

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JUAN FIGUEROA, DEREK MANNERS,
MARTTI MALLINEN, and
THE NATIONAL FEDERATION
OF THE BLIND,
Plaintiffs,

v.

SYLVIA MATHEWS BURWELL,
Secretary of United States Department
of Health and Human Services,
in her official capacity,
200 Independence Avenue, S.W.
Washington, D.C. 20201

Defendant.

CIVIL ACTION NO.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiffs, Juan Figueroa, Derek Manners, Martti Mallinen, and the National Federation of the Blind, by and through undersigned counsel, file their Complaint for Declaratory and Injunctive Relief and respectfully allege as follows:

INTRODUCTION

1. This action seeks to end systemic violations by the United States Department of Health and Human Services (“HHS”), through its sub-agency, the Centers for Medicare and Medicaid (“CMS”), and its Medicare providers of the civil rights of blind Medicare recipients by requiring HHS to provide blind individuals meaningful and equally effective access to their Medicare information, as required by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”).

2. For semantic convenience throughout this complaint, the term “blind” is used in its broadest sense to include all persons who, under federal civil rights laws including Section 504, have a vision-related disability that requires alternative methods to access print.

3. According to CMS data, there are approximately 49 million Medicare beneficiaries in the United States. This includes millions of blind Americans who rely on services provided through Medicare and Medicare contractors to meet their inpatient, outpatient, and medication healthcare needs. Approximately 4.3 million individuals over the age of 65 report some form of visual impairment. There are also approximately 700,000 Medicare beneficiaries between the ages of 21 and 64 who have some form of visual impairment.

4. Despite the obvious and critical importance of Medicare Summary Notices and other CMS communications, and despite requests from National Federation of the Blind (“NFB”) and its members, CMS regularly communicates with blind persons in inaccessible formats, which they cannot read. This lack of meaningful access compromises the ability of blind Medicare recipients to review and, if necessary, respond to Medicare notices on a timely basis, and forces them to divulge private information and rely on the availability of sighted third parties for assistance. CMS’s failure to communicate with blind Medicare recipients with effectiveness equal to that afforded sighted recipients can interrupt needed health benefits and result in penalties and termination of benefits, causing significant financial and personal hardship.

5. Section 504 and its implementing regulations require CMS to communicate effectively with its applicants, beneficiaries, and recipients. CMS must provide auxiliary aids and services and make the modifications necessary to ensure that blind persons have an equal opportunity to participate in and enjoy the benefits of CMS programs. Appropriate auxiliary aids

and services for blind individuals may include providing documents in alternative formats such as Braille, HTML, large print, audio CD, and digital navigable formats supported by computers and digital talking-book players, transmitted through data CD, e-mail, or other requested media. More than four decades after the enactment of the Rehabilitation Act, CMS and its contractors have failed to effectively and consistently communicate with blind persons in these or any other accessible formats.

6. In August 2014, in response to complaints filed with the HHS Office for Civil Rights (“OCR”) in 2011 and 2012 under Section 504, CMS entered into an agreement with OCR. The complaints were filed on behalf of blind Medicare beneficiaries, and those similarly situated, who were not provided with notice of their rights or with effective communication under Section 504. The agreement signed by CMS and OCR, entitled the “Commitment to Action to Resolve DREDF Section 504 Complaints” (“Commitment to Action”), established a timeframe within which CMS would take specified actions to ensure the agency’s compliance with Section 504 in the areas raised in OCR’s investigation of the complaints, found at <http://www.hhs.gov/ocr/civilrights/activities/agreements/cms.html> (last visited Sept. 9, 2015).

7. Under the Commitment to Action, CMS was to have completed a Section 504 Self-Assessment by the end of 2014 to identify interim and permanent modifications of policies and procedures needed in any service, program, or procedure that does not ensure effective communication with individuals with disabilities. Even more critically, CMS was required to complete a “Long-Term Action Plan” by April 2015 that would ensure effective communication with individuals who have hearing, vision, or speech disabilities, as well as the timely provision of auxiliary aids and services to CMS beneficiaries and consumers. However, there has been no

publication of the Section 504 Self-Assessment or the Long-Term Action Plan, and no effective public notice of any changes in policies or procedures resulting from them.

