



OCR IN ACTION

Enforcing Disability Rights
Authorities

U.S. Department of Health and
Human Services
Office for Civil Rights

1

Introduction to OCR



2

What Is the U.S. Department of Health & Human Services (HHS)?

- Formerly a part of the U.S. Department of Health, Education and Welfare (HEW).
- Health & Human Services created in 1980.
- HHS includes numerous sub-agencies such as: CMS, FDA, NIH, CDC, and IHS.

What Is the Office for Civil Rights (OCR)?

- Part of the U.S. Department of Health and Human Services.
- OCR enforces a number of civil rights laws as they relate to recipients of Federal financial assistance (FFA) from HHS, public entities, and programs & activities conducted by HHS.
- OCR enforces the HIPAA Privacy, Security, and Breach Notification Rules.
- Headquarters in D.C. supported by regional offices.

About OCR

- As HHS's law enforcement agency for civil rights, conscience and religious freedom rights, and health information privacy rights, OCR investigates complaints, enforces rights, promulgates regulations, develops policy, and provides technical assistance and public education to ensure understanding of and compliance with non-discrimination and health information privacy laws. OCR accomplishes this by:
- Ensuring that recipients of HHS federal financial assistance comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age, sex, and religion.

About OCR cont.

- Ensuring that federal agencies, state and local governments, health care providers, health plans, and others comply with federal laws protecting conscience and the free exercise of religion and prohibiting coercion and discrimination in health and human services.
- Ensuring the practices of health care providers, health plans, healthcare clearinghouses, and their business associates adhere to federal privacy, security, and breach notification laws under the Health Insurance Portability and Accountability Act (HIPAA), as amended, through the investigation of complaints, self-reports of breaches, compliance reviews, and audits.

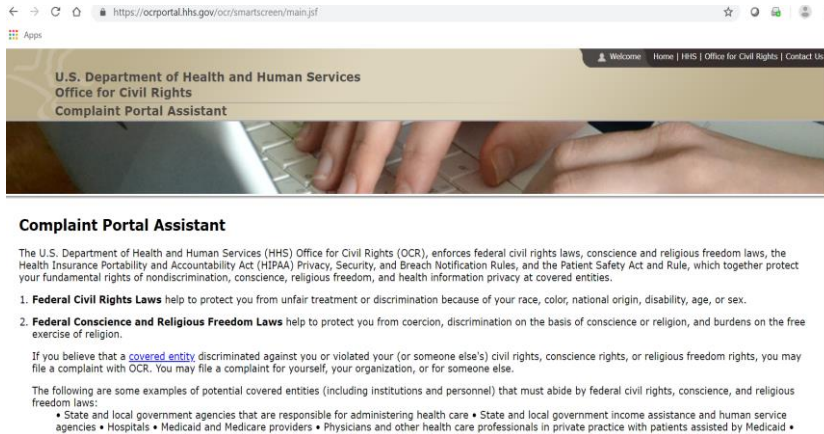
Enforcement and Compliance Activities

- Complaint Investigations
- Compliance Reviews
- Voluntary Resolution Agreements
- Formal Enforcement
- Audits
- Outreach and Public Education
- Policy Development

Filing Complaints

- Any person or organization may file complaint with OCR by mail or electronically.
 - Only for possible violations occurring after compliance date of the law at issue.
 - Complaints should be filed within 180 days of when the complainant knew or should have known that the act or omission occurred.
- Individuals may also file complaints with Covered Entity.

OCR Complaint Portal



Complaint Process

- Informal review may resolve issue fully without formal investigation
 - Many complaints will be resolved at this stage
- If not, begin investigation
 - Voluntary resolution may be possible through
 - Education
 - Training
- Technical Assistance
- Some cases may require formal enforcement



Major Laws Enforced By OCR

- Title VI of the Civil Rights Act of 1964
- Section 504 of the Rehabilitation Act of 1973
- Title II of the Americans with Disabilities Act of 1990
- The Age Discrimination Act of 1975
- Title IX of the Education Amendments Act of 1972
- Section 1557 of the Affordable Care Act
- HIPAA Privacy, Security, and Breach Notification Rules

Establishing Civil Rights Jurisdiction

Jurisdiction over the Entity

- Depending on the statute at issue, OCR has Federal civil rights jurisdiction over:
 - Programs and activities that receive Federal financial assistance (FFA) from HHS,
 - Federally (HHS) conducted programs,
 - Public entities (state or local governments).

