November 13, 2023

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U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Submitted via ***Federal eRulemaking Portal***

RE: City Of New York's Comments on U.S. Department of Health and Human Services (HHS) Notice of Proposed Rulemaking (NPRM) Discrimination on the Basis of Disability in Health and Human Services Programs or Activities, RIN 0945-AA15

Through this NPRM, the U.S. Dept. of Health and Human Services (HHS) has proposed updating and amending its rules on "Discrimination on the Basis of Disability in Health and Human Service Programs or Activities" under the implementing regulation for Section 504 of the Rehabilitation Act of 1973. (Federal Register : Discrimination on the Basis of Disability in Health and Human Service Programs or Activities).

New York City (NYC) prioritizes inclusion and accessibility in all areas of life. The NYC Human Rights Law (NYCHRL) prohibits discrimination in housing, employment, and public accommodations based on disability and is generally broader than federal anti-discrimination laws, including the Americans with Disabilities Act (ADA). The NYCHRL defines disability as any physical, medical, mental, or psychological impairment,[1] or a history or record of such impairment,[2] and includes a full range of sensory, mental, physical, mobility, developmental, learning, and psychological disabilities—whether they are visible and apparent or not. The NYCHRL also prohibits discrimination based on one's "association" or relationship with an individual with an actual or perceived disability. [3]

[1] The term "physical, medical, mental, or psychological impairment" means: [a]n impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or … [a] mental or psychological impairment.N.Y.C. Admin. Code § 8-102(16)(b). In the case of alcoholism, drug addiction or other substance abuse, the term "disability" applies to a person who "is recovering or has recovered" and "currently is free of such abuse." *Id.*
[2] N.Y.C. Admin. Code § 8-102(16)(a).
[3] N.Y.C. Admin. Code § 8-107 (20).

Under the NYCHRL, covered entities, including public accommodations like hospitals and healthcare provider's offices, must make reasonable accommodations to enable individuals with disabilities to "enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." Accommodations are reasonable unless a covered entity shows that the requested accommodation would cause it an "undue hardship."[4]

In addition to robust legal protections, NYC has continually worked in partnership with persons with disabilities to promote accessibility and inclusion and has developed an infrastructure to facilitate these objectives. The Commission on Human Rights enforces the NYCHRL, and the Mayor's Office of Persons with Disabilities liaises with communities to ensure initiatives, programs and policies address the needs and interests of people with disabilities.[5]

NYC, including its Department of Social Services/Human Resources Administration (DSS/HRA), Commission on Human Rights (CCHR), Administration of Child Services (ACS), and the Mayor's Office for People with Disabilities, welcomes HHS's NPRM on this important subject, and we submit the following comments in response.

Background:

Section 504 prohibits discrimination on the basis of disability in programs and activities that receive federal funding.

> "No otherwise qualified individual with a disability in the United States, as defined in Section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Post Office."[6]

The statutory language[7] in Section 504 makes it clear that ''program or activity'' means ''all of the operations of'' an agency. The term ''programs and activities'' is, therefore, intended to cover the same types of operations that are covered under Title II of the ADA. The Office for Civil Rights (OCR) in HHS enforces Section 504 as well as two other statutes that prohibit discrimination on the basis of disability: (1) the ADA, which prohibits discrimination on the basis of disability in, among other areas, all health care and social services programs and

[4] N.Y.C. Admin. Code §§ 8-107(15)(a); 8-107(18).
[5] *See NYC Commission on Human Rights, at https://www.nyc.gov/site/cchr/law/the-law.page; see also Mayor's Office for People with Disabilities, https://www.nyc.gov/site/mopd/about/about.page*
[6] 29 U.S.C. 794.
[7] 29 U.S.C. 794(b)(1)(A).

activities of State and local government entities,[8] and (2) Section 1557 of the Patient Protection and Affordable Care Act (ACA).

Section 504 was enacted by Congress under the Rehabilitation Act of 1973. Since 1973, the following legislation has been enacted: the ADA, ADA Amendments Act of 2008 (ADAAA), and the ACA. In addition, case law in this area has developed from Supreme Court and federal district court decisions. After 50 years, HHS has determined that its regulations must be updated to reflect legislative and legal requirements and bring clarity to existing Section 504 regulations. NYC welcomes these much-needed changes.

