in those documents in an accessible format that protects the privacy and independence of the individual with a disability.

Moreover, the Department does not believe it is workable to prescribe a set number of days under which a recipient must make these documents accessible since the content and quantity of individualized, password-protected or otherwise secured documents may vary widely, from a one-page medical bill to thousands of pages of medical records. The range of possible timeframes that commenters suggested, coupled with the comments the Department received on

the remediation timeframes that were associated with the previously proposed course content exceptions, helps to illustrate the challenges associated with selecting a specific number of days for recipients to remediate content.

The Department also notes that where, for example, a recipient is on notice that an individual with a disability needs accessible versions of an individualized, password-protected PDF medical bill, that recipient is generally required to continue to provide information from that medical bill in an accessible format in the future; the recipient generally may not require the individual with a disability to make repeated requests for accessibility.

The Department reiterates that, even when documents are covered by this exception, other section 504 obligations require recipients to furnish appropriate auxiliary aids and services where necessary to ensure an individual with a disability has, for example, an equal opportunity to enjoy the benefits of a service.[176] Whether a particular solution provides effective communication depends on circumstances in the interaction, including the nature, length, complexity, and context of the communication.[177]

Comment: Several commenters said that the impact of an exception for individualized, password-protected documents on people with disabilities would be having to rely on companions or strangers to read their documents, attempting to request accessible formats, or pursuing legal action. If the recipient posts contact information on their websites, many commenters pointed out that the onus is still on the individual with a disability to make the requests for accessible individualized, password-protected conventional electronic documents. Commenters mentioned these requests take time, and a patient with a disability who has just had surgery, for example, may not have the energy to make requests for accessible post-operative instructions. Additionally, commenters said that people with disabilities will continue to have difficulty with independence when paying their bills, receiving communications from their

[176] 45 CFR 84.77(b)(1).
[177] 45 CFR 84.77(b)(2).

doctors, reviewing and using school transcripts, reading job offer letters or notices related to a contract, accessing their medical records and other personal information.

Some commenters believe that if the Department moves forward with this exception, then recipients are disincentivized from prioritizing accessibility.

Response: While the Department agrees that people with disabilities will sometimes need access to password-protected or otherwise secured conventional electronic documents on a rapid timeline, particularly when they have important health implications, the Department disagrees that this proposed exception signals to recipients that the Department is disincentivizing accessibility. Recipients are still required to ensure that they provide accessible versions of documents to people with disabilities who request them.

As discussed, the Department believes that recipients often provide or make available a large volume of individualized, password-protected or otherwise secured conventional electronic documents, many of which do not pertain to individuals with disabilities, and it may be difficult to make all such documents accessible. Therefore, the Department believes it is sensible to permit recipients to focus their resources on ensuring accessibility for the specific individuals who need accessible versions of those documents.

The Department intends to strike the appropriate balance between accessibility and for people with disabilities and practicality for recipients.

Comment: On whether any of the exceptions discussed should apply to mobile apps, several commenters said that they believe the Department should adopt the same rules for web content and mobile apps since many people use mobile phones almost exclusively.

Response: The Department agrees that the exceptions should apply to both web content and mobile apps to the extent both web content and mobile apps are used in the contexts covered by the exceptions.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.85(g) (redesignated as § 84.85(d) due to deletions of preceding paragraphs) with the addition of "or otherwise secured conventional electronic" to the heading of the exception, for consistency with the text of the exception itself. This modification does not change the meaning or substance of the exception as proposed in the NPRM.

Conforming Alternate Versions (§ 84.86)

Proposed § 84.86 stated that recipients may use conforming alternate versions of web content instead of making their web content accessible only if it is not possible to make their web content directly accessible due to technical or legal limitations.

The Department invited comment on the following:

- *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 recipients' programs and activities?*

The comments and our responses regarding § 84.86 are set forth below.

Comment: Many commenters agreed that conforming alternate versions of web content should only be allowed in instances where it is impossible to make the web content in question compliant with WCAG 2.1 Level AA due to technical or legal limitations. They argued that requiring a separate website or alternative method for people with disabilities is inherently unequal and recipients should avoid such situations unless absolutely necessary. They also noted that historically, separate websites for people with disabilities have not provided the same access and functionality. Some commenters stated that recipients should be allowed to create conforming alternate version of web content regardless of technical or legal limitations because it provides more flexibility for recipients. Some of those commenters argued that WCAG 2.1 allows for conforming alternate versions and stated a belief that a separate website would allow for greater attention to detail and operability for people with disabilities.

Response: We appreciate the comments regarding the Department's approach to "conforming alternate versions." Under WCAG, a "conforming alternate version" is a separate web page that, among other things, 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.[178] Conforming alternate versions are allowable under WCAG. For reasons explained below, the Department believes it is important to put guardrails on when recipients may use conforming alternate versions under this rule. This final rule, therefore, specifies that the use of conforming alternate versions is permitted only in limited, defined circumstances, which represents a slight departure from WCAG 2.1. Section 84.86 states that a recipient may use conforming alternate versions of web content to comply with § 84.84 only where it is not possible to make web content directly accessible due to technical or legal limitations.

Generally, to conform to WCAG 2.1, a web page must be directly accessible in that it satisfies the success criteria for one of the defined levels of conformance—in the case of this final rule, Level AA.[179] However, as noted above, WCAG 2.1 also allows for the creation of a "conforming alternate version." The 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. The Department believes that having direct access to accessible web content provides the best user experience for many individuals with disabilities, and it may be difficult to reliably maintain conforming alternate versions, which must be kept up to date. W3C explains that providing a conforming alternate version is intended to be a "fallback option for conformance to WCAG and the preferred method of conformance is to make all content directly accessible."[180] However, WCAG 2.1 does not

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[178] *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].
[179] *See* W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/ and https://perma.cc/UB8A-GG2F.
[180] *See* W3C, *Understanding Conformance* (last updated June 20, 2023), https://www.w3.org/WAI/WCAG21/Understanding/conformance [https://perma.cc/QSG6-QCBL].

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 versions of a recipient's web content—one for individuals with relevant disabilities and another 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 content that is accessible. Such an approach would result in segregated access for individuals with disabilities and be inconsistent with how section 504's core principles of inclusion and integration have been historically interpreted.[181] The Department is also concerned that the frequent or unbounded creation of separate web content for individuals with disabilities may, in practice, result in unequal access to information and functionality. For example, and as discussed later in this section, the Department is concerned that an inaccessible conforming alternate version may provide information that is outdated or conflicting due to the maintenance burden of keeping the information updated and consistent with the main web content. As another example, use of a conforming alternate version may provide a fragmented, separate, or less interactive experience for people with disabilities because recipients may assume that interactive features are not financially worthwhile or otherwise necessary to incorporate in conforming alternate versions. Ultimately, as discussed later in this section, the Department believes there are particular risks associated with permitting the creation of conforming alternate versions where not necessitated by the presence of technical or legal limitations.

Due to the concerns about user experience, segregation of users with disabilities, unequal access to information, and maintenance burdens discussed above, the Department is adopting a slightly different approach to conforming alternate versions than that provided under WCAG 2.1. Instead of permitting recipient to adopt conforming alternate versions whenever they believe it is

[181] Redesignated, with minor revisions, at 45 CFR 84.68(d).

appropriate, § 84.86 states that a recipient may use conforming alternate versions of web content to comply with § 84.84 only where it is not possible to make 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 that cannot be changed due to legal reasons). The Department believes 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. However, § 84.86 does not prohibit recipients from providing alternate versions of web pages *in addition* to their WCAG 2.1 Level AA compliant main web page to possibly provide users with certain types of disabilities a better experience.

Having reviewed public comments and considered this issue carefully, the Department believes the rule strikes the right balance to permit conforming alternate versions, but only where it is not possible to make web content directly accessible due to technical or legal limitations. The Department believes that this approach ensures that generally, people with disabilities will have direct access to the same web content that is accessed by people without disabilities, but it also preserves flexibility for recipients in situations where, due to a technical or legal limitation, it is impossible to make web content directly accessible. The Department also believes that this approach will help avoid the concerns noted above with respect to segregation of people with disabilities by defining only specific scenarios when the use of conforming alternate versions is appropriate.

The determination of when conforming alternate versions are needed or permitted varies depending on the facts. For example, a conforming alternate version would not be permissible just because a recipient's web developer lacked the knowledge or training needed to make content accessible; that would not be a technical limitation within the meaning of § 84.86. By contrast, the recipient could use a conforming alternate version if its web content 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. 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.

The Department would also like to clarify the interaction between the allowance of conforming alternate versions under § 84.86 and the general limitations provided in § 84.88. These two provisions are applicable in separate circumstances. If there is a technical or legal limitation that prevents a recipient from complying with § 84.84 for certain content, § 84.86 is applicable. The recipient can create a conforming alternate version for that content, and, under § 84.86, that recipient will be in compliance with this final rule. Separately, if a fundamental alteration or undue financial and administrative burdens prevent a recipient from complying with § 84.84 for certain content, § 84.88 is applicable. As set forth in § 84.88, the recipient must still "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." A recipient's legitimate claim of fundamental alteration or undue burdens does not constitute a legal limitation under § 84.86 for which a conforming alternate version automatically suffices to comply with the rule. Rather, the recipient must ensure access "to the maximum extent possible" under the specific facts and circumstances of the situation. Under the specific facts a recipient is facing, the recipient's best option to ensure maximum access may be an alternate version of its content, but the recipient also may be required to do something more or something different. Because the language of § 84.88 already allows for alternate versions if appropriate for the facts of recipient's fundamental alteration or undue burdens, the Department does not see a need to expand the language of § 84.86 to address commenters' concerns.

The Department also wishes to clarify the relationship between §§ 84.86 and 84.89, which are analyzed independently of each other. Section 84.86 provides that a recipient may use conforming alternate versions of web content, as defined by WCAG 2.1, to comply with § 84.84 *only* where it is not possible to make web content directly accessible due to technical or legal limitations. Accordingly, if a recipient does not make its web content directly accessible and instead provides a conforming alternate version when not required by technical or legal limitations, the recipient may not use that conforming alternate version to comply with its obligations under the rule, either by relying on § 84.86 or by invoking § 84.89.

SUMMARY OF REGULATORY CHANGES

The Department will make a slight edit to § 84.86 to replace "websites and web content" with "web content." Upon further review, the Department determined that "web content" is more in line with the rest of the rule and would limit potential confusion among sections, including § 84.84. This change will not alter the meaning of § 84.86.

Equivalent Facilitation (§ 84.87)

Proposed § 84.87 stated that recipients may use alternative methods to those described in this subpart when the alternative method results in substantially equivalent or greater accessibility and usability of the web content or mobile app.

Section 84.87 provides that nothing prevents a recipient from using designs, methods, or techniques as alternatives to those prescribed in the 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.[182] The reason for allowing for equivalent facilitation in this subpart is to encourage flexibility and innovation by recipients while still ensuring equal or greater access to web content and mobile apps. Especially in light of the rapid pace at which technology changes, this provision is intended to

[182] *See* 28 CFR part 36, appendix D at 1000 (1991); 36 CFR part 1191, appendix B at 329.

clarify that recipients can use methods or techniques that provide equal or greater accessibility than this rule would require. For example, if a recipient wanted to conform its web content or mobile app to a future web and mobile app accessibility standard that expands accessibility requirements beyond WCAG 2.1 Level AA, this provision makes clear that the recipient would be in compliance with this rule. Recipients could also choose to comply with this rule by conforming their web content to WCAG 2.2 Level AA[183] because WCAG 2.2 Level AA provides substantially equivalent or greater accessibility and usability to WCAG 2.1 Level AA; in particular, WCAG 2.2 Level AA includes additional success criteria not found in WCAG 2.1 Level AA and every success criterion in WCAG 2.1 Level AA, with the exception of one success criterion that is obsolete.[184]

Similarly, a recipient could comply with this rule by conforming its web content and mobile apps to WCAG 2.1 Level AAA,[185] which is the same version of WCAG and includes all the WCAG 2.1 Level AA requirements, but includes additional requirements not found in WCAG 2.1 Level AA for even greater accessibility. For example, WCAG 2.1 Level AAA includes Success Criterion 2.4.10[186] for section headings used to organize content and Success Criterion 3.1.4[187] that includes a mechanism for identifying the expanded form or meaning of abbreviations, among others. The Department believes that this provision offers needed flexibility for recipients to provide usability and accessibility that meet or exceed what this rule would require as technology continues to develop. The responsibility for demonstrating equivalent facilitation rests with the recipient.

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[183] W3C, *WCAG 2 Overview*, https://www.w3.org/WAI/standards-guidelines/wcag/ [https://perma.cc/RQS2-P7JC] (Oct. 5, 2023).
[184] W3C, *What's New in WCAG 2.2 Draft*, https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/ [https://perma.cc/GDM3-A6SE] (Oct. 5, 2023).
[185] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, § 5.2 Conformance Requirements* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs [https://perma.cc/XV2E-ESM8].
[186] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1*, *Success Criterion 2.4.10 Section Headings* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs:~:text=Success%20Criterion%202.4.10,Criterion%204.1.2 [https://perma.cc/9BNS-8LWK].
[187] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1*, *Success Criterion 3.1.4 Abbreviations* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs:~:text=Success%20Criterion%203.1.4,abbreviations%20is%20available [https://perma.cc/ZK6C-9RHD].

SUMMARY OF REGULATORY CHANGES

The Department is finalizing § 84.87 as proposed with a single minor modification to add a missing comma.

Duties (§ 84.88)

Proposed § 84.88 stated that if compliance with § 84.84 would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens, the recipient is only required to comply with § 84.84 to the extent it does not result in a fundamental alteration or undue financial and administrative burdens. It also stated that a recipient has the burden of proving that compliance with § 84.84 would result in such alteration or burdens, and 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. In addition, it stated that 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.

The comments and our responses regarding § 84.88 are set forth below.

Comment: Many commenters expressed appreciation for proposed § 84.88 and opposed any measures that would constitute a fundamental alteration or undue burden. Some commenters asked for additional guidance on what would constitute a fundamental alteration or undue burden.

Response: The Department appreciates these comments. 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 the requirements of § 84.84 would fundamentally alter the nature of program or activity, or would result in undue financial and administrative

burdens, rests with the recipient. These limitations on a recipient's duty to comply with the regulatory provisions mirror the fundamental alteration and undue burdens compliance limitations under the ADA title II regulation,[188] and are consistent with how the limitations already operate in many contexts under section 504. These limitations are thus familiar to many recipients.

The Department believes, in general, 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 within the meaning of this final rule. However, this is a fact-specific inquiry, and the Department provides some examples later in this section of when a recipient may be able to claim a fundamental alteration. Moreover, like the fundamental alteration or undue burdens limitations in the title II regulation and elsewhere in this final rule, § 84.88 does not relieve a recipient of all obligations to individuals with disabilities. Although a recipient under this rule is not required to take actions that would result in a fundamental alteration in the nature of a program or activity, or in 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 complying with all of the success criteria under WCAG 2.1 Level AA would result in a fundamental alteration or undue financial and administrative burdens. However, the 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 conformance to some of the WCAG 2.1 Level A or Level AA success criteria.

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[188] *See* 28 CFR 35.150(a)(3), 35.164, 35.130(b)(7).

Whether the undue burdens limitation applies is a fact-specific assessment that involves considering a variety of factors. For example, some recipients have minimal operating budgets measured in the thousands or tens of thousands of dollars. If such a recipient had an archive section of its website with a large volume of older and historical material (such as old photographs), the recipient would have an obligation under the existing section 504 regulation to ensure that its programs and activities offered using web content and mobile apps are accessible to individuals with disabilities. However, it might be an undue burden for the recipient to make all those materials fully accessible in a short period of time in response to a request by an individual with a disability.[189] Whether the undue burdens limitation applies, however, would depend, among other things, on how large the recipient's operating budget is and how much it would cost to make the materials in question accessible. Whether the limitation applies will also vary over time. Increases in the recipient's budget, or changes in technology that reduce the cost of making the historical materials accessible, may make the limitation inapplicable. Lastly, even where it would impose an undue burden on the recipient to make its historical materials accessible within a certain time frame, the recipient would still need to take any other action that would not result in such a burden but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient to the maximum extent possible.

Application of the fundamental alteration limitation is similarly fact specific. For example, a recipient might hold an art contest in which students submit alternative covers for their favorite books and students view and vote on the submissions on the recipient's website. It would likely be a fundamental alteration to require the recipient to modify each piece of artwork so that any text drawn on the alternative covers, such as the title of the book or the author's name, satisfies the color contrast requirements in the technical standard. Even so, the recipient would still be required to take any other action that would not result in such an alteration but

[189] *See* proposed 45 CFR 84.68(b)(1)(ii), (b)(7), 84.77, 84.81.

would nevertheless ensure that individuals with disabilities could participate in the contest to the maximum extent possible.

Because each assessment of whether the fundamental alteration or undue burdens limitations applies will vary depending on the recipient, the time of the assessment, and various other facts and circumstances, the Department declines to adopt any rebuttable presumptions about when the fundamental alteration or undue burdens limitations would apply.

