



November 13, 2023

Xavier Becerra

Secretary

United States Department of Health and Human Services

200 Independence Ave. SW

Washington, DC 20201

**Discrimination on the Basis of Disability in Health and Human Service Programs or Activities
(RIN 0945–AA15)**

The American College of Physicians (ACP) appreciates the opportunity to comment on the Discrimination on the Basis of Disability in Health and Human Service Programs or Activities proposed rule. The American College of Physicians is the largest medical specialty organization and the second largest physician membership society in the United States. ACP members include 161,000 internal medicine physicians (internists), related subspecialists, and medical students. Internal medicine physicians are specialists who apply scientific knowledge, clinical expertise, and compassion to the preventive, diagnostic, and therapeutic care of adults across the spectrum from health to complex illness. Internal medicine specialists treat many of the patients at greatest risk from COVID-19, including the elderly and patients with pre-existing conditions such as diabetes, heart disease and asthma.

The American College of Physicians believes all patients, including those living with intellectual or physical disability, must have equitable access to high-quality health care and must not be discriminated against based on personal characteristics ⁽ⁱ⁾. Ethical and professional duties, along with fundamental fairness, require that “clinicians, their institutions and health care systems not discriminate against a class or category of patients... Treatment decisions must not be based on unjust and prejudicial criteria” ⁽ⁱⁱ⁾. **ACP applauds the department’s commitment to prohibiting discrimination on the basis of disability and supports the proposed changes.** In these comments we identify a few areas where additional nuance and balance may be necessary to ensure all patients, including those living with disabilities, receive high-quality, equitable care.

Section 504 of the Rehabilitation Act of 1973 prohibits programs and activities that receive federal financial assistance from discriminating against individuals on the basis of disability. The proposed rule clarifies that section 504 applies to medical treatment decisions, value assessments; web, mobile, and kiosk accessibility; and accessible medical equipment; among other areas.

Medical Care

Despite federal prohibitions, individuals with disabilities continue to experience discrimination in medical treatment context, which exacerbates health inequities and leads to poorer health outcomes. ACP supports the proposal's intent to ensure medical care decisions made by entities receiving Federal financial assistance "are not based on biases or stereotypes about individuals with disabilities, 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." The COVID-19 pandemic highlighted the discrimination that people living with disabilities face, especially during a large-scale health catastrophe. In response to concerns about limited resources and access restraints, many crisis standards of care protocols and triage policies included categorical and more subtle exclusions of people living with disabilities that prevented them from receiving needed care and lifesaving medical equipment, including ventilators (iii). In March 2020, ACP released the statement "Non-Discrimination in the Stewardship and Allocation of Resources During Health System Catastrophes Including COVID-19," which recommended:

Fairness and other professional responsibilities of physicians require that clinicians, their institutions and health care systems not discriminate against a class or category of patients...When, as in times of health system catastrophe, routine "first come, first served" or "sickest first" approaches are no longer appropriate, resource allocation decisions should be made based on patient need, prognosis (determined by objective scientific measures and informed clinical judgment) and effectiveness (i.e., the likelihood that the therapy will help the patient recover). Allocation of treatments must maximize the number of patients who will recover, not the number of "life-years," which is inherently biased against the elderly and the disabled (ii).

The dignity of every patient must be respected. Although fairness does not require identical treatment, through an anti-discriminatory lens, it does require "giving each person his or her due... Fairness will not tolerate judgments about worthiness or ask physicians to make quality-of-life assessments" (iv). We concur with the proposed language at 84.56(a)

regarding prohibiting discrimination, as it establishes a clear statement that “No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in medical treatment under any program or activity that receives Federal financial assistance, including in the allocation or withdrawal of any good, benefit, service” (v). However, we do wish to point out a potential risk for undertreatment or unwanted overtreatment. For example, proposed language at 84.56(c)(2)(i) says “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.” This does not address the circumstances of patients who are incapacitated and cannot make their own medical decisions, but do not have an authorized representative or advance directive.

Further, we strongly support efforts to eliminate discrimination and stigma regarding people with substance use disorder and appreciate the explicit language at 84.53 prohibiting discrimination of people with substance use disorder suffering from a medical condition.

Implications for Physicians Practices

ACP strongly supports the proposed rule’s clear language prohibiting discrimination against people with disabilities, though we ask that further thought be given to its implementation, particularly for solo and small group practices. The proposed rule’s Regulatory Impact Analysis estimates the rule will result in incremental costs related to preparing staff to operate accessible Medical Diagnostic Equipment; costs related to reviewing, updating, and ensuring compliance of web content and mobile apps; and other activities. While the proposed changes are necessary to ensure access for people living with disabilities, we encourage the department to assist practices in implementing these requirements through support and technical assistance.

Thank you for considering our comments. ACP very much appreciates this proposed rule on Discrimination on the Basis of Disability in Health and Human Service Programs or Activities.

Sincerely,

A handwritten signature in black ink, appearing to read "Omar Atiq".

Omar Atiq, MD, MACP
President
American College of Physicians

ⁱ Sulmasy LS, Bledsoe TA; ACP Ethics, Professionalism and Human Rights Committee. American College of Physicians ethics manual: seventh edition. *Ann Intern Med.* 2019;170:S1-S32.

ⁱⁱ American College of Physicians. Non-Discrimination in the Stewardship and Allocation of Resources During Health System Catastrophes Including COVID-19. March 26, 2020. Accessed at https://assets.acponline.org/acp_policy/policies/acp_policy_on_non-discrimination_in_the_stewardship_of_healthcare_resources_in_health_system_catastrophes_including_covid-19_2020.pdf

ⁱⁱⁱ Lund EM and Ayers KB. Ever-changing but always constant: “Waves” of disability discrimination during the COVID-19 pandemic in the United States. *Disabil Health J.* 2022;15(4):101374. Accessed at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9436863/>

^{iv} Bledsoe TA, Jokela JA, Deep NN, et al. Universal Do-Not-Resuscitate Orders, Social Worth, and Life-Years: Opposing Discriminatory Approaches to the Allocation of Resources During the CoVID-19 Pandemic and Other Health System Catastrophes. *Ann Intern Med.* 2020;173(3):230-232. Accessed at <https://www.acpjournals.org/doi/epdf/10.7326/M20-1862>

^v Discrimination on the Basis of Disability on Health and Human Services Programs or Activities. Department of Health and Human Services. Proposed rule. *Federal Register.* 2023;88(177):63392-63512. <https://www.govinfo.gov/content/pkg/FR-2023-09-14/pdf/2023-19149.pdf>