Specific Comments:

The proposed rule updates the current Section 504 regulations to clarify several crucial areas not explicitly addressed in that rule:

Section 84.56(a) Medical treatment. This section addresses current pervasive discrimination on the basis of disability in accessing medical care, which leads to significant health disparities and poorer health outcomes for individuals with disabilities. This pattern of discrimination can be found in a wide variety of contexts including organ transplantation, life-sustaining treatment, crisis standards of care that are triggered when resources are limited, and participation in clinical research. The proposed rule ensures that medical treatment decisions by entities that receive Federal financial assistance from the Department ("recipients") are not based on biases or stereotypes about individuals with disabilities, including judgments that an individual will be a burden on others, or beliefs that the life of an individual with a disability has less value than the life of a person without a disability.

> NYC supports this change. We are aware of the health disparities cited by HHS. For example, people with disabilities are routinely told that they cannot be accommodated at a medical practice, or that the medical practice does not have the equipment to conduct a full exam (see section below). These experiences are supported by research, such as this: Widespread bias, discrimination directed toward people with disabilities who seek health care - Northwestern Now. This article addresses a study that "follows work conducted by Lagu in 2012, in which she attempted to make an appointment for a fictional patient who used a wheelchair. Of 256 surveyed practices in the 2012 study, 56 (22%) reported they could not accommodate the patient. Of the rest, more than half planned to transfer the patient using methods considered to be unsafe….
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> More recently, Lagu and Dr. Lisa Iezzoni, a professor of medicine at Harvard Medical School living with Multiple Sclerosis, published results of a national survey of physicians revealing that: only 56% reported that they welcome patients with disabilities to their practice; 36% said that they know "little or nothing" about the ADA; and only 41% were

[8] 42 U.S.C. 12132.

confident that they could provide similar quality of care to patients with disabilities as they could to those without disability."

Barriers to adequate care arise even before patients with disabilities enter a medical facility if they can enter at all. Scheduling appointments can be challenging for individuals who are blind or have low vision or who are deaf or hard of hearing, and many healthcare facilities are still inaccessible to people with mobility disabilities. Further, patients often bear the burden of seeking out accommodation.[9] Transportation to a medical setting can be difficult, and it is known to exacerbate stress and anxiety. Further, the physical building structure of a medical facility can make navigating entrances, doorways, and restrooms a challenge. A 2016 blueprint developed by the New York City-based non-profit service provider, Independence Care System, documents the significant harms of longstanding failures to adequately meet the needs of persons with disabilities. The harms range from the reality that persons with disabilities are less likely than persons without disabilities to obtain preventative medical care -- from disease screenings to mammograms and dental cleanings – resulting in poorer care and overall health outcomes. As one specific example, women living with disabilities are 33.3% more likely to die from breast cancer than women without disabilities, even though both groups have similar instances of breast cancer. This difference is attributed to inadequate service delivery.[10]

To ensure more equitable health outcomes, individuals with disabilities must receive care with dignity, by making healthcare settings, physical spaces, and policies and practices accessible, respectful, and accommodating. The CHR has addressed allegations of discrimination against medical service providers through case settlements, that include modifying building entrances, room locations and spaces, and installing ramps so that individuals with disabilities have equal and independent access; establishing communications and scheduling scripts for staff to appropriately share and elicit information on accommodations; and fostering awareness of disabilities through training.[11]

Section 84.57 Value assessment methods. Value assessment methods can play an important role when physicians determine whether they will provide a particular intervention such as a medicine or treatment and under what circumstances. They are used by physicians as a tool for

[9] *See* N.Y.C. Admin. Code § 8-107(28 (b) ("It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require an accommodation related to disability…").

