Submitted Electronically

November 13, 2023

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Disability NPRM, RIN 0945– AA15
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, SW
Washington, D.C. 20201

Subj: Discrimination on the Basis of Disability in Health and Human Service Programs or Activities, RIN 0945-AA15

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (USCCB), the Christian Legal Society (CLS), and the National Association of Evangelicals (NAE), we respectfully submit the following comments on the proposed rule, published in 88 Fed. Reg. 63392 (Sept. 14, 2023), on disability nondiscrimination requirements under Section 504 of the Rehabilitation Act of 1973 applicable to recipients of financial assistance from the U.S. Department of Health and Human Services (HHS).

I. What the Church believes about persons with disabilities

The ministries of the Church serve all in need, without regard to race, religion, sex, disability, or any other characteristic, because we believe that health care is a basic human right. As the USCCB's predecessor organization, the National Conference of Catholic Bishops, stated in 1993, "This right flows from the sanctity of human life and the dignity that belongs to all human persons, who are made in the image of God."[1] The same core beliefs about human dignity and the wisdom of God's design that motivate Catholics to care for the sick also shape

[1] https://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/health-care-comprehensive-care.pdf

our convictions about care for preborn children, marriage, sex, and the immutable nature of the human person. These commitments are inseparable.

At the root of all principles of Catholic social teaching is the belief that human life is sacred and that the dignity of the human person is the foundation of a moral vision for society. As Pope Francis has observed, "The world exists for everyone, because all of us were born with the same dignity. Differences of color, religion, talent, place of birth or residence, and so many others, cannot be used to justify the privileges of some over the rights of all. As a community, we have an obligation to ensure that every person lives with dignity and has sufficient opportunities for his or her integral development."[2]

This belief applies in full to persons with disabilities. The Church holds that "[p]ersons with disabilities are fully human subjects, with rights and duties: in spite of the limitations and sufferings affecting their bodies and faculties, they point up more clearly the dignity and greatness of man. Since persons with disabilities are subjects with all their rights, they are to be helped to participate in every dimension of family and social life at every level accessible to them and according to their possibilities."[3]

The Church's concern for persons with disabilities springs from the same life ethic woven throughout Catholic social teaching. "When we fail to acknowledge as part of reality the worth of a poor person, a human embryo, a person with disabilities – to offer just a few examples – it becomes difficult to hear the cry of nature itself; everything is connected."[4]

In 1978, the United States Catholic Conference – a predecessor organization of the U.S. Conference of Catholic Bishops – published a pastoral statement on persons with disabilities.[5] The statement notes that "[I]t is not enough to merely affirm the rights of persons with disabilities. We must actively work to realize these rights in the fabric of modern society."[6] Among the ways identified to pursue that goal in public policy, the statement points out that "Enforcement of the regulations implementing Section 504 of the Rehabilitation Act...is a matter of particular interest."[7]

II. Comments on the preamble and the rule generally

We are grateful that the proposed rule, in both its substance and its reasoning, reflects the inherent dignity and value of the lives of persons with disabilities. Through enhancing nondiscrimination requirements and emphasizing safeguards for particularly vulnerable populations, it protects the dignity of the human person and counteracts societal tendencies to discredit the value of the lives of persons with disabilities. In the medical context, it provides necessary caveats for medical professionals to consider a person's disability when relevant to his

[2] Pope Francis, On Fraternity and Social Friendship [Fratelli Tutti], no. 118.
[3] Compendium of the Social Doctrine of the Church, no. 148 (internal citation and quotation omitted).
[4] Pope Francis, On Care for Our Common Home [Laudato Si'], no. 117.
[5] In June of 2023, the USCCB approved the drafting of a new pastoral statement on persons with disabilities.
[6] U.S. Catholic Conference, *Pastoral Statement of U.S. Catholic Bishops on Persons with Disabilities*, 1978.
[7] *Id.*

or her medical care. The disability framework is applied to several fields, including medicine and the child welfare system, two areas where disability discrimination can cause great harm.

While the rule is laudable overall, we must note where it falls short, and where it goes awry.

