PACIFIC ADA CENTER
DISABILITY ACCESSIBILITY IN HEALTH CARE: RECENT OCR CASES AND GUIDANCE
8/26/21
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>> LEWIS KRAUS: Welcome to the healthcare and the ADA inclusion of persons with disabilities Webinar Series. I am Lewis Kraus from the Pacific ADA Center, your moderator for this series. This series of webinars is brought to you by the Pacific ADA Center on behalf of the ADA National Network. The ADA National Network is made up of 10 regional centers that are federally funded to provide training, technical assistance and other information as needed on the Americans with Disabilities Act. You can reach your regional ADA Center by dialing 1-800-949-4232.

Realtime captioning is provided for this webinar. The caption screen can be accessed by choosing the CC icon in the meeting control toolbar. To toggle the meeting control bar on, press your alt key. As always in our sessions only the speakers will have audio. If you do not have sound capabilities on your computer or prefer to listen by phone, you can dial 1-669-900-9128, or 1-646-558-8656. And use the webinar ID of 864-8854-2838.

I also want to remind everyone that this webinar is being recorded and you will be able to access it on the ADAPresentations.org website in the archives section next week.

This Webinar Series is intended to share issues and promising practices in healthcare accessibility for people with disabilities. The series topics cover physical accessibility, effective communication, and reasonable modification of policy issues under the Americans with Disabilities Act of 1990, the ADA. Upcoming sessions are available at ADApresentations.org under the Schedule tab and then follow to healthcare. These monthly webinars occur on the fourth Thursday of the month at 2:30 Eastern, 1:30 Central, 12:30 Mountain, and 11:30 a.m. Pacific time. By being here, you are on the list to receive notices for future webinars in this series. Those notices go out two weeks before the next webinar and open that webinar to registration. You can follow along on the webinar platform of the slides, but if you are not using the webinar platform, you can download a copy of today's PowerPoint presentation at the healthcare schedule page at ADApresentations.org. At the conclusion of today's presentation, there will be an opportunity for everyone to ask questions. You may submit your questions using the chat area within the webinar platform. The speaker and I will address them at the end of the session, so feel free to submit them as they come to your mind during the presentation.

To submit your questions, you can open the chat area text box or press alt-H and enter your text in that chat area. If you are listening by phone and not logged into the webinar, you may ask your questions by emailing them to adatech@adapacific.org. If you experience any technical difficulties during the webinar, send a private chat

message to the host by typing in the chat window. You can also type your comment in using the keyboard, using alt H to access the chat box. You can also email us at adatech@adapacific.org with any technical problems you're having, or you can call us at 510-285-5600.

Today's ADA National Network Learning Session is titled "Disability Accessibility in Healthcare, What's New? – Recent OCR Cases and Guidance." The Office for Civil Rights, OCR of the Department of Health and Human Services enforces federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age, sex, religion, and the exercise of conscience. This seminar will focus on what HHS-OCR does to enforce those laws that protect the rights of individuals with disabilities to have an equal opportunity to participate in healthcare program activities and services. Today's speaker is Cathy Cushman. Cathy is an investigator at the U.S. Department of Health and Human Services Office for Civil Rights in the mid-Atlantic region. After graduating from the University of Connecticut school of law she clerked two years for the pro se law clerk at the U.S. district court for the district of Connecticut. She worked for the protection and advocacy program in Connecticut as well as Connecticut Legal Services focusing on representing individuals with disabilities in actions under the ADA, Section 504, and the IDEA, which is the Individuals with Disabilities Education Act. Cathy joined OCR in September 2020 where she investigates complaints and conducts compliance reviews to ensure compliance by covered entities with civil rights laws and HIPAA, insurance portability and accountability act. Cathy, I will now turn it over to you.

>> CATHY CUSHMAN: Great. Thank you so much, Lewis. Thank you for the introduction and the welcome. And thank you very much for inviting HHS OCR to participate again in your Webinar Series about healthcare and the ADA. It's really our pleasure to be a part of this series and to have the opportunity to share with you some of the things that OCR has been doing.
So, before we get started, if you don't mind, I have a couple of quick housekeeping matters I just wanted to explain. The first is that I don't typically read the slides verbatim unless folks prefer that I do. Instead I usually provide a summary of the content of the slide with some background or clarifying remarks. But if that doesn't work for you, please feel free to send a message in the chat box and I'm happy to adjust. It's not a problem. I also plan to move fairly quickly through the first 20 slides so that we can get to the new and recent guidance that we are eager to share with you, and so we can answer your questions and get your feedback. But if I don't provide enough information on the first couple of sections, please know that you can find all of this information on our website. Our address, the website address is at the end of the slides. And you can review the archive presentation from last year. We were here last year about the same time in August 2020 presenting some of the same information then. And I believe that's archived on the Pacific ADA Center website. And you can contact me with any questions. My information is at the end of the slides as well. There is only one presenter today, and I expect the presentation will move along fairly quickly. So we'll have plenty of time for questions at the end. And I really do encourage you to also share your experiences or trends that you are seeing, and any questions that you have

that you would like OCR to possibly address in the future in the form of guidance or technical assistance. And the last thing I just wanted to mention is that the information on these slides has been reviewed and approved by our headquarters. My contemporaneous remarks on the other hand have not been approved and they are really just remarks. They are not the official statements of the Office for Civil Rights or the Department of Health and human services. So having relieved myself of all accountability, why don't we move to Slide 2, please.

Slide 2 is the slide that explains what is the Office for Civil Rights. The Office for Civil Rights where I work is part of the United States Department of Health and Human Services. It is the entity that enforces civil rights laws for HHS, as we're commonly known, and enforces the HIPAA, privacy, security and breach notification rules. You may be very familiar with other civil rights enforcement operations of the federal government, especially the Department of Justice, for example, they have a Civil Rights Division and a Disability Rights Section within that division. In the Department of Education, there is also the Office for Civil Rights. And you may be aware, too, that in other agencies, such as the United States Department of Housing and Urban Development, also known as HUD, there's the office of fair housing and equal opportunity, and the United States Department of Agriculture, for example, there's also the office of the assistant secretary for civil rights, and they investigate -- these other offices also investigate allegations of discrimination in their programs. So there are a number of us in various places of the federal government, but our job is pretty much the same. We enforce the civil rights laws and the programs funded by those federal agencies.

