

# Drafting Effective OCR Complaints

**NATIONAL DISABILITY RIGHTS NETWORK**

**Annual Conference, Virtual**

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# Drafting Effective OCR Complaints

(U.S. Dept. of Education)



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# Presentation Goals

- ▶ Learn when to file with OCR
- ▶ Learn how to use OCR complaints *strategically* (i.e., not just waiting for a full resolution)
- ▶ Acknowledge and learn about regional variances

# Poll: What is Your Region?

- ▶ Boston
- ▶ Chicago
- ▶ New York
- ▶ Cleveland
- ▶ Philadelphia
- ▶ Kansas City
- ▶ Atlanta
- ▶ Denver
- ▶ Dallas
- ▶ San Francisco
- ▶ Washington, D.C.
- ▶ Seattle

# What Laws Does OCR Enforce?

- ▶ Title II of the ADA
- ▶ Section 504
- ▶ Title VI of the Civil Rights Act
- ▶ Title IX of the Education Amendments Act
- ▶ Age Discrimination Act of 1975
- ▶ Boy Scouts of America Equal Access Act

# What Laws Does OCR Enforce?

- ▶ ADA, Title II: State & local governments
- ▶ Section 504: Recipients of federal funding
- ▶ Both laws have same definition of disability
  - Physical/mental impairment that substantially limits 1+ major life activity, record of impairment, or regarded as
  - Not a high standard (ADA Amendments Act of 2008)
  - Students typically “qualified” (compulsory education)

# Statute of Limitations

- ▶ 180 days; allows for continuing violations and pattern/practice of discrimination
- ▶ Exceptions: Untimely, but file within 60 days of...
  - First becoming aware of discrimination
  - Recovering from an incapacitating illness
  - Another agency or court ruling on same case of action
  - Conclusion of recipient's internal grievance procedure

# Appeal Within 60 Calendar Days

- ▶ If OCR denies jurisdiction, can appeal on these grounds:
  - Complaint failed to allege violation or lacks sufficient factual detail
  - OCR cannot reasonably conclude recipient violated law
  - Complaint not timely filed
  - Similar complaint filed with other agency, court, internal grievance procedure
- ▶ Can also appeal final decision where OCR finds insufficient evidence for violation



# When to File with OCR

## Disability Discrimination, Section 504 (34 C.F.R. §104.4) & Title II (28 C.F.R. §35.130)

- ▶ Denied/unequal access to program (independent study, extracurriculars, field trip, etc.)
  - Berkeley Unified Sch. Dist. (CA), OCR Case No. 09-15-1502 (11/07/2018)
- ▶ Failure to provide reasonable modifications (including no individualized inquiry)
- ▶ Claim obviously not viable under IDEA
  - 504 Plan issues (non-implementation, manifestation determination, etc.)
  - Retaliation: *Hermosa Beach (CA)*, 108 LRP 57696 (OCR 2008)

# When to File with OCR

## ▶ OCR *Dear Colleague Letters* Point

- Bullying, Restraint/Seclusion, Equal Opportunities, Effective Communication, ADHD
- Letters provide *prima facie* elements for different claims

## ▶ Ask your regional office!

- E.g., Restraint & seclusion initiative launched in Jan. 2019

# When Not to File with OCR

- ▶ Question of appropriateness of IEP or 504 plan
- ▶ Entity not a Section 504/Title II Covered Entity
  - But consider other theories of liability (e.g., contract liability)
- ▶ When more effectively (and quickly) addressed by IDEA due process or state complaint

# Tips for Drafting Complaints

- ▶ Know Controlling Regulations
  - Title II: 28 C.F.R. Part 35
  - Section 504: 34 C.F.R. Part 104
- ▶ Know OCR Guidance
  - Leverage *Chevron* interpretation of 504 FAPE regs
  - E.g., manifestation determination review
- ▶ Know OCR's Case Processing Manual (Nov. 2018 is latest)