Complying with the web and mobile app accessibility requirements set forth in §§ 84.84 to 84.89 means that a recipient of Federal financial assistance from the Department is not required by this section 504 rule to make any further modifications to the web content or content in mobile apps that it makes available to the public. However, it is important to note that compliance with §§ 84.84 through 84.89 will not relieve recipients of their distinct employment-related obligations under section 504, which applies the employment standards set forth in title I of the ADA, as described in § 84.16. The Department realizes that this 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 disabilities will provide greater predictability for recipients, as well as added assurance of accessibility for individuals with disabilities.

This approach is consistent with the approach that the Department of Justice has taken in the context of physical accessibility under title II. In that context, a covered entity is not required to exceed the applicable design requirements of the ADA Standards even if certain wheelchairs or other power-driven mobility devices require a greater degree of accessibility than the ADA Standards provide.[190] The entity may still be required, however, to make other modifications to how it provides a program, service, or activity, where necessary to provide access for a specific individual. For example, where an individual with a disability cannot physically access a

[190] *See* 28 CFR part 35, appendix A at 626 (2022).

program provided in a building that complies with the ADA Standards, the covered entity does not need to make physical alterations to the building but may need to take other steps to ensure that the individual has an equal opportunity to participate in and benefit from that program.

Similarly, just because a recipient is in compliance with this rule's web content or mobile app accessibility standard does not mean it has met all of its obligations under section 504 or other applicable laws—it means only that it is not required to make further changes to the web content or content in mobile apps that it makes available**.** 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 is still obligated under § 84.84(a) 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 in undue financial and administrative burdens. The recipient also must still satisfy its general obligations to provide effective communication, reasonable modifications, and an equal opportunity to participate in or benefit from the recipient's programs or activities.

The recipient must determine on a case-by-case basis how best to meet the needs of those individuals who cannot access a program or activity that the recipient provides through web content or mobile apps that comply with all of the requirements under WCAG 2.1 Level AA. A recipient should refer to 45 CFR 84.68(b)(1)(ii) to determine its obligations to provide individuals with disabilities an equal opportunity to participate in and enjoy the benefits of the recipient's programs or activities. A recipient should refer to § 84.77 (effective 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 programs or activities. A recipient should refer to § 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. For example, while not required in this final rule, 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 content or mobile apps or to request assistance. Providing this information will help recipients to ensure that they are satisfying their obligations to provide equal access, effective communication, and reasonable modifications.

The Department also clarifies that a recipient's requirement to comply with general equal access, effective communication, and reasonable modification obligations remains in place for content that fits under one of the exceptions under § 84.85. For example, in the appropriate circumstances, a recipient may be obligated to add captions to a video that falls within the archived content exception and provide the captioned video file to the individual with a disability who needs access to the video, or edit an individualized password-protected PDF to be usable with a screen reader and provide it via a secure method to the individual with a disability. Of course, a recipient may also choose to further modify the web content or content in mobile apps it makes available to make that content more accessible or usable than §§ 84.84 to 84.89 require. In the context of the above examples, for instance, the Department believes it will often be most economical and logical for a recipient to post the captioned video, once modified, as part of web content made available to the public; or to modify the individualized PDF template so that it is used for all members of the public going forward.

SUMMARY OF REGULATORY CHANGES

The Department's final rule removes the word "full" in § 84.88 so that the text reads "compliance" rather than "full compliance." The Department made this change because § 84.84(b)(1) and (2) clarify that compliance with this final rule includes complying with the success criteria and conformance requirements under Level A and Level AA specified in WCAG

2.1. This minor revision does not affect the meaning of § 84.88, but rather removes an extraneous word to avoid redundancy and confusion.

Measuring Compliance

In the NPRM, the Department considered four possible approaches to defining and measuring compliance, which involved linking noncompliance with a technical standard to: (a) a numerical percentage; (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.[191] The Department also invited comment on the following questions regarding measuring compliance:

- *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 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*

[191] 88 FR 63392, 63447-49 (Sept. 14, 2023).

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*[192] *with a technical standard and under what circumstances should noncompliance be considered isolated or temporary? How should the Department address noncompliance that is a result of technical difficulties, maintenance, updates, or repairs?*
- *Web Accessibility Question 61: Are there any local, State, Federal, international, or*

[192] *See* 28 CFR 35.133(b).

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?

The provision at § 84.89, adopted in the final rule and discussed in the summary of regulatory changes, adopts approach (b), "situations that impact the ability to have equal access to the website or mobile app," from the NPRM, with a few changes.

Comment: Many commenters provided their opinions on what will be necessary to measure compliance with the proposed standard adopted in § 84.84. Almost all commenters recognized that it would be nearly impossible for recipients to conform to WCAG 2.1 Level AA across 100% of web content and mobile apps, and recognized that there must be a more nuanced method for measuring compliance. Most commenters also supported a consistent standard that could be applied across the range of recipients. One commenter stated that because the Department intends to apply a nuanced approach to measuring compliance, any of these methods for measuring compliance will be too difficult to enforce and, therefore, the Department should not adopt any of the proposed approaches to measuring compliance with the requirements of § 84.84.

Response: The Department agrees that any method for measuring compliance must be consistently applied across all recipients. The Department is also persuaded that requiring 100 percent conformance to WCAG 2.1 Level AA would not be the most prudent approach, and that a recipient's compliance obligations can be limited under some narrow circumstances without undermining the rule's objective of ensuring equal access to web content and mobile apps. The Department believes its approach should emphasize actual access, be consistent with existing legal frameworks, and is supported by a wide range of commenters.

First, digital content changes much more frequently than physical buildings – another area covered by set accessibility standards – do. Every modification to web content or a mobile app could lead to some risk of falling out of perfect conformance to WCAG 2.1 Level AA.

Recipients will need to address this risk much more frequently under this subpart than they do under physical access requirements, because web content and mobile apps are updated much more often than buildings are. By their very nature, web content and mobile apps can easily be updated often, while most buildings are designed to last for years, if not decades, without extensive updates.

As such, recipients trying to comply with their obligations under this rule will need to evaluate their compliance more frequently than they evaluate the accessibility of their buildings. But regular consideration of how any change that they make to their web content or mobile app will affect conformance to WCAG 2.1 Level AA and the resulting iterative updates may still allow minor nonconformances to escape notice. Given these realities attending web content and mobile apps the Department believes that it is likely to be more difficult for recipients to maintain perfect conformance to the technical standard set forth in this rule than it is to comply with physical access standards. Commenters agreed that maintaining perfect conformance to the technical standard would be difficult.

Web content and content in mobile apps are also more likely to be interconnected, such that updates to some content may affect the conformance of other content in unexpected ways, including in ways that may lead to technical nonconformance without affecting the user experience for individuals with disabilities. Thus, to maintain perfect conformance, it would not necessarily be sufficient for recipients to confirm the conformance of their new content; they would also need to ensure that any updates do not affect the conformance of existing content. The same kind of challenge is unlikely to occur in physical spaces.

Second, some commenters raised concerns about the litigation risk that requiring perfect conformance to WCAG 2.1 Level AA would pose. Commenters feared being subjected to a flood of legal claims based on any failure to conform to the technical standard, however minor, and regardless of the impact—or lack thereof—the nonconformance has on accessibility. Commenters agreed with the Department's suggestion that due to the dynamic, complex, and

interconnected nature of web content and mobile apps, a recipient's web content and mobile apps may be more likely to be out of conformance to WCAG 2.1 Level AA than its buildings are to be out of compliance with the ADA Standards, leading to increased legal risk. Some commenters even stated that 100 percent conformance to WCAG 2.1 Level AA would be unattainable or impossible to maintain. Commenters also agreed with the Department's understanding that the prevalence of automated web accessibility testing could enable any individual to find evidence of nonconformance to WCAG 2.1 Level AA even where that individual has not experienced any impact on access and the nonconformance would not affect others' access, with the result that identifying instances of merely technical nonconformance to WCAG 2.1 Level AA is likely much easier than identifying merely technical noncompliance with the ADA Standards. Based on the comments it received, the Department believes that if it does not implement a tailored approach to compliance under this rule, the burden of litigation under this subpart could become particularly challenging for recipients, enforcement agencies, and the courts. Though many comments about litigation risk came from recipients, commenters from some disability advocacy organizations agreed that the rule should not encourage litigation about issues that do not affect a person with a disability's ability to equally use and benefit from a website or mobile app, and that liability should be limited.

The Department does not agree that allowing minor deviations from the technical standard that have minimal impact on access would be too complicated and untenable. Simply because this approach may require more steps to assess compliance than checking whether a website has satisfied 100% of the WCAG 2.1 Level AA success criteria does not mean this approach is not worthwhile or feasible. As discussed further, the Department believes that the final version of § 84.89 is tenable and will help ensure the full and equal access to which individuals with disabilities are entitled while allowing some flexibility for recipients if nonconformance with WCAG 2.1 Level AA is so minimal as to not affect use of the recipient's web content or mobile app.

Comment: Commenters advanced a variety of opinions on what is sufficient evidence of noncompliance with the proposed technical standard. Many commenters stated that any enforcement method should not solely rely on automated software used to check compliance with web content, but if automated checkers are used, any violations should be confirmed by a human being. Automated checkers may result in false positives or minor variations that do not affect access, leading to a flood of legal actions. Some commenters stated that a determination of noncompliance should only be made when there is a deviation from WCAG 2.1 Level AA and the deviation negatively impacts the ability of a person with a disability to use the web content in question. Some commenters stated that a deviation from WCAG 2.1 Level AA should only be a violation if the deviation is inherent to the web content itself, is widely prevalent, or there is no evidence of institutional development in response to the deviation. One commenter summed up their opinion by stating "the true measure of compliance is whether a person with a disability who needs access to a service can actually access it or not."

Response: The Department agrees that the method for measuring compliance must take into consideration whether the deviation from the WCAG 2.1 Level AA success criteria impacts an individual with a disability's access to the web content in question.

Comment: Comments on whether a numerical percentage should be used to measure compliance agreed that such a measure of compliance would be arbitrary and not ensure that people with disabilities are able to access web content. Some commenters stated that it would be difficult, if not impossible, for larger recipients to ensure 100% technical compliance at all times.

Response: The Department considered requiring a certain numerical percentage of conformance with the technical standard and declines to take this approach. The Department concluded that approach would be unlikely to ensure access. Even if only a very small percentage of content does not conform with the technical standard, that could still block an individual with a disability from accessing a program or activity. For example, even if there was only one instance of nonconformance, that single error could prevent an individual with a

disability from submitting an application for benefits. As such, the Department continues to believe that a percentage-based approach would not be sufficient to advance this rule's objective to ensure equal access to recipients' web content and mobile apps.

Comment: Some commenters expressed the view that a recipient's policies and practices should be considered when determining compliance with subpart I. Some of these commenters stated that policies for receiving feedback, automated and manual testing, and remediation along a set schedule should all be taken into account. Other commenters stated that actual conformance to WCAG 2.1 Level AA, not whether a recipient has policies in place, should determine compliance, but policies could be used when determining enforcement or remediation requirements following a violation. Some commenters thought that policies should require automated testing, some thought policies should require manual testing, and still others thought policies should require both.

Response: The Department appreciates the comments on recipient policies and practices concerning web and mobile accessibility. The Department declines to adopt a policy-based approach because there is not a sufficient rationale that would justify adopting any specific set of accessibility policies in this generally applicable rule. There was no consensus among commenters about what policies would be sufficient, and most commenters did not articulate a specific basis supporting why their preferred policies were more appropriate than any other policies. In the absence of more specific rationales or a clearer consensus among commenters or experts in the field about what policies would be sufficient, the Department does not believe it is appropriate to prescribe what specific accessibility testing and remediation policies all recipients must adopt to comply with their obligations under this rule. Based on the information available to the Department at this time, the Department's adoption of any such specific policies would be unsupported by sufficient evidence that these policies will ensure accessibility, which could cause significant harm. It would allow recipients to comply with their legal obligations under this

rule based on policies alone, even though those policies may fail to provide equal access to online programs or activities.

The Department also declines to adopt a policy-based approach that would rely on the type of general, flexible policies, in which the sufficiency of recipients' policies would vary depending on the factual circumstances. The Department does not believe that such an approach would give individuals with disabilities sufficient certainty about what policies and access they could expect. Such an approach would also fail to give recipients sufficient certainty about how they should meet their legal obligations under this rule. If it adopted a flexible approach, the Department might not advance the current state of the law, because every recipient could choose any accessibility testing and remediation policies it believed would be sufficient to meet its general obligations, without conforming to the technical standard or ensuring access.

The Department agrees that while it may be useful to know a recipient's policies and practices when investigating alleged violations of this subpart, the ultimate goal is accessibility as defined by the subpart. The Office for Civil Rights (OCR) is responsible for investigating allegations that recipients have violated section 504 and typically reviews recipients' policies and procedures as part of an investigation. OCR will review policies, such as policies that address feedback, testing, and timely remediation, when determining resolutions of violations or instances where recipients agree to come into voluntary compliance.

Although the final rule does not specifically require manual testing by people with disabilities, because requiring such testing could pose logistical or other hurdles, the Department recommends that recipients seek and incorporate feedback from people with disabilities on their web content and mobile apps. Doing so will help ensure that everyone has access to critical government services.

Comment: Commenters were divided on whether a recipient should be deemed to be compliant with subpart I if it remediates errors within a set time period. Some commenters stated that the compliance date for WCAG 2.1 Level AA is when the rule goes into effect for the

recipient and that any question of remediation is appropriately addressed in the enforcement process. Some commenters support allowing for remediation in a set time period, ranging from three days to months. Some commenters endorsed shorter remediation time periods for recipients with multiple violations or deviations from WCAG 2.1 AA.

Response: The Department agrees that the date for recipient web content and mobile applications to comply with WCAG 2.1 Level AA is stated in the proposed rule as either two or three years after the final rule's publication date depending on the size of the recipient. However, the Department is not adopting a framework where a recipient has a certain period of time to remediate inaccessibility issues before the recipient could be considered out of compliance with the rule. The Department believes that adopting this approach would undermine a core premise of the rule, which is that web content and mobile apps will generally be accessible by default. Under section 504, individuals with disabilities cannot be, by reason of such disability, excluded from participation in or denied the benefits of recipients' programs or activities, including those offered via the web and mobile apps.[193] Accordingly, it is important for individuals with disabilities to have access to the same platforms as their neighbors and friends at the same time, and the commenters' proposal would not achieve that objective. With this rule, the Department is ensuring that people with disabilities generally will not have to request access to recipients' web content and content in mobile apps, nor will they typically need to wait to obtain that access. Given recipients' existing obligations under section 504, recipients should already be on notice of their general obligations. If they are not, this rule unquestionably puts them on notice.

Comment: Most of the commenters opposed different compliance measures for new versus preexisting content. Almost all stated that policing content based on its publication date would be too complicated and that the proposed compliance dates of two or three years are sufficient for all content.

Response: The Department agrees that the two- or three-year compliance periods are

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[193] 29 U.S.C. 794(a).

sufficient for recipients to make their existing web content and mobile apps accessible while preparing to make new web content and mobile apps accessible, especially given the exception for archived web content under § 84.85(a).

Comment: Most of the comments on organizational maturity as a method for measuring compliance took the position that it should not be used. Specifically, those commenters stated that there is no direct correlation between a recipient's organizational maturity and its future compliance to WCAG 2.1 AA. One commenter stated that some organizations deemed "mature" post inaccessible content while some organizations not deemed "mature" post accessible content. Some commenters voiced general support for using organizational maturity as it would be a relatively simple method for the Department to enforce. Some commenters also expressed misunderstandings concerning organizational maturity, which suggests that an organizational maturity model would be confusing to the public if adopted.

Response: There are many ways to measure organizational maturity, and it is not clear to the Department that one organizational maturity model is more appropriate or more effective than any other. The Department therefore declines to adopt an organizational maturity approach in this final rule because any organizational maturity model for compliance with web accessibility that the Department could develop or incorporate would not have sufficient justification based on the facts available to the Department at this time. As with the policy-based approach discussed above, if the Department were to allow recipients to define their own organizational maturity approach instead of adopting one specific model, this would not provide sufficient predictability or certainty for people with disabilities or recipients.

Also, like the policy-based approach discussed above, if the Department were to adopt an organizational maturity approach that was not sufficiently rigorous, recipients would be able to comply this rule without providing equal access. This would undermine the purpose of the rulemaking.

Comment: Many of the commenters agreed that the Department should limit compliance

obligations if deviation from a specific WCAG 2.1 AA success criteria does not limit access of a person with a disability. Specifically, some commenters stated that a recipient should not be deemed in violation of subpart I if people with disabilities are able to access their web content and mobile apps. Some commenters stated that the Department should prioritize the usability of the web content and actual functional barriers instead of focusing only on technical violations of WCAG 2.1 Level AA. Many commenters supported a functional definition of accessibility that would effectively allow for minor deviations from the technical standard as long as they do not impact the ability of people with disabilities to access and benefit from the web content in question. Some commenters specified that the ability to access and benefit from the web content in question also requires consideration of the timeliness, privacy, and independence in accessing the web content. This method would also result in the possibility that recipients could be in violation of subpart I if any aspect of their program or activity provided through web content is inaccessible to a person with a disability, even if the recipient is fully compliant with WCAG 2.1 AA. Some commenters stated that all information posted on a recipient's web content is important so all information, regardless of whether it limits access to a recipient's program or activity, should be accessible. Some commenters oppose this method of measuring compliance because they believe it would be too difficult to enforce.