8. Blind Medicare beneficiaries, many of whom already receive accessible formats from other government agencies and from private businesses, would equally seek accessible communications from CMS and its Medicare contractors if notified of their availability.

9. HHS and CMS's failure to provide equal access and equally effective communication with blind Medicare applicants and beneficiaries violates Section 504 of the Rehabilitation Act and its implementing regulations. Such conduct bars blind Medicare recipients from participating equally in CMS Medicare programs.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and 1361. Plaintiffs seek a declaration of rights pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

11. Venue over Plaintiffs' claims is proper in the District of Massachusetts because Plaintiff Juan Figueroa resides within the District, pursuant to 28 U.S.C. § 1391(b), a substantial part of the events, acts, and omissions giving rise to Plaintiffs' claims occurred in the District of Massachusetts, and because Defendant maintains an office and operates in this District.

12. Assignment to the Western Division is appropriate pursuant to Rule 40.1(D) of the Local Rules of the United States District Court for the District of Massachusetts.

PARTIES

13. Plaintiff Juan Figueroa is a blind recipient of Medicare Parts A and B and thus a qualified individual with a disability within the scope of Section 504. Mr. Figueroa resides in Holyoke, Massachusetts and is a member of the NFB.

14. Plaintiff Derek Manners is a blind recipient of Medicare Parts A and B, and thus a qualified individual with a disability within the scope of Section 504. He also has a Medicare Part D plan covered by EnvisionRx Plus. Mr. Manners currently resides in Cambridge, Massachusetts where he is attending Harvard Law School. Mr. Manners is a member of the NFB.

15. Plaintiff Martti Mallinen is a blind recipient of Medicare Parts A and B, and thus a qualified individual with a disability within the scope of Section 504. He also has a Medicare Part D plan covered by Anthem Blue Cross. Mr. Mallinen resides in Pleasanton, California.

16. The NFB, the oldest and largest national organization of blind persons, is a non-profit corporation duly organized under the laws of the District of Columbia with its principal place of business in Baltimore, Maryland. It has affiliates in all 50 states, Washington, D.C., and Puerto Rico. The vast majority of its approximately 50,000 members are blind persons who are recognized as a protected class under federal laws. The NFB is widely recognized by the public, Congress, executive agencies of government, and the courts as a collective and representative voice on behalf of blind Americans and their families. The purpose of the NFB is to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs that sighted and blind persons hold concerning the limitations created by blindness and that result in the denial of opportunity to blind persons in virtually every sphere of life.

17. The NFB and many of its members have long been actively involved in promoting equal access to important information regarding government benefits and accessible technology for the blind, so that blind persons can live and work independently in today's

technology-dependent world. NFB members reside throughout the United States, including Massachusetts. Plaintiffs Juan Figueroa and Derek Manners are among the many NFB members who cannot independently access the health care information that they receive from Medicare.

18. Defendant Sylvia Mathews Burwell is the Secretary of HHS, a federal agency. HHS administers the Medicare program through its sub-agency, CMS, and is responsible for ensuring the program's compliance with federal law. Secretary Burwell is sued in her capacity as the official charged with performing the statutory and regulatory duties of HHS, and with supervisory responsibility over CMS and its divisions, agents, employees and representatives. All divisions, agents, contractors, employees and representatives of HHS were acting within the scope of their agency or employment while making any of the statements and committing any of the acts alleged herein.

STATEMENT OF FACTS

19. CMS, a sub-agency of HHS, is the largest single payer for health care in the United States, providing health care coverage to nearly 90 million Americans through Medicare, Medicaid, and the State Children's Health Insurance Program.

I. Medicare Summary Notices and Other Communications

20. CMS regularly communicates complex information to Medicare beneficiaries through Medicare Summary Notices ("MSNs"). Although MSNs are not bills, people with Original Medicare receive these notices every three months regarding their Medicare Part A plan (which generally includes hospital care, skilled nursing facility care, nursing home care, hospice, and home health services) and Part B-covered services (which generally include doctors' services, outpatient care, medical supplies, and preventive services). CMS may send MSNs more frequently when reimbursing a beneficiary for a previously-paid bill.