Next slide, please. Slide 3 explains what we do on a day-to-day basis. So we investigate complaints, we review -- we conduct compliance reviews. If necessary we may engage in drafting formal resolution agreements, or we may have to take formal enforcement action. Audits is kind of an interesting one. That is really much more with respect to the work that we do in HIPAA to periodically audit covered entities and business associates for their compliance with the HIPAA rules. We also do outreach and we also do some policy development. Next slide, please.

This slide is a list of major laws that are enforced by OCR. These laws and their implementing regulations are implicated in the majority of OCR complaints and our enforcement activities. However, OCR enforces other nondiscrimination regulations and various nondiscrimination provisions of other laws. Most of these laws are probably familiar to you, so you may already be aware that title VI of the Civil Rights Act addresses allegations of discrimination based on race, color, national origin. Section 504 and Title II of the -- Section 504 of the Rehabilitation Act address allegations of discrimination based on disability. The Age Discrimination Act of 1975 addresses allegations of age. Title IX of the Education Amendments Act of 1972 addresses allegations based on sex in educational programs receiving money under Title IX. Section 1557 of the Affordable Care Act addresses allegations of all of the above. And as you probably are aware of the HIPAA privacy, security and breach notification rules, only pertains to the Health Insurance Portability and Accountability Act. So not civil rights allegations. Next slide, please.

On this slide, this is a fuller description of the three major disability rights laws that are enforced by OCR. We'll talk a little bit more about federal financial assistance in a minute, but in this particular slide I just wanted to point out that HHS OCR only enforces Title II of the ADA, which is a little different from what the DOJ does. They also have jurisdiction over both Title II and Title III. Next slide, please.

This slide is meant to in fact you and possibly remind you that HHS OCR investigates complaints alleging violations of the ADA's integration mandate. So this slide is entitled "The Olmstead Decision." The integration mandate is the central principle of the Olmstead decision. And in the 22 years since the Olmstead Decision, OCR's investigations of Olmstead complaints have had a positive impact in facilitating community integration of individuals with disabilities and helping individuals avoid unnecessary institutionalization. For more information on HHS OCR's ADA Olmstead enforcement activities, you can visit the Olmstead section of our website.

Next slide, please. On the next two or three slides I think it is, we would like you to know a little bit more about health disparities and civil rights. So that's what the title is of this slide. In particular health disparities can rise to the level of discrimination and they can be investigated under OCR's legal authorities. Health disparities occur when protected classes of individuals experience differences or barriers to healthcare. Next slide, please. So, this slide talks about information that -- research has been found to show that some populations in particular are disproportionally affected by barriers. For more information about the research and the studies that have been conducted, including accessing the data from that research, I recommend that you visit the websites of the Office of Minority Health, known as OMH, and the National Institute on Minority Health and Health Disparities also known as NIMHD. And there you can find really thorough and useful information about the research that has been done about health disparities. Next slide, please.

On this slide, we provide you with some examples of what discrimination may look like when health disparities exist. So it may look like unequal access to healthcare services. It may look like institutionalized forms of discrimination. Facially-neutral policies that result in adverse impact on certain groups. And in terms of a real-life example, I think it's always helpful to kind of think of an example that maybe we can all relate to. So I was thinking when I looked at this slide of back when the pandemic and the public health emergency sort of began, back in March and April of 2020, and there was widespread testing going on, as you may recall, or there were attempts to do widespread testing for COVID. Feel free, of course, to share what happened in your state, but I can tell you in my state of Connecticut, that we had some bumps in the road initially when we were talking about how to do this widespread testing. The first testing sites that popped up were primarily sponsored by hospitals. They were all drive-thru sites. They were predominantly located away from inner city locations. They weren't close to bus lines or public transportation. And they frequently required things like only one person per car or some required that the individual being tested needed to exit the car. Others required that the person being tested had to stay in the car. So you can probably already see that there were some health disparities or inequities that kind of became apparently with these early testing sites. For one, they did not allow walk-ups, and they were not near public transportation lines. So that really had the effect of excluding many people with disabilities who don't drive and who rely on public

transportation. And because most of the testing sites were located in or close to suburbs, a lot of the inner city communities with high percentages of people of color had unequal access to the testing sites. And then the method of administration that required one person per car or required people to exit cars independently had a really negative impact on people with disabilities who live in community living arrangements, for example, who typically will travel with paid staff, and may use wheelchairs, and need assistance exiting or entering the vehicle. So that was one example that came to my mind of a healthcare disparity that arose from the early attempts to administer testing. Next slide, please.

Now we're going to move on to how OCR establishes civil rights jurisdiction. Next slide, please. OCR civil rights jurisdiction -- again, this is civil rights jurisdiction, not pertaining to HIPAA -- is dependent upon one of three things. So either the program or the activity has to receive FFA, which is federal financial assistance from HHS, or it may be a federal program conducted by HHS, or it may be a public entity under Title II of the ADA. Next slide, please. This slide provides you with the definition of federal financial assistance and the statutory site. Next slide, please.
This slide provides you with examples of federal financial assistance to the recipients in the OCR context. So this provides a good overview of the many types of programs which receive federal financial assistance, and then consequently the programs over which HHS OCR has jurisdiction. So the top three are ones that you probably can already imagine healthcare providers, hospitals and nursing homes, Medicare Advantage Plans and prescription drug plans as well. But I did want to highlight on this slide that you may not have been aware that HHS provides federal financial assistance to entities that run programs such as Head Start or TANF, which is the Temporary Assistance for Needy Families, or to the programs typically run by child and welfare services, such as adoption and foster care agencies. And that funding for Head Start, for TANF, for child welfare, is typically administered through ACF, which is Administration for Children and Families. ACF is a division of HHS. And that's why HHS has jurisdiction over those programs. And I wanted to just pause for a moment and maybe think through a little bit about something like a program under TANF and how that might affect a person with a disability. So if, for example, a person with a disability applies for temporary cash assistance, there's typically a requirement that they participate in some sort of a work activity program in order to receive cash assistance. And as a person with a disability, they may be exempt altogether from the work activity requirement, or they may be assigned to a work activity vendor, which is usually a private agency contracted by the local or the county or the state social services department. So sometimes what happens is that the person with a disability may contact the vendor they have been assigned to and explain that they need a reasonable accommodation in order to participate in the work activity that the vendor requires. For example, some vendors say that you must report to their program every day from 9:00 to 5:00 Monday through Friday and you must participate for 40 hours a week in order to make the work activity requirements and get cash assistance. But a person with a disability may request an accommodation or may need accommodation, for example, maybe they need to take off Monday mornings because they have longstanding therapy appointments every Monday morning from 9:00 till noon. If the vendor says no, that

