March 27, 2018

Secretary Alex Azar
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: Comments on HHS proposed rule on Protecting Statutory Conscience Rights in Health Care, HHS–OCR–2018–0002, RIN 0945-ZA03

Dear Secretary Azar:

The co-chairs of the Consortium for Citizens with Disabilities (CCD) Rights Task Force submit these comments in response to HHS's proposed rule interpreting religious refusal laws. CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of children and adults with disabilities in all aspects of society.

As advocates for the rights of individuals with disabilities to full and equal participation in all aspects of our society, we have serious concerns about the vagueness and breadth of the proposed rule's provisions and the potential impact that it may have on the application of disability and civil rights laws, such as the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. For example, the proposed provisions at 45 C.F.R. §§ 88.3(a)(2)(v) and 88.3(a)(2)(vi) seem to allow health care providers and staff extremely broad latitude in refusing to perform or assist in the provision of any lawful health service on the ground that doing so would be contrary to his or her religious beliefs. The proposed rule fails to discuss how these broad interpretations of religious refusal laws would interact with civil rights laws. To the extent that its provisions may be interpreted to limit the rights of people with disabilities under the ADA, Section 504, or other civil rights laws to receive health care services, however, we strongly object to them.

Congress provided a "broad mandate" in the ADA and Section 504 "to remedy widespread

discrimination against disabled individuals."[1] The ADA was designed "to provide clear, strong, *consistent, enforceable* standards addressing discrimination against individuals with disabilities."[2] Religious beliefs, regardless of the sincerity with which they are held, cannot be used as a shield for discrimination in contravention of disability rights mandates.

Discrimination in the provision of health care based on religious grounds presents particular concerns for people with disabilities because many people with disabilities rely heavily on religiously affiliated service providers for daily supports. In fact, many people with disabilities have little choice but to receive needed services from such service providers. And those service providers—particularly residential providers—are frequently responsible for assisting with many aspects of a person's life.

People with disabilities have sometimes been excluded from needed services or faced barriers to receiving those services due to service provider objections. For example, group homes have sometimes refused to allow people with disabilities to live with their spouses or romantic partners - even in the case of a heterosexual married couple.[3] Recent federal regulations concerning Medicaid home and community-based services now more clearly require residential service providers for people with disabilities to allow choice of roommate and overnight visitors.[4] Allowing religiously-affiliated service providers to deny residential services to people with disabilities based on a religious objection such as this could dramatically undermine their clients' right to pursue relationships and exercise fundamental rights of association.

The broad language of the proposed rule might also be interpreted to mean that the service providers on whom people with disabilities rely to coordinate necessary services or to provide transportation, personal care services, or other key services could refuse to provide these services, even if the person is entitled to receive them through Medicaid, Medicare, or another program. For example, these provisions might permit a case manager to refuse to set up a medical appointment for a person with a disability to see a gynecologist if contraceptives might be discussed, might permit a personal care services provider to refuse to assist a person with a disability in performing parenting tasks because the person was married to someone of the same gender, might permit a mental health service provider to refuse to provide needed treatment to an individual based on the fact that the individual was transgender, and might permit a sign language interpreter to refuse to help a person communicate with a doctor about sexual health. As these examples demonstrate, a denial of service based on a provider's personal moral

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[1] *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001).
[2] 42 U.S.C. § 12101(b)(2) (emphasis added). Section 504 contains virtually identical requirements.
[3] *See Forziano v. Independent Grp. Home Livin Prog*., No. 13-cv-00370 (E.D.N.Y. Mar. 26, 2014) (dismissing lawsuit against group homes, including a religiously affiliated group home, that refused to allow married couple with intellectual disabilities live together).
[4] 42 C.F.R. §§ 441.710(a)(vi)(B)(2), 441.710(a)(vi)(D).

objection can potentially impact every facet of life for a person with disabilities – including autonomy, parental rights, and access to the community.

In addition, individuals with particular disabilities have historically faced discrimination on the basis of religious beliefs.[5] Cases abound where religious scruples have been invoked to deny services to HIV-infected people; as recently as 2009, pharmacists unsuccessfully challenged a Washington law prohibiting pharmacies from refusing to deliver lawfully prescribed or approved medicines.[6] This is also an extremely relevant issue for the disability community since 4.6 percent of Deaf people are infected with HIV/AIDS, four times the rate for the African-American population,[7] the most at-risk racial group in the U.S.[8]

People with disabilities not only experience health disparities themselves, but those disparities are compounded by the health disparities that they face as members of other demographic groups such as women, people of color, and LGBTQ people. While disability affects people of all races, ethnicities, genders, languages, sexual orientations, and gender identities, disability does not occur uniformly among racial and ethnic groups. Disability prevalence is highest among African Americans, who report disability at 20.5 percent compared to 19.7 percent for non-Hispanic whites, 13.1 percent for Hispanics/Latinos and 12.4 percent of Asian Americans.[9] Disability prevalence among American Indians and Alaskan Natives is 16.3 percent.[10] An Institute of Medicine report has already observed that there are "clear racial differences in medical service utilization rates of people with disabilities that were not explained by socioeconomic variables," and "persistent effects of race/ethnicity [in medical service utilization] could be the result of culture, class, and/or discrimination."[11] These compounded disparities place people with disabilities at greater risk of denials of needed health care.

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[5] National Women's Law Center, *Fact Sheet: Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS,* (May 2014), *available at* https://nwlc.org/wp-content/uploads/2015/08/lgbt_refusals_factsheet_05-09-14.pdf.

[6] *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1116 n.7 (9th Cir. 2009)

[7] Disability Policy Consortium, Seth Curtis and Dennis Heaphy, *Disabilities and Disparities: Executive Summary* 3 (March 2009).

[8] *Id*.

[9] U.S. Census Bureau, Matthew Brault, *Americans With Disabilities: 2005, Current Population Reports* 117 (2008). Many of the differences between the disability rates by race and Hispanic origin can be attributed to differences in the age distributions of their populations. For example, Hispanics are predominantly younger than non-Hispanic whites.

[10] U.S. Census Bureau, *2009 American Community Survey, S1810, Disability Characteristics 1 year estimates* (2009) http://factfinder.census.gov/servlet/STTable?_bm=y&¬qr_name=ACS_2009_1YR_G00_S1810&-geo_id=01000US&¬ds_name=ACS_2009_1YR_G00_&-_lang=en&- format=&-CONTEXT=st.

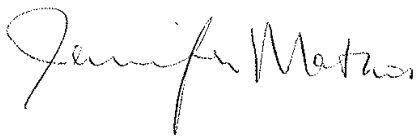
[11] Institute of Medicine, *The Future of Disability in America* 92 (2007).

Finally, we note that Title III of the ADA already exempts from coverage "religious entities or entities controlled by religious organizations, including places of worship."[12] The sweeping language of the proposed rule has the potential to create conflicts with Title III and to preempt enforcement of similar state and local laws protecting people with disabilities.

For the foregoing reasons, we urge you to revise the proposed rule to ensure that the religious refusal provisions are not interpreted to preempt civil rights protections.

Sincerely,

CCD Rights Co-Chairs
On behalf of CCD Rights Task Force



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[12] 42 U.S.C. § 12187.