A. Suicide prevention services

The rule fails to address an area within the Department's authority where disability discrimination can have tragic consequences: suicide prevention services. The threats that suicide, and assisted suicide in particular, pose to persons with disabilities are well documented.[8] Recent alarming reports from Canada and the Netherlands heighten the need for the Department to proactively address this issue domestically.[9]

The proposed rule hints at awareness of this problem by citing three times to documents from the National Council on Disability on the danger of disability discrimination in the context of assisted suicide. A publicly available draft request for information by the Department that appears to have been contemplated in relation to the proposed rule further indicates a more explicit and robust consideration of suicide prevention, as does an associated agenda filing with the Office of Information and Regulatory Affairs from the fall of 2021.[10] To potentially not address this issue in the proposed regulation, without explanation, could therefore be perceived as arbitrary and capricious.

Importantly, clear application of the proposed rule to suicide prevention services would be a consistent, natural extension – and even a necessary fulfillment – of the proposed rule's efforts to combat discrimination and stereotyping in other contexts, such as denial of life-extending treatments to persons with disability based on biased perceptions of their quality of life. We respectfully urge the Department to explicitly apply the protections under Section 504 to persons with disabilities who are experiencing suicidality in any form.

B. Gender dysphoria as a disability

Citing the Fourth Circuit Court of Appeals' decision in *Williams v. Kincaid*, the preamble states that "restrictions that prevent, limit, or interfere with otherwise qualified individuals' access to care due to their gender dysphoria, gender dysphoria diagnosis, or perception of gender

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[8] *See, e.g.,* National Council on Disability, *The Danger of Assisted Suicide Laws: Part of the Bioethics and Disability Series*, 2019.

[9] https://www.cbc.ca/news/politics/maid-canada-report-2022-1.7009704 ("[T]he number of medically assisted deaths in 2022 was more than 30 per cent higher than the year prior. Medically assisted deaths constituted 4.1 per cent of all deaths in Canada last year"); https://nationalpost.com/opinion/disability-rights-groups-euthanasia ("50 Canadian disability and anti-poverty non-profits co-signed a letter to Minister of Justice David Lametti urging him to dial back Canada's MAID regime lest it continue 'euthanizing people with disabilities who are not terminally ill.'"); https://apnews.com/article/euthanasia-autism-intellectual-disabilities-netherlands-b5c4906d0305dd97e16da363575c03ae ("Several people with autism and intellectual disabilities have been legally euthanized in the Netherlands in recent years because they said they could not lead normal lives").

[10] https://www.hhs.gov/sites/default/files/504-rfi.pdf; https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0945-AA15.

dysphoria may violate section 504."[11] But that case was wrongly decided. The flaws in the Fourth Circuit panel majority's reasoning are ably summarized by Judge Quattlebaum's dissent, and by Justice Alito in his dissent from the Supreme Court's denial of certiorari in the case.[12]

The Department has seen fit to disagree with decisions of Courts of Appeals before.[13] The preamble's discussion of *Kincaid* also fails to cite numerous rulings that reached the opposite conclusion of the *Kincaid* court.[14] The Department cannot arbitrarily pick and choose when to follow precedent, nor can it justify its choice to rely on *Kincaid* without a thorough review of courts' treatment of the question presented.

The preamble's discussion of gender identity under Section 504 creates confusion about how broadly the obligation to make accommodations for gender dysphoria would apply – it refers to restrictions on "access to care" due to gender dysphoria. This appears to contemplate application only to the provision of health care. But the Department funds countless entities that are engaged in activities other than health care. For instance, would a foster care and adoption agency funded by HHS through Title IV-E be required to make accommodations for a prospective parent suffering from gender dysphoria? Or an employee suffering from gender dysphoria?

The more broadly the *Kincaid* construction would apply under the proposed rule, the more extensive the religious liberty problems it would raise. Yet the proposed rule fails to address the significant question of how its reliance on *Kincaid* will raise religious liberty issues. Without notice of how the Department intends to administer the proposed rule in compliance with the First Amendment and the Religious Freedom Restoration Act, the public has no opportunity to comment on a major impact of the proposed rule.

