SPAN Parent Advocacy Network & Family Voices-New Jersey comments to the Department of Justice on the Nondiscrimination on the Basis of Disability; Accessibility of Medical Diagnostic Equipment of State and Local Government Entities

February 12, 2024

Thank you for the opportunity to comment to the Department of Justice on the Nondiscrimination on the proposed Basis of Disability; Accessibility of Medical Diagnostic Equipment of State and Local Government Entities. The SPAN Parent Advocacy Network (SPAN) is NJ's federally designated Parent Training and Information Center, Family-to-Family Health Information Center, NJ State Affiliate Organization (SAO) of Family Voices, and the NJ affiliate of Parent-to-Parent USA. We also house a Military Family 360 Support program and national RAISE (Resources for Access, Independence, Self-Determination, and Employment) TA Center. Our comments today are based on our years of work supporting diverse families and youth in advocacy as well as in systems improvement activities across nondiscrimination, family support, and healthcare access.

SUMMARY:

We understand that the purpose is to revise "the regulations implementing title II of the Americans with Disabilities Act ("ADA") to establish specific requirements…"

SUPPLEMENTARY INFORMATION
I. Executive Summary

We fully **support** the proposal "to adopt the standards for accessible MDE issued by the Architectural and Transportation Barriers Compliance Board ('Access Board')…"

II. Background
A. Statutory and Rulemaking Overview

We appreciated the overview that "Title II of the ADA protects qualified persons with disabilities from discrimination on the basis of disability…"

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B. Legal Foundation for Accessible MDE

We **strongly agree** that this "applies to health care services, programs, and activities that public entities offer through or with the use of MDE. Title II of the ADA prohibits discrimination on the basis of disability in all services…"

C. Overview of Access Board's MDE Standards

We **strongly support** the process by which the "Access Board received input from various stakeholders through a multi-year deliberative process" and participated in sessions.

D. Need for the Adoption of MDE Standards

We **strongly agree** that there needs to be "equal access to medical care to people with disabilities" and **strongly support** that NIH designated people with disabilities as a health disparities population.[i]

III. Section-by-Section Analysis

§ 35.104 Definitions

We **agree** with the proposal to "add definitions for the terms 'medical diagnostic equipment'".

Medical Diagnostic Equipment

We **agree** with the definition that medical equipment is "used in, or in conjunction with, medical settings by health care providers for diagnostic purposes".

Standards for Accessible Medical Diagnostic Equipment

We **support** that this "means the standards at 36 CFR part 1195, promulgated by the Access Board".

§ 35.210 Requirements for Medical Diagnostic Equipment

We **strongly support** the requirement that a provider "cannot deny services that it would otherwise provide to a patient with a disability because the provider lacks accessible MDE". We also **agree** that the provider "cannot require a patient…bring someone along with them to help" and further that the provider "cannot require the person accompanying the patient to assist".

• *Issue 1: The Department seeks public comment on whether 60 days would be an appropriate amount of time for these requirements, and, if 60 days would not be an appropriate amount of time, what the appropriate amount of time would be.*

We **agree** that this is a sufficient timeframe.

§ 35.211(a) Requirements for Newly Purchased, Leased, or Otherwise Acquired Medical Diagnostic Equipment

We **strongly support** that all "MDE that public entities purchase, lease, or otherwise acquire after the

effective date must meet the MDE Standards unless and until the public entity already has a sufficient amount…"

§ 35.211(b) Scoping

Although we understand that this applies to how "many accessible features are needed and technical requirements" we **strongly disagree** that this should be "at least 10 percent" as too low. It should be at least 25% as 1 in 4 adults have a disability.[ii] (Note for children it is 1 in 5 so again should at least be 20%).[iii]

• *Issue 2: 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.*

Accessible transportation is essential to appropriately access health care. This includes drop off points for accessible vehicles as well as sufficient disabled parking for private vehicles. Sleeping rooms, if needed, should also be fully accessible.

• *Issue 3: The Department seeks public comment on whether different scoping requirements should apply to different types of MDE (e.g., requiring a higher percentage of accessible exam…*

We **strongly disagree** that there should be differing percentages based on type of MDE as the numbers of people with disabilities remains constant.