21. The MSN shows all services or supplies that providers and suppliers billed to Medicare during the three-month period, the amount that Medicare paid, and the maximum amount the beneficiary may owe the provider. CMS advises Medicare beneficiaries to keep their MSNs to confirm that they are being billed correctly, for notice about denials of service, and for determining whether to appeal any adverse decisions regarding billing.

22. CMS regularly sends blind persons standard-print MSNs. Indeed, CMS's detailed online guidelines to its subcontractors on the style and content of MSNs, found at <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/clm104c21.pdf> (last visited Jan. 14, 2016) and revised most recently in March 2015, offer no information on providing the MSNs in any format other than standard print. However, most blind individuals cannot readily access standard print. Instead, they typically have a primary reading method, such as Braille, screen-access software, large print, or audio recording, that allows them to access necessary information and respond to requests for information independently.

23. CMS also provides Medicare beneficiaries with electronic MSNs through its website for Medicare recipients. Although blind individuals can access properly designed websites and electronic documents with the use of screen readers (assistive technology that transmits textual information on a computer, tablet, or smartphone screen into an audio output or a refreshable Braille display pad), CMS has failed to design the electronic MSNs for such access. The electronic MSNs, available in Portable Document Format ("PDF"), do not contain "tags" that provide the blind reader with the structural markup presented visually to a sighted reader, such as paragraphing or an indication that something is a heading, footnote, or table. In the absence of tags, assistive technology may not convey items in the document in a logical order or may not convey them at all and, thus, is not equally effective communication. At all events,

even properly tagged PDFs are not an accessible format for blind persons using iOS or Android devices, because those devices strip the PDFs of their tagging.

24. Because CMS routinely provides blind individuals with MSNs in standard print or as inaccessible PDFs, blind Medicare recipients cannot independently and privately acquire the information that the document comes from CMS or access the content contained in the MSN and may not be able to timely secure that information with the assistance of a third party. Receiving MSNs in inaccessible formats thus compromises blind beneficiaries' ability to independently and privately verify their co-payment obligations, address billing discrepancies and denials of service, or to dispute billing decisions through appeals, as can their sighted peers. As a result, failure by CMS to communicate in accessible formats ensures that Mr. Figueroa, Mr. Manners, Mr. Mallinen, and many other NFB members must sacrifice their privacy and independence to participate as Medicare recipients and puts them at risk of financial liabilities or penalties if a particular service or necessary medical equipment has not been covered by Medicare, or of exceeding Medicare service limits such as hospitalization days.

25. Moreover, individual Medicare providers often require that beneficiaries respond to or appeal Medicare determinations within specified deadlines. Yet because identifying information, such as the name of the sender, is provided exclusively in standard print, blind individuals cannot independently know that an important document, such as an MSN or other correspondence, has arrived in the mail, but must depend on the availability of other sighted persons to timely convey the information, thereby compromising their ability to respond to deadlines in a timely manner. While all or most Medicare providers also send their own bills to Medicare beneficiaries to show the co-payments that those beneficiaries may owe, many

individual providers fail to provide blind Medicare beneficiaries with bills and healthcare information in alternate formats.

26. The actions of HHS, through CMS, depriving blind persons of equally effective access to essential information they need to maintain and monitor their health insurance benefits, discriminates against Mr. Figueroa, Mr. Manners, Mr. Mallinen, and many NFB members.

II. Medicare Part D Notices

27. Since 2006, CMS requires a Parts A and B Medicare beneficiary to join a private Medicare Part D program or establish that she has some other comparable drug coverage. Through the Social Security Administration, CMS makes subsidies available to certain low-income Medicare recipients.

28. After Part D Medicare recipients fill prescriptions, their Part D plans send them monthly “Explanation of Benefits” (EOB) notices that summarize their drug claims and costs. The plans ask beneficiaries to carefully review their EOBs for accuracy and to take action if they see a mistake or want to file an appeal. Because of the complexity of Medicare drug coverage, EOBs are critical. For example, Part D plans use EOBs to give their beneficiaries the required 60-day notice of any changes to their lists of covered drugs, including changes from name-brand drugs to generics, as well as changes to pre-authorization requirements, co-payments, and refill limits. Without prior notice of such changes, Part D recipients could face grave health and financial consequences, particularly recipients with chronic conditions who require complex drug regimens.