kind of accommodation cannot be granted and you cannot deviate from their program as it's established, then they have the authority to just close the file and send it back to the social services department and report that the individual has refused. And at that point cash assistance is usually terminated.
So that can present a pretty dire circumstance for some people. And that's the kind of complaint that could be filed with HHS OCR because that program receives federal financial assistance from HHS. Next slide, please.
This slide gives information about filing complaints. So any person or organization may file a complaint by mail or electronically. What we really like to emphasize on this slide is complaints should be filed within 180 days of when the complainant knew or should have known of the act or omission. Next slide, please. This slide talks about complaint process. Generally OCR under attempts to achieve compliance through voluntary measures. So typically we start with an informal review. We try to resolve without formal investigation. But if that can't happen, then we actually begin an investigation. And if an investigation is conducted, we will notify the parties of the result of the investigation. And where the evidence indicates that the covered entity was not in compliance with the applicable regulation or law, OCR will attempt to resolve this case by obtaining corrective action, sometimes through a voluntary agreement, or through corrective action letter with the covered entity. But if the covered entity does not take voluntary action to resolve the matter in a way that is satisfactory, then OCR will issue a letter of findings and that describes how the covered entity is not in compliance, and it will identify the next steps, which may include a referral to the Department of Justice for enforcement through litigation. Or ultimately it could include steps to terminate federal financial assistance to the covered entity. And for more information about OCR's enforcement activities, again, you can visit our website, and you can find it there. Next slide, please.
On this slide we wanted to talk briefly about types of discrimination. So when you're considering filing a complaint or before rolling out a new policy or procedure, it's useful to think that there are generally two types of discrimination that may serve as a basis for a complaint. In the first type of discrimination, there would be direct evidence of intentional discrimination, which is admittedly rare, but it does happen. An example of this type of discrimination might be where an employer may not choose an employee for promotion because the manager's impression about that employee is that the manager does not understand the applicant's language or how he speaks. And that instance the employee is considered to be a person with limited English proficiency, and that courts have found is direct evidence of discrimination. With respect to disparate impact discrimination, the second type listed here on this slide, an example in the healthcare world might be, for example, if a hospital closes in a particular community. That closure could disproportionally and adversely affect or impact individuals of a particular race, color or national origin. Next slide, please.
On this slide, this slide basically lists the conduct that's prohibited by federal financial assistance recipients. This comes directly from regulations. So if you are receiving FFA from HHS, you are not to deny an individual a service or an aid or a benefit or provide a benefit which is different or provided in a different manner, and you're not to subject an individual to segregation or separate treatment or restrict an individual in the enjoyment of benefits and privileges, or to treat an individual differently in determining

eligibility, and lastly, you're not to deny a person an opportunity to participate on a planning board. Next slide, please.

On this slide we talk about the fact that there are several regulations that OCR enforces that contain provisions prohibiting retaliation, including Title VI Section 504, Title IX, the Age Discrimination Act, and Title II of the ADA as well as Section 1557. So examples of this in healthcare, believe it or not, I've only been working at OCR for just under a year, but I already have investigated three complaints that alleged retaliation when a patient would file a complaint with HHS OCR and then they would get what is known as a disconnect letter from their doctor or the health clinic shortly after the complaint was filed, and this disconnect letter would let the patient know that their patient-physician relationship had terminated. So that's not always evidence of retaliation, but it certainly is something that HHS OCR would look at given the sequencing and timing of the act of the covered entity. Next slide, please.

So this slide is called "What Does an OCR Investigator Look for?" at this point in the process OCR would have decided to open an investigation, and they typically will send out a request for data, and they require written responses from the covered entity. And it's usually within a specific time period. So these are some of the things that OCR typically asks for when they send out a request for data. They look at policies, nondiscrimination policies, notices of the policies. They look at procedure, such as a grievance procedure. Next slide, please.

OCR also looks for policies and procedures to provide auxiliary aids and services. OCR sometimes requests information about whether or not facilities are physically accessible. And they certainly look for a no retaliation policy confirmation that a 504 or ADA coordinator has been identified. And one of the big things that we always look for is documentation of civil rights training for staff. Next slide, please.

Okay. So I did breeze through the first 20 slides pretty quickly. Again, if you have any questions, I'm happy to answer them or provide you with additional information.

This section we put together really focusing on updating information since August of 2020 when OCR last presented to all of you in this Webinar Series. So for guidance or complaint resolutions that occurred prior to August 2020, you can please see the OCR website. If you go to our website and you click on the newsroom button, that is a good place to start for recent information. Next slide, please.

So this slide talks about new resources from OCR on the topic of long COVID as a disability. This guidance was recently released just last month on July 26th, and it's an initiative between HHS OCR and DOJ. We're very excited to talk you about this because it is brand new, and it comes with a lot of good resources to help us all get up to speed. So it's important to note that the onset that long COVID is considered to be a physical or mental impairment by the CDC, which is the Centers for Disease Control and Prevention. If you go to the second link on the slide, it takes you right to the CDC website where there's an informative overview of what long COVID is, including the symptoms that may be involved and the effects of long COVID. Now, from a civil rights perspective, because long COVID is considered to be a physical or mental impairment, that means that it may meet the definition of disability under the ADA. Because remember that there is no all-inclusive list of impairments under the ADA or Section 504 and 1557. So there's no list that you have to fit into in order to be considered to have a disability. Rather the definition simply states disability means a physical or mental

impairment that substantially limits one or more major life activities. So is long COVID always going to meet the definition of disability? No. There still needs to be an individualized assessment in order to determine if a particular person's long COVID condition does substantially limit a major life activity. But if it was, then that individual may need reasonable modifications to policies and procedures and practices, and that person is entitled to all of the protections afforded under the ADA 504 and 1557. Next slide, please.

