

# Health Care and Civil Rights During the COVID-19 Pandemic: HHS Office for Civil Rights on Telehealth and Effective Communication

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## Agenda

- ▶ Introduction and Background
- ▶ Issues in Telehealth
- ▶ Telehealth Guidance
- ▶ Effective Communication Enforcement Examples
- ▶ Questions and Comments

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## HHS Office for Civil Rights (OCR)

- ▶ OCR is a law enforcement agency responsible for enforcing Federal civil rights laws that apply to health and human services programs and activities.
- ▶ OCR also engages in rulemaking, creates guidance documents, and provides outreach and technical assistance.

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## Federal Disability Rights Laws we will Discuss

- ▶ Section 504 of the Rehabilitation Act applies to recipients of Federal financial assistance (FFA).
- ▶ Title II of the Americans with Disabilities Act applies to public entities, including state and local governments.
- ▶ Section 1557 applies to covered health programs and activities provided by covered entities.
  - ▶ All prohibit discrimination against qualified individuals with disabilities.

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## OCR's Disability Work During the COVID-19 Public Health Emergency

- ▶ FAQs for Healthcare Providers during the COVID-19 Public Health Emergency, including CSC plans and visitation policies.
- ▶ Resources from HHS on Access to COVID Vaccinations and Testing for People with Disabilities.
- ▶ Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557.

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## OCR's Disability Work During the COVID-19 Public Health Emergency, cont.

- ▶ Guidance on How the HIPAA Rules Permit Covered Health Care Providers and Health Plans to Use Remote Communication Technologies for Audio-Only Telehealth
- ▶ HHS COVID-related Complaint Resolutions and Technical Assistance.
- ▶ Investigations and resolutions of allegations of effective communication violations.

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## Information and Communication Technology (ICT)

- ▶ ICT, as defined by the Revised Section 508 Standards issued by the U.S. Access Board, is:
  - ▶ Information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content.
- ▶ Examples include: computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; Web sites; videos; and, electronic documents.

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## Telehealth

- ▶ Predating the COVID-19 Pandemic, telehealth is a method of delivering health care that does not require an in-person visit.
- ▶ Telehealth can take a number of forms, including communication between a patient and a health care provider via video, phone, or other electronic means.
- ▶ Telehealth has become a more accepted way to provide and receive health care services.

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## Telehealth, cont.

- ▶ Telehealth has many advantages. In addition to being used for remote health care appointments, it has been used during the COVID-19 Public Health Emergency to reduce community spread of the virus.
- ▶ Telehealth allows patients to send information to health care providers for review and analysis.
- ▶ Telehealth also allows providers to monitor a patient's health remotely.

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## Inaccessible Telehealth

- ▶ While telehealth has many advantages, accessing care via telehealth may present challenges for certain populations.
- ▶ If unaddressed, these challenges may result in individuals with disabilities facing barriers and issues accessing health care.
- ▶ A health care provider's failure to take appropriate action to ensure that care provided through telehealth is accessible can result in unlawful discrimination.

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## Examples of Inaccessible Telehealth

- ▶ A person who is blind or has limited vision may find that the web-based platform their doctor uses for telehealth appointments does not support screen reader software.
- ▶ A person who is deaf and communicates with a sign language interpreter may find that the video conferencing program their provider uses does not allow an interpreter to join the appointment from a separate location.

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## Guidance on Nondiscrimination in Telehealth

- ▶ On July 29, 2022, HHS OCR and DOJ released Guidance on how Federal disability rights laws require telehealth programs and activities to be accessible to individuals with disabilities.
- ▶ These laws include Section 504, Title II of the ADA, and Section 1557.
- ▶ The Guidance also covered protections for limited English proficient (LEP) persons and requirements to provide language access under Federal civil rights laws.

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## Telehealth Guidance – General Nondiscrimination

- ▶ Federal law provides a general rule that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a covered entity, or otherwise be subjected to discrimination by a covered entity.
- ▶ OCR enforces this requirement for:
  - ▶ Recipients of Federal financial assistance and programs and activities conducted by HHS under Section 504,
  - ▶ Public entities, including state and local governments, under Title II, and
  - ▶ Certain health programs and activities under Section 1557.

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## Telehealth Guidance – Reasonable Modifications

- ▶ Health care providers must make reasonable changes to their policies, practices, or procedures, which may include providing additional support to patients when needed before, during, and after a virtual visit, to avoid discriminating on the basis of disability.
- ▶ Reasonable modifications may take many different forms including additional time to connect and become familiar with a telehealth platform or allowing the addition of a support person to help meaningfully access an appointment.