29. CMS also frequently sends Medicare drug plan notices directly to beneficiaries to inform them of a proposed shift to another plan to maintain a low- or zero-cost premium. Because CMS does not take into account whether the proposed new plan meets the beneficiary’s

existing drug needs, CMS offers beneficiaries the option of staying with their current Part D plans or choosing another Part D plan. The notices advise that to pursue these options, beneficiaries must act within a specific time. The notices provide telephone numbers for alternative plans so that beneficiaries can learn more about their drug coverage options before making a decision to switch.

30. Medicare Part D plans and CMS regularly send blind persons standard-print EOBs and communications. Since most blind individuals cannot access standard print, they cannot independently and privately review and respond to the important information contained in the notices. They are therefore placed at a far greater risk of having their Part D plan or plan terms changed without their knowledge. Because they do not have access to their monthly, year-to-date, and out-of-pocket spending totals, all of which are set out in their EOBs, CMS deprives blind individuals, especially those with complex chronic health conditions and drug regimens, of equally effective communication.

III. Medicare Publications

31. Medicare has a number of publications designed to educate applicants and beneficiaries about the different Medicare programs available to them and their rights and obligations as beneficiaries, and to serve as reference material that beneficiaries may refer back to from time to time as needed. The topics addressed in these publications range from general information on the Medicare program, Medicare prescription drug coverage, health care benefits terms and limitations, coverage and limits on personal liability, and consumer rights and protections.

32. One publication, for example, entitled “Enrolling in Medicare Part A & B” is a 28-page guide that explains what Medicare Part A and B are and provides information about

eligibility and detailed instructions for enrolling. Another publication, entitled “Medicare Appeals,” is a 60-page document that explains what decisions can be appealed and how to file appeals under various Medicare programs, including instructions for filing expedited appeals in hospitals and other settings. Although the Medicare website gives sighted individuals the option of ordering print versions of these publications in either English or Spanish, the website does not offer blind individuals the option of ordering copies in accessible formats, such as Braille, large print, or audio CD.

33. There are currently 105 publications that are available on Medicare.gov. Although HHS makes 30 of these publications available to sighted Medicare beneficiaries in hard-copy print, it only makes three publications available to blind individuals in alternate formats: “Medicare and You,” which is available in standard print, large print, and an audio CD; “Choosing a Medigap Policy,” which is available in Braille; and “Medicare Coverage of Diabetes and Supplies,” which is available in large print. The haphazard availability of the 105 publications in alternate formats leaves some blind individuals who do not use or have computers without access to often complex program rules and health information.

34. All 105 publications can either be read online or downloaded onto a computer by Medicare beneficiaries who have consistent access to a computer. However, the publications do not always have properly labeled headings and tags. For example, someone using screen reading software will find much of the content in the publication “A Quick Look at Medicare,” found at <https://www.medicare.gov/Pubs/pdf/11514.pdf> (last visited Oct. 8, 2015), in lengthy text that is contained in a large alt tag for a graphic. That formatting results in uncertainty for blind computer users who do not know whether all the publication’s relevant information is contained in the alt tag because pertinent information was conveyed visually, or whether there is still

important information in the publication's written content. In addition, the document's lack of headings makes it very difficult for a blind individual to navigate.

IV. Medicare Forms

35. Many of the forms available on the CMS website are inaccessible to blind individuals. Many of the PDF forms do not have fillable form fields or descriptions, meaning that there are no interactive labels that would allow someone using screen-reading technology to process and submit information through the forms.

36. Moreover, the forms are not electronically reviewable, fillable, signable, submittible, and savable upon completion in HTML-based or any other universally accessible format. Nor are the forms available in other accessible formats such as Braille or large print. As a result, blind Medicare beneficiaries often must rely on sighted third parties to read, fill out, sign, and submit the forms.

