AAAHC

ACCREDITATION ASSOCIATION
for AMBULATORY HEALTH CARE, INC.

October 3, 2022

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA17)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, D.C. 20201

Via Electronic Submission at http://www.regulations.gov

RE: Docket ID HHS-OS-2022-0012

Dear Director Melanie Fontes Rainer,

The Accreditation Association for Ambulatory Health Care, Inc. (AAAHC) appreciates the opportunity to submit comment to the Centers for Medicare & Medicaid Services (CMS) Office for Civil Rights (OCR) regarding the recently proposed Nondiscrimination in Health Programs and Activities.

The AAAHC is a private and independent 501(c)(3) non-profit accreditation organization formed in 1979. Since its inception, AAAHC has promoted a voluntary, peer-based, and educational survey process to advance patient care. These values hold true today, as embodied in our mission statement: *Improving health care quality through accreditation*. With more than 6,600 accredited organizations in a variety of ambulatory health care settings, AAAHC is a leader in developing Standards to advance and promote patient safety, quality care, and value for ambulatory health care through its accreditation programs, education, research, and other resources. Currently, more than 1,000 ASCs are committed to excellence through AAAHC accreditation under the CMS deemed status program, making AAAHC the leading Medicare-approved, non-hospital accreditation organization in the country. AAAHC also provides accreditation services to the United States Coast Guard ambulatory health centers, Federally Qualified Health Centers that receive funds from United States Health Resource and Services Administration (HRSA), Indian Health Services funded health centers, and Correctional Healthcare units under the United States Federal Bureau of Prisons (BOP). Other AAAHC-accredited organizations include Community Health Centers, Indian Health Centers, Student Health Centers, Medical Group Practices, and office-based surgery centers.

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§92.7 Designation and Responsibilities of a Section 1557 Coordinator, page 47914

If entities will be required to designate a Section 1557 Coordinator, AAAHC strongly encourages CMS to provide training, templates, guidance, and any other resources and support required for easy implementation of Section 1557 documentation and tracking requirements. The current health care environment is already stressed due to workforce shortages and high rates of staff turnover as a direct result of the Public Health Emergency which is still in effect. Providing the maximum amount of support possible to assist in meeting current and changing compliance requirements can play a significant role in helping to ensure successful implementation and reduce the burden on an already strained system.

AAAHC encourages the Office of Civil Rights to review existing regulations, rules, and requirements of the Department of Health and Human Services that could be modified to reduce unnecessary costs and administrative burden imposed on the health care site[1], in consideration of the myriad of requirements and designated roles that facilities are required to have in place, such as the proposed grievance process. AAAHC Standards require an organization to have an established grievance process for documenting the existence, investigation, and disposition of a patient's written or verbal grievance. The grievance process must contain specific timeframes, a designated contact person, steps taken to resolve the grievance, and documentation of the resolution. This Standard is based on 42 CFR § 416.50 - Condition for coverage - Patient rights[2].

Data Collection, page 47856

Prior to implementing additional data requirements for covered entities, and to prevent duplication in reporting and the creation of unnecessary additional burden, AAAHC requests that the agency thoroughly analyze whether any of the desired data is already collected elsewhere [7]. Additionally, prior to requiring any new data collection, AAAHC encourages the agency to publish the intended purpose of the data and how the new data will be reviewed and analyzed to ensure actionable results. Publication of this information will allow meaningful feedback from stakeholders related to potentially more meaningful and/or less burdensome methods to obtain the same information.

§92.204 Accessibility of Information and Communication Technology for Individuals with Disabilities, page 47864

AAAHC agrees that accessibility is important and plays a role in nondiscrimination. However, abruptly requiring covered entities to comply with WCAG Accessibility Requirements for their websites, online portals, mobile applications, and telehealth providers creates a large burden, especially if updates are to be required to comply with future WCAG revisions. The extent of this burden is partially reflected in the requirement that all federal agencies meet accessibility requirements. President Clinton signed this law in 1998[3], and yet Information Technology Innovation Foundation (ITIF) found 85% of government sites non-compliant in a 2017 study[4]. ITIF performed a follow-up study in 2021[5], focusing solely on the top 72 most popular federal websites. The results showed that, more than a decade after accessibility compliance was mandated, less than 75% of federal site homepages passed accessibility requirements and only 52% of sites with accessible homepages passed accessibility requirements on their second and third most popular site pages.

