

FACT SHEET #11

The Civil Rights of People with Disabilities under the Americans with Disabilities Act and Section 504 and Section 508 of the Rehabilitation Act

This fact sheet is to clarify some of the issues that may arise for Navigators when applicants and participants in the Marketplace need reasonable accommodations or policy modifications from Navigators, Assistors and Certified Application Counselors.¹ It is intended to be a practical supplement that will help Navigators to evaluate how to best help consumers with various disabilities gain an equal opportunity to participate fully, privately and independently in all aspects of the Marketplace, including federally funded consumer assistance programs and activities.

Q1. Which federal disability rights laws apply to Navigators, Assistors, and Certified Enrollment Counselors?

A. There are two main federal disability rights laws that are relevant to Navigators, Assistors, and Certified Application Counselors.² The Americans with Disabilities Act of 1990 (ADA) covers “public entities” such as state and local governments and their departments and agencies. The ADA also covers “places of public accommodation,” which are defined as “a facility operated by a private entity whose operations affect commerce and fall within at least one of” twelve listed categories, one of which is exemplified as a “service establishment.” Most of the non-profit or for-profit organizations such as community health centers, health care providers, or social service agencies that are functioning in a consumer assistance role or involved in certifying application counselors will fall within this category of entities covered by the ADA. Section 504 of the Rehabilitation Act of 1973 (Section 504) is an even older law which covers entities that receive federal financial assistance, as well as the federal government itself. Section 504 applies to virtually all of the state partnership and federally facilitated Marketplace Navigators and Certified Assistance Counselors, either because they are receiving new federal funding directly related to their marketplace functions or because they already receive Medicaid, Medicare or other federal funding

¹ The various Marketplace consumer assistance roles, functions, funding sources, and training and certification requirements are outlined in a helpful document created by the Centers for Medicare and Medicaid Services’ Center for Consumer Information and Insurance Oversight (CCIIO) and available at: <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/marketplace-ways-to-help.pdf>

² There are other federal laws that prohibit disability discrimination in specific areas such as education, air travel, and housing. Most states also have their own disability discrimination and access laws that apply to entities that receive any state funding and/or are business establishments operating in the state. Note also that the employment provisions of the ADA equally apply to Marketplace assistors in their hiring and employment practices.

as medical or social service providers or agencies. Even Assistors who receive state funding can be subject to Section 504 if the state has used Exchange Establishment grants to fund the state's assistor grant or contract, or if they otherwise receive federal funding of any kind. It can also be argued that the entire federal Marketplace assistance program is a federally conducted activity that falls under Section 504 since the consumer roles are established under federal law and individual Navigators and Assistors are federally trained and certified.

While the ADA and Section 504 are distinct laws that cover different kinds of entities, they place the same or very similar non-discrimination and accessibility obligations upon covered entities. Section 508 of the Rehabilitation Act (Section 508) is a third law that was enacted more recently in 1998 and requires federal agencies to ensure accessibility when they develop, procure, maintain, or use electronic and information technology. Section 508 only applies directly to federal departments and agencies and its main application in the Navigator context is to the Marketplace website and online application process which are required to provide members of the public with disabilities the same access to information and services available to non-disabled members of the public. Though the underlying accessibility of the healthcare.gov site is not within the control or responsibility of the various Marketplace assistors, they nonetheless remain responsible for ensuring accessibility under the ADA and/or Section 504 in their own electronic and information technology, such as in their own individual or organizational websites and blogs.³

Q2. Who is protected by the federal disability civil rights laws?

A. A disability is defined under the ADA, with respect to an individual, as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.” The definition has multiple clauses, many of which have been the subject of much litigation. What Congress has made clear when it last amended the ADA is that courts and covered entities should not use a narrow technical interpretation of the definition that focuses on an individual's medical diagnosis or what he or she cannot do. The point is to not make stereotypical assumptions about what a “real” disability is or what an individual with a disability wants or needs. Instead, covered entities and their employees need to undertake meaningful efforts to remove physical, procedural, or attitudinal barriers that prevent individuals with disabilities from having an equal opportunity to participate in the program or activity in question. The Marketplace assistance program is there to help consumers apply for and enroll in health coverage that is available through the Marketplace, and this includes engaging in consumer outreach and education, helping consumers to find out if they qualify for premium or cost-share assistance or for Medicaid or CHIP, and providing referrals to independent consumer assistance programs if needed. If a consumer with mobility disabilities

³ Voluntary web accessibility standards and guidelines have been developed such as the World Wide Web Consortium's (W3C) Web Accessibility Initiative (WAI), which is widely acknowledged as a commercial best practice standard.

cannot physically enter the venue where an outreach event occurs, that consumer is likely covered by the ADA/Section 504. If a consumer with hearing impairments cannot effectively communicate with an Assistor to get the knowledge and help with the application that others who hear receive, then that consumer is likely covered by the laws. If a consumer with visual impairments cannot use the Marketplace website because documents or the application are inaccessible, that consumer is likely covered by the laws. If an organization that is a Certified Application Counselor has a policy of not making individual appointment times, and refuses to modify this policy and provide an afternoon appointment for a consumer with mental health disabilities who is using medications that make him or her groggy in the mornings, then that consumer is likely covered by the laws.