V. CMS Alternate Format Request Customer Service

37. Although Medicare.gov provides a phone number for requesting accessible CMS publications, when blind individuals call the 1-844-ALT-FORM number, they are met with an automated message that instructs them to leave a message specifying which publication they are requesting. There is no discernable way to leave a voicemail after the message plays. After the outgoing message, a caller is asked whether they want the message repeated, but there is no clear way to input a choice. This is followed by a long pause, and the message repeats regardless. Finally there is an aural signal that indicates that a voicemail can be left. Many callers hang up confused before being able to leave any message.

38. For those who do figure out how to leave a message on the 1-844-ALT-FORM number, their attempts to make universal alternative format requests (to govern all future

communications, MSNs, EOBs, and any other documents that Medicare might send) go unanswered and unfulfilled.

39. CMS also instructs blind individuals to call a different hotline, 1-800-MEDICARE, to request Medicare publications in alternative formats, as well as auxiliary aids and services. Both hotlines require the caller to know and ask for the precise document title—information a blind caller is unlikely to have without an accessible publications and forms list.

VI. Medicare Contractors

40. CMS contracts with numerous private entities for delivery of services to Medicare enrollees. CMS pays private health insurers, managed care entities, providers, and provider groups to provide medical services to Medicare Part C beneficiaries, Part D drug companies to provide prescription-related services, and Medicare Administrative Contractors to send and provide Medicare Summary Notices on CMS's behalf to fee-for-service Medicare beneficiaries. When acting through its contractors, CMS has failed to meet its obligations to ensure that Medicare beneficiaries are provided with accessible information as outlined in this complaint.

41. The plaintiffs below all receive information both from CMS and through Medicare contractors.

VII. Harm to Plaintiffs

JUAN FIGUEROA

42. Juan Figueroa became blind as a teenager and receives Medicare Parts A and B. He reads written information through Braille and screen-reading software. Mr. Figueroa has attempted to access his Medicare account online and gain access to his documents electronically using his computer software, but the website is inaccessible to him from the point where he tries to reach his individual account on the "My Accounts" page.

43. Mr. Figueroa, an adult, must depend on his sighted mother to read print communication from CMS to him. Because her primary language is Spanish, she cannot always convey the complexities and nuances of his Medicare communications. For example, Mr. Figueroa received a diagnosis of diabetes in early 2015. In May 2015 he went to his pharmacy to obtain a “talking glucometer” for his diabetic self-care routine. The pharmacy informed him it was not a distributor of the device, but equally critical, informed Mr. Figueroa that Medicare evidently required some kind of additional evidence of his blindness before it would cover the device. Mr. Figueroa is certain that Medicare knows that he is blind, and is unsure what additional documentation could be required. CMS’s need for additional documentation was not effectively communicated in any way. While Mr. Figueroa eventually received a talking glucometer through his doctor, he does not know exactly how the device came to be covered and has no assurance that he will not encounter another unexpected Medicare coverage problem.

44. Although Mr. Figueroa qualified for Medicare on the basis of blindness, no CMS representative or Medicare provider has ever notified him of a right to accessible formats or effective communications. He would like to receive his Medicare notices in Braille or in an accessible, electronic format.

45. In August 2015, when informed of CMS’s Commitment to Action and his right to effective communication, Mr. Figueroa called 1-800-MEDICARE, but hung up after being placed on hold for 15 minutes. When he called CMS’s 1-844-ALT-FORM number, he reached a message that asked him to leave certain information such as the Medicare publication title for which he sought an accessible format. The message provided no indication that he could make a general request for Medicare information in an accessible format, and provided no timeline for when a request would be met. As described above, because of the confusing way that the

message repeats and the long pause before the caller can leave a message, Mr. Figueroa initially could not figure out how to leave a message and simply hung up. Mr. Figueroa called back and eventually was able to leave a message requesting Braille versions of all MSNs.

46. Mr. Figueroa called 1-800-MEDICARE again in mid-August 2015 and eventually reached a CMS representative who took his request for a Medicare booklet and MSNs in Braille. The representative told Mr. Figueroa that she would “look into” whether MSNs could be provided in Braille. Mr. Figueroa asked her if the website was accessible to users of JAWS screen-access software, and she was unable to provide an answer.