[10] Independent Care Systems, Blueprint for Improving Access to Primary Care for Adults with Physical Disabilities, at 4 (2016), https://nyhealthfoundation.org/resource/blueprint-for-improving-access-to-primary-care-adults-physical-disabilities/

[11] NYCCHR, NYC COMMISSION ON HUMAN RIGHTS ANNOUNCES SETTLEMENT WITH LENOX HILL RADIOLOGY FOLLOWING INVESTIGATION INTO FAILURE TO PROVIDE EQUAL ACCESS TO MAMMOGRAMS FOR PATIENTS WITH DISABILITIES (March 14, 2018), https://www.nyc.gov/assets/cchr/downloads/pdf/press-releases/Lenox_Hill_Radiology_Press_Release.pdf

cost containment and quality improvement efforts. However, value assessment methods are likely to discriminate against individuals with disabilities because physicians often place a lower value on life-extension for individuals with disabilities. In fact, the Lagu and Dr. Iezzoni research revealed that 82.4 percent of physicians surveyed reported that they believed that people with significant disabilities have a worse quality of life than nondisabled people. This misperception leads to value assessment methods that limit access to or deny healthcare services. The proposed rule prohibits the discriminatory use of such methods.

> NYC supports this change. Moreover, DSS's Office of Disability Affairs notes that, during the pandemic, rationing of medical care, like the use of ventilators, was an issue for people with disabilities, based on the medical system's preconceived notions and misunderstanding of disability. *See* Disability, Ethics, and Health Care in the COVID-19 Pandemic - PMC (nih.gov). These issues are rarely considered during emergency preparedness discussions, and we believe that this places people with disabilities at greater risk of being discriminated against in healthcare during emergency settings.

Section 84.60 *Child welfare programs and activities.* Children, parents, caregivers, foster parents, and prospective parents may encounter a wide range of discriminatory barriers when accessing critical welfare programs and activities that are designed to protect children and strengthen families. This section sets forth detailed requirements to ensure nondiscrimination in a wide variety of areas including parent-child visitation, reunification services, child removals and child placements, guardianship, parenting skills programs, foster and adoptive parent assessments, and in and out-of-home services, inclusive of programs and services of that facilitate implementation of Individualized Education Programs (IEPs). Programs and activities should adequately accommodate participants physical, intellectual, and developmental disabilities; Programs must conduct individualized assessments through the interactive process to ensure that accommodations are not based on historical biases or stereotypes about what people with certain disability can and cannot do as parents, including but not limited to support systems that may be in place for the family.

> NYC supports this change. In fact, ACS seeks to partner with providers to achieve positive safety, permanency and well-being outcomes for children and families in the foster care system. ACS seeks providers who are committed to serving all children, parents, families and foster parents with respect and dignity, and to delivering high-quality services that recognize the diversity of children and families in terms of race, ethnicity, sexual orientation, gender identity and expression, religion, immigration and refugee status, socio-economic status, mental and physical ability and other factors. ACS seeks providers who recognize the impact of social systems, racism and other forms of discrimination on children and families, and who will actively partner with ACS to deploy strategies to address disparities in foster care services and outcomes.

Section 84.84 *Web and mobile accessibility.* As communications technology becomes a more widespread way to deliver health and human services programs and activities, particularly through websites, applications, and self-service kiosks, it is vital to ensure that web content and

mobile applications are readily accessible to and usable by individuals with disabilities. The proposed rule defines what accessibility means for web and mobile applications and sets forth specific technical standards for compliance with Section 504, using the same standards in a recently proposed rule from the Department of Justice under Title II of the ADA.

NYC supports this change. NYC recognizes that HHS is carrying out its stated purpose in this section by aligning the regulations to conform with the ADA. In NYC, we are continuously working on improving our ability to meet ADA standards. Local Law 12 of 2023 requires all City Agencies to develop a 5-year Accessibility Plan, which we are in the process of preparing. For example, DSS/HRA put great effort into developing ADA-accessible kiosks approximately five years ago. Additionally, DSS/HRA staff develops digital content for the internet, and AccessHRA staff ensure that its web content complies with the Web Content Accessibility Guidelines (WCAG). In fact, DSS/HRA's web pages have been WCAG tested and received passing grades. As with all technology, DSS/HRA constantly aim to improve access, and this is the case for all of NYC government.