Q3. What kind of behavior is considered “disability discrimination” under the law?

A. “Discrimination” is a word that carries much emotional weight. It is important to know that discrimination under federal disability rights laws does not denote or require any degree of ill intention or malice. Instead, discrimination is an outcome. Discrimination occurs if an individual with a disability is denied “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to),⁴ or operates a place of public accommodation.” The conclusion that discrimination has occurred can be the same if a Navigator holds a Marketplace outreach event advertised “for able-bodied persons only,” holds a neutrally advertised event on the second floor of a building without an elevator, welcomes everyone to the event but only provides take-home materials and information in a regular font print format, or provides Deaf persons with enrollment assistance only in a segregated timeslot once a month because that is how often he is able to afford paying for sign language interpretation. These are all equally possible examples of discrimination, though the covered entity denies participation with malice in the first case, thoughtlessly in the second, provides unequal participation in the third, and a segregated benefit in the fourth.

Another critical aspect of disability non-discrimination is that it places a proactive obligation on covered entities to make reasonable modifications in policies and procedures, provide auxiliary aids and services such as sign language interpreters or alternative reading formats, and remove architectural barriers and preserve accessible paths of travel to ensure that people with disabilities have an equal opportunity to partake of goods and services. This means that the obligation can be triggered by a consumer’s explicit request for a sign language interpreter during an appointment, for example, but there are also other circumstances in which a Navigator or Certified Application Counselor needs to act on their non-discrimination obligation. For example, holding outreach and education events triggers an obligation to hold those events in physically accessible locations, and taking phone calls includes the obligation to take

⁴ Landlords who own the buildings in which a public accommodation is housed and tenants who operate the public accommodation share responsibility for a public accommodation’s structural accessibility.

calls through a Teletype device and/or a video relay service. It should not be assumed that consumers with disabilities are necessarily knowledgeable about their own right to a reasonable accommodation, and there are no “magic words” that must be used to request accommodations. If a Navigator is with a consumer who is blind or clearly has vision impairments that make it difficult to read referral materials or Marketplace information brochures, the Navigator is under an obligation to ensure that those materials, in the appropriate preferred alternative format such as Braille, large font print, or computer CD, are readily available to the consumer so that he or she can get the same benefit as individuals who could take, read, and later review the printed materials on their own. At the same time, be aware that no individual with a disability can be *forced* to take an offered accommodation such as an alternative format.

A covered entity’s proactive obligation is not unlimited, however.

Q4. Are there limits on the Navigator’s obligation to provide policy modifications, auxiliary aids and services, and physical accessibility?

A. In general, a covered entity is not required to provide reasonable policy modifications when doing so would “fundamentally alter the nature” of the goods or services being offered. This standard is quite high and is not invoked successfully very often. If a consumer with mental health disabilities wanted to make an in-person appointment on their own with a Navigator and requested accommodations that required the Navigator to not make eye contact, not ask any questions, and not communicate directly with the consumer, it is arguable that the Navigator is so constrained that she could no longer perform the service of assisting the consumer with enrollment. However, if this consumer requested a pre-designated appointment time with the Navigator through a computer’s Chat function, this would probably not be seen as a fundamental alteration of the Navigator’s function and should be granted, even if the Navigator typically does not provide Chat appointments. The ADA allows public accommodation to refer a person with a disability to another public accommodation if that individual needs or is looking for specialized services and the public accommodation would have made a similar referral for a consumer without disabilities. If, for example, a person with a disability has a very unusual spoken language preference that is not English or a required threshold language, and there is another Navigator or Certified Application Counselor that offers Marketplace consumer assistance in that language, then the person with a disability could be referred, on the basis of a specialized language need, not on the basis of disability.

With regard to auxiliary aids and services, Navigators are not required to proactively take steps to ensure the availability of such aids or services if doing so would fundamentally alter the nature of the good or services *or* would result in an “undue burden,” which the law identifies as “significant difficulty or expense.” In evaluating what is or not an undue burden, the various Marketplace assistors need to consider such factors as the nature and cost of the accommodation request, as well as their own size and *overall* financial resources, including the resources of any parent corporation or entity. The question is not whether the federal funds or grants relating specifically to the

Marketplace assistance role explicitly include a budget item. The legal obligation does not require particular federal funds to be traced through to particular clients or activities. If an entity is subject to disability rights law as outlined under Question 1, then the legal obligation to ensure accessibility and an equal opportunity to participate applies, and continues to apply, even if the entity subcontracts or enters arrangements with additional entities to provide Marketplace assistance.

