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OCR Settlements Show Health Care & Disabled Housing Providers Face Growing Disability Discrimination Risks

A continuing series of federal investigations and enforcement actions highlight the need for health care providers and other health industry organizations to strengthen their disability discrimination management practices to defend against rising exposures to actions by the U.S. Department of Health & Human Services Office of Civil Rights (OCR) and other agencies as well as private law suits.

As part of a broader emphasis on the enforcement of disability and other federal discrimination laws by the Obama Administration, OCR is making investigation and prosecution of suspected disability discrimination by health industry organizations a priority. OCR recently has announced several settlement agreements and issued letters of findings as part of its ongoing efforts to ensure compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA) as well as various other federal nondiscrimination and civil rights laws.

Defending or paying to settle a disability discrimination charge brought by a private plaintiff, OCR or another agency, or others tends to be financially, operationally and politically costly for a health care organization or public housing provider. In addition to the expanding readiness of OCR and other agencies to pursue investigations and enforcement of disability discrimination and other laws, the failure of health care organizations to effectively maintain processes to appropriately include and care for disabled other patients or constituents with special needs also can increase negligence exposure, undermine Joint Commission and other quality ratings, undermine efforts to qualify for public or private grant, partnerships or other similar arrangements, and create negative perceptions in the community.

Federal Disability & Other Laws Prohibit Health Care Provider Discrimination

Public and private health care and housing providers may face discrimination exposures under various federal laws such as the public accommodation and other disability discrimination prohibitions of the ADA, Section 504, the Civil Rights Act and various other laws. Section 504 requires recipients of Medicare, Medicaid, HUD, Department of Education, welfare and most other federal assistance programs funds including health care, education, housing services providers, state and local governments to ensure that qualified individuals with disabilities have equal access to programs, services, or activities receiving federal financial assistance. The ADA extends the prohibition against disability discrimination to private providers and other businesses as well as state and local governments including but not limited to health care providers reimbursed by Medicare, Medicaid or various other federal programs. The ADA requirements extend most federal disability discrimination prohibits to health care and other businesses even if they do not receive federal financial assistance to ensure that qualified individuals with disabilities have equal access to their programs, services or activities. In many instances, these federal discrimination laws both prohibit discrimination and require health care and other regulated businesses to put in place reasonable accommodations needed to ensure that their services are accessible and available to persons with disabilities. Meanwhile the Civil Rights Act and other laws prohibit discrimination based on national origin, race, sex, age, religion and various other grounds. These federal rules impact virtually all public and private health care providers as well as a broad range housing and related service providers.

As a result of its stepped up enforcement of the ADA, Section 504 and other civil rights and nondiscrimination rules, OCR is racking up an impressive list of settlements with health care providers, housing and other businesses for violating the ADA, Section 504 or other related civil rights rules enforced by OCR. While OCR continues to wage this enforcement battle in the programs it administers, the Departments of Justice, Housing & Urban Development, Education, Labor and other federal agencies also are waging war against what the Obama Administration perceives as illegal discrimination in other areas. Along side their own enforcement activities, OCR and other federal agencies are maintaining a vigorous public outreach to disabled and other individuals protected by federal disabilities and other civil rights laws intended to make them aware of and to encourage them to act to enforce these rights. To be prepared to defend against the resulting risk of claims and other enforcement actions created by these activities, health care, housing and other U.S. providers and businesses need to tighten compliance and risk management procedures and take other steps to prepare themselves to respond to potential charges and investigations.

Recent Settlements Highlight Risk

Within recent settlement agreements, entities agreed to take steps to come into compliance with Section 504 and ADA, including: review and revision of policies and procedures; training staff on their non-discrimination obligations; providing a grievance procedure for patients; and other corrective actions specific to each entity's violations.

