

HHS Issues Guidance Regarding Civil Rights Protections Under Rehabilitation Act and Affordable Care Act for Persons with Disabilities

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What You Should Know

- The HHS Office of Civil Rights has issued new guidance to covered healthcare entities regarding civil rights protections for persons with disabilities.
- The guidance is based on protections under the federal Rehabilitation Act and Affordable Care Act and follows observations of how the availability and allocation of services and resources have been impacted by the COVID-19 pandemic.
- Scenarios under which covered healthcare entities may not deny treatment or determine the allocation of resources based on disability are included in the guidance.

On February 4, 2022, the U.S. Department of Health & Human Services (HHS) issued guidance to healthcare providers regarding civil rights protections for persons with disabilities under Section 504 of the Rehabilitation Act of 1973 and Section 1557 of the Affordable Care Act (ACA).

The guidance was issued by the HHS Office for Civil Rights (OCR) as part of a continued effort to protect those most at risk, advance equity, and address disparities in rates of infection, illness, and death during the COVID-19 pandemic. The OCR makes vitally clear in the guidance that preventing persons with disabilities from receiving necessary healthcare benefits and services during the pandemic violates federal civil rights laws.

The new guidance is based on HHS' observations of how biases and stereotyping have impacted decision-making when hospitals and other healthcare providers are faced with scarce resources. Section 504 and Section 1557 apply to any healthcare program or activity that is receiving federal financial assistance from HHS. To comply with these laws, covered healthcare entities must analyze the specific patient's ability to benefit from the treatment sought when allocating scarce resources or care, free from stereotypes and bias about disability including prejudicial preconceptions and assessments of quality of life, or judgments about a person's relative "worth" based on the presence or absence of disabilities.

Background and Applicability

Section 504 and Section 1557 ensure that persons with disabilities are not excluded from participation in, denied the benefits of services, programs, or activities, or otherwise subjected to discrimination on the basis of a disability. Concisely stated, persons with disabilities must be provided an opportunity to participate in, or benefit from, services equal to those afforded to others.

Additionally, when determining the allocation of resources, it is a violation of federal civil rights laws for covered healthcare entities to use assessment tools or factors that screen out persons with disabilities (or any class of persons with disabilities) from fully and equally enjoying any healthcare service, program, or activity unless such criteria can be shown to be necessary. However, a person with a disability that is qualified to receive healthcare from a provider does not have an unqualified right to any particular healthcare service by virtue of that disability.

Section 504 and Section 1557 apply to the provision of all healthcare and health-related services, regardless of the patient population served or type of service provided, including:

- COVID-19 testing
- Medical supplies
- Medication
- Hospitalization
- Long-term care
- Intensive treatments
- Critical care including oxygen therapy and mechanical ventilators

Federal civil rights laws also apply to state Crisis Standard of Care (CSC) plans, procedures, and related standards for triaging scarce resources that hospitals are required to follow.

Guidance on Denial of Treatment

The new guidance provides scenarios under which a covered healthcare entity may not deny treatment or determine the allocation of scarce medical resources because of a person's disability. For example, a provider may not refuse to admit a COVID-19 patient with a disability who may require additional services or resources. Similarly, providers may not impose or apply eligibility criteria that screen out persons with disabilities (or any class of persons with disabilities) from fully and equally enjoying a service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

Other examples include visitation policies wherein hospitals that developed stricter policies – or began enforcing existing visitation policies because of the risk of COVID-19 to patients and staff – may be required to modify those policies when a person with a disability is unable to provide medical history or

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understand medical decisions and directions. Another example includes covered healthcare entities administering COVID-19 vaccines and/or tests that must ensure these programs are accessible to and usable by persons with disabilities. Similarly, these entities may not deny persons with disabilities an equal opportunity to participate in and benefit from testing or vaccination programs as a result of accessibility barriers at testing or vaccination sites, which might include allowing such persons to enter a facility at a time of day, or through an entrance, that will reduce their contact with others.

Next Steps

It is important for covered healthcare entities to understand how federal civil rights protections impact standards of care when faced with decisions regarding scarce resources. Covered healthcare entities should familiarize themselves with the information provided in the HHS FAQs for healthcare providers to ensure compliance with the applicable federal civil rights laws. It would also be prudent for covered healthcare entities to be familiar with this additional information about how the OCR is protecting civil rights during the COVID-19 pandemic.

Please contact the author of this Alert, **Jessica M. Carroll**, with questions or to discuss your specific circumstances.

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