# Tips for Drafting Complaints

- ▶ Review OCR's Civil Rights Data Collection (CRDC) and other data sources to identify potential systemic violations
- ▶ Have to plead systemic claims; OCR no longer looks at systemic issues on its own

# Tips for Drafting Complaints

- ▶ Identify factually similar OCR decisions
  - Special Education Connection (LRP)
  - Not precedent, but helps for framing your claims
- ▶ FOIA resolution agreements and policy remedies
  - Can find model policies to frame requested remedies
  - OCR's FOIA portal system is efficient

# Tips for Drafting Complaints

Always include the OCR consent form with  
your complaint!!

# Poll: Which Track Does Your OCR Office Use?

- ▶ Rapid Resolution Process (Expedited)
- ▶ Facilitated Resolution Between the Parties (FRBP) (formerly Early Complaint Resolution (ECR))
- ▶ Resolution Agreement (before full investigation)
- ▶ Full investigation and final decision



# Tips After You File

- ▶ Disability Rights California (DRC) Problem:
  - OCR decisions take a long time (Berkeley was ~32 months)
  - FRBP/ECR effective, but our OCR office lacks the staffing for it
  - Our OCR office doesn't typically offer Rapid Resolution

# Tips After You File

- ▶ DRC Solution: Leverage OCR case opening into early settlement or structured negotiations
- ▶ When OCR opens a case, it asks for records production and written response (usually due in a month)
  - Compiling docs is expensive & time-consuming
  - Districts provide OCR with detailed responses, attach declarations

# Tips After You File

- ▶ Districts may be willing to resolve before due date
- ▶ Write demand letter after OCR opens case ask for settlement meeting
  - Bring any model policy remedies you FOIA'd
  - Be specific about compensatory education
  - Involve client in negotiations
  - Keep OCR investigation in the loop

# Questions & Comments

- ▶ Any other P&A strategies and tips?
- ▶ OCR regional office quirks?
- ▶ Questions?

# Resources

- ▶ OCR Reading Room:  
<https://www2.ed.gov/about/offices/list/ocr/publications.html>
- ▶ OCR FOIA:  
<https://www2.ed.gov/policy/gen/leg/foia/foiatoc.html>
- ▶ OCR Section 504 FAQ:  
<https://www2.ed.gov/about/offices/list/ocr/504faq.html>



Center for Public Representation

# How & When to Use the HHS Office of Civil Rights Complaint Process

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# DOJ vs. HHS OCR

- ▶ Most P&As have experience working with DOJ
  - ▶ DOJ has historically been the primary way to make systemic change on disability issues
  - ▶ DOJ can bring systemic litigation, where it does a formal investigation, issues a findings letter, attempts negotiations, and litigates if necessary; P&As sometimes co-litigate with DOJ
  - ▶ Some P&As have had success with filing complaints through DOJ's process, depending on the issue
  - ▶ But DOJ's process generally takes a very long time (literally years for systemic issues)

# DOJ vs. HHS OCR (cont'd)

- ▶ Most P&As have not often used the OCR complaint process
  - ▶ HHS OCR does not have authority to litigate (must refer to DOJ)
  - ▶ But HHS OCR does have an “early resolution process” and the ability to do compliance reviews, where it can fairly quickly address clear violations of law with willing covered entities
- ▶ Recent priorities of HHS OCR
  - ▶ HHS OCR has heavily been focused on HIPAA enforcement in this Administration; it also has created a “Religious Freedom” unit
  - ▶ But there has been interest in healthcare discrimination in areas like organ transplants and Quality Adjusted Life Years (QALYs)



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# Concerns Re Health Discrimination with COVID19

## ▶ Medical rationing

- ▶ State **crisis standards of care** for deciding who gets treatment and who doesn't in a shortage situation
- ▶ Concerns with people with disabilities being denied care or deprioritized over non-disabled people

## ▶ Access to Medical Care

- ▶ Denial of accommodations that are necessary for people to access treatment, like sign language interpreters, physical accommodations, etc.