On this slide we wanted to bring to your attention two places you can go to get additional information about long COVID and resources for people who have long COVID. I also just wanted to go a little further in describing the guidance that was issued and just to let you know that it addresses when a person has an actual disability, and that is the first prong of the definition of disability. The definition of disability contained in the ADA and 504 actually has three prongs. So this guidance does not address when a person may have a record of a disability, which is the second prong, and it does not address when a person may be regarded as having a disability, which is the third prong of the definition. This policy also does not address employment questions regarding reasonable accommodations in the workplace. So for that kind of guidance, you would need to go to the EEOC website. And I believe that they do have some good information there as well about long COVID. This new guidance also does not address other definitions of disability found in other federal laws, such as benefits programs under Social Security. So don't rely on this guidance if you're trying to determine whether or not you're eligible as a person with a disability for Social Security benefits. And I did want to mention that there should be one other link on this slide. I apologize it's not there, but there is another great resource that was issued on long COVID and it's a directory of resources that was developed by the ACL, the Administration for Community Living. And it also includes this journey map, which was very helpful. And that resource is intended to help people with long COVID identify programs to help address their needs. I'm going to -- I actually have the link right here in my notes, so I'm going to go ahead and try to send that over to Lewis so he can post it.

Next slide, please.

This information is new resources from OCR on access to COVID vaccinations for people with disabilities. Now, this information was actually previously presented in this Webinar Series by HHS OCR. I think it was back on April 22nd, 2021. So you can get a full discussion of that information in the archives, but we do have the links here and I'm happy to just mention that although vaccine access issues might not be quite as alarming as they were in the beginning of the vaccine roll-out, these materials are still great to consult as some parts of the country are experiencing as we know a fourth wave of infection spread and because of the recently announced proposed rollout of booster shots. These materials are still relevant and could be very helpful for you. In particular they help provide providers and consumers with a number of scenarios, kind of talking through a number of scenarios, including how to prioritize groups of people for vaccines, making sure that decisions are not based on social stigma or stereotypes about disability. And it also reminds us that modifications to methods of administration may be needed, such as helping an individual complete paperwork or providing additional social distancing for those who are immunocompromised. And these

resources also address accessibility awareness issues, such as providing appropriate communication supports for persons with communication needs, either in person or online when requiring registration for a vaccination appointment. And lastly there's also good information for assessing the physical sites and locations for delivering vaccinations. Next slide, please. On this slide, it's a continuation of the vaccination information. And it's a bit of a shout-out to a brand-new resource. Which is call-in service that operates from 9:00 in the morning until 8:00 at night Monday through Friday. The number is 888-677-1199. And this is another excellent resource from ACL, the Administration for Community Living. And it's designed to help people find local vaccination sites and to assist them in scheduling appointments. But it also connects callers to local services, such as accessible transportation to help them overcome those kinds of barriers to getting the vaccine. Next slide, please.

These couple of slides are going to talk a little bit about the new resources from OCR on the issue of support persons for patients with disabilities during the COVID-19 pandemic. These slides kind of bring you up to date on the work that OCR has been doing on this issue of support persons. So as you may remember, OCR issued a bulletin way back in March of 2020 reminding everybody that the laws prohibiting disability discrimination do remain in effect even during a public health emergency. And OCR took that action because they began receiving complaints and reports of people with disabilities being treated discriminatorily during that first wave of infection spread. This issue of support persons was one of the issues brought to OCR's attention. Back in June of 2020, OCR completed an early complaint resolution process with the state of Connecticut and issued an announcement about a resolution that produced an order from the Connecticut Department of Public Health which provided clear guidance to Connecticut healthcare facilities about the need to permit support persons into hospitals and other healthcare facilities when a support person was needed for a patient with underlying disabilities due to the specifics of that patient's disability. Next slide, please.

Then February 2021, OCR announced a resolution with Med Star Health. It's a very large healthcare system in D.C., Maryland and Virginia primarily, and this resolution resulted in the revision of Med Star's policy. So it would clearly distinguish between visitors versus support persons. And it also would recognize Med Star's ongoing responsibility to provide auxiliary aids, supports and services to all patients with disabilities. So this area of support persons has been somewhat of a dynamic evolving area, which is true for a lot of the issues associated with the pandemic. However, the key concepts to take away from these resolutions is patients with disabilities may need reasonable accommodations to policies, such as these restricted visitor policies, because without the modifications, they do not have the same opportunities to access their healthcare as patients without disabilities. So support persons are one type of a modification that a patient may need, but there may be others or there may be ways to provide similar supports in lieu of a support person. And that determination is made based on an individualized assessment of the patient, and really understanding the needs related to that patient's underlying disability. And understandably we've had many, many conversations with hospital personnel about this topic, and we understand this PLO success can be very difficult during a pub -- this process can be very difficult during a public health emergency when there are a lot of stressors. But typically if there can be a dialogue with the patient and their family member or a paid staff member at the

time of admission of an individual or even at the time of the scheduling of the appointment, then very often it's possible to identify what the needs are and putted in place the right supports. And that may include a support person, 24 hours a day, 7 days a week if necessary. Next slide, please.

These next couple slides are going to talk about the resources from OCR on Crisis Standards of Care. And these also provide somewhat of an update on OCR's recent activity in this area. And like the issue of support persons, OCR focused on this topic quite a bit since the early days of the public health emergency. For over a year OCR has been working with a number of states or locals providing technical assistance to ensure there are nondiscrimination principles incorporated in Crisis Standards of Care plans and practices. Again, I know this topic also has been addressed pretty thoroughly by other presenters in this Webinar Series, I think back in March of this year, 2021, there was a fantastic presentation about this. And those presenters explained what Crisis Standards of Care are far better than I could. But in a nutshell, I will try to summarize this for the folks who are not as familiar.