Examples of some of OCR's most recent enforcement actions include settlement agreements in two cases, Citizen's Medical Center and Bertrand Chaffee Hospital, and a letter of findings sent to Georgia's Medicaid agency:

- **Citizen's Medical Center**

OCR entered into a settlement agreement with CMC in Victoria, Texas, after finding violations of Section 504 and the ADA, when it rejected a child with autism for enrollment in a program based on its concern that the child would need one-on-one care as a reasonable modification. The evidence was insufficient to support the conclusion that the child needed one-on-one care. OCR determined that even if the child did need one-on-one care, CMC had not demonstrated that providing such a reasonable modification would fundamentally alter the nature of the program or pose a direct threat to the health or safety of other children in the program. OCR found that CMC's blanket policies of excluding children with "special needs" and excluding children who need one-to-one care, discriminates against children with disabilities.

- **Bertrand Chaffee Hospital**

OCR entered into a Settlement Agreement with Bertrand Chaffee Hospital in Springville, New York to correct potential compliance issues with Section 504 and the ADA. The Agreement follows a complaint alleging that the Hospital engaged in unlawful discrimination on the basis of disability by failing to provide a patient who was deaf with a sign language interpreter while she was treated at the Hospital. The complainant further alleged that there was no TTY service available to her while she was receiving treatment. Section 504 and the ADA require that covered entities provide auxiliary aids and services, including sign language interpreters, to people with disabilities, when necessary for effective communication.

- **Georgia Department of Community Health**

In a letter of findings to the Georgia Department of Community Health, OCR found the entity failed to assist the complainant in moving out of a nursing home and back into the community as required by the Olmstead decision. In Olmstead, the Supreme Court held that the ADA requires public entities to provide community-based services to persons with disabilities when such services are appropriate; the affected persons do not oppose community-based treatment; and community-based services can be reasonably accommodated. This complainant has lived in a nursing home for 17 years and has been very clear about her desire to move to the community. She has been determined by her doctor to be appropriate for community placement and the state has made no showing that such services cannot be reasonably accommodated.

Enforcement of Discrimination & Other Civil Rights Laws Obama Administration Priority

The Obama Administration has significantly increased federal emphasis on the enforcement of federal discrimination laws against private and public health care and housing providers, state and local governments and other businesses in light of the 20th anniversary of the ADA. In keeping with this renewed emphasis, the DCF settlement is the latest in a series of federal disability, national origin and other discrimination charges and settlements OCR, has brought over the past year against physicians, public and private hospitals, insurers, federally financed housing providers and other parties providing services financed under programs administered by OCR. As the Department of Housing and Urban Development (HUD), the Equal Employment Opportunity Commission (EEOC) and other federal agencies also similarly have increased emphasis in federal discrimination law enforcement during this period, health care providers and other federal program service providers need to be prepared to defend their programs and practices to withstand federal discrimination charges or other investigations by federal agencies, private plaintiffs or both.

Private Providers & Businesses & Government Entities Both At Risk

As for employment discrimination, violators of these and other federal discrimination prohibitions applicable to the offering and delivery of services and products also face exposure to large civil damage awards to private plaintiffs as well as federal program disqualification, penalties and other federal agency enforcement. Unfortunately, while most businesses and governmental leaders generally are sensitive to the need to maintain effective compliance programs to prevent and redress employment discrimination, the awareness of the applicability and non-employment related disability and other discrimination risk management and compliance lags far behind.

Many private health care organizations assume that OCR's enforcement actions are mostly a problem for state and local government agencies because state and local agencies and service providers frequently have been the target of OCR discrimination charges. However the record shows OCR enforcement risks are high for both public and private providers.

OCR can and does investigate and brings actions against a wide variety of public and private physicians, hospitals, insurers and other private health care and other federal program participants.

In October, 2009, for instance, OCR announced that an Austin, Texas orthopedic surgeon whose practice group sees an average of 200 patients per week, had entered into a settlement agreement to resolve OCR charges that he violated Section

504 of the Rehabilitation Act by denying medically appropriate treatment from patients solely because they are HIV-positive. The settlement was negotiated following OCR's investigation of an administrative complaint filed by a Latino male patient living with HIV. The patient, a Medicaid beneficiary, sought medical treatment for a knee injury and informed the surgeon of his HIV status. The surgeon contended that if he performed surgery on the man's knee (a bone-tendon-bone Reconstruction), blood would splatter and possibly expose him to HIV disease. Due to the patient's HIV status, the Austin surgeon referred the patient to another surgeon located over 200 miles away. OCR found that the Austin surgeon violated Section 504 by refusing to perform the surgery and instead referring the patient to another surgeon. The OCR settlement agreement with the physician requires among other things that he and his staff not deny care or other services to HIV-positive individuals, establish a non-discrimination policy, make reasonable modifications to his procedures to avoid discrimination against individuals living with HIV/AIDS, receive comprehensive training, implement patient grievance procedures, and inform patients of their right to file a complaint with OCR.

