

November 13, 2023

SUBMITTED ELECTRONICALLY

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
Attn: RIN: 0945-AA15
200 Independence Avenue, SW
Washington, DC 20201

**Re: Comments on Proposed Rule Updating Section 504 Regulations:
Discrimination on the Basis of Disability in Health and Human Service
Programs or Activities (RIN: 0945-AA15)**

Dear Secretary Becerra:

On behalf of the undersigned organizations, we submit these comments in response to the above referenced proposed rule. We appreciate the opportunity to provide comments to the U.S. Department of Health and Human Services in response to the critical proposed rule that strives to update and ensure protections for people with disabilities pursuant to Section 504 of the Rehabilitation Act of 1973. Section 504 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. We write to emphasize the importance of this proposal as it relates to Medicare beneficiaries and the Medicare program.

We would like to take this opportunity to thank HHS for the updates in this rule that will help protect beneficiaries from discrimination. We are fully supportive of the changes made in this proposal that will protect beneficiaries from discrimination from entities that receive assistance from HHS (part 84 of the regulation). At the same time, we would also like to highlight the pressing need for HHS to apply the same scrutiny to the Medicare program itself, which it administers. The plain language of the statute applies to HHS,¹ even though the administration of the program has not been addressed in this proposal. We are disappointed by the decision to delay updates to the “federally conducted” regulation (part 85) until a separate rulemaking. *See* 88 Fed. Reg. 63392, 63393 (Sept.14, 2023). We believe this was a critical omission; we urge HHS to accelerate publication of its separate intended rulemaking to amend the provisions that apply to HHS itself. Discrimination in the administration of Medicare exists, and it has direct, adverse impacts on Medicare beneficiaries. We therefore strongly urge HHS to reflect on the development and administration of payment and quality measurement models that create incentives in care, and oversight of the Medicare program, when considering these essential updates to Section 504.

¹ 29 U.S.C. § 794(a) (prohibiting discrimination on the basis of disability under any program or activity receiving Federal financial assistance, “or under any program or activity conducted by any Executive agency....”).

A key example of this discrimination within the Medicare program is the limited access to covered home health care for beneficiaries with longer term and chronic conditions, when compared to beneficiaries with more acute, short-term conditions. The Center for Medicare Advocacy outlined these concerns in our recent comments to the proposed home health rule.² As discussed in these comments, we have found that quality measures for *Jimmo* beneficiaries, (people with longer-term or chronic conditions who need skilled services but are not expected to improve),³ payment incentives and audits have led to discrimination against *Jimmo* beneficiaries.

The Center urged, and continues to urge, CMS to “place the interests of all Medicare beneficiaries at the heart of its payment models, quality measures, policies, and practices. How providers get paid and measured drives who gets access to care. Thus, these rules must carefully reflect Medicare coverage law, and advance Congressional intent to provide Medicare-covered care to maintain an individual’s condition or slow decline as well as to improve. Payment rules and quality measures – present, and proposed, fall short of this standard. . . . New rules should be proposed that encourage agencies to provide care for all people who qualify under the law, for all services covered under the law.”⁴ We know that providers do not act in a vacuum; payment models, audits and oversight drive treatment. In fact, it is the stated aim of these tools to drive care. It is imperative that HHS review and make changes to these tools to ensure that the resulting incentives in care do not lead to discrimination by the agency or by its’ contractors.

For example, several HHS developed payment models, such as the competitive Quality Reporting Program (QRP) and Value Based Purchasing (VBP) programs place excessive value on improvement in beneficiaries, meaning that *Jimmo* beneficiaries are considered a liability to home health agencies. As we noted in our comments, “[t]he reality of CMS’s policies and practices for *Jimmo* beneficiaries who qualify for home health care is that it means they are not worthy of being included in profit-determining measurements, they are not worthy of coverage, they are not worthy of care, and they will not be able to access meaningful Medicare-covered home health care.”

Again, we applaud HHS for updating the 504 regulations with the exact goal in mind of ensuring that all patients are treated as equally worthy of care and valued equally. The robust improvements in this proposed rule are welcome and critically important. It is for this reason that the decision to delay inward reflection on the systems and processes within the Medicare program and to defer updating the “federally conducted” regulation (part 85) is such a striking omission. We implore HHS to reflect on this omission and to promptly make parallel amendments to the rules governing HHS and the programs it conducts, including Medicare.

² Center for Medicare Advocacy Comments, available at <https://medicareadvocacy.org/center-comments-on-2023-2024-proposed-home-health-rule/>

³ Referring to the settlement in *Jimmo v. Sebelius*, No. 5:11-cv-17 (D. Vt.).

⁴ Center for Medicare Advocacy Comments, available at <https://medicareadvocacy.org/center-comments-on-2023-2024-proposed-home-health-rule/>

We appreciate the opportunity to submit these comments. For additional information, please contact Center for Medicare Advocacy Senior Policy Attorney, Kata Kertesz at kkertesz@medicareadvocacy.org.

Respectfully submitted,

Center for Medicare Advocacy
Disability Rights Education and Defense Fund (DREDF)
Diverse Elders Coalition
Justice in Aging
Medicare Rights Center
National Council on Aging
The Arc of the United States