[1] https://www.congress.gov/bill/116th-congress/house-bill/5688/text
[2] https://www.cms.gov/Regulations-and-Guidance/Legislation/CFCsAndCoPs/Downloads/CMS3217F.pdf
[3] 29 U.S.C. § 794(d)
[4] https://itif.org/publications/2017/03/08/benchmarking-us-government-websites/
[5] https://itif.org/publications/2021/06/03/improving-accessibility-federal-government-websites/

For currently existing platforms, meeting ADA Section 508 accessibility standards first requires an audit of current status, which generally costs within the range of $2,500 and $25,000 for websites that do not contain an e-commerce component[6]. Final cost is variable based on the number of pages and type of content. After completion of the audit, the cost to make a website accessible generally ranges from $3,000 to $20,000[6]. Even then, costs continue as monitoring and maintenance must be provided with every change or update to the site and every update to the WCAG guidelines. These costs do not include accessibility compliance for mobile applications or other technology used.

Additional concern arises from the fact that many online portals and telehealth systems are not owned by (or under the control of) the covered entity, but are contracted for use. Covered entities may have received additional benefits and savings for signing long-term contracts, many contracts are likely to contain penalties for early termination, and covered entities have likely invested significant resources into training staff and patients on their selected system. If a contracted system is not fully accessible, changing systems to comply with agency requirements can result in negative consequences for any affected covered entity including the diversion of funds that would have otherwise been reinvested in the facility to increase access or improve services through new patient safety and quality of care initiatives.

§92.206 Equal Program Access on the Basis of Sex, page 47865

Gender-based questions are necessary if gender-based attributes and/or physiology may correlate to current care, symptoms, or treatment. Medical records may best be updated to reflect the physical anatomy of patients, as opposed to gender labels. Inquiries related to gender identity should be made when appropriately related to services such as diagnostic testing, wellness, mental health care, and other treatments necessary to provide care. AAAHC Standards require that a provider ensure each patient has the right to be free from any act of discrimination or reprisal (as referenced by 42 CFR § 416.50 - Condition for coverage - Patient rights[7] and consistent with Section 1557 of the Affordable Care Act of 2010 which prohibits discrimination on the grounds of race, color, national origin, sex, age, or disability in certain health programs and activities[8]).

§92.211 Nondiscrimination in the Delivery of Health Programs and Activities Through Telehealth Services, page 47884

Prior to the COVID-19 pandemic, the use of telehealth was minimal due to lack of payer reimbursement and burdensome legal restrictions[9]. Medicare increased telehealth accessibility as of March 6, 2020, through the expansion of 1135 waivers; and two years later, federal law has still not permanently approved telehealth for use in a multitude of settings. Compounding the lack of permanency is the fact that most existing telehealth platforms were created in response to an immediate critical need and were not designed with accessible features[10]. Therefore, AAAHC proposes that instituting a requirement to meet LEA and disability accessibility guidelines in telehealth platforms is premature, since telehealth vendors need time to improve their platforms without requiring an already stressed system of health care providers to take on the additional burden of contracting with (and training staff and patients on) new platforms. Increasing this burden may decrease access to care, delaying diagnosis and impacting prognosis, thereby adding to the cost of an already high Gross Domestic Product for health.

[6] https://www.accessibility.works/blog/web-accessibility-ada-compliance-costs-budgeting-guide/
[7] https://www.cms.gov/Regulations-and-Guidance/Legislation/CFCsAndCoPs/Downloads/CMS3217F.pdf
[8] https://www.hhs.gov/healthcare/about-the-aca/index.html
[9] https://www.kff.org/womens-health-policy/issue-brief/opportunities-and-barriers-for-telemedicine-in-the-u-s-during-the-covid-19-emergency-and-beyond/
[10] https://www.toptal.com/designers/healthcare/healthcare-app-accessibility

Regulatory Impact Analysis, Costs of the Proposed Rule, page 47900

AAAHC strongly urges the agency to reconsider the cost assessment associated with the changes proposed. The agency has addressed the creation of mandatory and/or updated policies, procedures, notices, documentation and training, coverage of nondiscriminatory care for transgender patients, and submission of responses to OCR investigations within the published regulatory impact analysis. However, the proposal includes provisions for WCAG compliance of websites apps (§92.204), requiring providers to develop a better understanding of clinical algorithms and a process for incorporation of true clinical judgment (§92.210), and the meeting of accessibility requirements in telehealth services (§92.211). The burden and cost associated with the provisions that were not accounted for within the costs analysis are the most cost-intensive and burden-heavy endeavors. Proper accounting of these costs will significantly increase the impact of this proposal on the 254,998 small entities covered by the rule.

For any questions regarding this comment, please contact Ann Carrera, Senior Counsel, Corporate Affairs at 847-853-6060 or acarrera@aaahc.org.

Sincerely,

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