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MEMORANDUM

To: Adela Flores-Brennan, Phoebe Hawley, Raine Henry, Colorado Department of Health Care Policy and Financing
From: Julie Reiskin, Colorado Cross-Disability Coalition, and Sara Schmitt, Colorado Health Institute
Re: Federal and State Accessibility Requirements
Date: April 30, 2024 – updated May 13, 2024

The Colorado Health Institute (CHI) is working with the Colorado Department of Health Care Policy and Financing (HCPF) to review member access to disability competent care in primary care offices. This memo is the third of five that CHI will provide by June 30, 2024. These memos cover:

1. Best Practices in Disability Competent Care
2. Disability Competent Care in Federally Qualified Health Centers (FQHCs)
3. Federal and State Accessibility Requirements
4. Barriers to Getting Disability Competent Care
5. Final Recommendations

This memo covers the following objective and questions from the approved Data Collection Plan. Objective and question numbers correspond with the listed memo numbers.

Objective 3. Summarize federal and state accessibility requirements for primary care and FQHCs.

- Question 3.a: What do federal laws and regulations require of primary care and FQHCs for accessibility?
- Question 3.b: What do state laws and regulations require of primary care and FQHCs for accessibility?
- Question 3.c: What federal and state contractual requirements for accessibility exist for primary care and FQHCs?

CHI contracted with the Colorado Cross-Disability Coalition to lead the legal review for this memo.

Key Findings

- Several federal and state laws govern accessibility among providers that accept Medicaid. They include the Americans with Disabilities Act (ADA), the Architectural Barriers Act (ABA), the Colorado Anti-Discrimination Act (CADA), the Patient

Protection and Affordable Care Act (PPACA), and Section 504 of the Rehabilitation Act of 1973.

- The ADA and Section 504 of the Rehabilitation Act of 1973 say that all medical care providers must give people with disabilities full and equal access to their services and buildings. Providers must also make reasonable changes to policies, practices, and procedures, when needed, so their services are fully available to people with disabilities. The exception is if the changes would fundamentally change the services.[1]
- PPACA says all FQHCs and primary care providers participating in Medicaid must give priority to a person's choice of auxiliary aids or services for communication. This is stricter than the ADA.
- None of these laws and regulations involve proactive monitoring nor accountability. The burden of enforcement is usually on the patient. The patient can file an administrative complaint with the U.S. Department of Health and Human Services Office for Civil Rights or the Colorado Civil Rights Division. They can also sue their providers.
- Regional Accountable Entities require their contracted providers to follow all federal and state laws. No information was available about enforcement of these and other HCPF contracts.

A Brief Summary of Methods and Definitions

This memo assumes that nongovernmental FQHCs or primary care providers participating in Medicaid are offering, delivering, serving as, or supplying one or more of the following:

- A "program or activity" covered by the Rehabilitation Act
- A "public accommodation" covered by Title III of the ADA
- A "health program or activity" covered by the PPACA

The following questions determine which federal and state law provisions apply:

- Are you a public entity (any state or local government and its departments and agencies)?
  - Yes: ADA Title II and CADA
- Are you a place of public accommodation (businesses including private entities that are open to the public or that provide goods or services to the public)?
  - Yes: ADA Title III and CADA
- Do you receive federal financial assistance?
  - Yes: Rehabilitation Act and/or PPACA
- From which federal agency(ies) do you receive funding?
  - This review assumes all federal funding comes from the Department of Health and Human Services and limits discussion to this federal agency.

Examples of recipients of federal funding from the Department of Health and Human Services (HHS) include:

- Health care providers participating in CHIP and Medicaid programs
- Hospitals and nursing homes (recipients under Medicare Part A)
- Human or social service agencies
- Providers receiving federal award funding under section 330 of the Public Health Service Act or the Health Center Program (for FQHCs)

Defining Disability. The ADA identifies a person with a disability as someone who has a physical or mental impairment that substantially limits one or more major life activity, has a history or record of impairment(s), or is perceived by others as having impairment(s). This includes but is not limited to people with physical disabilities, people with sensory disabilities that can affect communication, such as people who are deaf or blind, people with cognitive disabilities, people with brain injuries, and/or people with certain chronic illnesses or serious mental illness.

