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January 25, 2024

TO: Rebecca B. Bond, Chief
Disability Rights Section, Civil Rights Division
U.S. Department of Justice
150 M St. NE, 9th Floor
Washington, DC 20002

FROM: Teri Morgan

RE: Notice of Proposed Rulemaking on *Nondiscrimination on the Basis of Disability: Accessibility of Medical Diagnostic Equipment of State and Local Government Entities*. Docket No.: 2024-00553, RIN: 1190–AA78.

I am writing to provide comments on behalf of the Virginia Board for People with Disabilities (the Board) regarding the U.S. Department of Justice's proposed rule, *Nondiscrimination on the Basis of Disability: Accessibility of Medical Diagnostic Equipment of State and Local Government Entities.* Thank you for the opportunity to comment on this proposed rule.

The Board is extremely heartened by this effort to address the pressing need for accessible medical diagnostic equipment (MDE). The proposed rule is a positive step towards realizing the right of people with and without disabilities to have equal access to medical care, as established in the Americans with Disabilities Act. This right can only be realized if all contributing factors, including accessible MDE, are enforced.

The Board has suggestions for improvement that relate to three issues for which the Department is seeking public comment. The suggestions pertain to the scoping requirements and the timeline for acquiring accessible medical equipment. The Board believes that these changes are needed to realize the Department's goal in a timely manner. The lives of people with disabilities may very well depend on it.

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.

The Department should expand the proposed scoping requirement in § 35.211(b) for two key reasons discussed below. The Board recommends requiring that 100% of equipment be accessible, regardless of program specialty, but any rate greater than the proposed 10-20% would be an improvement. The related costs would be spread out over time because the scoping requirement would only apply to newly acquired equipment, per the proposed rule.

The Department claims that MDE is more akin to parking spaces than sleeping rooms because it can be used for multiple people per day, but that logic does not account for differences in who can use it. Accessible MDE can be used for people with and without disabilities, similar to accessible sleeping rooms. The presence of accessible MDE does not preclude its use for someone without a disability. Parking spaces, on the other hand, are reserved solely for people with disabilities.

Furthermore, the proposed 10-20% scoping requirement risks perpetuating longer wait times for people with disabilities, which would constitute unequal access. The proposed rate may not be sufficient to accommodate patients with disabilities as quickly as patients without disabilities for four key reasons:

1. Available data underestimates disability prevalence. The American Community Survey found that 7% of Americans had ambulatory disabilities in 2022, but studies find that the survey substantially undercounts people with ambulatory and other disabilities.[1]

2. The number and percentage of Americans with physical disabilities is expected to continue growing as America's population ages. The population of people aged 65 and older is expected to increase from 56 million (17%) in 2020 to 86 million (22%) in 2050.[2]

3. The percentage of patients with physical disabilities likely varies based on the program's location and services, even among programs that don't specialize in treating conditions that affect mobility. For example, disability prevalence is much higher in rural areas.[3]

4. People with physical disabilities may need longer appointment times which reduces the number of people who can use equipment specific to that room, like exam tables.

[1] Hall, J., Kurth, N., Ipsen, C., Merys, E, & Goddard, K. 2022. "Comparing Measures of Functional Difficulty with Self-Identified Disability: Implications for Health Policy." *Health Affairs* 40, no. 1; Catherine Ipsen et al. 2018. "Underrepresentation of Adolescents with Respiratory, Mental Health, and Developmental Disabilities Using American Community Survey (ACS) Questions" *Disability & Health J.* 447.
[2] Vespa, Jonathan, Lauren Medina, and David M. Armstrong. 2020. "Demographic Turning Points for the United States: Population Projections for 2020 to 2060," Current Population Reports, P25-1144, U.S. Census Bureau, Washington, DC, 2020.
[3] Zhao, Guixiang et al. 2019. "Prevalence of Disability and Disability Types by Urban–Rural County Classification—U.S., 2016." *American Journal of Preventive Medicine* 57, no. 6: 749 – 756.

When the demand for accessible MDE exceeds the amount that an entity is required to have per the proposed rule, the Department proposes alternative access methods in Section § 35.212(c) that also risk perpetuating unequal access. For example, one proposed alternative is to send the patient to another location. Requiring a patient with a disability to travel further, obtain care in an unfamiliar setting, and potentially face a longer wait time than someone without a disability does not constitute equal access. Therefore, it is imperative that the scoping requirement reasonably approximate or exceed demand.

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 tables and scales than accessible x-ray machines)

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.

The Board recommends expanding Section § 35.211(c) to specify timelines for acquiring each type of accessible MDE. Section § 35.211(c) requires public entities to have at least one accessible examination table and weight scale, if that type of equipment is applicable to their practice, within two years of the rule's final publication. Public entities should also be expected to have at least one accessible version of other types of MDE applicable to their practice within a reasonable timeframe.

Omitting certain medical equipment from Section § 35.211(c) would unnecessarily delay access to needed care which impacts overall health and well-being. Public entities would likely wait until they have to replace equipment or expand their equipment inventory before acquiring accessible MDE. That could take years or decades. The average dental chair, for example, can last at least 10 to 20 years depending on its quality and frequency of use. In the meantime, people with disabilities would continue having difficulty accessing needed dental care.

The Board recognizes that some types of accessible MDE are not yet readily available on the market, which warrants a longer compliance timeframe in these cases. In its proposed *Standards for Accessible Medical Diagnostic Equipment* in May 2023, the Access Board noted that specialized adjustable height exam chairs for gynecology, podiatry, optometry, and other services did not yet meet the proposed 17-inch low transfer height requirement. However, the Access Board also noted that more accessible equipment became available on the market after their original standards went into effect in 2017 and that they expect that trend to continue. Therefore, for types of accessible MDE that are not yet readily available on the market, the Department should extend the compliance timeframe specified in § 35.211(c) from two years after the rule's final publication to two years after a given type of accessible MDE becomes readily available on the market.

However, dental chairs that meet the Access Board's proposed standards do appear to be readily available on the market. Thirteen of the 16 dental chairs that the Access Board reviewed met their proposed 17-inch low transfer height requirement. Consequently, the Department should apply the two-year compliance timeframe proposed in § 35.211(c) to all types of accessible MDE that are readily available on the market, including dental chairs.