• *Issue 4: Because more patients with 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.*

Although this contradicts the previous section with 10% requirements, again it is too low and should be 25% for reasons cited above. The need for accessible parking does not exist solely for individuals with physical disabilities but may also include people with developmental disabilities, for example.

• *Issue 5: The Department seeks public comment on any burdens that this proposed requirement* or *a higher scoping requirement might impose on public entities.*

The ADA is clear with stipulations regarding "undue burdens"; accommodating 1/4 of the population should not be seen as a burden.

• *Issue 6: 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.*

As stated above, we **do not think** the numbers proposed will meet the needs of all people with disabilities.

• *Issue 7: 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,* or *requiring each department, clinic, and specialty to have a certain percentage of accessible MDE).*

Although it may not be necessary to disperse MDE by department due to space considerations, there must be access to the equipment in the same facility by people with disabilities, in areas that are easily accessible to people with disabilities.

• *Issue 8: The Department seeks information regarding:*
(a} The extent to which accessible MDE can be moved or otherwise shared between clinics or *departments.*
(b} The burdens that the rule's proposed approach to dispersion or *additional dispersion requirements may impose on public entities.*
(c} 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 **agree** that MDE can be shared by departments but only if accessible by patients. As stated previously, dispersion should be based on the proportion of the population affected by disability. As long as the MDE is accessible in a timely manner, and if it is proportionate to the population affected, it should not increase wait times, etc. We share the Department's concern that dispersion and requirement that people with disabilities must go to a different part of a hospital or clinic to use accessible MDE may lead to increased wait times, embarrassment, frustration, or impairment of treatment and thus, to the maximum extent possible, MDE should be in all areas where it is likely to be needed.

• *Issue 9: The Department seeks public comment on whether higher, lower,* or *different scoping requirements than those proposed should be established.*

As stated above, if 25% of the population is affected by disability so 25% of the equipment should be accessible.

• *Issue 10: The Department seeks public comment on the burden that the proposed scoping requirements would impose on public entities.*

Again, it should not be burdensome to accommodate the population if done appropriately.

§ 35.211(c) Requirements for Examination Tables and Weight Scales

Although the proposal is "at least one examination table that meets the requirements of the Standards for Accessible MDE" this may be **insufficient**. For example, a rehabilitation facility focused on physical, occupational, and speech therapies may need to have more accessible tables. For general facilities, it just needs to be proportional to the population served.

• *Issue 11: The Department seeks public comment on the potential impact of the requirements in paragraph (c} on people with disabilities and public entities, including the impact on the availability of accessible MDE that will be available for purchase and lease. The Department also seeks public comment on whether two years would be an appropriate amount of time for such a requirement and, if*

two years would not be an appropriate amount of time, what the appropriate amount of time would be.

We **agree** that this is a sufficient timeframe for implementation and our comments on accessible MDE appear below.

§ 35.211(d) Equivalent Facilitation

We **agree** that this would apply "only where the public entity provides substantially equivalent or greater accessibility and usability…"

§ 35.211(e) Fundamental Alteration and Undue Burden

We understand that this "does not require public entities to take steps that would result in a fundamental alteration in the nature of their services, programs, or activities or in an undue financial or administrative burden".

§ 35.211(£) Diagnostically Required Structural or Operational Characteristics

We understand the need to "demonstrate that compliance with the MDE Standards would alter diagnostically required structural or operational characteristics of the equipment, preventing the use of the equipment for its intended diagnostic purpose, compliance with the Standards would result in fundamental alterations…"

• *Issue 12: The Department seeks public comment on whether the proposed exception set forth in § 35.21 l{f} is needed.*

If possible we would **suggest** eliminating this provision as it may create a loophole in compliance.

§ 35.212 Existing Medical Diagnostic Equipment

We **strongly agree** that facilities need to "address access barriers resulting from a lack of accessible MDE in their existing inventory of equipment".

§ 35.212(b) Methods

We acknowledge that this covers "methods by which public entities can make their services, programs, and activities readily accessible".

