November 13, 2023

U.S. Department of Health and Human Services
Melanie Fontes Rainer
Director
Office for Civil Rights
Hubert H. Humphrey Building, Rom 509F
200 Independence Avenue SW
Washington, DC 20201

Re: Discrimination on the Basis of Disability in Health and Human Services Programs or Activities (RIN – 0945-AA15)

Dear Director Fontes Rainer:

On behalf of our member medical group practices, the Medical Group Management Association (MGMA) is pleased to provide the following comments in response to the Department of Health and Human Services (HHS) Office for Civil Rights' (OCR') proposed rulemaking on discrimination on the basis of disability in HHS programs or activities (proposed rule). **MGMA is strongly supportive of ensuring persons with disabilities are not discriminated against and have equal access to care. We sincerely appreciate OCR's attention to this topic as our members are dedicated to providing high-quality care to all patients.**

With a membership of more than 60,000 medical practice administrators, executives, and leaders, MGMA represents more than 15,000 group medical practices ranging from small private medical practices to large national health systems representing more than 350,000 physicians. MGMA's diverse membership uniquely situates us to offer the following policy recommendations.

Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination against individuals on the basis of disability in programs and activities that receive federal financial assistance, as well as in programs and activities conducted by a federal agency. OCR's proposals center around updating Section 504 and aligning it with the Americans with Disabilities Act (ADA), the Americans with Disabilities Amendments Act of 2008, the Affordable Care Act (ACA), and case law. We support consistent and congruent federal disability laws and regulations to not only prevent discrimination against individuals with disabilities, but to provide clarity to the public and practices about requirements. Murky and competing regulations only lead to confusion, compliance gaps, and hurdles for practices providing access to care.

MGMA appreciates OCR for issuing this landmark rulemaking and for working to improve protections for people with disabilities as everyone should be able to access the care they need. We offer the following recommendations in the spirit of supporting practices' ability to advance health equity.

Key Recommendations

- **Move forward with many of the proposals to improve discrimination protections for persons with disabilities and harmonize language between regulations to provide much needed clarity to the public and practices.**
- **Offer resources including federal reimbursement or funding opportunities for medical groups where necessary to comply with updated requirements that necessitate significant investments.** Work to facilitate practices' ability to make changes by providing appropriate funding to support upgrades.
- **Allow for enough time and proper flexibilities for medical groups to come into compliance and provide critical training and resources.** We recommend OCR take a cooperative approach to enforcement utilizing compliance plans and education to ensure practices can institute the proposed changes. It is imperative that OCR provide an appropriate timeline to meet the requirements in this wide-ranging rule and not add significant strain to medical groups by moving too fast.
- **Collaborate with medical groups, other federal agencies, and the healthcare community more broadly to institute workable performance standards to promote website and mobile application accessibility.** MGMA urges OCR not to move forward with its web and mobile application technical standards and recommends the agency continue to work with other federal agencies and the medical community to avoid unintended consequences and untenable cost increases for practices. We support implementing consensus-based standards that increase access to care in a manner that integrates into practices' workflows and does not undermine their financial viability.

Accessibility Standards for Websites, Mobile Applications, and Kiosks

Website and Mobile Application Guidelines

OCR is proposing to adopt, for purposes of Section 504, the Website Content Accessibility Guidelines (WCAG) 2.1 Level AA that were developed by the World Wide Web Consortium as the technical standard for web and mobile application accessibility. These guidelines are meant to establish standards to promote accessibility for web and mobile application content and require websites to have accessibility features for people with low vision, cognitive and learning disabilities, and manual dexterity disabilities. WCAG 2.1 provides testable success criteria and includes four principles for accessibility – perceivable, operable, understandable, and robust.

MGMA supports OCR's desire to ensure that website and mobile application content is available to people with disabilities as it is an important avenue for patients to access care and keep informed of treatment options. We caution that the technical standards proposed may be unduly burdensome for medical groups, especially in light of the growing and disparate health information technology regulations and the current financial environment of continued cuts to Medicare reimbursement coupled with rising costs and staffing shortages. This burden would be especially pronounced in small and under-resourced practices where the ability to make the required updates, without additional resources, may be cost prohibitive. We are concerned about unintended consequences of practices avoiding altogether using valuable tools like mobile applications and social media as a result of unworkable standards and fear of sanctions.