What is Federal Financial Assistance (FFA)?

- “Federal financial assistance” means assistance in the form of any grant, loan, or contract.
- See 42 U.S.C. § 2000d-1

Examples of FFA Recipients in the OCR Context

- Health care providers participating in CHIP and Medicaid programs
- Hospitals and nursing homes under Medicare Part A
- Medicare Advantage Plans (HMOs and PPOs) under Medicare Part C
- Prescription Drug Plan sponsors and Medicare Advantage Drug Plans under Medicare Part D
- Head Start Programs
- TANF Programs
- Adoption and Foster Care Agencies
- Scholarships, loans, and grants are also FFA

OCR's Civil Rights Authorities

Disability Rights

Disability Rights Laws Enforced by OCR

- Section 504 of the Rehabilitation Act of 1973
- Section 1557 of the Affordable Care Act
- Americans with Disabilities Act, Title II

While these statutes and their implementing regulations have some important differences, in many respects, they establish **similar rights** and impose **similar requirements and obligations**.

Section 504 of the Rehabilitation Act of 1973

Prohibits discrimination on the basis of disability
in:

- Programs and activities that receive FFA
- Federally conducted programs (HHS)

Section 504 – Key Definitions

Disability:

- Physical or mental impairment that substantially limits one or more major life activities
- Major life activities include (but are not limited to) things such as walking, talking, hearing, seeing, eating, speaking, working, caring for oneself

Individual with a Disability

An individual with a disability is a person:

- Who has an impairment that substantially limits one or more major life activities
- Who has a record of an impairment
- Who is “regarded as” having an impairment

“Qualified Individual with a Disability”

- A “qualified individual with a disability” is an individual who, with or without reasonable modifications, meets the essential eligibility requirements for the services or programs s/he seeks.
- Analysis requires individualized assessment of the complainant’s qualifications and abilities.

Section 504 Concepts

Integration of Persons with Disabilities

- › shall not deny a person an aid, benefit or service
- › shall not limit the enjoyment of any right, privilege, or opportunity

Equal and Effective Services

- › not required to achieve same result but..
- › afford opportunity to obtain same result

Concepts Continued

Accommodations or Program Modifications (individuality)

- › reasonable accommodations
- › auxiliary aids and services

Program Access (i.e. physical accessibility)

- › not necessarily Barrier Free
- › “new” v. existing facilities
- › Programs in existing facilities are *viewed in their entirety*

Types of Discrimination

Disparate treatment (intentional)

- Intentional discrimination because of race, color, national origin, or disability.

Disparate impact (unintentional)

- Facially neutral policy or procedure that has the effect of discriminating against individuals of particular race, color, national origin or disability.

Conduct Prohibited by FFA Recipients

Recipients shall not:

- Deny an individual a service, aid, or other benefit.
- Provide a benefit, etc. which is different or provided in a different manner.
- Subject an individual to segregation or separate treatment.
- Restrict an individual in the enjoyment of benefits, privileges, etc.
- Treat an individual differently in determining eligibility.
- Deny a person opportunity to participate on planning board.

Prohibition Against Retaliation

A covered entity shall not “intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [the law] or because he has made a complaint, testified, assisted or participated” in an OCR investigation, review or proceeding.

Sec. 1557 of the Patient Protection and Affordable Care Act (Section 1557)

- **Section 1557** provides that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the grounds prohibited under:
 - Title VI of the Civil Rights Act of 1964, (race, color, national origin);
 - Title IX of the Education Amendments of 1972 (sex);
 - Age Discrimination Act of 1975 (age); and
 - **Section 504 of the Rehabilitation Act of 1973** (disability)

Sec. 1557 of the Patient Protection and Affordable Care Act

- OCR has enforcement authority with respect to health programs and activities that receive Federal financial assistance from the Department of Health and Human Services (HHS) or any program or activity administered by HHS under Title I of the Affordable Care Act or its amendments or any entity established under Title I of the Affordable Care Act or its amendments.

