

HHS Office for Civil Rights Bulletin on Civil Rights Issues During the COVID-19 Crisis

Article By:

Helaine I. Fingold

James S. Frank

Frank C. Morris, JR

Ashley A. Creech

Tzvia Feiertag

Numerous media reports concern the shortage of medical resources, personal protective equipment, and qualified professionals during the growing COVID-19 medical emergency. As a result, providers may ultimately have to make choices regarding resource allocation among hospitalized patients suffering from COVID-19. Disability rights and other advocacy groups have expressed concern about resource allocation from the point of view of how individuals with pre-existing disabilities and other individuals may have been treated in the past by the medical system. While bioethicists may work to address the ethical issues involved with treating patients under conditions of resource scarcity, providers rightfully may worry about potential legal liability in distributing scarce resources among those in need. While both the Trump Administration and Congress have acted to allay some of these worries, concerns remain for both individual practitioners and the facilities with which they work.

Enforcement Discretion Will Apply regarding Civil Rights Obligations During COVID-19

The Office for Civil Rights (“OCR”) at the U.S. Department of Health and Human Services (“HHS”) issued a [bulletin](#) on March 28, 2020 to remind entities covered by federal civil rights statutes of their continued obligation to prohibit discrimination on the basis of race, color, national origin, disability, age, sex, and religion in HHS-funded programs during the COVID-19 pandemic and provide reasonable accommodations to individuals with disabilities.

OCR enforces the Americans with Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act which prohibit discrimination on the basis of disability in HHS-funded health programs or activities. Under those protections, OCR states that, regardless of the pandemic, covered entities and healthcare providers should not deny medical care to a person with disabilities based on “stereotypes, assessments of quality of life, or judgments about a person’s

relative ‘worth’ based on the presence or absence of disabilities.” According to OCR, decisions as to whether a patient is a candidate for medical treatment “should be based on an individualized assessment of the patient and the best available objective medical evidence.” In a footnote, however, OCR notes that, due to the current public health emergency, it is exercising its enforcement discretion with respect to these Civil Rights requirements. That enforcement discretion, hopefully, should also take account of the fact in the situation of hospitalized patients with COVID-19, all such patients are almost certainly individuals with a disability covered by the ADA.

OCR specifically reminds covered entities, health care providers, and governmental officials, as resources allow, to help ensure all segments of the community are served by:

- Providing effective communication with individuals who are deaf, hard of hearing, blind and visually impaired through the use of qualified interpreters, picture boards, and other means;
- Providing meaningful access to programs and information to individuals with limited English proficiency through the use of qualified interpreters and through other means;
- Making emergency messaging available in plain language and in languages prevalent in the affected area(s) and in multiple formats, such as audio, large print, and captioning, and ensuring that websites providing emergency-related information are accessible;
- Addressing the needs of individuals with disabilities, including individuals with mobility impairments, individuals who use assistive devices or durable medical equipment, and individuals with immunosuppressed conditions, including HIV/AIDS, in emergency planning;
- Respecting requests for religious accommodations in treatment and access to clergy or faith practices as practicable.

As circumstances and resources allow, covered entities should also consider:

- Making use of multiple outlets and resources for messaging to reach individuals with disabilities, individuals with limited English proficiency, and members of diverse faith communities; and
- Stocking facilities with items that will help people to maintain independence, such as hearing aid batteries, canes, and walkers.

OCR’s notation that the services or accommodations that should be provided “as resources allow” is recognition of the fact that what might be appropriate or required in normal times may not be reasonable or required given limited and strained resources in a pandemic such as COVID-19.

None of the civil rights protections noted in the OCR Bulletin, however, should take precedence over good faith medical determinations, no matter how difficult, as to what is reasonable and appropriate under the particular circumstances and not a fundamental change to the program or activity involved. As always, caregivers should be encouraged to exercise their best professional judgment under the particular circumstances at the time, and institutions should make available ethical consultations for providers facing such decisions, and the institutions should defend providers’ good faith judgments in such circumstances.

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