Response: The Department has considered these comments and believes a recipient should be able to meet its requirements under this rule even if the recipient's web content or mobile app does not perfectly conform to the technical standard set forth in § 84.84.

Accordingly, this final rule adopts § 84.89, which describes a particular, limited circumstance in which a recipient "will be deemed to have met" the requirements of § 84.84 even though the recipient's web content or mobile app does not perfectly conform to the technical standard set forth in § 84.84(b). Section 84.89 will apply if the recipient can demonstrate that, although it was technically out of conformance to WCAG 2.1 Level AA, (i.e., fails to exactly satisfy a success criterion or conformance requirement), the nonconformance has

a minimal impact on access for individuals with disabilities, as defined in the regulatory text. If a recipient can make this showing, it will be deemed to have met its obligations under § 84.84 despite its nonconformance to WCAG 2.1 Level AA.

Section 84.89 does not alter a recipient's general obligations under this rule, nor is it intended as a blanket justification for a recipient to avoid conforming to WCAG 2.1 Level AA from the outset. Rather, § 84.89 is intended to apply in rare circumstances and will require a detailed analysis of the specific facts surrounding the impact of each alleged instance of nonconformance. The Department does not expect or intend that § 84.89 will excuse most nonconformance to the technical standard. Under § 84.84(b), a recipient must typically ensure that the web content and mobile apps it "provides or makes available, directly or through contractual, licensing, or other arrangements, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1." This remains generally true. However, § 84.89 allows for some minor deviations from WCAG 2.1 Level AA if specific conditions are met. This will provide a recipient that discovers that it is out of compliance with this rule with another means to avoid the potential liability that could result. Recipients that maintain conformance to WCAG 2.1 Level AA will not have to rely on § 84.89 to be deemed compliant with this rule, and full conformance to WCAG 2.1 Level AA is the only definitive way to guarantee that outcome. However, if a recipient falls out of conformance in a minimal way or such nonconformance is alleged, a recipient may be able to use § 84.89 to demonstrate that it has satisfied its legal obligations. Section 84.89 also does not alter existing enforcement mechanisms. Individuals can file complaints, and agencies can conduct investigations and compliance reviews, related to this rule the same way they would for any other requirement under section 504.

As the text of the provision indicates, the burden of demonstrating applicability of § 84.89 is on the recipient. The provision will only apply "in the limited circumstance in which the recipient can demonstrate" that all of the criteria described in § 84.89 are satisfied. This section

requires the recipient to show that its nonconformance to WCAG 2.1 Level AA "has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the recipient's web content or mobile app" to do one of the activities enumerated in paragraphs (a) through (d) of § 84.89 in the manner described in § 84.89. If the nonconformance has affected an individual in the ways outlined in § 84.89 (further described below), the recipient will not be able to rely on this provision. Further, as "demonstrate" indicates, the recipient must provide evidence that all of the criteria described in § 84.89 are satisfied in order to substantiate its reliance on this provision. While § 84.89 does not require a particular type of evidence, a recipient needs to show that, as the text states, its nonconformance "would not affect" the experience of individuals with disabilities as outlined below. Therefore, it would not be sufficient for a recipient to show only that it has not received any complaints regarding the nonconformance; nor would it likely be enough if the recipient only pointed to a few particular individuals with disabilities who were unaffected by the nonconformance. The recipient must show that the nonconformance is of a nature that would not affect people whose disabilities are pertinent to the nonconformance at issue, just as the analysis under other parts of section 504 regulations depends on the barrier at issue and the access needs of individuals with disabilities pertinent to that barrier.[194] For example, people with hearing or auditory processing disabilities, among others, have disabilities pertinent to captioning requirements.

With respect to the particular criteria that a recipient must satisfy, § 84.89 describes both *what* people with disabilities must be able to use the recipient's web content or mobile apps to do and *the manner* in which people with disabilities must be able to do it. Nonconformance to WCAG 2.1 Level AA must not "affect the ability of individuals with disabilities to use the recipient's web content or mobile app . . . in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use" compared to individuals without disabilities.

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[194] *Cf., e.g.,* 45 CFR 84.68(b)(1)(iv), (b)(8), 84.77.

Timeliness, privacy, independence, and ease of use are underscored throughout the ADA framework, as well as elsewhere in this rule under section 504, as key components of ensuring equal opportunity for individuals with disabilities to participate in or benefit from a recipient's programs and activities, and "ease of use" is intended to broadly encompass other aspects of a user's experience with web content or mobile apps. To successfully rely on § 84.89, it would not be sufficient for a recipient to demonstrate merely that its nonconformance would not completely block people with disabilities from using web content or a mobile app as described in § 84.89(a) through (d). That is, the term "would not affect" should not be read in isolation from the rest of § 84.89 to suggest that a recipient only needs to show that a particular objective can be achieved. Rather, a recipient must also demonstrate that, even though the web content or mobile app does not conform to the technical standard, the user experience for individuals with disabilities is substantially equivalent to the experience of individuals without disabilities.

For example, if a recipient's online health questionnaire does not conform to WCAG 2.1 Level AA, a person with a manual dexterity disability may need to spend significantly more time to fill out a health questionnaire online than someone without a disability. This person might also need to seek assistance from someone who does not have a disability, provide personal information to someone else, or endure a much more cumbersome and frustrating process than a user without a disability. Even if this person with a disability was ultimately able to fill out the form online, § 84.89 would not apply because, under these circumstances, their ability to use the web content "in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use" would be affected. Analysis under this provision is likely to be a fact-intensive analysis. Of course, a recipient is not responsible for every factor that might make a task more time-consuming or difficult for a person with a disability. However, a recipient is responsible for the impact of its nonconformance to the technical standard set forth in this rule. The recipient must show that its nonconformance would not affect the ability of individuals with

pertinent disabilities to use the web content or mobile app in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use.

Paragraphs (a) through (d) of § 84.89 describe what people with disabilities must be able to use the recipient's web content or mobile apps to do "in a manner that [is] substantially equivalent [as to] timeliness, privacy, independence, and ease of use." First, under § 84.89(a), individuals with disabilities must be able to "[a]ccess the same information as individuals without disabilities." This means that people with disabilities can access all the same information using the web content or mobile app that users without disabilities are able to access. For example, § 84.89(a) would not be satisfied if certain web content could not be accessed using a keyboard because the content was coded in a way that caused the keyboard to skip over some content. In this example, an individual who relies on a screen reader would not be able to access the same information as an individual without a disability because all of the information could not be selected with their keyboard so that it would be read aloud by their screen reader. However, § 84.89(a) might be satisfied if the color contrast ratio for some sections of text is 4.45:1 instead of 4.5:1 as required by WCAG 2.1 Success Criterion 1.4.3.[195] Similarly, this provision might apply, for example, if the spacing between English words is only 0.15 times the font size instead of 0.16 times as required by WCAG 2.1 Success Criterion 1.4.12.[196] Such slight deviations from the specified requirements are unlikely to affect the ability of, for example, most people with vision disabilities to access information that they would be able to access if the content fully conformed with the technical standard. However, the recipient must always demonstrate that this element is met with respect to the specific facts of the nonconformance at issue.

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[195] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.4.3 Contrast (Minimum)* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/#contrast-minimum [https://perma.cc/4XS3-AX7W].

[196] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.4.12 Text Spacing* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/#text-spacing [https://perma.cc/B4A5-843F].

Second, § 84.89(b) states that individuals with disabilities must be able to "[e]ngage in the same interactions as individuals without disabilities." This means that people with disabilities can interact with the web content or mobile app in all of the same ways that people without disabilities can. For example, § 84.89(b) would not be satisfied if people with disabilities could not interact with all of the different components of the web content or mobile app, such as chat functionality, messaging, calculators, calendars, and search functions. However, § 84.89(b) might be satisfied if the time limit for an interaction, such as a chat response, expires at exactly 20 hours, even though Success Criterion 2.2.1,[197] which generally requires certain safeguards to prevent time limits from expiring, has an exception that only applies if the time limit is longer than 20 hours. People with certain types of disabilities, such as cognitive disabilities, may need more time than people without disabilities to engage in interactions. A slight deviation in timing, especially when the time limit is long and the intended interaction is brief, is unlikely to affect the ability of people with these types of disabilities to engage in interactions. Still, the recipient must always demonstrate that this element is met with respect to the specific facts of the nonconformance at issue.

Third, pursuant to § 84.89(c), individuals with disabilities must be able to "[c]onduct the same transactions as individuals without disabilities." This means that people with disabilities can complete all of the same transactions on the web content or mobile app that people without disabilities can. For example, § 84.89(c) would not be satisfied if people with disabilities could not submit a form or process their payment. However, § 84.89(c) would likely be satisfied if web content does not conform to Success Criterion 4.1.1 about parsing. This Success Criterion requires that information is coded properly so that technology like browsers and screen readers can accurately interpret the content and, for instance, deliver that content to a user correctly so

[197] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 2.2.1 Timing Adjustable* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/#timing-adjustable [https://perma.cc/V3XZ-KJDG].

that they can complete a transaction, or avoid crashing in the middle of the transaction.[198] However, according to W3C, this Success Criterion is no longer needed to ensure accessibility because of improvements in browsers and assistive technology.[199] Thus, although conformance to this Success Criterion is required by WCAG 2.1 Level AA, a failure to conform to this Success Criterion is unlikely to affect the ability of people with disabilities to conduct transactions. However, the recipient must always demonstrate that this element is met with respect to the specific facts of the nonconformance at issue.

Fourth, § 84.89(d) requires that individuals with disabilities must be able to "[o]therwise participate in or benefit from the same programs and activities as individuals without disabilities." Section 84.89(d) is intended to address anything else within the scope of section 504 (i.e., any program or activity that cannot fairly be characterized as accessing information, engaging in an interaction, or conducting a transaction) for which someone who does not have a disability could use the recipient's web content or mobile app. Section 84.89(d) should be construed broadly to ensure that the ability of individuals with disabilities to access or use any part of the recipient's web content or mobile app that individuals without disabilities are able to access or use is not affected by nonconformance to the technical standard.

The Department believes this framework is generally consistent with the framework of title II of the ADA, with which many recipients will be familiar, as well as the approach reflected in the Department's revisions and additions in §§ 84.68 and 84.77 of this final rule to ensure consistency between section 504 and title II of the ADA. Title II similarly requires covered entities to provide equal opportunity to participate in or benefit from services;[200] equal opportunity to obtain the same result;[201] full and equal enjoyment of services, programs, and

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[198] W3C, *Understanding SC 4.1.1: Parsing (Level A)*, https://www.w3.org/WAI/WCAG21/Understanding/parsing.html [https://perma.cc/5Z8Q-GW5E] (June 20, 2023).
[199] W3C, *WCAG 2 FAQ* (Oct. 5, 2023), https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411 [https://perma.cc/7Q9H-JVSZ]. W3C, *WCAG 2 FAQ* (Oct. 5, 2023), https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411 [https://perma.cc/7Q9H-JVSZ].
[200] 28 CFR 35.130(b)(1)(ii), 35.160(b)(1).
[201] 28 CFR 35.130(b)(1)(iii).

activities;[202] and communications with people with disabilities that are as effective as communications with others, which includes consideration of timeliness, privacy, and independence.[203]

The regulatory language codified in § 84.89 is very similar to language discussed in the NPRM's preamble.[204] However, the Department believes it is helpful to explain differences between that discussion in the NPRM and this final rule. The Department has only made three substantive changes to the NPRM's relevant language.

First, though the NPRM discussed excusing noncompliance that "does not prevent" equal access, § 84.89 excuses noncompliance that "would not affect" such access. The Department was concerned that the use of "does not" could have been incorrectly read to require a showing that a specific individual did not have substantially equivalent access to the web content or mobile app. In changing the language to "would not," the Department clarifies that the threshold requirements for bringing a challenge to compliance under this subpart are the same as under any other provision of section 504. Except as otherwise required by existing law, a rebuttal of a recipient's invocation of this provision would not need to show that a specific individual did not have substantially equivalent access to the web content or mobile app. Rather, the issue would be whether the nonconformance is the type of barrier that would affect the ability of people with pertinent disabilities to access the web content or mobile app in a substantially equivalent manner. Certainly, the revised standard would encompass a barrier that actually does affect a specific individual's access, so this revision does not narrow the provision.

Second, the Department originally proposed considering whether nonconformance "prevent[s] a person with a disability" from using the web content or mobile app, but § 84.89 instead considers whether nonconformance would "affect the ability of individuals with disabilities" to use the web content or mobile app. This revision is intended to clarify what a

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[202] 28 CFR 35.130(b)(8).
[203] 28 CFR 35.160.
[204] 88 FR 63392, 63447 (Sept. 14, 2023).

recipient seeking to invoke this provision needs to demonstrate. The Department explained in the NPRM that the purpose of this approach was to "provide equal access to people with disabilities," and limit violations to those that "affect access."[205] But even when not entirely "prevent[ed]" from using web content or mobile app, an individual with disabilities can still be denied equal access by impediments falling short of that standard. The language in the final rule more accurately reflects this reality and achieves the objective proposed in the NPRM. As explained above, under the language in the final rule it would not be sufficient for a recipient to show that its nonconformance would still permit people with disabilities to use the recipient's web content or mobile app as described in § 84.89(a) through (d). In other words, someone would not need to be entirely prevented from using the web content or mobile app before a recipient could be considered out of compliance. Instead, the effect of the nonconformance must be considered. This does not mean that any effect on usability, however slight, is sufficient to prove a violation. Only nonconformance that would affect the ability of individuals with disabilities to do the activities in § 84.89(a) through (d) in a way that provides substantially equivalent timeliness, privacy, independence, and ease of use would prevent a recipient from relying on this provision.

Third, the language proposed in the NPRM considered whether a person with a disability would have substantially equivalent "ease of use." The Department believed that timeliness, privacy, and independence were all components that affected whether ease of use was substantially equivalent. Because some commenters proposed explicitly specifying these factors in addition to "ease of use," the Department is persuaded that these factors warrant separate inclusion and emphasis as aspects of the user experience that must be substantially equivalent. This specificity ensures clarity for recipients, individuals with disabilities, Federal agencies, and courts about how to analyze an entity's invocation of this provision. Therefore, the Department has added additional language to clarify that timeliness, privacy, and independence are all

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[205] *Id.*

important concepts to consider when evaluating whether this provision applies. If a person with a disability would need to take significantly more time to successfully navigate web content or a mobile app that does not conform to the technical standard because of the content or app's nonconformance, that person is not being provided with a substantially equivalent experience to that of people without disabilities. Requiring a person with a disability to spend substantially more time to do something is placing an additional burden on them that is not imposed on others. Privacy and independence are also crucial components that can affect whether a person with a disability would be prevented from having a substantially equivalent experience. Adding this language to § 84.89 ensures consistency with the effective communication provision of section 504.[206] The Department has included timeliness, privacy, and independence in this provision for clarity and to avoid unintentionally narrowing what should be a fact-intensive analysis. However, "ease of use" may also encompass other aspects of a user's experience that are not expressly specified in the regulatory text, such as safety risks incurred by people with disabilities as a result of nonconformance.[207] "Ease of use" should be construed broadly to allow for consideration of other ways in which nonconformance would make the experience of users with disabilities more difficult or burdensome than the experience of users without disabilities in specific scenarios.

Regarding comments that recommended a two-part method of measuring compliance that includes a functional definition of accessibility in addition to WCAG requirements, the Department is concerned about imposing additional requirements on recipients. A major benefit of requiring conformance to WCAG 2.1 Level AA is that if a recipient's web content and mobile apps fully conform to it, the recipient can be certain that they are compliant with § 84.84. Adding a functional accessibility standard beyond WCAG would result in situations where even if a

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[206] 45 CFR 84.77.

[207] *See, e.g.*, W3C, *Web Content Accessibility Guidelines (WCAG) 2.1*, *Success Criterion 2.3.1. Three Flashes or Below Threshold* (June 5, 2018), https://www.w3.org/TR/2018/REC-WCAG21-20180605/#three-flashes-or-below-threshold [https://perma.cc/A7P9-WCQY] (addressing aspects of content design that could trigger seizures or other physical reactions).

recipient is 100% in compliance with WCAG 2.1 AA, they may still be in violation of subpart I if a single person with a disability is unable to access some portion of their web content or mobile app. This lack of certainty would prove difficult for recipients and result in confusion throughout health and human services programs and activities.

Comment: Some commenters expressed the view that not all instances of nonconformance to WCAG 2.1 Level AA should be treated equally. Some stated that there should be higher consequences based on how frequently accessed the content is, how egregious the violation is, and whether an issue is inherently more serious.

Response: The Department will investigate all alleged violations of section 504, including alleged nonconformance to WCAG 2.1 Level AA. During the investigation process, the Department may choose to pursue different methods of investigation and remedies depending on the specifics of the alleged violation, including the impact on people with disabilities and the importance of the content in question.

Comment: Some commenters stated that isolated or temporary instances of nonconformance to WCAG 2.1 Level AA should generally not be treated as violations as long as the recipient in question is not a repeat offender, they notify the public of the issue, they remediate the issue in a set period of time, and the issue itself is small.