Section 1557 Regulations

- Section 1557 Regulations incorporate ADA Title II Regulations and Standards:
 - 45 C.F.R. § 92.102 refers to 28 C.F.R. § 35.160-35.164 (Effective Communication)
 - 45 C.F.R. § 92.103 refers to 2010 Standards of the ADA (Accessibility Standards for Buildings and Facilities)
 - 45 C.F.R. § 92.105 refers to 28 C.F.R. § 35.130(b)(7) (Definition of Reasonable Modification)

The Americans with Disabilities Act (ADA)

- Passed in 1990
- Comprehensive law which applies Section 504 prohibitions to the private sector as well as state and local governments
- Contains 5 titles and is enforced by a variety of federal agencies

Title II of the ADA

- HHS enforces Title II as it applies to state and local government programs related to the provision of health care and social services.
- Employs the same concepts as used in Section 504: integration, equal and effective, accommodation, program accessibility
- FFA does not have to be established to assert ADA, Title II jurisdiction

ADA Amendments Act of 2008

- Amended the ADA to restore broad coverage intended by Congress when the ADA was passed
- Focus should primarily be on whether unlawful discrimination occurred not on whether the individual is covered by the law
- Amended the definition of disability

2010 Title II ADA Regulation

- Adoption of 2010 Standards for Accessible Design
- Enhanced protections for individuals who use service animals
- Enhanced effective communication protections, including those for companions with disabilities
- Distinctions between wheelchairs and other power driven mobility devices (OPDMDs)
- Video Remote Interpreting (VRI) added as a kind of auxiliary aid that may be used to provide effective communication

Auxiliary Aids and Services—ADA and 1557--Requirements

- A covered entity must provide auxiliary aids and services to individuals with disabilities free of charge and in a timely manner when necessary to ensure an equal opportunity to participate and benefit from the entity’s health programs or activities.
- A covered entity must give “primary consideration” to the request of the individual for type of auxiliary aid and service

Auxiliary Aids and Services—ADA and 1557 Examples

- Auxiliary aids and services include, but are not limited to:
 - Qualified sign language interpreters
 - Large print materials
 - Text telephones
 - Captioning
 - Screen reader software
 - Video remote interpreting services

Auxiliary Aids and Services-ADA and 1557--Prohibitions

- A covered entity may not:
 - Require an individual to provide his or her own interpreter
 - Rely on a minor child to interpret, except in a life threatening emergency where there is not qualified interpreter immediately available
 - Rely on interpreters that the individual prefers when there are competency, confidentiality or other concerns
 - Rely on unqualified staff interpreters
 - Use Low-quality video remote interpreting services

ADA and the “Most Integrated Setting”

- Title II requires public entities to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”
- “Most Integrated Setting” is “the setting that enables people with disabilities to interact with people without disabilities to the fullest extent possible.”

The Olmstead Decision

- This 1999 Supreme Court decision provides a legal framework for Federal/State efforts to enable individuals to live in “the most integrated setting appropriate to their needs.”
- Challenges us to develop more opportunities for individuals with disabilities through more accessible systems of cost-effective community-based services.

The Olmstead Decision

- The Supreme Court held that the unjustified segregation of people with disabilities constitutes discrimination in violation of Title II of the ADA. The Court held that public entities must provide community-based services to people with disabilities when:
 - Such services are appropriate;
 - The affected persons do not oppose community-based treatment; and
 - Community-based services can be reasonably accommodated (taking into account the resources available to the public entity and the needs of others who are receiving disability services from the entity).

Health Disparities & Civil Rights--Definition

Health Disparities: differences in health access, treatment or outcomes associated with race or ethnicity that adversely affect the health status of racial and ethnic minorities, and that may violate Title VI or other OCR legal authorities.