Question 3.a: What do federal laws and regulations require of primary care and FQHCs for accessibility?

Americans With Disabilities Act

Title III of the ADA covers public accommodations. The definition of a place of accommodation includes the "professional office of a health care provider."[2]

Title III prohibits disability discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[3]

For places of public accommodation, discrimination includes "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."[4] Examples of modifications include longer appointment times, a dedicated notetaker during appointments, flexible no-show or lateness policies if the cause is disability-related, and/or dedicated patient room assignments.

Effective Communication

The ADA requires Title III entities to communicate effectively with people who have communication disabilities. Effective communication includes offering websites that are accessible using screen readers and phone systems that can be operated by people without hand function or with speech disabilities. It also might require covered entities to

provide appropriate auxiliary aids and services at no cost. Some examples of auxiliary aids include Braille, large print, captioning, plain language explanations, qualified sign language interpreters, qualified readers, and qualified speech-to-speech translation.[5]

Public accommodations "shall not require an individual with a disability to bring another individual to interpret for him or her." If a patient brings someone with them, the provider can only rely on that companion to interpret if the patient requests it; however, this creates liability issues if the companion is not a certified interpreter or if they do not understand or properly interpret medical issues and terminology. Public accommodations must not rely on a minor child to interpret, except in the case of emergency.

Places of public accommodation must also provide effective communication for companions at no cost. Companions are family members, friends, or associates.[6]

Lastly, when auxiliary aids or services are needed, they must be provided free of charge and in a timely manner.[7]

The ADA states that Title III entities are "encouraged to consult with the person with a disability to discuss what aid or service is appropriate" and are not required to honor a person's choice of aid but are still required to ensure communication is effective. The PPACA differs from the ADA on this consideration and requires entities to give primary consideration to the requests of individuals with disabilities (see below).

Physical Accessibility

The ADA sets requirements for new construction and changes to buildings and facilities, including health care facilities.

New facilities as of 1992 must "be designed and constructed in such a manner that the facility is readily accessible to and usable by handicapped persons." [8]

Title III entities must remove barriers to accessibility. These entities are prohibited from "failing to remove architectural barriers … that are structural in nature, in existing facilities, … where removal is readily achievable." [9]

A public accommodation must also maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities. Examples include elevators and door pushes. Isolated or temporary interruptions in service due to maintenance or repairs are unavoidable. However, failure to quickly make repairs could constitute a violation of federal laws and requirements.

Architectural Barrier Act

The Architectural Barriers Act (ABA), 42 U.S.C. §§ 4151–4157, requires that buildings and facilities that are designed, constructed, or altered with federal funds or are leased by a federal agency comply with federal standards for physical accessibility. ABA requirements are limited to architectural standards in new and altered buildings and in newly leased facilities. They do not address the activities conducted in those buildings and facilities. The ABA is enforced through standards for accessible design.[10]

The ABA may be applicable for those primary care offices and FQHC clinics that were designed, constructed, or altered with federal funds.

Patient Protection and Affordable Care Act

The Patient Protection and Affordable Care Act (PPACA) prohibits discrimination on, among other bases, the basis of disability in any health program or activity, any part of which receives federal financial assistance.

All public or private entities covered by the PPACA "shall give primary consideration to the requests of individuals with disabilities" when selecting an auxiliary aid or service.

The PPACA led to the development of technical criteria for medical diagnostic equipment. These criteria have not yet been adopted but are advisory. Health care providers are encouraged to "use this final rule as guidance on how to provide equitable access to medical diagnostic equipment for people with mobility and communication disabilities." The criteria are based on how a patient uses the equipment — whether standing, lying down, seated, and/or seated in a wheelchair. The criteria "focus on ensuring the patient can transfer from a mobility device onto the diagnostic equipment" and/or "allow the patient to use the diagnostic equipment while seated in their wheeled mobility device, or while standing." [11]

Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against people with disabilities by recipients of federal funding. Section 504 states "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[12]

Section 504 addresses reasonable accommodation. The Department of Health and Human Services' Section 504 regulations have been mostly unchanged since they were issued in 1977.