47. As of the filing of this complaint, Mr. Figueroa has yet to receive any MSNs in Braille.

DEREK MANNERS

48. Derek Manners is blind and started receiving Medicare Parts A, B, and D through his receipt of Social Security Disability Insurance (“SSDI”) beginning in or around 2010 or 2011. When he first enrolled in SSDI, Mr. Manners was asked if he needed an alternative format. Mr. Manners requested large-font print. He has never received Medicare notices or other information in large print, however, and CMS has never informed him of his right to accessible formats or effective communication.

49. To access his print Medicare notices and materials, Mr. Manners has either relied on his sighted partner to read them to him or has used the Closed Circuit Television System (CCTV/Video Magnifier) in his library. This past summer, however, Mr. Manners was working in Washington, D.C., away from his partner and his law school library. Thus, throughout the entire summer, Mr. Manners had no access to communications from Medicare. Mr. Manners receives a MSN, Part D EOB notice, or information about other Medicare benefits at least

monthly. Some of the other Medicare mailings appear to provide helpful information about additional Medicare benefits or products, but he cannot independently read the brochures or information.

50. When Mr. Manners called the CMS's 1-844-ALT-FORM number in August 2015 to request his Medicare notices and communications in an accessible format, he could not figure out how to leave a message. Even had Mr. Manners been able to leave a message, he could not have told CMS "which publication" he wanted in an alternative format, as requested in the automated message, given that he is unable to view which publications are available or sent to him in print.

51. When Mr. Manners called 1-800-MEDICARE in August 2015, he spoke with a representative named "Ben," who stated that Mr. Manners needed to specify which Medicare document he wanted to receive. When Mr. Manners informed Ben that he could not access the documents to see their titles, Ben told him to get a sighted family member or friend who could read the document to him so that Mr. Manners would know what to request. Mr. Manners asked if he could just put in a global request to receive all his notices and communications in large print after making the request. Ben replied that this was not possible. As of the date of this filing, Mr. Manners has yet to receive any Medicare notices or communications in large print.

52. In another attempt to receive effective communication, Mr. Manners signed up online before September 2015 to receive Medicare letters through email, but he has not yet received any communications this way. Instead, as recently as December 2015, CMS and/or its contractors continue to send Mr. Manners hard-copy letters in standard print. In a standard print letter to Mr. Manners dated November 17, 2015, CMS informed him that Medicare was moving Mr. Manners to a new Medicare Part D plan as of January 1, 2016, to maintain Mr. Manners at a

\$0 monthly premium rate. The letter outlines three options for Mr. Manners: (1) do nothing and the transfer will take effect; (2) call a specific number to stay with his existing plan and assume a small monthly premium; or (3) join one of the completely new Part D plan options presented in the letter.

53. In describing the third option in the letter, CMS advises Mr. Manners to call the six drug plans listed there and ask each plan whether they cover his drugs, whether his drugs are subject to any special coverage rules or limitations, and which pharmacies he can use. This is very helpful advice since every Part D plan places different kinds of drugs in myriad different categories of availability and cost. Many individuals with disabilities and chronic conditions need to carefully track and maintain availability of specific drug brands since their bodies can react very differently to generic and name brand drugs, particularly depending on interactions with other prescriptions. Because, like every other letter and notice CMS has sent Mr. Manners, the November 17 letter is not in his requested format of large print, Mr. Manners took no action and was likely transferred to a new Part D plan by default on January 1, 2016. While this transfer may have spared Mr. Manners the financial impact of his current plan's increase in premium rates, it may not spare him from undergoing any financial and health consequences that could arise from coverage differences between his current and new Part D plans. In December 2015, Mr. Manners received a follow-up letter advising him of which drugs his new plan would cover, but, once again, this letter arrived in inaccessible standard print.

MARTTI MALLINEN

54. Martti Mallinen is blind in his right eye, and has low vision in his left eye. He receives Medicare Parts A, B, and D. After receiving Social Security Disability Payments on the basis of his vision impairments and other disabilities that occurred as a result of a work-related

injury in 2003, Mr. Mallinen became a Medicare Part A beneficiary in 2006, and Part B beneficiary in 2007. He would like to receive his MSNs in bold, 24-point font. Neither CMS nor any of its contractors has ever informed him that MSNs are available in an accessible format.