Health Disparities & Civil Rights--Impact

- Researchers have found that some populations, including certain racial and ethnic groups, LEP persons, people with disabilities, and the elderly, are disproportionately affected by barriers which prevent or decrease access to healthcare services.
- There are also measurable differences in the use of healthcare services and the quality of healthcare services received among various population groups.

Discrimination that May Result in Health Disparities

- Unequal access to health care services
- Unequal access to clinical trials
- Institutionalized forms of discrimination
- Facially-neutral policies that result in an adverse impact on certain groups
- Differential treatment and bias

Compliance Basics

What Does OCR Investigator Look For?

- Non-Discrimination Policy
- Notice of Non Discrimination Policy
 - Posted in Facilities
 - Posted on Covered Entity's Website
 - Included in conspicuous place in brochures
- Grievance Procedure

What Does OCR Investigator Look For? cont.

- Policies and Procedures to Provide Auxiliary Aids and Services
- Are facilities physically accessible
- No Retaliation Policy
- 504/1557 Coordinator
- Documentation of Civil Rights Training of Staff

OCR RECENT COMPLAINT RESOLUTIONS

Voluntary Resolution Agreement - Opioid Use Dependency Recovery-- W VA DHHR

- In May 2018, a Complaint was filed with OCR against West Virginia Department of Health and Human Resources (DHHR) by husband and wife who are the paternal aunt and uncle of two small children in Child Protective Services' custody.
- DHHR through its Bureau for Children and Families (BCF) is responsible for ensuring the safety of vulnerable children in West Virginia.

VRA-Opioid Use Dependency Recovery Allegations

- Complaint alleged that Child Protective Services discriminated against the Complainants based on disability when it denied their request for placement of the niece because of husband Complainant's use of medically prescribed Suboxone and his history of opioid use disorder.

VRA-Opioid Use Dependency Recovery Jurisdiction

- Jurisdiction:
 - DHHR is a recipient of HHS funds requiring its compliance with Section 504
 - DHHR is a public entity providing state government services hence it is obligated to comply with Title II of the ADA which prohibits discrimination on the basis of disability, including denying opportunities to benefit from services and failing to reasonably modify policies and procedures.

VRA- Opioid Use Dependency Recovery The investigation

- OCR's investigation addressed potential violations of:
 - Section 504
 - Title II of the ADA
- The investigation identified systemic deficiencies in DHHR's Section 504 and Title II policies, practices and procedures in West Virginia's child welfare system

VRA- Opioid Use Dependency Recovery

- Pursuant to 504 and Title II of the ADA, child welfare agencies are required to ensure that individuals with disabilities are afforded an equal opportunity to participate in and benefit from all child welfare programs, activities and services. This may require:
 - Reasonable modifications to an agency's services and programs
 - Provision of auxiliary aids and services
 - Prohibition of criteria or methods of administration that have effect of discriminating on the basis of disability

VRA-Opioid Use Dependency Recovery

- April 2020, OCR and DHHR entered into a VRA

VRA-Opioid Use Dependency Recovery– Agreement Terms

- **General Non-Discrimination Requirements** in the VRA applicable to DHHR and its contractors include:
 - Ensure that participants with disabilities (or individuals who associate with a person with a disability) are afforded an opportunity to preserve and reunite their families that is equal to the opportunity DHHR offers to participants without disabilities. DHHR will ensure that participants with disabilities are afforded opportunities to serve as legal guardians, foster parents and adoptive parents that are equal to the opportunity that DHHR offers to participants without disabilities.

VRA—Opioid Use Dependency Recovery—More Terms

General Non-Discrimination Requirements cont.

- Safety requirements are based on actual risks that pertain to the participant with a disability and not on mere speculation or generalizations

VRA—Opioid Use Dependency Recovery—More Terms cont.

General Non-Discrimination Requirements cont.