On May 1, HHS announced a final rule titled "Discrimination on the Basis of Disability in Health and Human Service Programs or Activities". The rule was published on May 9 and

will go into effect on July 8. The rule prohibit biases against people living with disabilities in medical treatment decisions as well as the use of discriminatory value assessment methods and defines accessibility for website and mobile applications as well as medical equipment. The rule requires at least one accessible version of an examination table and/or weight scale within two years of the rule's effective date.[13]

Coordinator, Notice, and Grievance Procedures

Section 504 requires recipients of federal funding to have the following:

- Notice requirements: A recipient of federal financial assistance that employs 15 or more people shall make information about Section 504 rights and its application to the services, programs, or activities. This information should be made available to applicants, participants, beneficiaries, and other interested persons.[14]
- Section 504 Coordinator: A recipient of federal financial assistance that employs 15 or more people shall designate at least one Section 504 coordinator to ensure its Section 504 responsibilities are carried out and to investigate Section 504 complaints. This person's name, address, and phone number must be publicly available.[15]
- Grievance procedures: A recipient of federal financial assistance that employs 15 or more people shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action prohibited by Section 504.[16]

Question 3.b: What do state laws and regulations require of primary care and FQHCs for accessibility?

Colorado Anti-Discrimination Act

The CADA states that an individual with a disability (as defined in section 24-34-301) must not, by reason of the individual's disability, be excluded from participation in or be denied the benefits of services, programs, or activities provided by a place of public accommodation (as defined in section 24-34-601(1)), a public entity (as defined in section 24-34-301), or a state agency (as defined in section 24-37.5-102), or be subjected to discrimination by any such place of public accommodation, public entity, or state agency.

CADA is interpreted consistently with the ADA and its terms, including disability, individual with a disability, place of public accommodation, and public entity.

Question 3.c: What federal and state contractual requirements for accessibility exist for primary care and FQHCs?

Federal Requirements

Recipients of federal financial assistance must comply with federal nondiscrimination laws, including the Rehabilitation Act and PPACA. The Office for Civil Rights in HHS enforces Section 504, Title II of the ADA, and the PPACA.[17] The Office for Civil Rights investigates complaints, reaches settlement agreements with recipients and public entities, and initiates enforcement proceedings that can suspend or terminate assistance. The Department of Justice also enforces the ADA.[18] Recipients of federal financial assistance, public entities and places of public accommodation cannot contract away their ADA, Rehabilitation Act, PPACA, or CADA obligations.[19]

HHS Grant Requirements

Based on their receiving federal funds, FQHCs must comply with the HHS Grants Policy Statement. By signing a grant or funding application, the requesting organization certifies that it will comply with all applicable public policies. The Rehabilitation Act is applicable to "All applications from and awards to domestic organizations" and the "Elimination of Architectural Barriers to the Handicapped" [Architectural Barriers Act] is applicable to "All awards involving construction or major alteration and renovation."[20]

Regional Accountable Entity Contracts

Primary care providers and FQHCs contract with Regional Accountable Entities (RAEs) to serve as primary care medical providers.

Provider service agreements that CHI was able to secure with HCPF's assistance include general nondiscrimination language that requires primary care providers to give services and care in a nondiscriminatory manner in accordance with national standards, Health First Colorado and Accountable Care Collaborative (ACC) program rules and requirements, and all applicable state and federal laws, rules, and/or regulations.

Some contracts or provider manuals include specific references to the ADA and/or the Rehabilitation Act of 1973. Some manuals simply encourage providers to adapt services and their offices/locations to meet the special needs of members. One provider manual identified specific best practice activities for providing full and equal access to persons with disabilities including:

- Removing physical barriers
- Providing means for effective communication with people who have vision, hearing, or speech disabilities, including providing auxiliary aids as needed
- Providing flexibility in scheduling to accommodate people with disabilities

- Allowing extra time for members with disabilities to dress and undress, transfer to examination tables, and extra time with the provider to ensure the individual is fully participating and understands the information
- Making reasonable modifications to policies, practices, and procedures

Neither contracts nor manuals include specific consequences for failure to meet laws and regulations nor benefits for providers that implement best practices.

