

Blog Post

Healthcare Discrimination Based on Disability – Still Prohibited in the Pandemic!

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It may seem as though the pandemic is coming to an end, but while COVID cases are declining, they have not ceased. As the pandemic continues, the Department of Health and Human Services (HHS) Office for Civil Rights issued [new guidance](#) on February 4, 2022 to remind healthcare providers that federal disability laws remain in place.

The new guidance recognizes that during a public health emergency, such as the one caused by the pandemic, when resources can be scarce, individuals with disabilities may be victims of healthcare rationing. So HHS reminds providers that Section 504 of the Rehabilitation Act ([Section 504](#)) and Section 1557 of the Affordable Care Act ([Section 1557](#)) (collectively, the Anti-Discrimination Laws) both prohibit discrimination on the basis of disability. These Anti-Discrimination Laws require healthcare providers who receive HHS funds to ensure individuals with disabilities are not excluded from services, programs, or activities on the basis of disability.

To prevent this type of discrimination, HHS issued this guidance with examples as follows:

- 1. Avoid Stereotypes.** Medical decisions regarding the allocation of scarce medical resources, such as

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ventilators, should not be based on stereotypes, pre-conceptions, or generalizations about a patient based on the patient's disability.

- An assessment should not be used to screen out individuals with disabilities from fully or equally benefitting from a particular healthcare item or service. For example, it would be inappropriate to use an assessment to prevent people with disabilities from receiving access to ventilators when they have COVID-19 under the belief that they would require too much additional care based on their disability.

2. Healthcare Decisions Should Not be Based Solely on an Individual's

Disability. Healthcare providers cannot categorically exclude individuals based solely on their disability.

- Healthcare providers should not exclude people with Down Syndrome from receiving life-saving care based on a healthcare provider's judgment that people without Down Syndrome would be a greater benefit to society.
- However, it is permissible to deny healthcare services to a patient on the basis that such care is unlikely to be effective for that particular patient.

3. Provide Equal Opportunities to Receive Care.

Individuals with disabilities should be provided an equal opportunity to participate in health programs and activities, unless doing so fundamentally alters the nature of the program or activity or imposes an undue financial and administrative burden.

- In determining whether ventilator treatment is appropriate, a healthcare provider may need to allow an individual with a disability additional time on a ventilator to assess likely clinical improvement, unless doing so would constitute a fundamental alteration of

the ventilator trial or impose an undue burden.

- To provide equal opportunities for access to care, healthcare providers should avoid imposing on patients time-consuming and challenging paperwork. With vaccine distribution, for example, healthcare providers should only require the documentation necessary to ascertain eligibility.

4. Modifications to Visitation Policies Should Protect Individuals with Disabilities. Visitation policies may be changed during the pandemic to provide additional safety for patients. These changes to visitation policies, however, must consider the needs of people with disabilities, such as whether a disabled individual will have trouble providing their medical history or understanding medical decisions without the help of a support person. Policy changes also should be based on actual risks and not mere speculation, stereotypes, or generalizations about individuals with disabilities.

- A person with a disability should be permitted to use a support person in order to have an equal opportunity to obtain care, unless doing so interferes with that care. Determining whether a support person should be permitted to be physically present with the patient is based on a number of factors, including safety issues and whether remote care would be equally effective. If it is determined that the support person should not be permitted to be physically present with the patient, a reasonable accommodation could be to allow the individual with a disability to communicate with the support person remotely (by video or phone calls).

5. Ensure Accessible Communications for Individuals with Disabilities. Communications with individuals with disabilities regarding vaccination,

testing, or contact tracing must be as effective as communications with others. For example, providing auxiliary aids, such as sign language interpreters and large print materials may assist in ensuring such communications are accessible.

HHS is concerned that healthcare providers are not aware of the above requirements. Moreover, as a reminder, the obligations discussed in this article augment those imposed upon healthcare providers by a state's patient's bill of rights. For example, in Florida, healthcare providers are obligated by Florida's Patient Bill of Rights and Responsibilities to allow patients to bring any person of their choosing to the patient-accessible areas of the healthcare facility to accompany the patient while the patient receives treatment, unless doing so would risk the safety or health of the patient, other patients, or staff of the facility or office or cannot be reasonably accommodated by the facility or provider.

In addition to understanding the Anti-Discrimination Laws and similar obligations imposed by state law, healthcare providers can avoid violations of these laws by maintaining accurate documentation of their decision in connection with these laws. As discussed throughout this blog, it is permissible to deny healthcare services to a patient on the basis that such care is unlikely to be effective for that particular patient, after analyzing their ability to respond to the treatment. When this determination is made, recording the facts that formed the basis for that determination is crucial. Documentation is also critical when a healthcare provider determines that a particular accommodation cannot be provided to an individual with a disability because the accommodation would fundamentally alter the nature of the program or activity or impose an undue financial and administrative burden. The factual basis for the financial or administrative concerns that dictated such a determination must be documented. To assist in making these types of decisions, we recommend including the Ethics

Board, when appropriate, and Risk Management. Any guidance they provide should be documented, as well.

We recommend healthcare providers read this blog carefully to ensure they understand their obligations. We are available to healthcare providers to provide guidance in complying with the Anti-Discrimination Laws.

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