## ▶ Hospital visitor policies

- ▶ States and hospitals putting in no-visitor policies
- ▶ But some people with disabilities need a support person to access treatment due to communication, behavioral or other needs

# Federal Laws Re: Healthcare Discrimination

- ▶ Federal laws prohibit discrimination by healthcare providers and are enforced by HHS OCR:
  - ▶ **Title II of the Americans with Disabilities Act**
    - ▶ Covers states and public hospitals
  - ▶ **Title III**
    - ▶ Covers private healthcare facilities
  - ▶ **Section 504 of the Rehabilitation Act**
    - ▶ Covers recipients of federal funding (most hospitals receive Medicaid, Medicare, etc.)
  - ▶ **Section 1557 of the Affordable Care Act**
    - ▶ Covers recipients of HHS funding (includes almost all hospitals)
- ▶ Includes both intentional discrimination and discriminatory impact

# Advocacy with OCR for Guidance on COVID-19 and Healthcare Discrimination

- ▶ In mid-March, there was a push for OCR to provide guidance to covered entities on their legal requirements around rationing of care and other issues related to healthcare discrimination
  - ▶ Letter from National Council on Disability
  - ▶ Letter from Consortium for Citizens with Disabilities
  - ▶ Letter from Congress
- ▶ By late March, P&As, with CPR and other national advocates, had filed 4 complaints about states' crisis standards of care showing the need for immediate guidance
- ▶ HHS OCR issued a Civil Rights Bulletin on March 28, 2020

- ▶ HHS Office of Civil Rights Bulletin (March 28)
  - ▶ Purpose of guidance: “to ensure that entities covered by civil rights authorities keep in mind their obligations under laws and regulations that **prohibit discrimination on the basis of** race, color, national origin, **disability**, age, sex, and exercise of conscious and religion”
  - ▶ Disability discrimination laws “remain in effect” during the crisis
  - ▶ It is illegal to deny medical care “on the basis of **stereotypes, assessments of quality life, or judgments about a person’s worth**” based on disability
  - ▶ Decisions about treatment must be based on **individualized assessments** based on the **best available objective medical evidence**

# HHS OCR Bulletin (cont'd)

- ▶ Legal obligations to make reasonable modifications to ensure equal access to treatment, including:
  - ▶ Effective communication for people who are deaf, blind, or have communication or cognitive disabilities
  - ▶ Accommodations for people with mobility impairments, use assistive devices, durable medical equipment, etc.
  - ▶ Interpreters for people with limited English proficiency
  - ▶ Plain language and multiple formats

# HHS OCR Complaints re Crisis Standards of Care

- ▶ Numerous (10) complaints have been filed with HHS OCR, alleging discrimination because of:
  - ▶ Categorical exclusions of people with certain disabilities
  - ▶ Reliance on quality of life judgements (including around long-term survivability, duration of need, etc.)
  - ▶ Consideration of co-morbidities unrelated to survival of COVID-19, that disparately impact people with disabilities, people of color, and older adults
  - ▶ Age discrimination
  - ▶ Reallocation of ventilators (including personal vents)
  - ▶ Failure to make reasonable modifications

# HHS OCR Resolutions re Crisis Standards of Care

- **Alabama:** rescinded policy with categorical exclusions for people with intellectual and cognitive disabilities and people above a certain age
  - ▶ Rescinding the illegal policy and issuing a general non-discrimination statement was sufficient for OCR
  - ▶ OCR did not require AL to develop a new non-discriminatory CSOC re ventilators; advocates are still trying to work with the state on this
  - ▶ Complainants were not involved in negotiations or even directly contacted prior to resolution