Some providers contract with RAEs to provide care coordination services on behalf of members. One RAE includes a contract requirement to ensure staff are trained to provide services to all Medicaid members, including those with physical disabilities, and identifies disability competent care as a relevant training.

Conclusion

Federal and state laws require all primary care providers that accept Medicaid and FQHCs to provide full physical and communication access for individuals with disabilities. Providers must give priority to a person's preferences for communication supports. Provider contracts with Regional Accountable Entities require compliance with these laws; however, these contracts do not identify any consequences for a failure to comply. Similarly, federal and state laws and regulations as well as contract requirements do not include proactive monitoring for compliance.

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Endnotes: U.S.C refers to United States Code and C.F.R. to Code of Federal Regulations

[1] U.S. Department of Justice Civil Rights Division, Access to Medical Care for Individuals with Mobility Disabilities. https://www.ada.gov/resources/medical-care-mobility/

[2] 42 U.S.C. § 12181(7)(F); 28 C.F.R. § 36.104

[3] 42 U.S.C. § 12182(a)

[4] 42 U.S.C. § 12182(b)(2)(A)(ii)

[5] 28 C.F.R. § 35.160(b)(1), 28 C.F.R. § 36.303(c)(1), 28 C.F.R. § 35.104; 28

[6] 28 C.F.R. § 35.160(c)(1-3); 28 C.F.R. § 36.303(c)(1-4)

[7] 35 C.F.R. § 35.130(f); 36 C.F.R. § 36.301(c); 45 C.F.R. § 92.102(b)(2)

[8] 45 C.F.R. § 84.23(a); 28 C.F.R. § 35.151(a)(1)

[9] 42 U.S.C. § 12182(b)(2)(A)(iv)

[10] U.S. Access Board, Architectural Barriers Act Accessibility Standards, https://www.access-board.gov/aba/

[11] 82 Fed. Reg. 2810, 2811 (Jan. 9, 2017)

[12] 29 U.S.C. § 794(a)

[13] U.S. Department of Health and Human Services. HHS Finalizes Rule Strengthening Protections Against Disability Discrimination. https://www.hhs.gov/about/news/2024/05/01/hhs-finalizes-rule-strengthening-protections-against-disability-discrimination.html. May 1, 2024.

[14] 28 C.F.R. § 35.106; Technical Assistance Manual, *supra*, II-8.4000; 45 C.F.R. § 84.8

[15] 28 C.F.R. § 35.107(a); Technical Assistance Manual, *supra*, II-8.5000; 45 C.F.R. § 84.7(a)

[16] 28 C.F.R. § 35.107(b); Technical Assistance Manual, *supra*, II-8.5000; 45 C.F.R. § 84.7(b)

[17] *See* 35 C.F.R. § 35.190(b)(3) (designating HHS responsible for investigating complaints of discrimination in "provision of health care" and "the operation of health care and social service providers and institutions"); 45 C.F.R. § 84.61 (incorporating enforcement provisions of Title VI)

[18] 42 U.S.C. § 12188(b)

[19] 28 C.F.R. § 35.130(b)(1), (b)(3) (public entities); 45 C.F.R. § 84.4(b)(1), (b)(4) (HHS FFA); 42 U.S.C. § 12182(b)(1)(A)(i)-(iii), (b)(1)(D) & 28 C.F.R. § 36.204 (public accommodations)

[20] *Id*. at Ex. 3. *See also* U.S. Department of Health and Human Services. Assurance of Compliance, https://ocrportal.hhs.gov/ocr/aoc/instruction.jsf (requiring all recipients to have an "'Assurance of Compliance with Non-Discrimination Laws and Regulations' on file with HHS"); U.S. Department of Health and Human Services. Assurance of Compliance, https://www.hhs.gov/sites/default/files/form-hhs690.pdf