55. In 2012 and 2013, Mr. Mallinen called CMS to request that all documents be sent to him in bold, 24-point font. A CMS representative with whom he spoke stated that CMS did not have a system in place to provide documents in that format.

56. As recently as October 17, 2015, Mr. Mallinen received an MSN for Part B. The MSN was in regular, 12-point font.

57. On that same date, Mr. Mallinen received a Medicare Appeal Decision, denying his claim for coverage of a Glucose Test or Reagent Strips. The decision notified Mr. Mallinen that he had 180 days from receiving the letter to request reconsideration to the Qualified Independent Contractor. This decision letter is in regular, 12-point font.

58. Mr. Mallinen's Part D plan is administered by Anthem Blue Cross. Anthem Blue Cross has never sent him any documents in bold, 24-point font, nor has it informed Mr. Mallinen of his right to receive Part D Evidence of Coverage notices or other documents in an accessible format. CMS has also failed to inform Mr. Mallinen that Part D documents or notices are available in an accessible format.

THE NATIONAL FEDERATION OF THE BLIND

59. The National Federation of the Blind has been and continues to be harmed by Defendant's discriminatory actions, as set forth herein, in two ways.

60. First, because the ultimate purpose of the National Federation of the Blind is the complete integration of the blind into society on a basis of equality, HHS's discriminatory treatment of blind Medicare recipients and applicants frustrates the NFB's organizational

mission. The NFB's objective includes the removal of legal, economic, and social discrimination. As part of its mission and to achieve these goals, the NFB has worked actively to ensure that the blind have an equal opportunity to access government programs and services by collaborating with federal agencies such as the United States Department of Education to ensure accessibility for the blind. The NFB has devoted extensive resources – resources that have been diverted from other important projects – to assisting federal and state government agencies, along with countless private entities, with identifying and correcting methods of communication (including websites and hard-copy documents) that are inaccessible to the blind. Indeed, before filing this lawsuit, the NFB devoted resources to making several unsuccessful overtures to HHS to work collaboratively to remedy the problems outlined in this complaint.

61. Second, the NFB is a membership organization and has many blind members, including Mr. Figueroa and Mr. Manners, who now receive or may be interested in receiving Medicare benefits and wish to access Medicare notices, communications, statements, publications, forms, and other pertinent information independently. HHS's discriminatory conduct harms many NFB members who are similarly situated.

COUNT I

VIOLATION OF SECTION 504 OF THE REHABILITATION ACT OF 1973

62. The foregoing paragraphs are each re-alleged and incorporated as if fully set forth herein.

63. Section 504 of the Rehabilitation Act of 1973 ("Section 504") provides that:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her 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 or activity conducted by any Executive agency[.]”

29 U.S.C. § 794 (as amended).

64. Mr. Figueroa, Mr. Manners, Mr. Mallinen, and members of the NFB are “individual[s] with a disability” as defined in 29 U.S.C. § 705(20) because each has a visual impairment that substantially limits one or more of his or her major life activities, including the major life activity of seeing.

65. As a result of being “individual[s] with a disability” as defined in 29 U.S.C. § 705(20), Mr. Figueroa, Mr. Manners, Mr. Mallinen, and members of the NFB are entitled to modifications and auxiliary aids and services that provide them equal access to the programs CMS administers.

66. Defendant HHS is an executive agency sufficient to invoke the coverage of Section 504.

67. Defendant HHS is bound by the regulations it has promulgated under Section 504 of the Rehabilitation Act, 45 C.F.R. Part 85.

68. These regulations require Defendant HHS to provide Plaintiffs with “auxiliary aids,” which are “services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities” that HHS conducts. 45 C.F.R. § 85.3. As defined by the regulations themselves, auxiliary aids that are “useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices.” *Id.* The regulations also require Defendant HHS to “take appropriate steps to ensure effective communication” and “furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity” to participate in its programs. 45 C.F.R. § 85.51. In addition, Defendant

HHS must “give primary consideration to the requests of the individual with handicaps” in determining the type of auxiliary aid it must provide. *Id.*

69. These regulations also state that “in providing any aid, benefit, or service,” Defendant HHS may not “through contractual, licensing, or other arrangements” deny individuals with disabilities “the opportunity to participate in or benefit from” Defendant HHS’s aids, benefits, or services or afford individuals with disabilities an opportunity to participate that “is not equal to that afforded others” or “not as effective in affording equal opportunity.” 45 C.F.R. § 85.21. Furthermore, the regulations prohibit Defendant HHS from “directly or through contractual or other arrangements” using “methods of administration” that discriminate against individuals with disabilities or “[d]efeate or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.” 45 C.F.R. § 85.21(b)(3)(ii).