Response: The Department has considered all of the comments it received on this issue and, based on the comments and its own independent assessment, decided not to separately excuse a recipient's isolated or temporary noncompliance with § 84.84(b) due to maintenance or repairs in the final rule. Rather, as stated in § 84.89, a recipient's legal responsibility for an isolated or temporary instance of nonconformance to WCAG 2.1 Level AA will depend on whether the isolated or temporary instance of nonconformance—as with any other nonconformance—would affect the ability of individuals with disabilities to use the recipient's web content or mobile app in a substantially equivalent way.

The Department believes it is likely that the approach set forth in § 84.89 reduces the need for a provision that would explicitly allow for instances of isolated or temporary noncompliance due to maintenance or repairs, while simultaneously limiting the negative impact of such a provision on individuals with disabilities. The Department believes this is true for two reasons.

First, to the extent isolated or temporary noncompliance due to maintenance or repairs occur that affect web content or mobile apps, it logically follows from the requirements in § 84.84 that these interruptions should generally result in the same impact on individuals with and without disabilities after the compliance date because, in most cases, all users would be relying on the same content, and so interruptions to that content would impact all users. From the compliance date onward, accessible web content and mobile apps and the web content and mobile apps used by people without disabilities should be one and the same (with the rare exception of conforming alternate versions provided for in § 84.86). Therefore, the Department expects that isolated or temporary noncompliance due to maintenance or repairs generally will affect the ability of people with disabilities to use web content or mobile apps to the same extent it will affect the experience of people without disabilities. For example, if a website is undergoing overnight maintenance and so an online form is temporarily unavailable, the form would already conform to WCAG 2.1 Level AA, and so there would be no separate feature or form for individuals with disabilities that would be affected while a form for people without disabilities is functioning. In such a scenario, individuals with and without disabilities would both be unable to access web content, such that there would be no violation of this rule.

Thus, the Department believes that a specific provision regarding isolated or temporary noncompliance due to maintenance or repairs is less necessary than it is for physical access. When there is maintenance to a feature that provides physical access, such as a broken elevator, access for people with disabilities is particularly impacted. In contrast, when there is

maintenance to web content or mobile apps, people with and without disabilities will generally both be denied access, such that no one is denied access on the basis of disability.

Second, even to the extent isolated or temporary noncompliance due to maintenance or repairs affects only an accessibility feature, that noncompliance may fit the parameters laid out in § 84.89 such that a recipient will be deemed to have complied with its obligations under the rule. Section 84.89 does not provide a blanket limitation that would excuse all isolated or temporary noncompliance due to maintenance or repairs, however. The provision's applicability would depend on the particular circumstances of the interruption and its impact on people with disabilities. It is possible that an interruption that only affects an accessibility feature will not satisfy the elements of § 84.89 and a recipient will not be deemed in compliance with § 84.84. Even one temporary or isolated instance of nonconformance could affect the ability of individuals with disabilities to use the web content with substantially equivalent ease of use, depending on the circumstances. As discussed above, this will necessarily be a fact-specific analysis.

In addition to being less necessary than in the physical access context, the Department also believes a specific provision regarding isolated or temporary interruptions due to maintenance or repairs would have more detrimental incentives in the digital space by discouraging recipients from adopting practices that would reduce or avert the disruptions caused by maintenance and repair that affect accessibility. Isolated or temporary noncompliance due to maintenance or repairs of features that provide physical access would be necessary regardless of what practices recipients put in place,[208] and the repairs and maintenance to those features often cannot be done without interrupting access specifically for individuals with disabilities. For example, curb ramps will need to be repaved and elevators will need to be repaired because physical materials break down. In contrast, the Department believes that, despite the dynamic

[208] *See* 28 CFR part 35, appendix B at 705 ("It is, of course, impossible to guarantee that mechanical devices will never fail to operate.")

nature of web content and mobile apps, incorporating accessible design principles and best practices will generally enable recipients to anticipate and avoid many instances of isolated or temporary noncompliance due to maintenance or repairs—including many isolated or temporary instances of noncompliance that would have such a significant impact that they would affect people with disabilities' ability to use web content or mobile apps in a substantially equivalent way. Some of these best practices, such as regular accessibility testing and remediation, would likely be needed for recipients to comply with subpart I regardless of whether the Department incorporated a provision regarding isolated or temporary interruptions. And practices like testing content before it is made available will frequently allow maintenance and repairs that affect accessibility to occur without interrupting access, in a way that is often impossible in physical spaces. The Department declines to adopt a limitation for isolated or temporary interruptions due to maintenance or repairs. Such a limitation may disincentivize recipients from implementing processes that could prevent many interruptions from affecting substantially equivalent access.

Comment: Commenters mentioned specific laws or policies used by States, including California and Texas, which require covered entities to post certification of their sites' accessibility and submit to testing by the state comptroller, respectively. Some commenters pointed to different technical standards instead.

Response: The Department has considered many States' approaches to assessing compliance with their web accessibility laws[209] and declines to adopt these laws at the Federal level. State laws like those in Florida, Illinois, and Massachusetts, which do not specify how compliance will be measured or how entities can demonstrate compliance, are essentially requiring 100 percent compliance with a technical standard. This approach is not feasible for the reasons discussed earlier in this section. In addition, this approach is not feasible because of the large number and wide variety of recipients covered by section 504, as compared with the relatively limited number of State agencies in a given State. Laws like California's, which

[209] 88 FR 63392, 63445-46 (Sept. 14, 2023).

require entities covered by California's law to certify or post evidence of compliance, would impose administrative burdens on recipients similar to those imposed by the international approaches discussed below. Some State agencies, including in California, Minnesota, and Texas, have developed assessment checklists, trainings, testing tools, and other resources. The Department may also provide further guidance about best practices for a recipient to meet its obligations under this rule. However, such resources are not substitutes for clear and achievable regulatory requirements. Some commenters stated that regulations should not be combined with best practices or guidance, and further stated that testing methodologies are more appropriate for guidance. The Department agrees and believes recipients are best suited to determine how they will comply with the technical standard, depending on their needs and resources.

The Department also declines to adopt a model like the one used in Texas, which requires State agencies to, among other steps, 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.[210] This approach is one way recipients may choose to ensure that they comply with this rule. However, as noted above when discussing the policy-based approach, the Department is unable to calibrate requirements that provide sufficient predictability and certainty for every recipient while maintaining sufficient flexibility. The Department declines to adopt an approach like Texas's for the same reasons it declined to adopt a policy-based approach.

The Department has also determined that other specific international approaches to evaluating compliance with web accessibility laws are currently not feasible to adopt in the United States.[211] The methodologies used by the European Union and Canada require reporting

[210] 1 Tex. Admin. Code 206.50, 213.21; Tex. Dep't of Info. Res., *EIR Accessibility Tools & Training*, https://dir.texas.gov/electronic-information-resources-eir-accessibility/eir-accessibility-tools-training [https://perma.cc/A5LC-ZTST].

[211] *See* 88 FR 51948, 51980 (Aug. 4, 2023) (explaining existing methods for measuring compliance in Canada, the European Union, New Zealand, and the United Kingdom).

to government agencies.[212] This would pose counterproductive logistical and administrative difficulties for recipients and the Department. The Department believes that the resources recipients would need to spend on data collection and reporting would detract from efforts to increase the accessibility of web content and mobile apps. New Zealand's approach,[213] which requires testing and remediation, is similar to the policy-based approach already discussed in this section, and the Department declines to adopt that approach for the reasons stated above. The approach taken in the United Kingdom, where a government agency audits websites and mobile apps, sends a report to the entity, and requires the entity to fix accessibility issues,[214] would raise similar logistical and administrative difficulties for recipients and the Department. Though the Department will continue to investigate complaints and enforce the section 504, given constraints on its resources and the large number of recipients within its purview to investigate, the Department is unable to guarantee that it will conduct a specific amount of enforcement under this rule on a particular schedule.

Given the number of recipients, the wide range in their uses of web content and mobile apps, and the Department's existing compliance activities, such arrangements would not be logistically feasible for section 504. Laws that require 100% conformance to WCAG are not feasible for section 504 for the reasons mentioned above. Laws that establish a single accessibility policy would not allow the hundreds of thousands of HHS recipients sufficient flexibility to determine how to ensure their web content and mobile apps comply with section

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[212] Commission Implementing Decision (EU) 2018/1524 (Dec. 10, 2018), https://eurlex.europa.eu/eli/dec_impl/2018/1524/oj [https:// perma.cc/5M7B-SVP9]; Government of Canada, Standard on Web Accessibility (Aug. 1, 2011), https://www.tbssct.gc.ca/pol/doc-eng.aspx?id=23601&section=html [https://perma.cc/ZU5D-CPQ7].

[213] New Zealand Government, 2017 Web Standards Self-Assessments Report (July 2018), https://www.digital.govt.nz/dmsdocument/97-2017- web-standards-self-assessments-report/html [https://perma.cc/3TQ3-2L9L]; New Zealand Government, Web Standards Risk Assessment (Oct. 19, 2020), https://www.digital.govt.nz/standardsand-guidance/nz-government-web-standards/riskassessment/ [https://perma.cc/N3GJ-VK7X]; New Zealand Government, About the Web Accessibility Standard (Mar. 3, 2022), https:// www.digital.govt.nz/standards-and-guidance/nzgovernment-web-standards/web-accessibilitystandard-1-1/about-2/ [https://perma.cc/GPR4- QJ29].

[214] United Kingdom, Understanding accessibility requirements for public sector bodies (Aug. 22, 2022), https://www.gov.uk/guidance/accessibilityrequirements-for-public-sector-websites-and-apps; United Kingdom, Public sector website and mobile application accessibility monitoring (Nov. 1, 2022), https://www.gov.uk/guidance/public-sector-websiteand-mobile-application-accessibility-monitoring.

504.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are editing § 84.89 to formalize a method for measuring compliance. Specifically, we are finalizing a method of measuring compliance where a recipient that is not fully in compliance with § 84.84(b) will be deemed to have met the requirements of § 84.84 if the recipient can demonstrate that the noncompliance has a minimal impact on access. Whether the noncompliance has minimal impact on access depends on whether the noncompliance would not affect the ability of individuals with disabilities to access the same information, engage in the same interactions, conduct the same transactions, and otherwise participate in or benefit from the same programs and activities with substantially equivalent timeliness, privacy, independence, and ease of use.

Accessible Medical Equipment (Subpart J)

Subpart J addresses requirements related to providing accessible medical equipment for people with disabilities.

Application (§ 84.90)

Proposed § 84.90 stated that this subpart would apply to programs or activities that receive Federal Financial assistance and recipients that operate, or receive Federal financial assistance from the operation of, such programs or activities.

We received no comments on § 84.90.

SUMMARY OF REGULATORY CHANGES

The Department is finalizing § 84.90 as proposed with no modifications.

Requirements for medical diagnostic equipment (§ 84.91)

Proposed § 84.91 contained a general requirement that no individual with a disability shall be excluded from or denied the benefits of a program or activity of a recipient offered through MDE due to the inaccessibility of the recipient's MDE.

The comments and our responses regarding § 84.91 are set forth below.

Comment: Almost all commenters supported requiring recipients to ensure the availability of accessible MDE for health equity and access to needed care for people with disabilities. A wide array of stakeholders including disability rights advocates and organizations, individuals with disabilities, civil rights, faith-based, and reproductive rights advocacy groups, as well as medical providers, researchers, State and local jurisdictions, and public health groups all expressed support for incorporating the Access Board's MDE standards into this section 504 regulation.

Response: The Department agrees with commenters that accessible MDE is vital for health equity, person-centered care, and access to care for patients with disabilities. The support for providing accessible care comes from a variety of commenters and recipient groups including physicians, nurses, allied professions, hospital associations, medical suppliers, and others. As discussed in the preamble to our NPRM, researchers have demonstrated and documented that the scarcity of accessible MDE constitutes a significant barrier to access to care for patients with disabilities, resulting in a lack of preventative care and diagnostic exams, while contributing to poorer health outcomes and lower life expectancies. The Department hopes that implementation of this final rule will make a tangible difference.

Comment: Many commenters described the importance of accessible MDE and provided firsthand accounts of instances where they were unable to receive health care or received substandard care because recipients did not utilize accessible exam tables, scales, radiological or other diagnostic equipment. Commenters recounted instances when they were unable to receive prostate exams, mammograms, or skin biopsies or when they received incomplete physical exams because they could not transfer to an exam table. Other commenters noted that they could not have their weight checked regularly because of the lack of an accessible weight scale resulting in an inability to document unexpected weight loss or to track a child's weight and growth over time. Some commenters described recipients' expectations that individuals with

mobility disabilities would be accompanied by companions to physically transfer them onto MDE. Some disability advocacy groups shared representative accounts submitted by a number of people documenting the harms experienced by people with disabilities due to recipients who lacked accessible MDE.

Response: The Department is aware of many instances where people with disabilities were denied access to needed care, subjected to demeaning situations, or received substandard care because recipients did not utilize accessible exam tables, weight scales, radiological, or other diagnostic equipment. OCR has taken action to enforce section 504 as it applies to medical care. However, the lack of standards for accessible MDE before the Access Board completed its standards in early 2017, the lack of scoping and rulemaking to make these standards enforceable for recipients, and modest voluntary adoption of accessible MDE by health care providers mean that these circumstances remain all too prevalent. This rulemaking and its effective date will be turning points in ensuring improved access to diagnostic services for people with disabilities. Because many people with disabilities are unable to receive even basic health care services as a result of inaccessible exam tables and weight scales, and because many health care providers, including primary care physicians, use exam tables and weight scales and the equipment is relatively inexpensive compared to other accessible MDE such as imaging equipment, the Department decided to add a specific requirement for exam tables and weight scales at § 84.92(c). At a minimum, recipients must acquire one accessible exam table, if they use exam tables, and one accessible weight scale, if they use weight scales, within two years. The Department decided on a two-year time period because it believes that is a sufficient period for most recipients to budget for and acquire accessible exam tables and weight scales. Some commenters were concerned that two years would be too long considering the availability and affordability of accessible exam tables and weight scales measured against the negative health outcomes experienced by people with disabilities when waiting for recipients to acquire accessible MDE, but the Department recognizes recipients will need some time to acquire

accessible exam tables and weight scales. This requirement will help address the specific denials of service raised by commenters relating to the inaccessibility of exam tables and weight scales, and ensure that regardless of recipient size, as long as recipients use at least one exam table or weight scale, patients will have access to accessible exam tables and weight scales. The Department also chose to specify exam tables and weight scales because exam tables and weight scales that meet the MDE Standards are already available on the open market and are less expensive than some other available accessible MDE, such as imaging equipment.[215]

Comment: A few medical provider groups expressed concerns about the extension of responsibility for these provisions to facilities not directly controlled by the section 504 covered recipient, giving an example of an emergency department boarding patients for other departments when inpatient beds or appropriate transfers are unavailable. These groups sought clarification of whether accessible MDE responsibilities will apply in these cases and requested a collaborative approach with the Department rather than being held accountable for decisions beyond their control, and consideration when complying with these requirements would result in undue burden.

Response: Since its publication in 1977, the Department's section 504 regulations have applied to recipients of Federal financial assistance from the Department. This rulemaking does not change the recipients covered by section 504. This rulemaking applies to each recipient and to the program or activity that receives such assistance. In the unlikely circumstance that a health care provider that receives financial assistance from the Department uses the facilities of a health care provider that does not accept financial assistance from the Department, the recipient is still required to comply with section 504 and all other appropriate Federal civil rights laws. Section 84.68(b)(1)(i) in the general prohibitions against discrimination section states that a recipient, in

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[215] *See, e.g.,* 82 FR 2810, 2829 (Jan. 9, 2017) (stating that commenters were concerned about immediate compliance with the MDE Standards for "more expensive imaging equipment" compared to other accessible MDE). *See also 2024 Mammography Price Guide*, Block Imaging, https://www.blockimaging.com/bid/95356/digital-mammography-equipment-price-cost-info (last visited Feb. 20, 2024).

providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangement deny a qualified individual the opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others. Paragraphs (b)(1)(ii) through (vii) list other types of discrimination prohibited by recipients whether directly or through contractual, licensing, or other arrangements.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.91 as proposed with no modifications.

Newly purchased, leased, or otherwise acquired medical diagnostic equipment (§ 84.92)

Proposed § 84.92(a) required that all MDE that recipients acquire more than 60 days after final publication of this rule must meet the Standards for Accessible MDE until the recipient satisfies scoping requirements in § 84.92(b). Proposed § 84.92(b) contained specific scoping requirements for accessible MDE ranging from 10% to 20% of all MDE based on facility specialty or purpose. We invited comment on the following questions:

- *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.*
- *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.*
- *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).*

We proposed in § 84.92(c) to require recipients that use exam tables must acquire at least one accessible exam table within two years of the final publication of this rule. We proposed the same requirement for recipients that use weight scales. As noted above, we decided that accessible exam tables and weight scales should be included in this requirement because many primary care health care providers use them for a range of basic diagnostic services. Additionally, accessible exam tables and weight scales are available on the open market and

more affordable when compared to other accessible MDE, such as imaging equipment.[216] Finally, we proposed a two year time period to acquire an accessible exam table and accessible weight scale because while that MDE is currently available, we understand that some recipients may need additional time to budget for and acquire it. We did not propose a longer time period because, as commenters note below, the inability to receive even basic health care services because of inaccessible exam tables and weight scales results in negative health outcomes for people with disabilities. We invited comment on the following questions:

- *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.*

We proposed in § 84.92(d) to make clear that recipients may use alternative standards to those required by the Standards for Accessible MDE as long as the alternative standards result in substantially equivalent or greater accessibility and usability.