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## Telehealth Guidance – Effective Communication

- ▶ Providers must communicate effectively with people who have communication disabilities (including certain disabilities affecting speech or motor function) when providing care in person or through telehealth.
- ▶ This requirement applies to all communications, including about provider availability, records access, scheduling, and during appointments.

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## Effective Communication, cont.

- ▶ Health care providers must provide communication aids and services when needed and at no cost to the patient.
- ▶ Because communication needs can differ depending on the individual and their situation, effective solutions will differ too, including which aids or services are effective.

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## Examples of Effective Communication – Individuals who are Deaf or Hard of Hearing

- ▶ A provider that uses telehealth may need to provide a qualified sign language interpreter to interpret applicable instructions and techniques, including using any necessary specialized vocabulary.
- ▶ When an interpreter is necessary, the provider will need to make sure that their telehealth platform allows the interpreter to join the session.
- ▶ A provider that uses telehealth may need to ensure that the telehealth platform it uses can support effective real-time captioning.

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## Examples of Effective Communication – Individuals who are Blind or have Vision Disabilities

- ▶ A recipient that uses a web-based platform to send written recommendations to their patients may need to make sure the recommendations are screen-reader compatible.
- ▶ A provider that uses videos to show patients how to do physical therapy exercises may need to make sure that the videos have audio descriptions.
- ▶ A provider that uses remote consultations through a video platform may need to provide a consultation by phone for a patient who requests that option.

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## Section 1557 and ICT

- ▶ Section 1557 specifically requires that covered health programs and activities provided by covered entities through ICT (including telehealth) be made accessible to individuals with disabilities unless doing so would result in undue financial and administrative burdens or fundamental alteration of the health program.

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## Guidance on HIPAA and Audio-Only Telehealth

- ▶ On June 13, 2022, OCR issued guidance to providers on how to provide audio-only telehealth in compliance with HIPAA.
- ▶ The guidance addressed a number of issues, including:
  - ▶ Whether the use of audio-only telehealth violates HIPAA,
  - ▶ Whether the provider and health plans must meet HIPAA requirements for audio-only telehealth,
  - ▶ Whether a business associate agreement must be in place, and
  - ▶ What to do when a health plan does not provide coverage for audio-only telehealth.

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## HHS Rulemaking

- ▶ On August 4, 2022, OCR published a notice of proposed rulemaking (NPRM) to revise its implementing regulation for Section 1557. In addition to continuing to require that health programs and activities provided through ICT be accessible, the Section 1557 NPRM would explicitly require that telehealth services be made accessible. Comments closed on October 3, 2022.
- ▶ OCR is also working on revisions to its implementing regulation for Section 504 for recipients of HHS funding. As part of that rulemaking, OCR is considering addressing ICT specifically, including telehealth.

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## Effective Communication Enforcement Example 1

- ▶ OCR received an allegation that an individual who is deaf was denied appropriate auxiliary aids and services during their hospital visit.
- ▶ Specifically, the Complainant alleged they were denied an ASL interpreter or video remote interpreting services at critical points during their inpatient stay. Instead, the Complaint had to rely on hand-written notes.
- ▶ OCR entered into a voluntary resolution agreement with the hospital requiring specific steps to ensure compliance with Section 504 and Section 1557, along with a monitoring period.

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## Effective Communication Enforcement Example 2

- ▶ OCR received an allegation that an individual who is deaf was denied appropriate auxiliary aids and services while in labor at a hospital.
- ▶ Specifically, the Complainant alleged that she informed the hospital before her scheduled labor that she would require an ASL interpreter to communicate during the delivery. Despite this, she was not provided an interpreter during labor and delivery.
- ▶ OCR entered into a voluntary resolution agreement with the medical center requiring specific steps to ensure compliance with Section 504 and Section 1557, along with a monitoring period.

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## Questions? Comments?

- ▶ Information on the Civil Rights laws OCR enforces is available on our website at [hhs.gov/ocr](https://hhs.gov/ocr).
- ▶ Information on how to file a complaint is available at [hhs.gov/ocr/complaints](https://hhs.gov/ocr/complaints).
- ▶ Contact Information:
  - ▶ [John.Thompson@HHS.gov](mailto:John.Thompson@HHS.gov)
- ▶ **Thank you!**

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