OCR contemplates these challenges in the proposal in its discussion regarding the balance of increasing accessibility for individuals with disabilities with the need to avoid hampering innovation in the use of

websites or mobile applications. The agency identified only four states (Louisiana, Maryland, Nebraska, and Washington) that "already either use WCAG 2.1 or strive to use WCAG 2.1 for at least some of their web content." The proposed rule cites recent research showing 4.9% of 100 hospitals are compliant with WCAG 2.1. Taken together, these examples demonstrate that WCAG 2.1 standards are not widely used. We urge OCR to consider the impact of adopting WCAG 2.1 before they are appropriately mature. A quick survey of services that provide website compliance show how expensive it is to not only upgrade a website – with the costs increasingly significantly for bigger and more complex websites – but to maintain compliance moving forward that meets these standards.

MGMA recommends OCR work with medical groups and other federal agencies like the Office of National Coordination for Health Information Technology (ONC) to implement criteria derived from consensus-based principles to ensure this technology is accessible for persons with disabilities and practicable and affordable for medical groups to institute. These performance standards would best facilitate the widespread adoption of accessible web content. In the alternative, we encourage OCR to adopt WCAG 2.0 which has been in place much longer than 2.1. Finally, we support OCR including funding to practices enabling widespread adoption.

Social Media

This proposed rule applies not only to content on a recipient's website and mobile applications, but to content offered on social media content platforms. It is the recipient's responsibility to use certain accessibility features when they make content available on social media sites. Posts on social media will be treated the same as any other web content, but OCR is considering an exception for posts made before the effective date of the rule, subject to certain limitations.

We support these reasonable exceptions as there are varied scenarios that can occur given the different levels of functionality on the many different public social media platforms. We encourage OCR to allow additional alternative accommodations that work for both practices and patients and are reasonable in scope to encourage the proper utilization of social media.

Accessibility Exceptions

The agency included certain exceptions for extenuating circumstances such as if compliance would constitute a fundamental alteration in the nature of a program, or an undue financial and administrative burden for the recipient, then they may take additional actions to increase accessibility to the maximum extent possible. WCAG 2.1 standards would not apply to preexisting electronic documents (unless used by the public to participate in a recipient's activities), archived web content, content posted by a third-party, individualized documents, linked third-party content, and certain course content for schools.

MGMA appreciates OCR's recognizing the myriad complexities that may come with meeting these standards and offering reasonable exceptions. Should OCR move forward with WCAG 2.1, we support these exceptions that relieve administrative burden and suggest the agency continue to examine scenarios that would require an exception to avoid putting practices and patients in untenable situations.

Compliance

OCR defines large recipients as organizations with fifteen or more employees, while small recipients are defined as organizations with fewer than fifteen employees. Large recipients would have two years following the finalization of this proposed rule to meet the success criteria requirements of Level AA in WCAG 2.1. Small recipients would have three years to come into compliance. We recommend OCR expand the definition of small recipients – in this section and throughout the proposed rule – to

organizations with fifteen or fewer clinicians, similar to how a small practice is defined by the Centers for Medicare and Medicaid Services for the Quality Payment Program established in the *Medicare Access and CHIP Reauthorization Act of 2015*. This would appropriately capture small practices under Section 504 and not set up competing definitions in federal regulations.

The agency seeks input on how compliance should be measured which it intends to address ultimately in the final rule. The proposed rule includes examples of the dynamic nature of web and mobile application content and corresponding issues with testing tools providing an incomplete assessment of a website's accessibility. These challenges illuminate the need for a different approach than instituting the highly technical WCAG 2.1 standards when enforcement may be mired in complications leading to the diversion of resources from both medical groups and OCR.

MGMA appreciates OCR's consideration of the range of resources different sized organizations have access to in its proposal. The agency should adopt an enforcement approach that uses corrective action plans as medical groups may not be able to immediately comply due to factors outside of their control. Utilizing corrective action plans and working with groups to come into compliance by leveraging technical assistance, funding, and additional guidance would help progress to better access for patients with disabilities.

MGMA suggests OCR continue to develop reasonable enforcement priorities to ensure that the finalized rule is not installing a punitive compliance regime that cannot accurately and straightforwardly address complaints but ends up stifling practices with administrative burden ultimately impacting patient care. We support giving practices ample time to comply with any finalized changes. OCR should extend the timeline for medical groups to come into compliance to an appropriate length that allows practices to meet the numerous changes in this extensive proposal.