To say that Crisis Standards of Care are a deviation from the usual standard of care that is provided to patients in hospitals, Crisis Standards of Care are meant to be utilized in emergencies, such as catastrophic event like a bombing or destructive weather event like Hurricane Katrina or a public health emergency like COVID-19. And due to the impact and scale of those events, healthcare institutions have to deviate from usual standard of care they provide because suddenly they're faced with scarcity, scarcity of resources, and there's a need to start raging. So these Crisis Standards of Care are supposed to ensure the equitable distribution of those scarce resources during the crisis. However, sometimes Crisis Standards of Care can actually exacerbate existing inequities in healthcare. When they contain biases or when they rely on stereotypes of characteristics of people or conditions that people have. So try to keep in mind that when this public health emergency started, many public health authorities or hospitals had very old Crisis Standards of Care or they had none at all. So when that first big concern arose, I'm sure you all remember, about the availability of ventilators at the start of the public health emergency, the medical providers and the patients and the advocates started asking, well, how are we going to make those tough decisions about who gets a ventilator and who doesn't? Crisis Standards of Care are supposed to help guide those decisions. So there was a bit of a scramble early on in the pandemic for public health authorities and hospitals to either update their old documents or to develop new documents and to identify a nondiscrimination principles to be included in those new standards. And also to really develop the best practices that are needed to operationalize those nondiscrimination principles. So that is really what OCR has been focusing on for the last year and a half in nine different locations across the country. Next slide, please. On this slide we have a listing of the nine standard of care guidelines that have been revised after the provision of technical assistance from OCR, with Arizona being the most recent. That was completed in May of 2021. So if you are a healthcare provider or a public health authority, I do really encourage you to review these various guidelines. This is a fairly technical area and does require quite a bit of training of staff to make sure that everyone is on the same page when it comes to the principles of nondiscrimination. And even if you end up with just draft guidance, it's still

worth going through the process and engaging the medical community and raising awareness.
Next slide, please. This slide talks about a new video series on civil rights protections for individuals in recovery from opioid use. This information builds off the case that OCR discussed with you all last year involving a family from West Virginia. And this was a case where a couple, a husband and wife, filed a complaint against the West Virginia department that oversees Child Protective Services, because that department refused to consider them as a family or a kinship placement for two children who were related to them. I think it was a niece and a nephew. And the reason that the couple was not found suitable for kinship placement was because one of the adults was receiving medication assisted treatment, which is known as MAT, and the individual was taking MAT for an Opioid Use Disorder. So the OCR investigation substantiated that West Virginia was not in compliance with 504 and Title II of the ADA and a voluntary resolution was entered into. And this video series came about subsequently as a partnership between OCR and the National Center on Substance Abuse and Child Welfare. And it's a very comprehensive thorough video series, including webinars, a motion graphic -- I'm not even sure if I know what that is -- and two animated videos.
Next slide, please.
These two slides talk about a new resolution agreement that was reached between HHS OCR and the United States attorney's office Department of Justice with the Great Lakes surgical associates, which is a bariatric practice in Michigan. This came about when OCR and DOJ became aware of a patient who was allegedly refused services by the bariatric practice in Michigan due to the patient's HIV status.
This is an example where HHS OCR and DOJ used their various jurisdictions to review the conduct of the Great Lakes surgical associates under a number of statutes. OCR reviewed the case under Section 504 and 1557 and DOJ investigated under Title III, which covers public accommodations, because the bariatric practice was private and considered to be a public accommodation. Next slide, please.
This slide just lets you know that the voluntary resolution agreement required the bariatric practice to take corrective actions and to compensate the patient in the amount of $37,000, and for more information and a copy of that agreement, you can just go to that website. Next slide, please.
These next two slides focus on child welfare cases that have been addressed by OCR. I don't know if this is really a proper kind of case to talk in depth about on a Webinar Series about healthcare and the ADA, but we did want to share these resolutions with you and to point out these are cases where it's another example of OCR's ability to investigate another type of recipient of federal financial assistance. So both of these cases, this one here involving the Massachusetts Department of Children and Families, and the next slide talks a little bit about the New Jersey Department of Children and Families. Both of these cases involve the issue of parents with disabilities needing reasonable accommodations in the programs and the services that child welfare agencies typically require for reunification, for example, or the receipt of General Protective Services.
Next slide, please.
And this slide talks about the New Jersey DCF case. This was not a case where settlement agreement was reached. Instead OCR provided technical assistance, but

you can still find out information about it if you go to that link. That is the end of our recent guidance and new resolution agreements, but I did want to give one more quick update. I wanted to share with you a new resolution. It was a voluntary resolution agreement that was reached in the New England region involving the Genesis Healthcare System. OCR and DOJ worked together to reach an agreement with 12 skilled nursing facilities in Rhode Island and Massachusetts that are operated by Genesis, to resolve allegations that those facilities were denying admission to prospective consumers who were prescribed an FDA-approved medical treatment for Opioid Use Disorder. So under that voluntary resolution agreement, Genesis agreed to take corrective actions and pay a civil penalty of $60,000, which most of it would be excused after they had completed their corrective actions. So for more information and a copy of that agreement, you can certainly go to the OCR website and click on the newsroom and it's the top story listed there, just came out in August. And also I will try to put that link also in the chat room. Next slide, please. Okay, so I think we're ready to start answering questions if people have some.

>> LEWIS KRAUS: Okay, Cathy, thank you so much. That was a tremendous overview of everything involved in HHS OCR. We have a good number of questions to work our way through. So let's begin. And for the first question, I'm going to ask that the slides go back to number 19. Because the question was from somebody: Why is Medicare Part B not included on this slide? This is the examples of FFA recipients in the OCR context.

>> CATHY CUSHMAN: That is a good question. And the answer is that that particular -- I believe the answer is that that particular program does not receive direct financial assistance from HHS. I'm happy to follow up on that, though, and correct myself if I'm wrong, but that's my understanding.