- Nothing prohibits DHHR from removing a child from a participant with a disability or denying placement of a child...if DHHR determines the participant represents a direct threat to the safety of the child. But:
 - Decisions must not be based on stereotypes or generalizations about persons with disabilities; or
 - A participant’s diagnosis or intelligence measures; or
 - A participant’s history of an opioid use disorder or participation in medication assisted treatment (MAT) alone

VRA-Opioid Use Dependency Recovery—More Terms

General Non-Discrimination Requirements cont.

- Decisions are to be based on an individualized assessment of the parent with a disability, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence; the probability that the potential injury to the child will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

VRA—Opioid Use Dependency Recovery—More Terms and Obligations

Other Obligations Under the VRA:

- DHHR required to:
 - Revise and or develop non-discrimination policy and procedures;
 - Post it notice of non-discrimination
 - Revise its Grievance Procedure
 - Appointment a 504/ADA Coordinator
 - Prepare training materials for staff and provide annual training
 - Report to OCR over a two year period

VRA—Opioid Use Dependency Recovery—More Terms and Obligations

Other Obligations Under the VRA cont.

- DHHR is to file the VRA with the Court along with a brief or memorandum notifying the Court of the allegations made by the Complainants and notifying the Court that DHHR and OCR entered into the VRA. Court to determine best interests of the children involved.

OCR and the Opioid Crisis

For more information about OCR and the Opioid crisis see: <https://www.hhs.gov/civil-rights/for-individuals/special-topics/opioids/index.html>

Voluntary Resolution Agreement - Strengthen Auxiliary Aids and Services--Christus

- CHRISTUS TMF is a faith-based, not-for-profit organization that includes six hospitals and over thirty clinics and outpatient centers in Texas.
- CHRISTUS receives FFA through its participation in the Medicare and Medicaid programs and is subject to the requirements of Section 504 and Section 1557.
- OCR initiated a compliance review after it received a complaint, on behalf of a CHRISTUS patient, that a CHRISTUS clinic and hospital failed to provide adequate or timely interpreter services despite multiple requests.

VRA to Strengthen Auxiliary Aids and Services—Christus—More Facts

- OCR subsequently received information from additional patients alleging deficiencies in CHRISTUS' provision of auxiliary aids and services to individuals who are deaf or hard of hearing.
- The allegations led OCR to conduct a broad review of CHRISTUS' policies and procedures regarding its obligations under Section 504 and Section 1557.

VRA to Strengthen Auxiliary Aids & Services—Christus—Terms of Agreement

- In January 2020, as a result of OCR's investigation, CHRISTUS and OCR entered into a VRA in which CHRISTUS agreed to:
 - Perform communication assessments at patient intake and reassess communication effectiveness regularly;
 - Improve and upgrade its review, assessment, and provision of qualified interpreters, including in-person and video remote interpreting

VRA to Strengthen Auxiliary Aids and Services—Christus—More Terms

- Provide annual staff training on effective communication;
- Submit reports to OCR regarding CHRISTUS' ongoing compliance activities;
- Conduct outreach to local disability groups on the available auxiliary aids and services that CHRISTUS TMF provides to individuals who are deaf or hard of hearing.

Voluntary Corrective Action –HIV/AIDS-- Florida Orthopedic—The Complaint

- In February 2017, OCR received a complaint that a Florida Orthopedic surgeon allegedly made an offensive comment relating to the patient's HIV status and then refused to perform the patient's scheduled surgery which prompted the patient to file a complaint with OCR.
- After informing Florida Orthopedic of the allegations, and before OCR reached any conclusion as to the merits of the claims, Florida Orthopedic prohibited the patient from receiving further care at the practice and cited patient's complaint with HHS as a basis.

VCA-HIV/AIDS-Florida Orthopedic—The Practice and Jurisdiction

- Florida Orthopedic is a comprehensive orthopedic practice that employs approximately 40 physicians working in 10 offices and 20 hospitals in the Tampa area.
- Florida Orthopedic receives federal financial assistance through its participation in Medicaid and Medicare Part C; and is subject to the requirements of Section 504.
- Section 504 prohibits discrimination on the basis of disability (including HIV/AIDS) in health programs or activities that receive HHS funding, such as medical practices, nursing homes, and hospitals.