# HHS OCR Resolutions re Crisis Standards of Care

- ▶ **Pennsylvania:** made changes to policy that had quality of life judgments (long term survivability) and deprioritized people with certain disabilities
  - ▶ State did revise its policy versus just rescinding it
  - ▶ OCR said it could not force state to adopt “policy preferences” (versus addressing illegal provisions)
  - ▶ There have been negative ripple effects from the problematic issues
  - ▶ No substantive engagement with the complainants during OCR negotiations but at least gave a heads up about resolution
  - ▶ Kelly will discuss in more detail the parallel negotiations between DRP and the state and OCR and the state

# HHS Complaints re Hospital Visitor Policies

- ▶ **Connecticut:** P&A, CPR, and other national orgs filed complaint about CT's statewide no-visitor policy
  - ▶ Currently policy only allows for modifications of no-visitor policies for people with IDD who are receiving state services
  - ▶ Complaint alleges that this is illegally narrow and excludes people with other disabilities and people with IDD who are not receiving state services for required accommodations
  - ▶ Policy also does not allow for designation of more than one visitor (even if one is only allowed at a time) for long hospital stays
  - ▶ Complaint also raises issue with the policy being issued by the DD Agency and not the state public health agency that oversees state hospitals

# HHS Complaints re Hospital Visitor Policies

- ▶ **Individual hospital:** Filed a supplement to the CT complaint against an individual hospital that would not allow a visitor for an older woman who does not communicate by speaking (this individual was an exemplar in the statewide complaint)
  - ▶ This complaint was referred to the regional office for mediation and coordination with the statewide complaint

# HHS Resolution re Hospital Visitor Policies

- ▶ Connecticut statewide complaint:
  - ▶ Complainants provided OCR a list of specific issues we thought were critical to be included in a statewide policy and examples of other states that had adopted the policies; OCR was able to get most
  - ▶ OCR seemed to understand the national implications → longer negotiations
  - ▶ More communication between the complainants and OCR, although still not part of any direct negotiations
- ▶ CT individual hospital complaint:
  - ▶ Mediation facilitated by OCR was eventually successful for the one individual complainant

# Other Areas of HHS OCR Interest

HHS OCR has expressed an interest in additional COVID-19 related healthcare complaints including:

- ▶ Discrimination in access to PPE (e.g., prioritizing people in institutional settings over people equally at risk in community settings)
- ▶ Discrimination in access to testing (e.g., drive-in testing sites that do not provide accommodations)
- ▶ *Olmstead* cases (e.g., people being forced into institutional settings after release from the hospital)

# Pros & Cons of HHS OCR Engagement

## Pros:

- ▶ OCR has a strong interest in COVID-19 and disability issues
- ▶ OCR has brought on some good subject matter experts as contractors
- ▶ OCR process can move quickly
- ▶ Filing an OCR complaint can give you leverage in separate negotiations with your state

# Pros & Cons of HHS OCR Engagement

## Cons:

- ▶ OCR collaboration with complainants is VERY limited, at best
- ▶ OCR process only works with a willing covered entity; OCR does not have much leverage (other than a prolonged investigation or referral to DOJ)
- ▶ OCR will take a resolution that complainant may not think is sufficient
- ▶ OCR resolution is not an enforceable agreement

# Resources

- ▶ CPR Medical Rationing Page, with links to OCR complaints:  
<https://www.centerforpublicrep.org/covid-19-medical-rationing>
- ▶ HHS OCR Bulletin:  
<https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>
- ▶ Advocate Guidance on Crisis Standards of Care:  
[https://www.centerforpublicrep.org/wp-content/uploads/2020/04/Guidance-to-States-Hospitals\\_FINAL.pdf](https://www.centerforpublicrep.org/wp-content/uploads/2020/04/Guidance-to-States-Hospitals_FINAL.pdf)



# Resources (cont'd)

- ▶ Evaluation Framework for Hospital Policies:

[https://www.centerforpublicrep.org/wp-content/uploads/Disability-Org-Guidance-on-COVID-19-Hospital-Visitation-Policies\\_5-14-20\\_Final.pdf](https://www.centerforpublicrep.org/wp-content/uploads/Disability-Org-Guidance-on-COVID-19-Hospital-Visitation-Policies_5-14-20_Final.pdf)

- ▶ Evaluation Framework for Crisis Standards of Care:

<https://www.centerforpublicrep.org/wp-content/uploads/2020/04/Evaluation-framework-for-crisis-standards-of-care-plans-4.9.20-final.pdf>

QUESTIONS?