In a similar vein, the *Kincaid* majority's argument that Section 504 must be construed to cover gender dysphoria in order to avoid constitutional issues – specifically, the concern that failing to do so may violate the Equal Protection Clause – is especially weak considering that Section 504 has no religious exemption. It is unreasonable to avoid the question of whether Section 504 violates the Equal Protection Clause at the expense of raising the question of whether it violates the Free Exercise Clause.

Therefore, the undersigned organizations urge the Department to remove from the preamble this highly debatable argument about coverage of gender dysphoria. By doing so, the

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[11] 88 Fed. Reg. at 63464; *Williams v. Kincaid*, 45 F. 4th 759 (4th Cir. 2022), cert. denied, 143 S. Ct. 2414 (2023).
[12] *Kincaid v. Williams*, 143 S. Ct. 2414 (2023) (Alito, J., dissenting).
[13] 87 Fed. Reg. 47824 (Aug. 4, 2022) at 47858 ("The Franciscan Alliance court concluded that the 2016 Rule's definition of 'sex' as including 'gender identity' was contrary to Section 1557 because 'Title IX and Congress' incorporation of it in [Section 1557 of] the ACA unambiguously adopted the binary definition of sex.' The Department disagrees."), 47879 ("We acknowledge that the Franciscan Alliance court vacated the challenged provisions of the 2016 rule and reasoned that the Department was required to incorporate the language of Title IX's abortion neutrality provision; however, we disagree with that decision").
[14] *Duncan v. Jack Henry & Assocs., Inc.*, 617 F. Supp. 3d 1011 (W.D. Mo. 2022); *Doe v. Northrop Grumman Sys. Corp*., 418 F. Supp. 3d 921 (N.D. Ala. 2019); *Tetlow v. Maryland Dep't of Pub. Safety & Corr. Servs*., No. CV TDC-18-1522, 2019 WL 4644271 (D. Md. Sept. 24, 2019); *Gulley-Fernandez v. Wisconsin Dep't of Corr*., No. 15-CV-995, 2015 WL 7777997 (E.D. Wis. Dec. 1, 2015).

Department would fulfill its obligation to follow the plain intent of Congress in excluding "gender identity disorders not resulting from physical impairments." The Department would also thereby avoid constitutional infirmity and the confusion and litigation that it undoubtedly will spawn if this part of the preamble is left uncorrected.

III. Comments on specific sections of the proposed rule

A. 84.31, .38 - Childcare, Preschool, Elementary and Secondary, and Adult Education

These proposed provisions ensure applicability of disability nondiscrimination to childcare. We support this provision as a means of easing burdens that fall on parents with disabilities when welcoming new children into the world, or on any parent bringing a new child into the world when there is a concern that that child may have a disability.

B. 84.56 - Medical Treatment

We support these provisions' prohibition on discrimination in medical treatments where (1) such discrimination is based on bias or stereotypes about disability, judgments about individuals with disabilities' being a "burden" on others, or a belief that the life of a person with a disability is of lesser value or not a life worth living; or (2) treatment for a person with a disability is for a separate condition but different from similarly situated persons who do not have an underlying disability. We also especially support the protection in (c)(2) against discriminatory treatment in obtaining consent, e.g., for discontinuing types of treatment.

There is much to commend in the preamble's discussion of section 84.57 - in its exposition of disparities experienced by persons with disabilities, especially in maternal health; widespread misconceptions about "quality of life"; discriminatory practices in providers' determinations of benefits or "futility" in considering transplants or other life-sustaining treatment for patients; and its admonishment of providers who pressure individuals with disabilities and their families to agree to documents or decisions forgoing treatments and care.

In addition, the preamble specifically notes the discrimination issues that arose during the COVID-19 pandemic and identifies particularly vulnerable populations, including those with mental illness. The preamble highlights discrimination in clinical research and crisis standards of care (e.g. COVID-19). This attention to safeguarding quality healthcare for vulnerable populations resonates with Catholic social teaching.

C. 84.57 - Value Assessment Methods

This proposal would prohibit use of assessment methods that discount the value of life extension on the basis of disability such as to deny or provide unequal opportunity for provision of benefits and services. This is important for insurance coverage, greatly affecting access to care. Here too, the proposed rule upholds the equal and incalculable value of human life against existing temptations to do otherwise.