Subpart J— 84.90 *Accessible medical equipment.* People with disabilities continue to experience barriers to accessing medical care because of inaccessible medical equipment. Barriers such as exam tables that are not height adjustable, mammography machines that require a person to stand, and weight scales that do not accommodate wheelchairs result in inequities and exclusion from basic health services for individuals with disabilities. What's worse, these barriers contribute to poor health outcomes in this demographic. The proposed rule establishes enforceable standards for accessible medical diagnostic equipment, a significant and concrete step toward addressing health disparities experienced by people with disabilities. It also requires that, within two years of the rule's effective date, recipients that use an examination table in their program or activity have at least one accessible exam table and recipients that use a weight scale in their program or activity have at least one accessible weight scale.

NYC supports this very important regulatory change. We believe that these regulatory requirements are the bare minimum standard of care for treatment of individuals with disabilities and should not be burdensome on medical practices to implement. Our work with clinics serving people with disabilities informs our opinion that accessible exam tables and scales make a huge difference for people with disabilities, allowing for a full, comprehensive exam.

The regulation should go further and require all practices providing radiology services to have accessible equipment as well. An often-overlooked aspect of medical care is dental care. We would like the regulation to clarify that dental practices which, in the regular course of doing business, utilize radiology equipment be included in this regulation. For example, wheelchair users are typically unable to get a 360-degree dental x-rays because the radiological machines are inaccessible. We understand that the regulation may need to only apply to large scale dental practices. However, NYC encourages the rules to model NYU's dental practice for people with disabilities: NYU Dentistry Oral Health

Center for People with Disabilities. There, wheelchair users can get a 360-degree dental x-ray, and they can remain in their wheelchairs during procedures.

NYC sees the same issue when it comes to women's health, particularly mammography. *See* Women-with-Disabilities-1.pdf (komen.org). Women with disabilities are often denied basic pap smears and mammograms due to inaccessibility, and this leads to poor health outcomes for this demographic. The CCHR has worked with medical providers to facilitate systemic change that enhances accessibility, including making changes to medical equipment so that individuals requiring use of a wheelchair are able to avail themselves of critically important mammograms. For example, in a 2018 case, the Commission found that an individual using a wheelchair had to change into a gown in an open, non-private equipment room because the private changing room was too small to accommodate her wheelchair. Following that pre-procedure indignity, the patient experienced extreme pain and discomfort during the mammogram because the mammography machine would not lower far enough, and she had to contort herself and stand on one leg during the exam. Staff at the inaccessible facility were further unable to direct the patient to an alternative accessible facility when she tried to make a subsequent appointment. The settlement required the provider to: redesign or relocate their Mammography Room, Dexa Room, and Ultrasound Room so that people using wheelchairs have adequate turn around space; provide equipment to make examinations accessible to people with disabilities, including an adjustable mammography chair, foam positioning devices to provide stabilization during imaging, a mobile overhead lift to remain onsite; and revise their equipment purchasing policy to ensure all future purchased equipment is accessible.[12]

In past years, HHS has suggested tax incentives to enable medical practices to come into compliance with accessibility laws at the city, state, and federal level. We renew that suggestion and defer to financial experts to opine on how that could be implemented.

Section 84.76 *Integration.* The existing Section 504 regulation requires programs and activities to be administered in the most integrated setting appropriate to the needs of the person with a disability. The proposed rule incorporates language reflecting principles established through Supreme Court and other significant court decisions that require the provision of community-based services to persons with disabilities when such services are appropriate, the affected persons do not oppose community-based treatment, and the placement in a community setting can be reasonably accommodated. The proposed rule will help recipients better understand and comply with their obligations under Section 504 and provide more detail about the right to be served in the most integrated setting appropriate for individuals with disabilities.

[12] *See* CCHR Press Release on the decision, available at https://www.nyc.gov/assets/cchr/downloads/pdf/press-releases/Lenox_Hill_Radiology_Press_Release.pdf (last viewed on Nov. 12, 2023).

NYC welcomes these changes. The Supreme Court's landmark decision in *Olmstead* held that people with disabilities have the right to live in their communities and not be forced to live in nursing homes to receive the long-term care they need, such as assistance with performing activities with daily living (ADLs). However, most cities and states are unable to guarantee this right because their Medicaid programs force people with disabilities to be unemployed and impoverished to receive long-term care coverage.