Standards for Accessible Medical Diagnostic Equipment (MDE)

OCR intends to adopt standards and requirements for adapting existing MDE and purchasing new MDE to ensure this equipment is equally available to people with disabilities. Under the proposed rule, a recipient cannot deny services it would otherwise provide to a person with a disability due to a lack of accessible MDE. OCR proposes to implement the U.S. Access Board's Standards for Accessible MDE that include technical criteria for equipment that is used when patients are in a supine, prone, or side-lying position, in a seated position, in a wheelchair, or in a standing position. They also include standards for supports, communication, and operable parts.

OCR proposes to institute the requirement that at least 10% of MDE is compliant with MDE standards for medical programs that do not specialize in conditions that affect mobility. Newly purchased, leased, or acquired MDE after the effective date of the proposed rule must be accessible until this requirement is satisfied. The proposed rule includes a dispersion requirement so that any facility or program that has multiple departments, clinics, or specialties, where a program or activity uses MDE, then accessible MDE shall be dispersed proportionally.

The proposed rule would not prevent the use of alternatives to the MDE standards if they are substantially equivalent or result in greater accessibility. OCR "does not require recipients to take steps that would result in a fundamental alteration in the nature of their programs or activities or undue financial or administrative burdens." Further, the proposal reviews possible supply chain issues impacting practices' ability to acquire the necessary MDE.

MGMA understands the importance of access to MDE equipment as it is a vital aspect of care. Many of the provisions in this section balance updates to MDE requirements, consider factors outside of practices that impact the availability of MDE, and allow for reasonable exceptions. We urge OCR to work with medical practices using corrective action plans if they are unable to come into compliance and allow for enough time for them to make any necessary upgrades. We suggest OCR first evaluate how compliance with these MDE sections is accomplished before instituting new requirements for non-diagnostic equipment as discussed in the proposed rule.

Patient Communications

OCR proposes to institute communication requirements related to telephone emergency services, information and signage, and telecommunications. It further states that: "in meeting its communication requirements, a recipient is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or undue financial and administrative burden."

MGMA strongly supports providing effective communications for persons with disabilities and agrees with the impetus of these proposals to address potential communication gaps. We recommend OCR make financial assistance, training, education, and/or equipment such as auxiliary aids available to practices as under-resourced groups may require additional funds and support to meet these requirements. We agree with the exception that does not require practices to make a fundamental alteration that would result in an undue financial and administrative burden, and note that practice deficiencies can stem from hard decisions regarding resource allocation from financial precarity due to rising costs and other external pressures. We ask for more clarification around what this exception would look like in practice and for education from the agency about these requirements.

Alignment of Section 504 Definitions with Other Authorities

The proposed rule intends to add new sections to Section 504 regulations that align with ADA definitions of disability, notice, maintenance of accessible features, retaliation and coercion, personal devices and services, service animals, mobility devices, and communications. The proposal acknowledges that the ADA and Section 504 have been understood to implement comparable requirements.

MGMA appreciates OCR's recognition of the various statutes and regulations impacting medical groups and their intention to ease confusion as there are myriad complex requirements currently in place. We support harmonization whenever appropriate throughout agencies as balancing unclear and competing standards can negatively impact medical groups by diverting resources away from clinical care to compliance with byzantine administrative processes.

In this regard, MGMA believes it would be enormously helpful to stakeholders if OCR could, in the preamble to the final rule, succinctly summarize what burdens this rulemaking will impose on regulated entities that are more stringent than, or otherwise not aligned with, compliance obligations already in place pursuant to the ADA. Similarly, a clear statement of how anticipated enforcement mechanisms under Section 504 do or do not align with enforcement mechanisms already existing under the ADA would be very helpful.

Conclusion

MGMA thanks OCR for its leadership in supporting access to medical care for persons with disabilities. We urge the agency to make these modernizing changes using a balanced approach to ensure medical groups can effectively implement updates to avoid unintended consequences. If you have any questions,

please contact James Haynes, Associate Director of Government Affairs, at jhaynes@mgma.org or 202-293-3450.

Sincerely,

/s/

Anders Gilberg
Senior Vice President, Government Affairs