>> LEWIS KRAUS: All right. You can scroll back to the questions and answers slide now. The next question is: How can an MD continue caring for a person who files against them? It seems the disconnect protects both the patient and the provider.

>> CATHY CUSHMAN: That's a great question. And I understand that certainly there's a sense of whether or not the relationship has broken down and there's no longer a sense of trust between the doctor and the patient, but it also puts that patient in a situation where they're now being denied a service. They're also being treated differently, because all they did was they exercised their rights. They're entitled to file a complaint if they have a concern about the way they're being treated. So I don't know if I have an easy answer or an easy solution for that situation but it probably makes sense that the doctor and the patient would have to have a conversation and talk about whether or not there's trust and there's the ability to move forward. And as I said, you know, the patient has that right. It's a protected right. So they shouldn't be treated differently. They shouldn't be cut off necessarily.

>> LEWIS KRAUS: All right, the next question: Hearing loss can be mild to profound. Is it considered a disability? And do you have examples of discrimination against

people with hearing loss? Now, before you answer, Cathy, I do want to say, this is a kind of a question that is very appropriate to ask the ADA Center's technical assistance lines. And you can contact them at 1-800-949-4232. And so, Cathy, you can answer if you would like or we can have the person just call the 800 line.

>> CATHY CUSHMAN: Well, I'm happy to throw in my opinion, as always. You know, my initial thought on that was to always go back to the definition of disability, which is that it's a physical or mental impairment that substantially limits a major life activity. So hearing loss or severe hearing loss could very well qualify as a disability under the definition, in which case then the individual would be entitled to auxiliary aids and services and other supports and protections under the ADA and 504 and 1557.

>> LEWIS KRAUS: Great. And, you know, I would say, just to add to that, about the part that the person is asking about, examples of discrimination against people with hearing loss, that may fall more under kinds of things like effective communication that doesn't happen in the patient relationship with the facility, so that might be an example of kinds of discrimination.

>> CATHY CUSHMAN: Exactly. Thank you, Lewis. I didn't really address that part of the question. And, actually, there have been many investigations that have been conducted by HHS OCR, as well as the Department of Justice, and both groups have done pretty extensive work in the field of providing technical assistance to hospitals in particular and medical providers on the issue of exactly what Lewis said, to provide those auxiliary aids and services to ensure effective communication for people with hearing loss or who are hard of hearing. So definitely check out our websites and as Lewis said, check out the ADA National Network for examples, but I think you will find plenty of resources.

>> LEWIS KRAUS: Right. And also the DOJ barrier-free healthcare initiative, you can just search on that on Google and you will find that. And many of cases listed there are those cases.
Next question. It's a similar one. I just want to tell the person who wrote it that this is going to be a similar kind of answer. Your question is: Based on the definition of disability provided, would essentially any long-term effects of illnesses fall under ADA protection, breathing difficulties due to CHF, age-related mobility issues, etc.? Again, this is a kind of a question that you can absolutely ask our ADA technical assistance, and I think you can apply what Cathy just said, but if you want to add to that, that's fine.

>> CATHY CUSHMAN: I totally agree with what you said, Lewis. And I realize -- I think we all realize that with this identification of long COVID as a new physical or mental impairment, there are going to be a lot of conversations and discussion about that issue, when you have long-term effects from a disease or an illness, and what does that really mean in terms of meeting the definition of disability. Again, there are three steps to it. It has to be recognized as an impairment. It has to substantially limit a major life activity, typically those kinds of symptoms that you describe are considered to be an impairment

that substantially limit the activity of breathing. So probably it's going to be covered. But every case is assessed individually.

>> LEWIS KRAUS: All right, the next question... when should you file with DOJ rather than HHS? Both have jurisdiction over the issue.

>> CATHY CUSHMAN: That's a good question. You can file with both. You can file with DOJ, and your complaint may be referred over to HHS OCR. Or you can file with HHS OCR initially and solely if you choose. I think they're probably -- there are probably some differences in the way that the cases are processed. Sometimes there are different priorities within each agency. So you may want to see if you can find out what some of the cases are that are being moved along quickly in a particular office. And you may want to be aware of the remedies that you can receive from each office as well, each agency. So, for example, with HHS when we substantiate that there may be non-compliance with a civil rights law, we are typically looking for voluntary resolution, corrective action, and our big enforcement would be possibly the loss of federal financial assistance for that covered entity with some investigations that are conducted by the Department of Justice. They have been successful in receiving some monetary compensation for the complainants, and they also have the ability to take legal enforcement action. But as I mentioned earlier, some of the cases that we handle at HHS OCR also go towards enforcement action with the Department of Justice. So a couple different things to consider, but you can file any place that you want.

>> LEWIS KRAUS: All right, on one of your earlier slides you had a phrase that someone is asking about, which is what is meant by "facially neutral"?

>> CATHY CUSHMAN: Facially neutral. That's a good question. So that might be an instance where somebody -- I'm trying to think of something more specific so I don't use such big terms. But, for example, when I was talking about in the context of health disparity and I was talking about how those initial testing sites were developed in the very beginning of the public health emergency, nobody thought that they were intentionally discriminatory, the way they were set up or where they were placed. People thought it was fairly neutral, the way sites were located. So it was on its face neutral, in the way that that program was initiated. And that's what is meant by facially neutral. It looked okay when it started but ended up having a discriminatory impact for the reasons we talked about earlier.

>> LEWIS KRAUS: Great. Next question: On January 15th, 2021, OCR issued a news statement, OCR seeks information on addressing disability discrimination in healthcare and child welfare contexts regarding suicide prevention and treatment programs, including around organ transplant, suicide prevention, etc. However, it appeared to never actually open this docket item for comment at the URL provided when the RDI or by searching by docket number. Can you comment on this?

>> CATHY CUSHMAN: No. Sorry. I am not aware of that announcement. I'm just making a note to myself, January 15th, 2021. I apologize, I'm not aware of that request for comments, but I'm happy to look into it and then provide that information to Lewis. Do you have an opportunity or an ability to provide that additional information?