We proposed in § 84.92(e) to provide that this section would not require a recipient to take actions that would result in a fundamental alteration in the nature of a program or activity, or in undue financial and administrative burdens, while providing additional clarity on claiming these exceptions.

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[216] *See* U.S. Access Board, Access Board Review of MDE Low Height and MSRP, (May 23, 2023), https://www.regulations.gov/document/ATBCB-2023-0001-0002 (listing available exam table models that meet the height requirements of the MDE Standards, and their retail prices). Additionally, based on conversations with recipients, Federal partners, and advocacy organizations, and as supported in the comments received, accessible weight scales are more prevalent and affordable than accessible exam tables. On the affordability of accessible exam tables and weight scales compared to imaging equipment, *see* 82 FR 2810, 2829 (Jan. 9, 2017) (stating that commenters were concerned about immediate compliance with the MDE Standards for "more expensive imaging equipment" compared to other accessible MDE). *See also 2024 Mammography Price Guide*, Block Imaging, https://www.blockimaging.com/bid/95356/digital-mammography-equipment-price-cost-info (last visited Feb. 20, 2024).

We proposed in § 84.92(f) to provide that recipients could prove that compliance with § 84.92(a) or (c) would be a fundamental alteration if compliance would alter diagnostically required structural or operational characteristics of the equipment, and prevent the use of the equipment for its intended diagnostic purpose.

The comments and our responses to § 84.92 are set forth below.

Comment: Most recipient organizations acknowledged the need to provide accessible MDE to people with disabilities and generally supported the accessible MDE provisions with scoping as proposed in the NPRM. Many recipient organizations expressed appreciation of the Department's measured approach and expressed support for provisions offering providers flexible approaches to compliance, particularly for small provider organizations with fewer than fifteen employees and the proposals at § 84.22(c) for existing facilities allowing alternative compliance schemes. A minority of groups representing physician, dental, hospital and insurance providers expressed concerns with costs for small recipients and requested longer phase-in periods, extensions for small recipients if recent MDE purchases had been made, or in some cases, requiring all new purchases to be accessible MDE as opposed to requiring that practices have a minimum number or percentage of accessible equipment. A number of health care provider groups requested technical or financial assistance in support of their efforts to come into compliance.

Response: The Department appreciates provider groups' recognition of the importance of these provisions for people with disabilities, as well as their support for the nuanced approach the Department is taking with scoping. The Department declines to extend the phase-in period, offer extensions for small practices which recently procured MDE, or to only require newly purchased equipment to be accessible at this time. This is because the health disparities and barriers to access-to-care people with disabilities are facing are urgent[217] and extending phase-in periods

[217] *See* CB Steele et al., *Prevalence of Cancer Screening Among Adults With Disabilities, United States, 2013*, 14 Preventing Chronic Disease (Jan. 2017), https://www.cdc.gov/pcd/issues/2017/16_0312.htm

will extend the time that they must wait for necessary services. Many people with disabilities have been urging the Department to make the MDE Standards mandatory since the Access Board issued them in 2017. Additionally, recipients have had considerable notice that these standards were under development, given that the ACA, enacted in 2010, directed the Access Board to promulgate standards for MDE.[218] Recipients were also on notice since the Access Board issued the MDE Standards in 2017 that enforcing agencies might make the standards enforceable.[219]

Finally, with the defenses of fundamental alteration and undue burden, this regulation already includes a carefully calibrated balance of interests to account for the burden on smaller recipients.

Comment: Many disability advocates, disability rights advocacy organizations, a member of Congress, and some State and local jurisdictions voiced concerns that the proposed scoping provisions were inadequate to meet demand among people with mobility disabilities. Many commenters dismissed using parking space percentages, which assume time-limited use of designated slots, as an inappropriate model for MDE scoping for facilities providing medical services frequented by a growing population of patients with disabilities. Without a larger

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(finding disparate access to cancer screenings); Gloria Krahn, *Persons with Disabilities as an Unrecognized Health Disparity Population*, 105 Amer. J. Public Health 198 (Apr. 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4355692/ (finding higher prevalence of obesity and cardiovascular diseases). *See also* Michael Karpman et al., Urban institute Health Policy Center, QuickTake: Even with Coverage, Many Adults Have Problems Getting Health Care, with Problems Most Prevalent among Adults with Disabilities, (Sept. 2015), https://apps.urban.org/features/hrms/quicktakes/Many-Adults-Have-Problems-Getting-Health-Care.html#:~:text=Adults%20with%20disabilities%20were%20also,to%20get%20to%20a%20doctor's; Henning Smith, *Delayed and Unmet Need for Medical Care Among Publicly Insured Adults with Disabilities*, 51 Medical Care 1015, (Nov. 2013), https://pubmed.ncbi.nlm.nih.gov/24113815/; Amanda Reichard et al, *Prevalence and Reasons for Delaying and Foregoing Necessary Care by the Presence and Type of Disability Among Working-age Adults*, 10 Disability and Health J. 39, (Jan. 2017), https://pubmed.ncbi.nlm.nih.gov/27771217/; Michelle Stransky et al., *Provider Continuity and Reasons for not Having a Provider Among Persons With and Without Disabilities*, 12 Disability and Health J. 131, (Jan. 2019), https://pubmed.ncbi.nlm.nih.gov/30244847/; Sarah Bauer et al., *Disability and Physical and Communication-related Barriers to Health Care Related Services Among Florida Residents: A Brief Report*, 9 Disability and Health J. 552, (July 2016), https://pubmed.ncbi.nlm.nih.gov/27101882/ (finding barriers to access to care).

[218] Section 4203 of the Affordable Care Act, 42 U.S.C. 18001 et seq, amending the Rehabilitation Act to add section 510, 29 U.S.C. 794f.

[219] 82 FR 2810 (explaining that "other agencies, referred to as enforcing authorities in the MDE Standards, may issue regulations or adopt policies that require health care providers subject to their jurisdiction to acquire accessible medical diagnostic equipment that complies with the MDE Standards").

percentage or all equipment being accessible, they asserted that patients with disabilities will have fewer scheduling options than their nondisabled counterparts. Instead, some commenters suggested using standards now applied to transportation retrofits.

Many commenters felt that 10% and 20% were inadequate percentages for accessible MDE because of demographic trends and the belief that accessible MDE would be considerably more in demand than parking spaces, especially since nondisabled drivers often drive their relatives with disabilities to these facilities, while those who need accessible MDE can only utilize the accessible equipment. Those commenters either proposed higher percentage thresholds for compliance, such as 20% and 40%, or that facilities require all newly purchased and leased MDE to be accessible. Some commenters also noted that the cost difference between accessible and inaccessible scales is negligible, so thresholds for scales could be instituted in a shorter time frame. An individual with disabilities objected to having to wait two more years for accessible MDE after they already waited 50 years from the adoption of section 504 and warned that an additional two-year waiting period would put the health of some people with disabilities at risk and even result in untimely deaths. An independent Federal agency charged with advising the President, Congress, and other Federal agencies on policies, programs, practices, and procedures that affect people with disabilities also objected to the two-year implementation timeline, recommending instead one year for exam tables and 120 days for scales. A commenter from the health advocacy field noted the absence of timelines for accessible MDE beyond scales and medical exam tables and requested the Department set an outer limit for compliance with these provisions at two years.

While several disability commenters opposed varying percentage requirements for different covered entities because of the difficulties in identifying which specialties are most vital to people with disabilities, others supported higher requirements for facilities whose patient census includes large numbers of people with mobility disabilities.

Response: The Department appreciates the concerns of commenters seeking more stringent scoping and recognizes that the needs for accessible parking are not perfectly aligned with the needs underpinning accessible MDE. While parking spaces and MDE are not used in the exact same manner and may not be used with the same consistency, the limited use of MDE is analogous to the use of parking spaces at a rehabilitation facility because, as with parking spaces, multiple patients with mobility disabilities could use the same piece of MDE in a day. Additionally, the use of MDE is not analogous to the use of vehicles covered by transportation regulations, which address a transportation system, rather than the accessibility of individual units of equipment, as under this rule.[220] Weight scales and exam tables also typically cannot be retrofitted to be accessible with the same ease or cost ratio compared to acquiring accessible MDE. Inaccessible weight scales typically do not have large platforms that are required for wheelchair access. Inaccessible exam tables are usually fixed height "box" tables with static bases, and possibly drawers, that are not easily or cheaply replaced with adjustable mechanisms.[221]

Section 84.91 states that recipients may not exclude, deny benefits to, or otherwise discriminate against people with disabilities in programs or activities that use MDE. Additionally, § 84.93 requires that each program or activity that uses MDE be readily accessible to and usable by people with disabilities in its entirety independent of the scoping requirements for newly acquired MDE set forth in § 84.92. Acquiring additional accessible MDE is one method to ensure that recipients do not exclude, deny benefits to, or otherwise discriminate against people with disabilities in programs or activities that use MDE, but it is not the only method. If a recipient denies a physical exam to a patient with a disability before the recipient is required to have an accessible exam table, they may still violate the other provisions of section 504.

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[220] 49 CFR part 37.
[221] ADA National Network, Accessible Medical Examination Tables and Chairs, https://adata.org/factsheet/accessible-medical-examination-tables-and-chairs (last visited March 1. 2024).

As noted above, the Department imposed specific requirements for exam tables and weight scales because of their ubiquity among primary care providers, their importance for basic diagnostic health services, and their relative attainability compared to more expensive accessible imaging equipment.[222] We did not propose a longer time period because the inability to receive even basic health care services because of inaccessible exam tables and weight scales results in negative health outcomes for people with disabilities. Additionally, we did not propose a shorter time period because we recognize that some recipients, especially small recipients with fewer resources, will need sufficient time to budget for and acquire accessible exam tables and weight scales.

Recipients that provide services that rely on other MDE are still required to provide those services to patients with disabilities, but section 504 will not require those recipients to acquire other accessible MDE (unless the requirements for all newly purchased, leased, or otherwise acquired MDE set forth in § 84.92(a) apply) if they are able to make their programs and activities accessible through other means.

In view of demands on recipients, particularly small practices and rural facilities, the Department will not require all newly acquired MDE, beyond the requirements set forth in § 84.92, to be accessible at this time or shorten the two-year implementation timeline. The utility of additional pieces of accessible MDE may be limited, given that multiple patients with mobility disabilities can use the same accessible MDE. Additionally, many recipients are small entities that only use a small amount of MDE. This means that regardless of whether the scoping

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[222] *See* U.S. Access Board, Access Board Review of MDE Low Height and MSRP (May 23, 2023), https://www.regulations.gov/document/ATBCB-2023-0001-0002 (listing available exam table models that meet the height requirements of the MDE Standards, and their retail prices). On the affordability of accessible exam tables and weight scales compared to imaging equipment, *see* 82 FR 2810, 2829 (Jan. 9, 2017) (stating that commenters were concerned about immediate compliance with the MDE Standards for "more expensive imaging equipment" compared to other accessible MDE). *See also 2024 Mammography Price Guide*, Block Imaging, https://www.blockimaging.com/bid/95356/digital-mammography-equipment-price-cost-info (last visited Feb. 20, 2024).

requirement is 10%, 20%, or even 40%, many recipients would only be required to acquire one piece of accessible MDE.[223]

While the Department will not increase the scoping requirements of proposed § 84.92, recipients may determine that the most effective method to comply with the program access obligation set forth in § 84.93 will be to acquire additional accessible MDE beyond that required by § 84.92. In addition, the nondiscrimination provisions in §§ 84.68(a) and 84.91 continue to apply.

Comment: A few commenters suggested different scoping requirements to reflect the omission of higher weight patients from the Standards for Accessible MDE by adding higher capacity equipment.

Response: The Department is not in a position to use scoping to address omissions from the MDE Standards developed by the Access Board as a part of this final rule.[224] However, these comments will be noted and relayed to the Access Board.

Comment: Some commenters asked whether MDE or medical treatment equipment used in home settings is covered under this rulemaking. Some commenters made the assumption that such equipment was covered. Although some commenters supported such application as urgently needed, others cautioned that it could add unforeseen burden to recipients or even impede access to home-based care.

Response: The obligations set forth in this rule apply to "program[s] or activit[ies] offered through or with the use of MDE," and are subject to the limitations set forth in the rule, including the undue burden limitation. Whether recipients would need to ensure that MDE used

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[223] Tables 18 and 19 of the Regulatory Impact Analysis provide estimates for the numbers of employees and accessible MDE that recipients will acquire in response to this rulemaking.

[224] The Rehabilitation Act, as amended by the ACA, directed the Access Board to promulgate technical standards for accessible MDE. 29 U.S.C. 794f. The Access Board's MDE Standards are not binding unless they are adopted by an enforcement agency such as HHS or DOJ. HHS is one of the 12 Federal agencies that are on the Access Board. The Access Board is the agency that can update its standards and HHS, as a member of the Board, participates in issuing updates to those standards. While HHS or another enforcement agency can establish scoping requirements if they adopt the Access Board's standards, neither HHS nor any other Federal agency can amend the Access Board's standards on its own.

in the provision of health care programs or activities in home settings complied with the MDE Standards would depend on the particular factual circumstances. Regarding the comments about the application of this rule to medical treatment equipment, while the Department inquired about application of these standards to non-diagnostic equipment as a part of MDE Question 14 for future consideration, the MDE Standards are not being applied to non-diagnostic equipment at this time. Any extension of the MDE Standards or new standards will result from the work of and future standards set by the Access Board, and the Department will relay this information to the Access Board for future consideration.

Comment: Many comments on the Department's proposed dispersion requirements to give larger covered entities flexibility in how they comply with subpart J requirements at § 84.92(b)(3) stated that it is not logistically feasible to share MDE across medical departments. Many disability advocates and public health groups expressed concern that the proposed rule would lead to incomplete or partial accessibility. Without additional safeguards, these groups worry there would be scheduling and logistical issues for providers and patients alike, leading to untimely access to necessary care, and commenters suggested additional statutory requirements or IT infrastructure would be needed to coordinate availability of accessible MDE. Some groups noted that some MDE isn't sufficiently portable to support the flexible compliance scheme the Department envisioned, particularly if equipment is being shared beyond one floor, building, or campus. A State cautioned that the experience of trying to serve at-risk populations with scarce resources during COVID-19 could prove instructive in anticipating the challenges medical facilities would have providing accessible MDE to considerable numbers of people with mobility disabilities. Further, commenters stressed that strategies to achieve compliance that rely on patients travelling between remote campuses are infeasible for the many people with mobility disabilities who may lack ready access to transportation. Alternatively, some provider groups expressed appreciation for a flexible approach to problem-solving and meeting patients' needs.

Response: The Department appreciates the comments on its proposed dispersion requirements. This provision does not require exact mathematical proportionality, which at times would be impossible. The Department agrees that there may be situations where a recipient with multiple departments, clinics, or specialties will not be able to simply disperse its accessible MDE proportionally across all departments, clinics, or specialties. If a recipient requires a patient with a disability who requires accessible MDE to use the MDE of another department, the recipient must ensure that the accessible MDE is readily accessible to and usable by the patient. Factors to consider in determining whether this standard has been met may include, among other things, whether the MDE is readily available and not a significant distance from where the patient is seeking care; whether changing locations during the patient visit significantly increases wait times; whether the patient is required to be undressed or partially dressed to use the MDE (if, for example, the patient has to go to a different part of the same building to use the accessible MDE); and whether the recipient provides assistance moving between locations. This means that some of the situations commenters described, including going to a separate campus or building to use a recipient's accessible MDE, could result in the recipient's program or activity not being readily accessible to and usable by patients with disabilities as required by § 84.93(a). Recipients must ensure that the dispersal of their accessible MDE does not discriminate against people with disabilities.

The Department also recognizes there may be situations where small recipients with a limited number of departments, clinics, or specialties in the same building may have one piece of accessible MDE that is shared among all departments, clinics, or specialties in a manner that provides access for all patients with disabilities who require access to the accessible MDE. The Department recommends as a best practice that where a recipient in a large facility with many departments, clinics, or specialties uses MDE, recipients have at least one piece of accessible MDE in each department, clinic, or specialty to limit instances where patients with disabilities must traverse between departments, clinics, or specialties for care.

Comment: The Department received many comments with suggestions for alternative requirements or methods for the placement of accessible MDE. Many disability and public health group commenters supported the alternative of requiring at least one exam table and scale per department, as a minimum, utilizing dispersion only as an interim measure. One commenter requested further clarity on how rules would apply to facilities with multiple non-adjacent campuses. Other disability organizations suggested requiring facilities to provide accessible transportation between facilities at no cost to the patient if necessary to secure timely access to MDE, or providing access to MDE via home visits. Similarly, one public health foundation expressed concern the NPRM did not recognize the burden imposed on people with disabilities of having to travel further or wait longer to access MDE. By contrast, many provider groups expressed concern about the cost and burden of more prescriptive approaches including one exam table and scale for each component of a medical facility.