70. As alleged herein, Defendant HHS has and continues to discriminate unlawfully against Mr. Figueroa, Mr. Manners, Mr. Mallinen, and many NFB members by failing to communicate with them in an accessible format, and by contracting with private health plans, drug plans, providers, and administrative contractors who fail to communicate with Plaintiffs in an accessible format. By refusing to communicate in formats that are accessible to blind persons, Defendant HHS and its contractors have created and continue to create a significant and unnecessary obstacle to Mr. Figueroa, Mr. Manners, Mr. Mallinen, and many NFB members’ participation in Medicare programs.

71. Examples of inaccessible communications include, but are not limited to: (1) Medicare notices, publications, and other correspondence sent to Plaintiffs in standard print or as image PDFs; and (2) the websites of CMS and its Medicare providers, which include forms that lack many required features necessary for online accessibility, such as tagged text that can be

read by a screen reader and form fields with descriptions, and that cannot be reviewed, filled out, signed, submitted, and saved electronically using screen access technology.

72. Mr. Figueroa, Mr. Manners, Mr. Mallinen, and many NFB members cannot comprehend or use critical information from Defendant HHS in a manner equal to that of sighted persons. As a direct consequence, they are constantly at greater risk of interruption to needed healthcare services and benefits, and have far less capacity to discover, correct, and appeal benefit errors.

73. Providing individual Medicare benefit statements, medical statements, and program information in formats accessible to Mr. Figueroa, Mr. Manners, Mr. Mallinen, and NFB members would not fundamentally alter Defendant HHS's programs or create an undue administrative or cost burden. Numerous governmental agencies and large commercial entities already provide individual account and benefits information to blind persons in similar accessible formats.

74. Defendant HHS's conduct constitutes an ongoing and continuous violation of the law. Unless restrained from doing so, Defendant will continue to so violate the law while making only superficial improvements. Defendant HHS's conduct has caused and will continue to cause Plaintiffs immediate and irreparable injury. Plaintiffs have no adequate remedy at law for the injuries they suffer and will continue to suffer. Thus, Plaintiffs are entitled to injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Declare that Defendant's failure to ensure that CMS and its Medicare contractors offer and provide Medicare information in accessible formats to blind applicants and beneficiaries of Medicare violates Section 504 of the Rehabilitation Act of 1973;

2. Declare that Defendant has a duty to provide equal and meaningful access (including website access) to all CMS information including, but not limited to, communications, forms, materials about individual Medicare benefits and obligations, and CMS Medicare publications about its programs and rules, in appropriately secure formats that are accessible to blind persons, including Braille, large print, electronic mail, data CD, audio recordings, and online statements;

3. Grant a permanent injunction, requiring Defendant, her successors in office, agents, assigns, representatives, employees, and all persons acting in concert therewith, to develop and implement a comprehensive Section 504 policy, including broad public notice and effective Section 504 compliance monitoring of its contractors, to provide equal and meaningful access (including website access) to all CMS information including, but not limited to, communications, forms, materials about individual Medicare benefits, and CMS Medicare publications about its programs and rules, in appropriately secure formats that are accessible to blind persons, including Braille, large print, electronic mail, data CD, audio recordings, and online statements;

4. Award Plaintiffs' reasonable attorneys' fees and costs, as provided by law; and Order such other and further relief as the Court deems just and proper.

Respectfully submitted,

PLAINTIFFS, NATIONAL FEDERATION OF THE BLIND,
JUAN FIGUEROA, DEREK MANNERS, and
MARTTI MALLINEN.

By their Attorneys,

/s/ Christine M. Netski

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* Application for admission *pro hac vice* forthcoming