>> LEWIS KRAUS: Sure. I mean, we can either post it on the website if you would like or if you would like, the person who asked that, Rowan, you can send your information in the chat to Cathy and Cathy can maybe reply to you directly. Will that work for you, Cathy?

>> CATHY CUSHMAN: Absolutely. And I believe my direct contact information is at the end of the slide deck. So, yeah, feel free to reach out to me directly and I'm happy to follow up on that question.

>> LEWIS KRAUS: Good idea. Next question. There's Cathy's contact information. Next question: Is it better to file complaints by numerous individual incidents of discrimination by a healthcare entity or one single complaint that details all individual incidents, and should OCR complaints be submitted with all relevant medical records, etc., or should the initial complaint explanation be kept brief?

>> CATHY CUSHMAN: Good questions. It's probably best to go ahead and file the individual complaints instead of just the one. It certainly provides us with information about possibility a systemic or larger problem. And then with respect to the type of documentation that is required, generally the more that documentation you can provide, the more detailed information, the better for us, so that we can really suss through carefully and know what to ask for as follow-up questions in the event that the investigation is opened and we reach out to the covered entity. I'm not sure if I remember the entire question. You certainly don't need to provide medical records per se, especially if they're of a sensitive nature. We don't necessarily need the medical records, but I need documentation of actions that have been taken by a covered entity that were adverse to you, to the complainant. Those are always helpful to have. Dates are always important. So that kind of information would be useful to have upfront.

>> LEWIS KRAUS: Next question: Is there a plan or system for keeping a person filing a complaint with HHS OCR informed of the progress of that complaint as it works its way through the system?

>> CATHY CUSHMAN: I'm sorry, Lewis, could you repeat that one more time? I was looking at something in the chat box.

>> LEWIS KRAUS: Is there a plan or system for keeping a person filing a complaint with HHS OCR informed of the progress of that complaint as its works its way through the system?

>> CATHY CUSHMAN: There is, yes, thank you for asking that. The procedure that we follow at OCR is that the investigator that is assigned to the complaint is the point of

contact for the complainant. So that person can be contacted at any time and you can certainly ask the investigator for the status of the case or the investigation at any time. I'll give you a quick sense of how things proceed in the office, depending on whether or not certain cases are identified as priority or not may mean that they get moved along a little bit more quickly. Typically what the office tries to do is to respond within a few weeks of a complaint being filed and assigned to an investigator, so that the complainant knows that the case has been assigned to an investigator, and then sort of depending on the path of that case, it may go to a full investigation, which we had talked about earlier, that's when OCR would send out something called the data request. And if a data request is sent out to the covered entity, then that entity usually has 30 days to respond. Sometimes it's shorter. Sometimes they are allowed to have additional time to respond. And then after that there is usually a period of time that is required for review of the information. And then a decision is typically made about whether or not to find that there has been compliance with the civil rights laws, or HIPAA, or sometimes there's a need for additional information. So that's the way cases sort of wind their way through. Sometimes they can be resolved fairly quickly. Sometimes they can take several months to a year.

>> LEWIS KRAUS: All right, just in response to many of you who have written in about the archive and the slides, the slides are available. Right now at ADApresentations.org in the Schedule section of healthcare. As of tomorrow they will move over to the archive section, and as of next week the archive will include the recording of this as well as the transcript. So just so you know that. Next question: Were there any trends you noticed for facilities that needed to update their Crisis Standards of Care. And before you answer that one, Cathy, I'm going to say, if you are particularly interested in the Crisis Standards of Care, we had an entire webinar about that in our Webinar Series and go to ADApresentations.org and the Archive, and you can look that up. I believe it was in around March of this year.

>> CATHY CUSHMAN: So the question was were there trends when the crisis centers of care were start -- Crisis Standards of Care were starting to be reviewed, correct?

>> LEWIS KRAUS: Yes.

>> CATHY CUSHMAN: I would say there were trends. I would say that the trends were, as I mentioned earlier, somewhat old. They did, unfortunately, contain biases and notions of quality of life that were outdated, that were clearly nondiscriminatory. There were some Crisis Standards of Care that, in fact, referred to particular diagnoses, such as intellectual disability, developmental disability, and indicated that it was appropriate to rate a patient with intellectual disability lower in this rating scale that is often used to ration resources. So that was, I think, surprising and, of course, disheartening to see that those were actually in current and, you know, actively used Crisis Standards of Care in some parts of the country. So if there was a trend, it was probably the trend toward needing to update, needing to modernize, needing to incorporate clear principles of nondiscrimination, and then trying to figure out how to operationalize those. And like I said before, it's somewhat technical. There are formulas that are used where patients

are needing -- unfortunately. It's hard to even think of in terms of how to make these decisions, but there is a process for rating a patient and whether or not the patient's needs would qualify that person for one of the scarce resources. So there was a need to update a rating system.

>> LEWIS KRAUS: All right. Did you have more?

>> CATHY CUSHMAN: No, I think that was it. Thank you, Lewis.

>> LEWIS KRAUS: Next question. How much of an influence does a victim's perception of discrimination by the perpetrator play in an investigation in reaching a resolution?

>> CATHY CUSHMAN: How much of an influence... sorry, say that one more time.

>> LEWIS KRAUS: How much of an influence does a victim's perception of discrimination by the perpetrator play in an investigation in reaching a resolution?

>> CATHY CUSHMAN: Hmm... wow, that's a very insightful question. It has to play a part, clearly, right? Because sometimes, as we talked about earlier, there's not direct evidence of discrimination. Right? It's pretty rare that somebody is going to say something that clearly shows their intent. So it does play a part. When we receive complaints of discrimination and we follow up with the complainant, we always -- the investigators always ask, please help me understand. Please help me understand why you think that this person's action was motivated by bias, please help me understand why you think that there was discrimination based on disability or race or age or sex. And sometimes it really does include that perception. And so I think it's a great question and I think I would encourage people to try to explain exactly why they feel that way.

>> LEWIS KRAUS: Thank you. The next question: As a future physical therapist, where can I look for resources to ensure my location of work is adhering to the correct standards?