D. 84.60 - Children, parents, caregivers, foster parents, and prospective parents in the child welfare system.

This provision prohibits discrimination on the basis of disability within the child welfare system, including discrimination against caretakers with disabilities and children with disabilities. This provision protects the family from unnecessary child removals or state intrusion into the family by prohibiting discrimination based on stereotypes or assumptions regarding disabilities. As the Church teaches, "Since persons with disabilities are subjects with all their rights, they are to be helped to participate in every dimension of family and social life at every level accessible to them and according to their possibilities."[15] We support the proposed rule's protection of the natural family.

E. 84.76 - Integration

This provision requires that recipients of federal funds "administer a program or activity in the most integrated setting appropriate to the needs of a qualified person with a disability" (§ 84.76(b)). This includes, but is not limited to, children with disabilities in the child welfare system, who must be placed in the most integrated setting appropriate to the needs of the child. As the preamble highlights, this requirement is closely connected to the prohibition on discrimination against children with disabilities in the context of the child welfare system, as discrimination may manifest in inappropriate placements in congregate care. Placement in congregate care also impacts children along racial lines.[16] We appreciate the preamble's reference to the potentially discriminatory use of psychotropic medication, as children in foster care are more likely than the general population to be treated with psychotropics[17] and there is lack of medical oversight for foster youth who receive this treatment.[18] According to the Government Accountability Office, "[F]oster children who lived in group homes or residential treatment centers had much higher rates of psychotropic medication use than foster children living in nonrelative foster homes or formal kin care—48 percent versus 14 percent and 12 percent, respectively."[19] We agree with the Department's assertion, in the preamble's discussion of this provision, that "congregate care should not be a default placement for children."

The Catechism teaches that the family "should live in such a way that its members learn to care and take responsibility for the young, the old, the sick, the handicapped, and the poor."[20] This provision is pro-family because it combats systemic and individual discrimination that could prevent a child with disabilities from remaining with or finding a family and opens the door wider to families who are attempting to fulfill their duty in caring for vulnerable children in the child welfare system. While we have made particular emphasis here on discrimination

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[15] Compendium of the Social Doctrine of the Church, no. 148.
[16] *See* "Congregate Care in the Age of Family First," Capacity Building Center for States, https://capacity.childwelfare.gov/sites/default/files/media_pdf/congregate-care-overview-cp-20114.pdf.
[17] "Children's Mental Health: Concerns Remain about Appropriate Services for Children in Medicaid and Foster Care," United States Government Accountability Office, Dec. 2012 ("GAO Report"), https://www.gao.gov/assets/gao-13-15.pdf.
[18] "Treatment Planning and Medication Monitoring Were Lacking for Children in Foster Care Receiving Psychotropic Medication," U.S. Department of Health and Human Services Office of Inspector General, Sept. 2018, https://oig.hhs.gov/oei/reports/oei-07-15-00380.pdf.
[19] GAO Report, supra note 18.
[20] The Catechism of the Catholic Church, no. 2208.

against children with disabilities in the child welfare system, we fully support this provision in its application to all individuals with disabilities.

F. 84.90-94 - Accessible Medical Equipment

These proposed provisions would cover medical diagnostic equipment, and potentially some treatment equipment. In the preamble discussion, a noticeable focus is placed on how persons with disabilities may forgo or postpone important diagnostic care because of experiences with non-accessible medical diagnostic equipment. Here again, we support the proposed rule's advancement of right to quality health care, especially for vulnerable populations.

IV. Conclusion

We applaud the Department for the substantial steps the proposed rule would take toward ensuring the just and equal treatment of persons with disabilities. We encourage the Department to expressly extend the protections of Section 504 to suicide prevention services, where persons with disabilities are especially vulnerable. And we urge the Department to reconsider its interpretation of Section 504 to include gender dysphoria as a disability – an erroneous reading of the statute that will only serve to burden religious liberty and ensnare this otherwise laudable rulemaking in litigation.

Thank you for the opportunity to comment.

Respectfully submitted,

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[21] While NAE joins fully in the substance of the Comment, it was not, of course, party to the generation of some of the ecclesial authorities cited.