Invest in Prevention To Minimize Liability Risks

In light of the expanding readiness of OCR to investigate and take action against health care providers for potential violations of the ADA, Section 504 and other federal discrimination and civil rights laws, health care organizations and their leaders should review and tighten their policies, practices, training, documentation, investigation, redress, discipline and other nondiscrimination policies and procedures. In carrying out these activities, organizations and their leaders should keep in mind the critical role of training and oversight of staff and contractors plays in promoting and maintaining required operational compliance with these requirements. Reported settlements reflect that the liability trigger often is discriminatory conduct by staff, contractors, or landlords in violation of both the law and the organization's own policies.

To achieve and maintain the necessary operational compliance with these requirements, organizations should both adopt and policies against prohibited discrimination and take the necessary steps to institutionalize compliance with these policies by providing ongoing staff and vendor training and oversight, contracting for and monitoring vendor compliance and other actions. Organizations also should take advantage of opportunities to identify and resolve potential compliance concerns by revising patient and other processes and procedures to enhance the ability of the organization to learn about and redress potential charges without government intervention.

For More Information Or Assistance

If you need assistance reviewing or tightening your policies and procedures, conducting training or audits, responding to or defending an investigation or other enforcement action or with other health care related risk management, compliance, training, enforcement or management concerns, the author of this update, attorney Cynthia Marcotte Stamer, may be able to help. Vice President of the North Texas Health Care Compliance Professionals Association, Past Chair of the ABA Health Law Section Managed Care & Insurance Section and the former Board Compliance Chair of the National Kidney Foundation of North Texas, Ms. Stamer has more than 24 years experience advising health industry clients about these and other matters. Her experience includes advising hospitals, nursing home, home health, rehabilitation and other health care providers and health industry clients to establish and administer compliance and risk management policies; prevent, conduct and investigate, and respond to peer review and other quality concerns; and to respond to Board of Medicine, Department of Aging & Disability, Drug Enforcement Agency, OCR Privacy and Civil Rights, HHS, DOD and other health care industry investigation, enforcement and other compliance, public policy, regulatory, staffing, and other operations and risk management concerns.

A popular lecturer and widely published author on health industry concerns, Ms. Stamer continuously advises health industry clients about compliance and internal controls, workforce and medical staff performance, quality, governance, reimbursement, and other risk management and operational matters. Ms. Stamer also publishes and speaks extensively on health and managed care industry regulatory, staffing and human resources, compensation and benefits, technology, public policy, reimbursement and other operations and risk management concerns. Her presentations and programs include [**How to Ensure That Your Organization Is In Compliance With Regulations Governing Discrimination**](#), as well as a wide range of other workshops, programs and publications on discrimination and cultural diversity, as well as a broad range of compliance, operational and risk management, and other health industry matters.

Her insights on these and other related matters appear in the Health Care Compliance Association, Atlantic Information Service, Bureau of National Affairs, World At Work, The Wall Street Journal, Business Insurance, the Dallas Morning News, Modern Health Care, Managed Healthcare, Health Leaders, and a many other national and local publications. You can get more information about her health industry experience [**here**](#). If you need assistance responding to concerns about the matters discussed in this publication or other health care concerns, wish to obtain information about arranging for training or presentations by Ms. Stamer, wish to suggest a topic for a future program or update, or wish to request other information or materials, please contact Ms. Stamer via telephone at (214) 452-8297 or via e-mail [**here**](#).

If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile [**here**](#). For important information concerning this communication click [**here**](#). If you do not wish to receive these updates in the future, send an e-mail with the word "Remove" in the Subject to [**here**](#).