Response: As noted in the Department's response above, recipients are encouraged to obtain at least one piece of accessible MDE for each department that uses that MDE. However, due to the varying sizes, patient populations, and circumstances of different recipients, the Department recognizes that recipients in large facilities with multiple departments will not necessarily have to obtain at least one piece of accessible MDE for each of its departments.

Situations where a recipient has multiple campuses and requires a patient who requires accessible MDE to go to different campuses for services from the same department due to the distribution of accessible MDE may constitute violations of § 84.92(b)(3) if the recipient's MDE is not readily accessible to or usable by persons with disabilities. In such situations, however, the recipient may be able to take other measures to ensure that its programs and activities are readily accessible to and usable by the patient. For example, it could offer home visits that provide equal access to care or accessible transportation to the patient with a disability at no cost to them within a reasonable time frame.

Comment: The Department received several comments urging the Department to amend this rule to reflect the Access Board NPRM proposing to revise the Accessible MDE standards by replacing the current 17 to 19 inch low transfer height range with a low transfer height of 17 inches.[225] The Access Board issued this NPRM to revise the height consistent with the findings of recent NIDILRR-funded research that the 17-inch low transfer height better reflects the needs of wheelchair users for safe transfers to examination tables.[226]

Response: The Access Board issued an NPRM that proposed to remove the sunset provision allowing for a 17 to 19 inch low transfer surface height and replace it with a 17-inch low transfer height requirement in May of 2023. As of the drafting of this final rule, the Access Board has not yet finalized the 17-inch low transfer height. As noted in the NPRM, the Department will consider issuing supplemental rulemaking updating the low transfer height requirement once the Access Board's NPRM on transfer height is finalized.

Under this rule, recipients acquiring accessible examination tables have the option acquiring examination tables that lower to between 17 to 19 inches.

As a reminder, under § 84.93(a) recipients are required to operate their programs and activities that use MDE so that they are accessible to people with disabilities, regardless of whether their exam tables lower to 17 or 19 inches.

Comment: A commenter encouraged the Department to work with the Access Board and DOJ on guidance and to consider the General Services Administration's framework for implementing the technology accessibility standards under section 508 of the Rehabilitation Act.

Response: The Department appreciates the recommendation and is committed to creating guidance documents and other technical assistance and providing education to assist recipients

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[225] 88 FR 33056 (May 23, 2023).

[226] *See, e.g.,* Clive D'Souza, University of Pittsburgh Dep't of Rehabilitation Science and Technology, Analysis of Low Wheelchair Seat Heights and Transfer surfaces for Medical Diagnostic Equipment Final Report (Jan. 2022), https://www.access-board.gov/research/human/wheelchair-seat-height/.

with understanding and meeting their obligations, in addition to guidance documents on the MDE Standards that already exist.[227]

SUMMARY OF REGULATORY CHANGES

Based on comments we received concerning methods for acquiring accessible MDE, discussed below in the comments and responses concerning § 84.93, we are modifying § 84.92(a) to explicitly recognize that lease renewals, in addition to the purchase, lease, or other acquisition, of MDE, will trigger the requirements of § 84.92(a). The Department's intent was always that lease renewals fall under the umbrella of new purchases, leases, or other methods for acquiring MDE under § 84.92(a), but we recognize that some readers may be confused if lease renewals are not specifically mentioned.

Existing medical diagnostic equipment (§ 84.93)

We proposed in § 84.93 to include clarifications regarding requirements for existing MDE. We proposed in § 84.93(a) to clarify that the program or activity in its entirety must be accessible, which does not necessarily require a recipient to make each of its pieces of MDE accessible, nor does it require a recipient to take an action that would result in a fundamental alteration in the nature of a program or activity, or in undue financial and administrative burdens.

In § 84.93(a)(3) of this final rule, we are correcting a typographical error in the NPRM. Section 84.93(a)(3) of the final rule will state that a recipient meets its burden of proving that compliance with § 84.93(a) would result in a fundamental alteration under § 84.93(a)(2) if it demonstrates that compliance with § 84.93(a) would alter diagnostically required structural or operational characteristics of the equipment and prevent the use of the equipment for its intended diagnostic purpose. The NPRM mistakenly referred to § 84.92(a) and (c) rather than § 84.93(a).

We proposed in § 84.93(b) to state that recipients could comply with this section through other methods beyond the acquisition of accessible MDE where other methods are effective in

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[227] *See e.g.*, ADA Nat'l Network, Accessible Medical Diagnostic Equipment, https://adata.org/factsheet/accessible-medical-diagnostic-equipment (last visited Dec. 11, 2023).

achieving accessibility of the program or activity. We invited comment on the following questions:

- *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.*
- *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& 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.*
- *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?*

The comments and our responses to proposed § 84.93 are set forth below.

Comment: The Department received comments on leasing arrangements and alternatives from disability, public health, and provider groups and State and local jurisdictions. One public health entity advised the Department to conduct a comprehensive survey to better understand

leasing practices and their utilization in diagnostic health care delivery. This commenter mentioned that in addition to leasing new equipment, some entities will lease or purchase refurbished units. Other health care providers may receive MDE through donations, long-term borrowing, or pooling and sharing arrangements. One commenter said that about 70% of medical equipment is leased, typically on three to five year contracts but often with early opt-out provisions, and that leases may qualify for tax benefits like IRS section 179. Disability and caregiving commenters specifically warned that lease renewals may be used by recipients to circumvent compliance and urged the Department to revise regulatory language to clarify that lease renewals are considered "new" leases. Another disability advocacy organization noted trade-ins and rentals as other possible alternatives to leases.

Response: The Department appreciates these responses. The Department agrees that recipients may not rely on the renewal of leases for existing MDE as a method to avoid acquiring accessible MDE for a prolonged period of time. Accordingly, the Department has edited the regulatory text at § 84.92(a) to clarify that lease renewals will also trigger the requirement to acquire accessible MDE. The intent of the rulemaking was always to require recipients to acquire accessible MDE when a recipient's lease of inaccessible MDE will expire at a set point in the future, when a piece of MDE reaches the end of its useful life and the recipient replaces it, or when a recipient decides to acquire a new piece of MDE for any of a myriad of reasons. Failing to explicitly state that lease renewals are included under § 84.92(a) may suggest that they are not covered and incentivize recipients to renew leases on inaccessible MDE for greater periods than they would have otherwise, extending the period where patients with disabilities do not have access to accessible MDE. Additionally, the Department notes that other arrangements, such as purchasing refurbished units or acquiring MDE through donations, long term borrowing, pooling, or sharing agreements will not exempt recipients from the obligations of § 84.92. Accordingly, the Department clarifies that lease renewals, purchasing refurbished MDE, acquiring MDE through donations, long term borrowing, pooling, and sharing agreements are all

considered new purchases, leases, or other acquisitions of MDE under § 84.92 and its scoping standards. Additionally, the Department considers trade-in, rental, and other methods of acquisition of MDE as methods to "otherwise acquire MDE" already covered under § 84.92. The intent of this rulemaking is not to provide for loopholes where a recipient, regardless of fundamental alteration or undue burden, can avoid acquiring accessible MDE for long periods of time and avoid providing access to people with disabilities.

Comment: The Department received many comments from diverse stakeholders on whether the Access Board's MDE Standards should be applied to medical equipment beyond MDE. While most commenters supported applying the MDE Standards to non-diagnostic equipment, especially equipment used for therapeutic or treatment purposes, some commenters urged the Department not to do so without further input from interested parties. Disability stakeholders strongly supported these applications and several encouraged the Department to approve standards for a range of medical equipment used primarily for treatment. However, those commenters also stated that the Department lacks technical expertise to impose such standards unilaterally on a broad range of equipment. They therefore suggested the Department coordinate with the Access Board, while also extending new standards to account for blind individuals, people with sensory disabilities, higher weight people, and people with intellectual disabilities. Other commenters advocated for the Department to set standards for equipment used in the home and for telehealth.

Response: The Department agrees that any extension of the MDE standards to non-diagnostic equipment, or any new standards for medical equipment meant to account for additional disabilities, should come with additional input from the Access Board. The Department has been in frequent contact with the Access Board about this rulemaking and the MDE Standards, and would rely heavily on the Access Board's extensive knowledge and technical acumen before altering the MDE Standards or creating new standards. The Department also notes that proposed subpart I covers accessible web content and mobile apps, including

telehealth platforms, and requires that recipients conform to the success criteria of WCAG 2.1 AA.

Comment: An association representing dental support organizations asked the Department whether dentists could continue to treat patients who prefer to be treated in their wheelchairs after the effective date of the final rule. This association also raised the issue of the accessibility of exam chairs in instances where plumbing is attached to the chairs in ways that prevent compliance with the standards.

Response: This rule establishes accessibility requirements that recipients that use MDE must comply with. It does not require patients to receive medical services while using accessible MDE if the recipient can provide the benefits of the recipient's programs or activities that the patient requires without the need for the patient to transfer to the accessible MDE, and if the patient prefers not to transfer to the accessible MDE.

In instances where a recipient has decided to use inaccessible exam chairs with plumbing built into the chair, whether replacing one or more of such inaccessible MDE with accessible MDE would constitute an undue burden or fundamental alteration would depend entirely on the individual circumstances of the recipient.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, in § 84.93(a)(3), we are replacing the reference to § 84.92(a) and (c) with a reference to § 84.93(a), and we are finalizing the remainder of § 84.93 as proposed with no other modifications.

Qualified staff (§ 84.94)

Proposed § 84.94 required that a recipient ensure its staff is able to successfully operate accessible MDE, assist with transfers and positioning of individuals with disabilities, and carry out program access obligations for existing MDE. We invited comment on the following questions:

- *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.*

The comments and our responses to proposed § 84.94 are set forth below.

Comment: The Department received comments on how to ensure staff are qualified and properly trained from diverse stakeholders. Disability commenters overwhelmingly supported mandatory trainings of recipients on the safe use of accessible MDE, accompanied by modules covering effective communication and person-centered care, developed in consultation with disability rights organizations and advocates with lived experience with refresher trainings at regular intervals. Commenters asserted that the costs of these trainings would be modest, especially when compared with the costs of worker or patient injury resulting from untrained staff. One commenter asserted that proposed § 84.94, as drafted in the NPRM, was insufficient to ensure recipients train and retrain qualified staff to operate accessible MDE and assist with necessary transfers and positioning to meet recipient program access obligations and safely serve clients. Many commenters agreed that health care providers must be trained on accessible MDE and given guidance on cultural competency in interactions with patients with disabilities, and urged the Department to provide more support and training for recipients.

Finally, some disability commenters, citing personal or aggregated accounts of hospitals asking relatives or companions to lift and transfer patients, requested that we clarify that it is hospital staff, not the patient or their relatives' responsibility, to do lifting and transferring necessary to utilize MDE.

Response: The Department appreciates the comments on qualified staff. As the NPRM notes, 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. While it may be in the best interest of recipients to provide training, both for the safety of the patient and the safety of the employee, the Department wishes to provide recipients with flexibility in how they ensure qualified staff. Appropriate training curricula and regimens for a small single-physician providers may differ from those required for large hospital systems.

Although specific trainings are not required, it is worth noting that medical practices and facilities seeking technical assistance on these and other health care accessibility requirements can reference previously issued joint guidance from the Department and the Department of Justice, titled "Access to Medical Care for Individuals with Mobility Disabilities."[228] The Department will consider updating this guidance for consistency with this rulemaking.

Finally, the Department clarifies that, as noted in the NPRM, barring an applicable limitation or defense, a recipient 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, 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.[229] The recipient cannot require the person accompanying the patient to assist. We also remind recipients that the provision in the ACA that required the development of these MDE accessibility standards was designed to "allow independent entry to, use of, and exit from the equipment by such individuals to the maximum extent possible."[230]

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[228] U.S. Dep't of Health & Human Servs., U.S. Dep't of Justice, *Access to Medical Care for Individuals with Mobility Disabilities* (July 2010), https://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/disability/adamobilityimpairmentsguidance.pdf.

[229] *See id*.

[230] 29 U.S.C. 794f.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.94 as proposed with no modifications.

Subpart K—Procedures

Subpart K contains the procedures for enforcement of this rule.

Procedures (§ 84.98)

Proposed § 84.98, stated that the procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to the part. Those procedures are found in 45 CFR 80.6 through 80.10 and 45 CFR part 81.

The comments and our responses regarding § 84.98 are set forth below.

Comment: Many commenters expressed concerns about what they viewed as a lack of enforcement procedures in the rule, noting that without "teeth," the regulation is not useful and will have no effect. One commenter urged that the rule contain a means of enforcement other than through filing a lawsuit.

Response: The Department appreciates commenters' concerns about what they believe to be a lack of enforcement procedures in the rule. As noted above, § 84.98 incorporates the compliance procedures of title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, and national origin in federally funded programs. Many other civil rights regulations that apply to recipients of Federal financial assistance similarly incorporate title VI procedures.

The incorporated regulations mandate that the Department conduct proactive periodic compliance reviews without the need for a complaint and also that it investigate complaints filed with it. Any person who believes themselves or any specific class of individuals to have been subjected to discrimination may file a written complaint within 180 days from the alleged discrimination, unless the time is extended by the Department. The Department is required to make a prompt investigation whenever a compliance review, complaint, or other information

coming to its attention indicates a possible failure to comply with this part. If compliance cannot be achieved through voluntary means, the regulations provide procedures for termination of Federal financial assistance following an administrative hearing. The Department may also refer the matter to DOJ to secure compliance through any other means authorized by law. These administrative procedures allow individuals to have their complaints investigated without having to file lawsuits.

Complaints may be filed through the OCR Complaint Portal at ocrportal.hhs.gov/ocr/smartscreen/main.jsf. The Department also accepts complaints by email at OCRcomplaint@hhs.gov and by mail at Centralized Case Management Operations, U.S. Department of Health and Human Services, 200 Independence Ave., S.W., Room 509F, Washington, D.C. 20201.You can call OCR's toll-free number at (800) 368-1019 or (800) 537-7697 (TDD) to speak with someone who can answer your questions and guide you through the process.

Comment: Observing the urgent need for enforcement, multiple commenters, including several disability rights organizations, recommended that we put in place procedures for oversight, monitoring, and enforcement of the regulation. Others said that there must be prioritization and strengthening of enforcement mechanisms. Several commenters stated that compliance is complaint driven and they cautioned against reliance on complaints alone to enforce the regulations. They noted the difficulty of expecting individuals to file complaints during a very stressful time.

Many commenters expressed concerns that the Department does not have enough investigators for all the complaints. They felt that complaints were being "pushed aside" because of other priorities. Several commenters said that OCR needs to be adequately funded and staffed to fully implement and enforce the regulations. One commenter suggested that there be a separate division within the Department dedicated to investigating complaints.

Response: We appreciate commenters' concerns and recognize the need for strong enforcement mechanisms. As noted above, the Department can initiate proactive compliance reviews on any matter that comes to their attention without the need for a complaint to be filed. The Department has a robust program of performing proactive agency-initiated compliance and an enforcement division dedicated to compliance reviews and complaint investigations with regional offices around the county. We will continue to efficiently address complaints and conduct compliance reviews consistent with the finite resources that we have available.

Comment: We received many comments urging that the complaint process be reformed and streamlined. Several commenters highlighted the need for transparency about the complaint investigation process. A few commenters recommended that individuals should have more than 180 days to file complaints, there should be shorter time frames for responding by the Department, and barriers to accessing the complaint form should be eliminated. Many commenters suggested that resources, including legal assistance, be made available to help individuals in filing complaints. Noting that the Department encourages the use of the on-line complaint form, many commenters expressed concerns about the burden that this places on individuals who may have difficulty using a computer and filling out forms on-line. They said that the technical process should not create a hardship when an individual is already under emotional and mental stress because of perceived discrimination.

A number of commenters urged the Department to reduce the burden of filing complaints and to improve communication with individuals with disabilities during the filing process. Others said that we should provide specific guidance on how individuals and organizations can file complaints, how we will investigate them, and how they will be resolved. One commenter recommended that the regulations permit individuals to file complaints even if they haven't personally experienced discrimination.

Response: We thank the commenters for their suggestions to improve the complaint process. We understand that the complaint procedure can be challenging, and we are always

striving to simplify the process and to make it as transparent as possible. Staff are available to assist in the process; however, we cannot provide legal assistance to individuals filing complaints. The OCR website contains information about the process of filing a complaint and what to expect when a complaint is filed. In response to the comment about extending the 180-day time frame for filing complaints, we note that under the existing regulations the Department has discretion to extend the 180-day requirement. In addition, the existing regulations make it clear that anyone can file a complaint of discrimination.

Comment: Many disability rights organizations and others urged the Department to use a cooperative rather than a punitive approach. They emphasized the need for the Department to work collaboratively with recipients to develop corrective action plans. Several asked that we provide recipients with resources and support to help them comply with the law. One commenter suggested that the Department focus on systemic practices while State and local recipients handle individual complaints. Noting that self-policing is a powerful way to promote enforcement, the commenter recommended that large recipients be required to institute internal complaint systems. Several commenters suggested that recipients designate someone to be responsible for ensuring enforcement of the regulation, accepting complaints, and answering questions.