• *Issue 13: The Department seeks information about other ways that public entities can make their services, programs, and activities readily accessible to and usable by individuals with disabilities when proposed§ 35.211 does not apply.*
• *Issue 14: The Department seeks information regarding public entities' leasing practices, including how many and what types of public entities use leasing, rather than purchasing, to acquire MDE; under what circumstances public entities lease equipment; whether leasing is limited to certain types of equipment (e.g., costlier and more technologically complex types of equipment}; and the typical length of public entities' MDE lease agreements.*
• *Issue 15: The Department seeks information regarding whether there is a price differential for MDE*

lease agreements for accessible equipment.
• Issue 16: The Department seeks information regarding any methods that public entities use to acquire MDE other than purchasing or leasing.

The instances in which 35.211 doesn't apply should be scarce. We **agree** that entities should be able to lease equipment, as long as it is accessible and price should not matter. In addition to purchasing/ leasing, some accessible equipment may be available from entities such as Goodwill Medical, or assistive technologies through P&A (Protection and Advocacy) in states, but again it must be in good working order.

Medical Equipment Used for Treatment, not Diagnostic, Purposes

We understand that this applies to "devices intended to be used for therapeutic or rehabilitative care such as treatment tables and chairs for oncology, obstetrics, physical therapy, and rehabilitation medicines; lifts; infusion pumps used for dispensing chemotherapy drugs, pain medications, or nutrients into the circulatory system; dialysis chairs used while a patient's blood is pumped between a patient and a dialyzer; other tables or chairs designed for highly specialized procedures; general exercise and rehabilitation equipment used while seated or standing; and ancillary equipment…" but would suggest **adding** "but not limited to" this set of examples.

• Issue 17: If this rule were to apply to medical equipment that is not used for diagnostic purposes:
o *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?*
o *Are there particular types of nondiagnostic medical equipment that should or should not be covered?*

We **strongly agree** that these accessibility requirements need to also apply to non-diagnostic equipment. This could include for example, phlebotomy/labs and treatment such as infusion centers.

§ 35.213 Qualified Staff

We **strongly agree** that there must be "appropriate and knowledgeable personnel who can operate MDE in a manner that ensures services are available and timely provided".

• Issue 18: The Department seeks public comment on this proposal, as well as any specific information on:
o The effectiveness of programs used by public entities in the past to ensure that their staff is qualified;
o Any information on the costs associated with such programs; and
o Whether there are any barriers to complying with this proposed requirement, and if so, how they may be addressed.

Again, it disability affects ¼ of the population, there must be sufficient staff trained and costs should not be a factor other than the undue burden provision.

IV. Regulatory Process Matters

A. Preliminary Regulatory Impact Analysis Summary

We acknowledge that it "has determined that this regulatory action is significant".

B. Executive Order 13132:
• Issue 19: The Department seeks public comment on the potential federalism implications of the proposed rule, including whether the proposed rule may have direct effects on State and local governments, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government.

Federalism

We acknowledge that this rule "has some federalism implications" and also appreciated the information presented in Table 1.

C. National Technology Transfer and Advancement Act of 1995

Here again we **strongly support** that the "Department is proposing to adopt the Standards for Accessible Medical Diagnostic Equipment issued by the Access Board".

• Issue 20: The Department seeks public comment on the Standards for Accessible Medical Diagnostic Equipment and whether there are any other standards for accessible medical diagnostic equipment that the Department should consider.

We think that the recommendations from the Access Board are sufficient and comprehensive.

D. Plain Language Instructions

We acknowledge that the "Department makes every effort to promote clarity and transparency in its rulemaking".

E. Paperwork Reduction Act

We understand that this" proposed rule does not contain any collections of information as defined by the PRA".

F. Unfunded Mandates Reform Act

We acknowledge that "this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act".

Thank you again for the opportunity to provide input on accessibility of medical diagnostic equipment.

Sincerely,

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To empower families and inform and involve professionals and other individuals interested in the healthy development and education of children, to enable all children to become fully participating and contributing members of our communities and society.

[i] https://www.nih.gov/news-events/news-releases/nih-designates-people-disabilities-population-health-disparities
[ii] https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html
[iii] https://www.cdc.gov/childrenindisasters/children-with-special-healthcare-needs.html