>> CATHY CUSHMAN: Hmm... so standards, I'm going to guess might be something like Crisis Standards of Care, or in a broader sense, if you're a physical therapist and you want to work for a place that you feel is respectful and nondiscriminatory and has thought that through, then maybe the first place to start is really with the prospective employer and to research what kind of nondiscriminatory policies they have in place. There is information and there are resources on the HHS OCR website that talk specifically about nondiscrimination policies, and I believe there are some templates available, so you can see what a good one would look like. I would also suggest DOJ would probably have the same kind of information. So look to see what good nondiscrimination policies should look like, make sure there's a grievance procedure in place. And those might be the good first steps to take to determine whether or not this entity has sort of the steps -- has gone through the steps that you're interested in.

>> LEWIS KRAUS: Good. The next question: Does a supervisor owner have a duty to disclose an employee's HIV status with other team members?

>> CATHY CUSHMAN: Have a duty to disclose? No. I'm not sure if I totally understand what the question is. And this is an employment context, you think?

>> LEWIS KRAUS: It looks like it. I would say for this questioner, do talk to the ADA National Network phone line technical assistance about this. They will be able to guide you to the answer about this. They will be able to answer the questions that will tease out what more you're actually looking for there.
Next question: How can a hospital prove a patient, quote, does not trust their doctor if they make a complaint? When patients may have a psychiatric disability, such as PTSD resulting from mistreatment from medical professionals, at least a chronic lack of trust, how does this factor in to ensuring this patient isn't discriminated against if they express a complaint or a concern?

>> CATHY CUSHMAN: Okay. That's a tough question. And I don't -- I understand exactly what the sense is around that. That a patient might just due to their disability, might manifest certain symptoms of non-trust. And so what does the provider do in that situation if the trust has actually broken down? I think I'm understanding that question correctly. And, I mean, again, I can't give legal advice with respect to particular situations, however, it seems there's an opportunity always to have a conversation to try to dialogue with the individual to determine the needs of that individual and to try to accommodate those needs as best you can. So if lack of trust between the patient and the physician is leading to a breakdown of the relationship, is there a way to address that deterioration or the breakdown of the relationship and the context of that person's disability? If that's part of the person's disability, then that needs to be treated and that needs to be addressed. So I don't have -- fortunately I don't have a great clear answer to that, other than each person is individual and needs to be assessed individually. And at some point, you know, the relationship may deteriorate, so that treatment can no longer be effective, but as I said, there would have to be some ability or some attempt, anyway, to try to assist that patient in the trust relationship and the trust process, I would think.

>> LEWIS KRAUS: Next question: I haven't received in-person healthcare treatment since before March 2020 due to disability-related conflicts with masking. How do I seek medical care I need considering this conflict? I asked for an accommodation once which was allowed by staff initially until the doctor came across me and forced me to stay in a room while she consulted several times with the supervisor about how they would allow me out of the building. She was insisting I mask to exit the building. Also my appointment treatment was interrupted at that point and wasn't completed due to this.

>> CATHY CUSHMAN: That's a really good question. And the issue of masking is one we are still looking at and we're still sort of wrestling with, because it can present issues of safety. But as you already have pointed out in your body of your question that there

are different ways to handle that. There are ways that might require exiting and entering a facility at a certain time, being able to exit or enter a facility a different way, being able to be someplace waiting for service or being treated at a separate from individuals who are wearing masks or not wearing masks. So it does require some creative thinking, and sometimes an alternative, like a shield. I think one of the individuals has mentioned that might be an alternative to a mask. So I don't have a definite answer for you on that one other than to say that each person does need to be assessed individually and there need to be modifications that are appropriate for that individual as well as the location.

>> LEWIS KRAUS: All right, and we've got quite a backlog of questions in there, I don't think we're going to get to them all, but let's do one or two more. There is a little guidance for you, Cathy, from maybe a colleague that says the department's request for information that was withdrawn by the Biden administration, and now those issues will come up in upcoming Section 504 PRM. So if you want to explain that to people.

>> CATHY CUSHMAN: Thank you for mentioning it. That with respect to the question about the announcement from January 15th, 2021, I believe. So that announcement apparently has been withdrawn by the Biden administration, and there is going to be an opportunity in the near future for public comment on new regulations for 504 and Section 1557. I believe that's what that was in reference to. So please stay tuned. We are looking for input on the new regulations that will be published.

>> LEWIS KRAUS: Great. Next question: If the covered entity provides services to an individual with a disability after you begin to investigate, do you carry through with the investigation to determine if that entity is failing at a systemic level, or does the entity's resolution of the individual's complaint moot out the issue?

>> CATHY CUSHMAN: That is a good question. It does sort of depend on the case and, you know, what the individual also is seeking in terms of a remedy. But for the most part, we do continue to investigate when we -- if it's reached the stage of investigation where we've already sent out a request for data, as I mentioned a little bit earlier, we do look for a number of things when we send out that request for data. So besides the fact that that particular entity may have already accommodated the patient, we also want to know if that entity has, you know its affairs in order, if it has nondiscrimination policy, if it has a proper notice, fit has a grievance procedure. So we do continue those kinds of complaints typically and make sure that some of these other protections are in place.

>> LEWIS KRAUS: We realize you may have questions for Cathy, and apologize if you didn't get a chance to ask your questions. I do think many of your questions have sounded like ones that would be appropriate for the ADA -- your regional ADA Center. So if your question is really an ADA question, you can call the regional ADA Center at 1-800-942342.
And you can contact Cathy at the information on the screen.

You will receive an email link to an online session evaluation. Please complete that because we value your input and want to demonstrate the importance of this Webinar Series to our funder. We want to thank Cathy today for sharing her time and knowledge with us. A reminder that today's session was recorded, and it will be available for viewing next week at ADApresentations.org in the archives section of the healthcare area. Our next webinar September 23rd, we will have a presentation on disability and ADA education in medical schools. We hope you can enjoy -- we hope you can join us. We hope you enjoy it too. But watch your email two weeks ahead of time for the announcement of the opening of registration for that session.
So thank you, again, Cathy, for your presentation today. Thank you all for attending, and we wish you a great rest of your afternoon. Bye-bye!