Finally, Navigators, Assistors or Certified Application Counselors are obligated to ensure that they operate in premises that are “readily accessible” if they are occupy new construction, or they must engage in “readily achievable” barrier removal if they occupy existing facilities.⁵ These standards are evaluated with regard to the same variety of factors that require consideration in the “undue burden” standard. One best practice for Marketplace assistors to use as they prepare to meet their ADA and Section 504 obligations is to fully incorporate accommodation and accessibility expenses as they budget and financially plan. For example, alternative format and sign language translation costs should be included as an inherent and natural part of the outreach budget, and not treated as an unforeseen last-minute cost overrun. Planning also enables an assistance entity to achieve cost efficiency. For example, Marketplace assistors in a certain geographic area could work together to make common arrangements with sign-language interpreters to be available for appointment times that are made ahead of time by Deaf consumers. Architectural barrier removal should also be planned for and prioritized ahead of time, and executed over time.

Q5. There are many kinds of alternative formats, do I have to have them *all* on hand? Similarly, can't I use written notes to communicate with people who are Deaf and hard-of-hearing?

A. Communication is a core aspect of the Marketplace function performed by Navigators, Assistors and Certified Application Counselors. Here are some key pointers to address common misunderstandings about the obligation to provide effective communication under the ADA and Section 504:

- Effective communication requires you to take into account the nature, length and complexity of what is being communicated. A written note is likely effective when a consumer with hearing impairments needs directions to the bathroom, for example. It is likely to be ineffective when providing assistance on a consumer's health insurance options available in the Marketplace, and this is especially the case for some Deaf individuals whose first language is American Sign Language and who may not be comfortable with written English.

⁵ Facilities that were already occupied as of January 26, 1993 are categorized as existing construction under the ADA, while facilities that were intended for first occupancy after this date or that have been altered/renovated after January 26, 1992 are categorized as new construction. Physical accessibility and barrier removal requirements are quite detailed and technical and need to be thoughtfully considered.

- While there is some overlap, each type of alternative format provides effective communication for distinct groups of people. Bold 18 font large print works well for many people with visual impairments but not for blind individuals. A computer CD only works for individuals who have access to and use a computer with screen reading technology. For those who use Braille, it is the fastest and most independent means of acquiring written information. While you do not necessarily have to warehouse all of your Marketplace written materials in multiple alternative formats, you should have tested policies and procedures in place to give people with disabilities their preferred alternative format in a timely manner.
- Maximizing privacy and independence are both important aspects of effective communication. The fact that a consumer with disabilities can give their information to a Navigator or Certified Application Counselor who will fill in the application is not an exact substitute for having an accessible online application that an individual can fill out for themselves, on their own schedule.
- Effective communication is owed not only to an individual Marketplace applicant, but also to family members, friends or associates (e.g., personal assistants) with whom the Marketplace assistor should appropriately be engaging. For example, auxiliary aids and services must be provided to the Deaf mother of a minor child who is applying for her state's Children's Health Insurance Program through the Marketplace.
- It is against the law to require or pressure any individual with a disability to bring someone with them who will interpret, read or otherwise assist them.
- It is against the law to charge an individual with a disability for supplying auxiliary aids and services that the individual needs to receive equal access to the services provided by a Navigator, Assistor, or Certified Application Counselor.

Q6. What referrals can I give to someone who believes his or her needs are not being met by me or by other Marketplace entities, like Qualified Health Plans (QHPs)?

A. Individuals with disabilities who believe that they have been subject to disability discrimination in the Marketplace have a number of options under federal law. They can file an administrative complaint with the Health and Human Services Office of Civil Rights (HHS-OCR), which is the designated enforcement agency for Section 504, as well as for Section 1557 of the Affordable Care Act, which explicitly and broadly incorporates Section 504's non-discrimination standards with respect to the programs and activities of Marketplaces and state exchanges.⁶ They also have the right under both the ADA and Section 504, and almost certainly Section 1557, to file a private lawsuit in federal court. In 2013 HHS-OCR issued a "request for information" to the public with questions that received detailed stakeholder responses, and the agency is

⁶ For additional information on how to file a complaint with HHS-OCR: <http://www.hhs.gov/ocr/civilrights/complaints/index.html>.

expected to issue more specific regulations for Section 1557 that will provide additional guidance concerning disability discrimination in the context of Marketplaces.

Below are some good references for additional information concerning the civil rights of people with disabilities:

<http://adata.org/ada-national-publications>: not a resource that is geared toward healthcare services at all, but definitely an excellent “layperson” resource for determining the accessibility obligations of small businesses under federal disability rights law. Available fact sheets covers many particular topics such as service animals, accessible parking, customer service, ADA Title II and III Regulations, and effective communication. A number of the fact sheets are also available in Spanish.

<http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm>: a slightly more technical publication from the Department of Justice that provides technical assistance to small businesses to help them understand their requirements under the Title II and III regulations that were updated in 2010, effective since 2011. Available in PDF as well.

http://www.ada.gov/medicare_ta.htm: *The Access To Medical Care for Individuals with Mobility Disabilities* brochure issued by the Department of Justice in 2010 provides guidance about individual rights to access of people with mobility disabilities under the ADA in the specific context of healthcare services. This is not so much of direct applicability to most Navigators, but it is an effective referral resources for Navigators to direct individuals who are concerned about, or who do not seem to know the extent of, their right to accessible examination equipment and transfer assistance from individual providers.

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