Response: We appreciate commenters' concerns and remain firmly committed to using a cooperative approach. Throughout the investigative process, OCR provides technical assistance and works closely with recipients to help them comply with the law. The vast majority of OCR's complaints are resolved in this cooperative manner and often result in Voluntary Resolution Agreements. The Department's current section 504 regulation at §84.61 adopts the procedural provisions of title VI of the Civil Rights Act of 1964 for its section 504 regulation. The title VI regulation provides the legal framework for the Department's investigative process, including the obligation to attempt to resolve matters voluntarily and to assist recipients with compliance. 45 CFR 80.6(a); 80.7(d)(1); 80.8(a).

The existing regulations require that recipients designate an individual responsible for ensuring compliance and instituting a grievance procedure. Section 84.7(a) in the existing section 504 rule, which is retained in this final rule, requires recipients with 15 or more employees to designate an employee to coordinate efforts to comply with the part. Section 84.7(b) requires those recipients to adopt grievance procedures that provide for prompt and equitable resolution of complaints.

With regard to the suggestion that the Department only handle statewide cases while State and local recipients handle individual matters, we note that the only agency with authority to enforce section 504 and to investigate section 504 complaints against its recipients is the Department. However, an effective grievance procedure can allow internal resolution of complaints, potentially reducing the number of formal complaints filed with the Department.

Comment: Multiple commenters, including several disability rights organizations, emphasized the urgent need for training and educational materials on the provisions in the rule. Many requested technical assistance and guidance documents to help them understand the requirements. Others asked for financial resources to help them comply.

Response: We appreciate commenters' concerns and understand the importance of providing technical assistance and guidance to support compliance with this rule, and we will continue our practice of providing educational materials, guidance, and technical assistance documents on our website. Commenters' requests for providing increased training on the rule will be taken into consideration. The Department cannot provide financial assistance to recipients to ensure compliance with the part.

Data Collection

Comment: A multitude of commenters, including many disability rights organizations, urged the Department to collect disability data. They recommended a provision in the rule requiring recipients to gather disability data that would allow for equal inclusion of people with disabilities in equity and quality analyses and would contain information as to whether and how

individuals received modifications. Others said that there is a need for systematic, accurate, timely, and comprehensive collection, analysis, and public reporting of disability data for demographic purposes.

Response: Section 80.6(b) of the title VI regulations, incorporated into this rule by § 84.98, requires recipients to keep compliance records that must be submitted to the Department as requested including data showing the extent to which individuals with disabilities are beneficiaries of and participants in federally assisted programs. That section permits the Department to obtain any data it needs to determine compliance with this rule as it performs complaint investigations and compliance reviews. However, obtaining data in this manner is done on a case-by-case basis as needed. There is no requirement that every recipient maintain and submit data to the Department.

We agree that there needs to be better standards and practices in collecting data as this can have a positive impact in reducing disparities. Developing a civil rights data collection scheme can help to ensure that any civil rights data collection yields accurate data that mitigates potential negative impacts and that adequately protects the privacy of individuals. The Department is actively engaged with other agencies within the Department and throughout the Federal Government related to responsible data collection and recognizes the importance of data collection to meet its mission. The value of any data collection requirement will be significantly hampered by misalignment with the data needs of other agencies. For these reasons, the Department has decided to forgo the imposition of a data collection requirement in this rulemaking. We will continue to work with recipients and beneficiaries, and will consider whether an additional data collection requirement is needed in a future rulemaking.

SUMMARY OF REGULATORY CHANGES

For the reasons set forth above and considering the comments received, we are finalizing § 84.98 as proposed without modification.

Section 504 Federally Conducted Rule

This rule covers federally assisted programs. In the preamble to the proposed rule, we stated that since section 504 also covers programs and activities conducted by the Department, the Department intends to publish a separate rulemaking to update its federally conducted regulation enacted in 1998 (45 CFR part 85).

Comments: Many commenters, including several disability rights organizations, applauded the Department for issuing the federally assisted regulation, noting that the robust improvements in the proposed rule are welcome and critically important. However, they expressed disappointment that a federally conducted NPRM was not issued at the same time as the federally assisted NPRM. They said that this delay represents a striking omission, and they strongly urged the Department to accelerate publication of the rulemaking so that the essential updates to the section 504 federally assisted regulations can be applied to the Department itself which has a wide range of programs under its purview. Another commenter noted the importance of supporting individuals with disabilities within the Federal Government to ensure equal and full participation in the Federal workforce.

Response: The Department appreciates the comments received. We understand the importance of issuing a section 504 federally conducted rule, and we intend to do so soon. We note that the current section 504 federally conducted regulation remains in effect.[231]

IV. Executive Order 12866 and Related Executive Orders on Regulatory Review

A. Regulatory Impact Analysis Summary

a. Statement of Need

The Department is revising its existing section 504 regulation prohibiting discrimination on the basis of disability in programs and activities receiving Federal financial assistance from the Department. More than 40 years have passed since the Department originally issued regulations implementing section 504, with only limited changes in the decades since. During

[231] 45 CFR part 85.

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. HHS's section 504 regulation needed to be updated to reflect these developments in the law.

b. Overall Impact.

We have examined the impacts of the final rule under Executive Order (E.O.) 12866, as amended by E.O. 14094; E.O. 13563; the Small Business Regulatory Enforcement Fairness Act (also known as the Congressional Review Act, 5 U.S.C. 801 et seq.); 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 final rule is a significant regulatory action under section 3(f)(1) of E.O. 12866, as amended by E.O. 14094.

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 final 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 certify that the final rule will not have a significant economic impact on a substantial number of small entities.[232]

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." This final rule is not

[232] *See* discussion in section "Regulatory Flexibility Act – Small Entity Analysis" below.

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.[233]

The Congressional Review Act (CRA) defines a "major rule" as "any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget finds has resulted in or is likely to result in—(A) "an annual effect on the economy of $100,000,000 or more"; (B) "a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions"; or (C) "significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." 5 U.S.C. 804(2). OMB's Office of Information and Regulatory Affairs has determined that this final rule does meet the criteria set forth in 5 U.S.C. 804(2). The Department will comply with the CRA's requirements to inform Congress.

The Background and Overview sections at the beginning of this preamble contain a summary of this final 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 version of this RIA will be available at https://www.hhs.gov/sites/default/files/sec-504-ria-final-rule-2024.PDF.

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.[234] The health care

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[233] 2 U.S.C. 1503(2).

[234] 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 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.

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 rule applies to this universe of recipients, updating the Department's original regulation and adding new provisions in several areas. This section 504 rule 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.[235] While a majority of the estimated costs associated with this rule concern health care providers, the rule covers all recipients of HHS funding.

The RIA considers the various 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 final 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 final rule is expected to accrue.

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 using discount rates of 7 and 3 percent. The Final RIA results differ from Preliminary RIA results

[235] 45 CFR part 85.

because some subpart I costs and benefits, which are based on the DOJ web accessibility RIA,[236] have been recalculated to account for changes DOJ has made to its web accessibility RIA. Final RIA results also differ from Preliminary RIA results because the Final RIA results are expressed in 2022 dollars, while the Preliminary RIA results are expressed in 2021 dollars.

TABLE 1— ANNUALIZED VALUE OF MONETIZED BENEFITS AND COSTS UNDER THE FINAL RULE, IN 2022 DOLLARS

ANNUALIZED VALUE OF MONETIZED COSTS AND BENEFITS UNDER THE FINAL RULE

[In 2022 dollars]

	7-Percent discount rate (in millions)	3-Percent discount rate (in millions)
Monetized Incremental Costs		
Subpart I – Web, Mobile, and Kiosk Accessibility	934.7	916.9
Subpart J – Accessible Medical Equipment	377.4	371.6
§ 84.56– Medical Treatment	14.0	13.6
§ 84.57 – Value Assessment Methods	0.1	0.1
§ 84.60 – Child Welfare	0.1	0.1
TOTAL Monetized Incremental Costs*	**1,326.1**	**1,302.1**
Monetized Incremental Benefits		
Subpart I – Web, Mobile, and Kiosk Accessibility	1,265.6	1,311.8
Subpart J – Accessible Medical Equipment	145.5	145.5
TOTAL Monetized Incremental Benefits*	**1,411.1**	**1,457.3**

(***Note:** Totals may not sum due to rounding. The effects of this rule overlap with the effects of DOJ's final rule under title II of the ADA (89 FR 31320, April 24, 2024); see Summary Table C in the Regulatory Impact Analysis (RIA), which is also reproduced below, for quantified overlapping costs and benefits.)

Summary Table C. Annualized value of monetized base costs and benefits excluding those associated with recipients that are public entities covered by DOJ Title II web accessibility final rule (89 FR 31320, April 24, 2024) in 2022 dollars (millions)

Subpart I costs and benefits	Costs, 7 % discount rate	Costs, 3 % discount rate	Benefits, 7 % discount rate	Benefits 3 % discount rate
(1) All recipients	**934.7**	**916.9**	**1,265.6**	**1,311.8**
(2) Excluding recipients that are also public entities under title II	384.9	393.2	77.4	84.0

Quantified incremental costs concerning accessible medical equipment under subpart J come from updating policies and procedures, acquiring accessible medical diagnostic equipment

[236] U.S. Dep't of Justice, Title II Web and Mobile App Access FRIA 04-08-2024, https://www.ada.gov/assets/pdfs/web-fria.pdf.

(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 for web content and mobile apps.

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 requested comment on more extensive transition and ongoing costs, but did not receive comments on those costs.

Concerning the provisions to ensure consistency with the ADA, statutory amendments to the Rehabilitation Act, and Supreme Court and other significant court cases, the Department believes that these provisions will likely result in no additional costs to recipients.

Regarding costs that can be monetized, the RIA finds that the final rule would result in annualized costs of $1,302.1 million or $1,326.1 million ($778.4 million or $776.4 million, if limited to costs that do not overlap with DOJ's final web accessibility rule under title II of the ADA), corresponding to a 3% or a 7% discount rate. We separately report a full range of cost estimates of about $1,047.5 million to $1,765.6 million at a 3% discount rate, and a full range of cost estimates of about $1,072.9 million to $1,798.8 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.

Benefits from web, mobile, and kiosk accessibility and accessible school courses come from time savings and better education outcomes for both people with disabilities and people without disabilities. We conclude that the final rule yields subpart I benefits of $1,311.8

million/year at a 3% discount rate or $1,265.6 million/year at a 7% discount rate ($84.0 million or $77.4 million, if limited to benefits that do not overlap with DOJ's web accessibility final rule).

Subpart J benefits are benefits people with disabilities are expected to receive thanks to higher percentages of accessible MDE yielding improved health outcomes at recipients' locations. We conclude that the final rule yields $145.5 million/year in cancer-associated benefits. We separately report a range of quantifiable cancer-associated benefit estimates of $97.0 million to $193.9 million per year.

Total quantified benefits from subparts I and J provisions are thus estimated to exceed corresponding costs. Total annualized benefits are estimated to be $1,457.3 million at a 3% discount rate and $1,411.1 million at a 7% discount rate ($229.4 million or $222.8 million, if limited to benefits that do not overlap with DOJ's web accessibility final rule).

In addition to these quantified benefit estimates, the RIA includes discussions of potential unquantified benefits under the rule. Generally, the RIA anticipates that the final rule will result in myriad 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 requested comment that would facilitate more thorough estimation, and we received no additional information.

The RIA discusses both quantitatively and qualitatively the regulatory alternatives the Department considered in an attempt to achieve the same statutory and regulatory goals while imposing lower costs on society.

Regulatory Flexibility Act – Small Entity Analysis

The Department examined the economic implications of this final rule as required by the Regulatory Flexibility Act. This analysis, as well as other sections in the Regulatory Impact Analysis, serves as the Regulatory Flexibility Analysis, as required under the Regulatory Flexibility Act.

The Department deems that a rule has a significant economic impact on a substantial number of small entities whenever the rule generates incremental cost representing more than 3% of revenue for 5% or more of small recipients.[237]

The U.S. Small Business Administration (SBA) maintains a Table of Small Business Size Standards Matched to North American Industry Classification System Codes (NAICS).[238] Because the RIA uses 2019 counts of firms, for consistency, we have used SBA yearly revenues thresholds for 2019, which for recipients ranged between $8 million[239] and $41.5 million.[240]

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 final rule are small businesses. Moreover, the fraction of total small firms in each NAICS code that falls in the smallest size group (fewer than 5 employees) is greater than 5% for all relevant NAICS codes. Because most non-government recipients under the scope of the final rule are

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[237] HHS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3% for 5% or more of affected small entities." 81 FR 31463 (May 18, 2016). *See also* 87 FR 47906 (Aug. 4, 2022) ("The Department generally considers a rule to have a significant impact on a substantial number of small entities if it has at least a 3% impact on revenue on at least 5% of small entities").

[238] 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.

[239] 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).

[240] 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.

small businesses, it is sufficient to investigate the impact of the final rule on the average recipient in the smallest size group to determine whether the final 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 incur incremental cost 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 certify that the final 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 revenue (in 2022 dollars) for a recipient belonging to the smallest size group — for each 6-digit NAICS code considered separately — is $190,000 or more. Three percent of this sum is about $5,700 (2022 dollars), which, based on our review of data on prices for MDE as well as incremental costs for ensuring qualified staff, we deem is an amount sufficient to finance purchase of the limited set of inexpensive MDE the smallest entities typically need as well as to ensure qualified staff.

Considering the smallest recipient groups among each of the 6-digit NAICS groups that private recipients belong to, the typical yearly average revenue is about $354,000. That represents the median of the average revenues across all relevant 6-digit NAICS codes. Podiatrists' offices' average yearly revenue is at the median, but general hospitals have the highest average yearly revenue among the relevant NAICS codes at $20 million, and Child Day Care Services have the lowest average yearly revenue among the relevant NAICS codes at $116,000. Thus, in many cases the 3% revenue threshold is about $10,000. Costs of the final 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.[241]

[241] See full Regulatory Impact Analysis for tables and calculations.

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 small recipients will be able to ensure that their websites can be made accessible and kept accessible each year.

Comment: Some commenters expressed concern that the requirements of subpart I would lead to significant costs for recipients. One commenter in particular stated that it reviewed the price estimates of a firm that offers services to make web content "ADA compliant" and believed that the costs for reviewing existing web content for compliance and remediating web content for compliance could be more than $23,500 with additional monthly expenses.[242]

Response: In the RIA, the Department sampled several software companies' price lists for products and services designed to make websites accessible in order to estimate average compliance costs for recipients of various sizes. Based on that sampling, the Department estimates the average annual compliance costs for the 113,295 larger recipients to be $2,500 per year. Using that same methodology, the Department estimates the annual compliance costs for the 339,789 smaller recipients (comprising offices of physicians, dentists, and other health practitioners) will be much lower given that the smaller entities' websites are expected to be less complex and include fewer pages. The Department's RIA estimates that the 85.9% of these smaller entities that have websites will spend an average of $440/year to ensure their pages are accessible. While there will be instances where a recipient incurs costs above the Department's estimated annual costs, those will likely be incurred by large recipients, such as hospitals with

[242] *See* Skynet Technologies, *How much does it cost to make a website ADA compliant? What are the factors that impact the cost?*, https://www.skynettechnologies.com/blog/cost-to-make-website-ada-compliant (last visited Dec. 15, 2023).

multiple locations, that use web content and mobile apps extensively and already devote significant resources to creating and maintaining web content and mobile apps. In rare instances where a small recipient has a significant online presence that would require a large percentage of its resources to review and remediate, the recipient may argue that full compliance with subpart I would amount to an undue burden under § 84.88.

We stress that the final rule includes exceptions meant to ease the burden on small firms and does not require entities to take any action that would result in a fundamental alteration in the nature of a program or activity or cause the entities to incur undue financial and administrative burdens.

Executive Order 13132: Federalism

As required by E.O. 13132 on Federalism, the Department has examined the effects of provisions in the final regulation on the relationship between the Federal Government and the States. The Department has concluded that the final regulation has federalism implications but notes that State law will continue to govern unless displaced under standard principles of preemption.

The 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 final rule. The 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 Federal regulatory requirements or implementation specifications will continue to be enforceable. Section 3(b) of E.O. 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 E.O. 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 rulemaking 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.

We received comments, including from States, that the Department did not consult with States in violation of E.O. 13132, particularly with respect to the integration provision's prohibition of failure to provide community-based services that results in serious risk of institutionalization. As explained above in the preamble discussion of the integration provision at § 84.76, application of the integration mandate's protection to individuals "at serious risk of institutionalization" in the absence of community-based services is a well-established principle adopted by six circuits following *Olmstead,* beginning in 2003 with the decision in *Fisher v. Oklahoma Health Care Authority.*[243] Given that this rule creates no new obligations to State and local governments, all of which have the existing responsibilities clarified in this rule under section 504 and analogous regulatory provisions in title II, this rule does not impose any new preemption of State law. Moreover, although the proposed rule addresses circumstances not previously covered specifically in the existing rule, those provisions also do not create new obligations for State and local governments, or other recipients of Federal financial assistance, but instead explicate longstanding requirements in the existing section 504 regulations that prohibit recipients from providing services to qualified persons with disabilities in a manner that

[243] 335 F.3d 175 (10th Cir. 2003).

does not provide equal opportunities for such persons to gain the same benefits. In addition, a number of State and local governments and State agencies participated in the process by submitting comments in response to NPRM.