New York proudly provides one of the nation's best Medicaid waiver programs for people with disabilities that permits them to work and hire their trusted loved ones to provide their long-term care. Nevertheless, NYC believes that HHS should do more to assist New York and other states with waiver programs to ensure compliance with *Olmstead.* Specifically, NYC urges HHS to permit states to eliminate income limits and asset caps that force people with disabilities to be underpaid and underemployed and prevent them from saving for things like their retirement, emergency needs, or their children's education. People who need long-term care should not have to choose between their care and having a job or assets.

Finally, NYC believes that, when an entire family can go to the same medical facility, it promotes ease of use and coordinated care. When an individual with a disability can't go to the same local doctor or dentist that their family goes to, it impacts the entire family negatively. Time is lost from work, school, and "family-time" in an effort to ensure medical care for a loved one. Worse, if the individual with a disability is forced into a nursing home simply to receive the long-term care they need, families are involuntarily separated.

- **Improves consistency with major judicial and legislative developments including the Americans with Disabilities Act.** The proposed rule incorporates changes needed to reflect amendments to Section 504, the ADA and ADAAA's enactment, and significant case law decided since the last regulations. Most HHS recipients have been covered by the ADA since 1991. New sections added to ensure consistency are, among others:

  - *Section* 84.73 *Service animals*: Recipients must permit the use of trained service dogs except under certain circumstances.

    NYC supports this change. NYC recognizes that HHS is carrying out its stated purpose in this section by aligning the regulations to conform with the ADA. DSS/HRA has very clear policies and procedures in place for allowing both service and emotional support animals in all of our facilities, including homeless and Domestic Violence shelters.

  - *Section 84.69 Illegal use of drugs:* Nondiscrimination requirements generally do not apply to individuals based on their current illegal use of drugs.

    Our understanding of this proposal is that HHS is referring to the fact that under the definition of disability in the ADA, substance use disorder is covered but not if an

individual is actively using. NYC supports this under Section 84.69 pursuant to our understanding.

- *Section 84.71 Retaliation and coercion:* Recipients may not retaliate against an individual for having made a complaint or objected to any act or practice made unlawful by Section 504.

  CCHR supports explicitly articulating protections against retaliation for individuals who have participate in or support opposing an unlawful practice or assist an individual with enjoying and exercising their rights, including requesting an accommodation. The NYCHRL prohibits retaliation against an individual for opposing discrimination because freedom from retaliation helps ensure that individuals needing accommodations will request them and promotes a culture where people are not afraid to exercise their rights. Under the NYCHRL, failure to provide a reasonable accommodation is unlawful, and accordingly, it is considered retaliation for a covered entity to take an adverse action against an individual with a disability for making a complaint alleging a failure to provide a reasonable accommodation.[13]

- *Section* 84.76(e) *Limitations*: Recipients need not take actions if those actions would result in a fundamental alteration in the nature of their program or in undue financial and administrative burdens.

  Beyond a general statement of support, NYC notes this is already covered by Section 504. *See* Fact Sheet: Nondiscrimination on the Basis of Disability Proposed Rule Section 504 of the Rehabilitation Act of 1973 | HHS.gov

- *Sections* 84.77– 84.81 *Communications:* Recipients must ensure effective communications with individuals with hearing, vision, and speech impairments through the provision, when necessary, of auxiliary aids and services such as qualified interpreters, text telephones, and information in Braille, large print, or electronically for use with a computer screen-reading program.

  NYC supports this change. NYC recognizes that HHS is carrying out its stated purpose in this section by aligning the regulations to conform with the ADA. For example, as part of DSS/HRA's implementation plan under Local Law 12 of 2023, which requires all City Agencies to develop a 5-year Accessibility Plan, we have been working to expand our capacity in this area.

[13] N.Y.C. Admin. Code § 8-107(15)(a); *See Serdans v. N.Y. Presbyterian Hosp.*, 112 A.d.3d 449, 450 (1st Dep't 2013).

Sincerely,

Molly Wasow Park, Commissioner, New York Department of Social Services

Christina Curry, MA, MPA, Commissioner, New York City Mayor's Office for People with Disabilities

Jess Dannhauser, Commissioner of the Administration for Children's Services

Annabel Palma, Chair and Commissioner of the New York City Commission on Human Rights