VCA—HIV/AIDS—Florida Orthopedic—Terms of Agreement

- The patient informed OCR of the retaliatory dismissal from the practice and on this ground OCR secured several corrective actions from Florida Orthopedic, including amending its nondiscrimination policies and revising its procedures for dismissing any patient from the practice.
- Florida Orthopedic provided staff with multiple trainings on HIV, federal non-discrimination laws, grievance procedures, and the requirement to refrain from retaliatory actions.

VCA—HIV/AIDS—Florida Orthopedic— More Terms

- Before Florida Orthopedic completed its compliance activities, it provided the complainant with referrals to three orthopedic surgeons in the area to prevent further delays in the patient's health care.
- Complaint closed October 2019.

OCR and HIV/AIDS

- For additional information on HHS OCR's work on HIV/AIDS issues, visit: www.hhs.gov/civil-rights/for-individuals/special-topics/hiv

Voluntary Resolution Agreement – Auxiliary Aids & Services—Mid-Maryland—The Complaint

- In February 2017, OCR received a complaint that a sign language interpreter provided by Mid-Maryland Musculoskeletal Institute (“MMI”) for a patient and his companion (mother) was not qualified to provide sign language interpretation, in violation of Section 504 and Section 1557.

Voluntary Resolution Agreement – Auxiliary Aids & Services—MMI—The Practice and its Compliance History

- MMI is an orthopedic practice that provides a full-range of orthopedic services.
- MMI had entered into a Voluntary Resolution Agreement (VRA) with OCR in 2009 in which it agreed to provide qualified sign language interpreters.

VRA to Strengthen Auxiliary Aids and Services—MMI—Terms of Agreement

- On June 2019, MMI and OCR entered into a VRA in which MMI agreed to:
 - Designate a 504/1557 Coordinator
 - Adopt a non-discrimination policy
 - Display the non-discrimination policy in the waiting area, website, brochures and promotional materials
 - Adopt a grievance procedure
 - Provide appropriate aids and services without charge to the patient/companion
 - Inquire into each patients needs giving primary consideration to individual's preference

VRA to Strengthen Auxiliary Aids & Services—MMI—Additional Terms

- Terms of VRA continued:
 - Document the assessment of needs and note in the medical record
 - Document denials and give patient/companion a notice of the grievance procedure
 - Develop a process to determine whether interpreters are qualified
 - Assure that the interpretation services are provided in a timely manner

VRA to Strengthen Auxiliary Aids and Services—MMI—More Terms

Terms of VRA continued:

- Comply with standards if Video Remote Interpreting will be utilized
- Keep a log of auxiliary aids and services provided.
- Provide staff training regarding Section 504, Section 1557, effective communication and the provision of auxiliary aids to individuals who are deaf or hard of hearing on an annual basis.
- OCR to continue review and monitoring of MMI for three years from effective date of the VRA.

OCR Resolves Matter with Early Complaint Resolution- Heart Transplant List-UNC Health Care

- In September 2018, OCR received a complaint alleging that an individual with an intellectual disability was in need of a heart transplant, **but a doctor on staff at UNC Health Care determined that the patient was not a good candidate for heart transplant because of his/her developmental learning disabilities** and because he/she does not live independently. The complainant asserted that without the transplant, the individual would eventually die.

UNC Health Care—ECR --What is it?

- OCR used its Early Complaint Resolution (ECR) process.
- ECR is a facilitated negotiation between the parties to an OCR complaint with the goal of achieving a resolution that quickly provides a remedy to the individual that has been allegedly discriminated against as well as securing additional measures that can be implemented to reduce the likelihood of future incidents of alleged discrimination.

UNC Health Care—ECR—The outcome

- In January 2019, UNC Health Care agreed that the individual's medical records will be amended to clarify that the individual is eligible to be considered for placement on the transplant list.
- OCR provided technical assistance to UNC Health Care in the development of its transplant eligibility policy.

Questions?

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