Section 6(b) of E.O. 13132 includes some qualitative discussion of substantial direct compliance costs that State and local governments would incur as a result of a final regulation. We have considered the cost burden that this rule imposes on State and local government recipients and estimate State and local government annualized costs will be about $563.6 million per year (2022 dollars) at a 3% discount rate and $589.8 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 40% of costs for all recipients, i.e., public and private entities altogether), subpart J (about 10% of costs for all recipients), § 84.56 - Medical treatment (about 10% of costs for all recipients), 100% of costs for § 84.57 - Value assessment methods (only public entities – Medicaid agencies – bear these costs), and § 84.60 - Child welfare (about 4 % of costs of all recipients).

In addition, the Department is aware that DOJ published the final Regulatory Impact Analysis[244] to accompany its rule finalizing requirements for public entities covered by title II of the ADA and that its requirements are consistent with this Department's subpart I.[245] 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 final rule (89 FR 31320, April 24, 2024), 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.

Paperwork Reduction Act

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[245] U.S. Dep't of Justice, Title II Web and Mobile App Access FRIA 04-08-2024, https://www.ada.gov/assets/pdfs/web-fria.pdf.

This final 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).[246] 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. In order to evaluate whether an information collection should be approved by OMB, the PRA requires that the Department solicits comment on the following issues:

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.[247]

The PRA requires consideration of the time, effort, and financial resources necessary to meet the information collection requirements referenced in this section. The Department previously published a notice of a proposed data collection on September 14, 2023, at 88 FR 63392-6351, as part of an NPRM entitled "Discrimination on the Basis of Disability in Health and Human Service Programs or Activities" (RIN 0945-AA15), to invite public comment. OCR solicited comment on the issues listed above and estimated the annual burden of the information collection request (ICR) to be 256,763 hours. The new information collection is evaluated under OMB Control Number 0945-0013.

OCR did not receive comments related to the previous notice.

The notice requirement outlined in § 84.8 implicates the third-party disclosure provisions of the PRA implementing regulations, which compels an agency to request comment

[246] 44 U.S.C. 3501-3520.
[247] 44 U.S.C. 3506(c)(2)(A).

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 § 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. The estimated total number of hours to respond is 256,763 (0.5667 x 453,084).

Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995 (UMRA), 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 UMRA.

The Department received comment from some State officials arguing that the integration provision in § 84.76 Integration is subject to the UMRA. For the reasons discussed in the preamble for § 84.76, the Department declines this interpretation and restates that the rule in its entirety is exempted from the UMRA as a rule that enforces nondiscrimination on the basis of disability.

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.[248]

The Department sought public comment in the NPRM on the accessibility standards for accessible medical diagnostic equipment and whether there are any other standards for accessible medical diagnostic equipment that the Department should consider. We received no significant public comment in response to our question requesting suggestions of alternative standards to apply to MDE. We also sought comment on the selection of WCAG 2.1 AA to coordinate the implementation and enforcement by Executive agencies of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794). Executive Order 12250 at section 1-2(c), 45 FR 72995 (Nov. 2, 1980). 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.[249] 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 and final rules.[250]

The proposed rule was reviewed and approved by the Assistant Attorney General, and this final rule was also reviewed and approved by the Assistant Attorney General.

Incorporation by Reference

Through this rule, the Department is adopting the internationally recognized accessibility standard for web access, WCAG 2.1, published in June 2018, as the technical standard for web and mobile app accessibility under section 504. WCAG 2.1, published by W3C WAI, specifies success criteria and requirements that make web content more accessible to all users, including individuals with disabilities. The Department incorporates WCAG 2.1 by reference into this rule,

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[248] Pub. L. 104-113, section 12(d)(1) (15 U.S.C. 272 Note).
[249] *See* E.O. 12250 (DOJ Coordination authority) at 1-503 and E.O. 12067 (EEOC Coordination authority).
[250] 28 CFR 0.51.

instead of restating all of its requirements verbatim. To the extent there are distinctions between WCAG 2.1 and the standards articulated in part 84, the standards articulated in part 84 prevail.

The Department notes that when W3C publishes new versions of WCAG, those versions will not be automatically incorporated into this rule. Federal agencies do not incorporate by reference into published regulations future versions of standards developed by bodies like W3C. Federal agencies are required to identify the particular version of a standard incorporated by reference in a regulation.[251] When an updated version of a standard is published, an agency must revise its regulation if it seeks to incorporate any of the new material.

WCAG 2.1 Level AA is reasonably available to interested parties. Free copies of WCAG 2.1 Level AA are available online on W3C's website at https://www.w3.org/TR/2018/REC-WCAG21-20180605/ and https://perma.cc/UB8A-GG2F. In addition, a copy of WCAG 2.1 Level AA is also available for inspection by appointment at Office for Civil Rights, U.S. Department of Health and Human Services, 200 Independence Ave., SW, Room 509F, HHH Building, Washington, D.C. 20201.

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, Incorporation by reference, Individuals with disabilities, Integration, Long term care, Medical care, Medical equipment, Medical facilities, Nondiscrimination, Public health.

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[251] *See*, *e.g.,* 1 CFR 51.1(f) ("Incorporation by reference of a publication is limited to the edition of the publication that is approved [by the Office of the Federal Register]. Future amendments or revisions of the publication are not included.").

For the reasons set forth in the preamble, the Department of Health and Human Services amends 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*. *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" (paragraph (a)(1)(i) of this section) or "record of" (paragraph (a)(1)(ii) of this section) 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" (this paragraph (a)(1)(iii)) 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)(i) *Physical or mental impairment* is defined as 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, mental health condition, 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, mental health condition, 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 ADA Amendments Act of 2008 (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" (paragraph (a)(1)(i) of this section) or "record of" (paragraph (a)(1)(ii) of this section) 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 the principles in this section, 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 the principles of this section 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 (d)(2) 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 this section, 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" (paragraph (a)(1)(i) of this section) or "record of" (paragraph (a)(1)(ii) of this section) 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*. 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 the prong in this paragraph (e) 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 the terms set forth at 29 U.S.C. 705(20)(F).

§ 84.6 [Amended]

9. Amend § 84.6 by:

a. Removing the word "handicap" and adding in its place the word "disability" in paragraphs (a)(1) and (2); and

b. Removing the words "handicapped persons" and adding in their place the words "persons with disabilities" wherever they occur in paragraphs (a)(3), (b), and (c).

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 their designee finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

11. Revise and republish newly redesignated § 84.10 to read as follows:

§ **84.10 Definitions.**

As used in this part, the term:

2004 ADA Accessibility Guidelines (ADAAG) means the requirements set forth in appendices B and D to 36 CFR part 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 through 102-76.95.

Archived web content means web content that—

(1) Was created before the date the recipient is required to comply with § 84.84, reproduces paper documents created before the date the recipient is required to comply with § 84.84, or reproduces the contents of other physical media created before the date the recipient is required to comply with § 84.84;

(2) Is retained exclusively for reference, research, or recordkeeping;

(3) Is not altered or updated after the date of archiving; and

(4) 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, and spreadsheet 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.

Department means the Department of Health and Human Services.

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).

Director means the Director of the Office for Civil Rights.

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; and

(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 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 nondisabled persons to the fullest extent possible. These settings provide opportunities to live, work, and receive services in the greater community, like individuals without disabilities; 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.

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) through (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, 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 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.

Recipient means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

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.

Section 508 Standards means the standards for Information and Communications Technologies (ICT) promulgated at 36 CFR part 1194 by the U.S. Access Board per section 508 of the Rehabilitation Act (29 U.S.C. 794d 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 promulgated by the Architectural and Transportation Barriers Compliance Board (Access Board) under section 510 of the Rehabilitation Act of 1973, as amended, found at 36 CFR part 1195 (as of Jan. 9, 2017), with the exception of M301.2.2 and M302.2.2.

State includes, in addition to each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, 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.

User agent means any software that retrieves and presents web content for users.

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/ and 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 the 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. 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 their 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 (a) 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 in 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, in making alterations to existing buildings, shall 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 **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, and that comply with the corresponding technical and scoping specifications for those elements in the American National Standard Specification (ANSI) (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 part 101-19, subpart 101–19.6 (revised as of July 1, 2002), for those facilities constructed between January 18, 1991, and **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, 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 paragraph (c) 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 **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, 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), appendix A to 41 CFR part 101-19, subpart 101–19.6 (revised as of July 1, 2002). 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 **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, but before May 9, 2025, 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 May 9, 2025, 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 paragraph (d) 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 where 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, shall be deemed in compliance with this section if they meet the requirements of 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) 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 **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, or if no permit is required, if the start of physical construction or alterations occurs on or after January 18, 1991, and before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Departures from particular requirements of UFAS 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.

(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 **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, and before May 9, 2025, or if no permit is required, if the start of physical construction or alterations occurs on or after **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, and before May 9, 2025. 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) 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 May 9, 2025, or if no permit is required, if the start of physical construction or alterations occurs on or after May 9, 2025.

(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 May 9, 2025, and that do not comply with UFAS shall before May 9, 2025, 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 May 9, 2025, 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 May 9, 2025, 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 the Architectural Barriers Act and its implementing regulations, 41 CFR 102-76.60 through 102-76.95 (General Services Administration); 39 CFR part 255 (U.S. Postal Service); 24 CFR part 40 (U.S. Department of Housing and Urban Development); and the U.S. Department of Defense "Policy Memorandum for Secretaries of the Military Departments: Access for People with Disabilities" (October 31, 2008).

(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.

This subpart 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 “persons with disabilities” wherever they occur in paragraphs (a), (b)(1), (b)(2) introductory text, and (b)(3)(iii);

c. Removing the words “handicapped person” and “handicaps” and adding in their places the words “person with a disability” and “disabilities”, respectively, 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 “handicap” and adding in their places the words “student with a disability” and “disability”, respectively, in paragraphs (a) and (c); and

b. Removing the words “handicapped persons” and adding in their place the words “persons 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 words “handicapped applicant or student” and adding in their place the words “applicant or student with a disability” in paragraph (a);

c. Removing the words “handicapped students” and adding in their place the words “students with disabilities” wherever they occur in paragraph (b); and

d. Removing the words “handicapped student” and adding in their place the words “student with a disability” in paragraph (d)(1).

§ 84.45 [Amended]

24. Amend § 84.45 by:

a. Revising paragraph (a); and

b. Removing the word “handicap” and adding in its place the word “disability” in paragraph (b).

The revision reads as follows:

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its students without disabilities shall provide comparable, convenient, and accessible housing to students with disabilities at the same cost as to others. At the end of the transition period provided for in subpart C of this part, such housing shall be available in sufficient quantity and variety so that the scope of students with disabilities’ choice of living accommodations is, as a whole, comparable to that of students without disabilities.

* * * * *

§ 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 their place the words “persons with disabilities” wherever they occur in paragraph (a)(1); and

c. Removing the words “nonhandicapped persons” and adding in their place the words “persons 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 (b);

c. Removing the words “handicapped student” and adding in their place the words “student with a disability” in paragraph (a)(2); and

d. Removing the words “nonhandicapped students” and “handicapped persons” and adding in their places the words “students without disabilities” and “persons with disabilities”, respectively, 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 “person with a disability” in paragraphs (a)(1) through (3);

b. Removing the words “nonhandicapped persons” and adding in their place the words “persons without disabilities” in paragraph (a)(2);

c. Removing the words “handicapped persons” and adding in their place the words “persons with disabilities” wherever they occur in paragraphs (a)(4) and (5) and (b);

d. Removing the word “handicap” and adding in its place the word “disability” in paragraph (b); and

e. 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 health care facility may not discriminate in admission or treatment against an individual with a substance or alcohol use disorder who has a medical condition, because of the person's substance 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 the section heading, paragraph (a), and paragraph (f) introductory text;

b. Removing the words "handicapped infants" and adding in their place the words "infants with disabilities" in paragraphs (f)(1)(i), (f)(1)(ii)(A), and (f)(1)(ii)(C);

c. Removing the word "handicaps" and adding in its place the word "disabilities" in paragraph (f)(1)(ii)(C); and

d. 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, or 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) Circumstances in which the recipient has a legitimate, nondiscriminatory reason for denying or limiting a service or where the disability renders the individual not qualified for the treatment may include 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 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 paragraph (a)(1) of this section, 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 any and all services provided by a child welfare agency, including but not limited to, family preservation and reunification services equal to that afforded to persons without disabilities;

(3) Terminate the parental rights or legal guardianship of a qualified individual with a disability;

(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; or

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

(c) *Parenting evaluation procedures*. A recipient to which this subpart applies shall establish procedures for referring to qualified professionals for evaluation those individuals, who, because of disability, need or are believed to need adapted services or reasonable

modifications. A recipient shall also ensure that tests, assessments, and other evaluation tools and materials used for the purpose of assessing or evaluating parenting ability are based in evidence or research, are conducted by a qualified professional and are tailored to assess actual parenting ability and specific areas of disability-related needs. Parenting evaluations must be fully accessible to people with disabilities and shall not be based on a single general intelligence quotient or measure of the person's disability, rather than their parenting ability. Assessments of parents or children must be individualized and based on the best available objective evidence.

33. 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 § 84.4(a)(1)(iii).

(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 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 this paragraph (c) 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; and

(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.

(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 section 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.

(c) *Segregated setting.* Segregated settings include but are not limited to congregate settings that are populated exclusively or primarily with individuals with disabilities and may be characterized by regimentation in daily activities; lack of privacy or autonomy; or policies or practices 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 qualified 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 paragraph (d)(4) includes, but is not limited to planning, service system design, funding, or service implementation practices that result in institutionalization or serious risk of institutionalization. Qualified 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.

34. Add subpart H, consisting of §§ 84.77 through 84.81, 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 Federal Communications Commission (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 TTYs 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.

35. Add subpart I, consisting of §§ 84.82 through 84.89, to read as follows:

Subpart I — Web, Mobile, and Kiosk Accessibility

Sec.

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 Effect of noncompliance that has a minimal impact on access.

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 provides or makes available, directly or through contractual, licensing, or other arrangements; and

(2) Mobile apps that a recipient provides or makes available, directly or through contractual, licensing, or other arrangements.

(b) *Requirements*. (1) Beginning May 11, 2026, a recipient with fifteen or more employees shall ensure that the web content and mobile apps that the recipient provides or makes available, directly or through contractual, licensing, or other arrangements, 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 in undue financial and administrative burdens.

(2) Beginning May 10, 2027, a recipient with fewer than fifteen employees shall ensure

that the web content and mobile apps that the recipient provides or makes available, directly or through contractual, licensing, or other arrangements, 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 in 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 material approved for incorporation by reference (IBR) is available for inspection at HHS and at the National Archives and Records Administration ("NARA"). Contact HHS, OCR at: Office for Civil Rights, U.S. Department of Health and Human Services, 200 Independence Ave., SW, Room 509F, HHH Building, Washington, D.C. 20201; phone: (202) 545-4884; email: 504@hhs.gov. For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations 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/ and 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 that are available as part of a recipient's web content or mobile apps before the date the recipient is required to comply with § 84.84, unless such documents are currently used to apply for, gain access to, or participate in the recipient's programs or activities.

(c) *Content posted by a third party.* Content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements with the recipient.

(d) *Individualized, password-protected documents or otherwise secured conventional*

electronic documents. Conventional electronic documents that are:

(1) About a specific individual, their property, or their account; and

(2) Password-protected or otherwise secured.

(e) *Preexisting social media posts*. A recipient's social media posts that were posted before the date the recipient is required to comply with § 84.84.

§ 84.86 Conforming alternate versions.

(a) A recipient may use conforming alternate versions of web content, as defined by WCAG 2.1, to comply with § 84.84 only where it is not possible to make 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 material approved for incorporation by reference is available for inspection at HHS and at NARA. Contact HHS, OCR at: Office for Civil Rights, U.S. Department of Health and Human Services, 200 Independence Ave., SW, Room 509F, HHH Building, Washington, D.C. 20201; phone: (202) 545-4884; email: 504@hhs.gov. For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations 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/ and 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 compliance with the requirements of § 84.84

would result in a fundamental alteration in the nature of a program or activity or in 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 Effect of noncompliance that has a minimal impact on access.

A recipient that is not in full compliance with the requirements of § 84.84(b) will be deemed to have met the requirements of § 84.84 in the limited circumstance in which the recipient can demonstrate that the noncompliance has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the recipient's web content or mobile app to do any of the following in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use:

(a) Access the same information as individuals without disabilities;

(b) Engage in the same interactions as individuals without disabilities;

(c) Conduct the same transactions as individuals without disabilities; and

(d) Otherwise participate in or benefit from the same programs and activities as individuals without disabilities.

36. Add subpart J, consisting of §§ 84.90 through 84.97, 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 (including via lease renewals), or otherwise acquire more than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], 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 **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, 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 this section 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 (f) 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 (a) 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 this paragraph (a) would result in a fundamental alteration under paragraph (a)(2) of this section if it demonstrates that compliance with this paragraph (a) 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]

37. 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 45 CFR 80.6 through 80.10 and 45 CFR part 81.

Xavier Becerra,

Secretary,

Department of Health and Human Services.

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