**DISABILITY RIGHTS**  
PENNSYLVANIA

# How & When to Use the HHS OCR Complaint Process: Observations and Lessons Learned from PA

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# Observations and Lessons Learned\*

\* Important caveat

- ▶ The process was really fast (too fast?)
- ▶ It provided some leverage to obtain changes in PA
- ▶ OCR differs from other administrative complaint processes
- ▶ You should assume you are not in the loop
- ▶ You must be proactive
- ▶ It was critical to connect to the larger advocacy community
- ▶ You may need to keep advocating after OCR process

# The process was really fast (too fast?)

- ▶ March 27 Letter from DRP to PA raising concerns
- ▶ April 3 Complaint to OCR by DRP and co-complainants
- ▶ April 3 PA Department of Health released Draft CSOC for
- ▶ April 7 DRP submitted Supplement to OCR complaint
- ▶ April 8 DRP and PA DOH negotiation
- ▶ April 13 PA DOH issued "Version 2" of CSOC dated April 10
- ▶ April 14 OCR notified DRP of conclusion of early case
- ▶ April 15 DRP submitted Second Supplement to OCR
- ▶ April 16 Resolution of OCR Complaint / OCR press release

limited comment

resolution

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# It provided leverage with the state

- ▶ PA called DRP to discuss concerns
  - ▶ DRP provided red-lined version of CSOC to PA
- ▶ Positive changes resulted
  - ▶ Re SOFA scores: Doctors may not consider a patient's underlying conditions that do not impact immediate or near-term survivability when they evaluate a patient to make a health care rationing decision
  - ▶ Prohibition on reallocating personal ventilators
- ▶ But we got stuck with short-term survivability of < 5 years
  - ▶ If we had had more time, could we have pushed for more with DOH?

# OCR differs from other administrative complaint processes

- ▶ Don't expect much of a process or opportunity to be heard
- ▶ It is not necessarily going to resolve all the issues presented
  - ▶ Focus on facially discriminatory policies
- ▶ There was not a settlement process to lead to an agreed-to resolution



# You should assume you are not in the loop

- ▶ OCR invitation to participate in early resolution process
- ▶ OCR had discussions with DOH without DRP
  - ▶ “Technical Assistance”
- ▶ PA issued “final” CSOC without notifying DRP

# You must be proactive

- ▶ We filed two addendums to the complaint as PA changed its draft CSOC
- ▶ We pushed back on OCR press release
  - ▶ Didn't want perception that DRP had "agreed" in a settlement
  - ▶ Pushed back on 5-year survivability
  - ▶ Pushed for clarity that discrimination could occur in implementation

# It was important to connect to the larger advocacy community

- ▶ Both in the state and nationally
- ▶ Framing of issues and positions
- ▶ Maintaining consistency in front of OCR
- ▶ Understanding the OCR process
- ▶ Minimizing negative impact on other states

# Advocacy after OCR result

- ▶ Press release emphasizing that OCR was still open to complaints regarding discriminatory implementation
- ▶ Started a Hospital Discrimination Hotline
  - ▶ **Covered both rationing and hospital visitation**
- ▶ Fact sheets on rationing and hospital visitation

# Resources

## PA Crisis Standards of Care

<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/COVID-19%20Interim%20Crisis%20Standards%20of%20Care.pdf>

## PA Hospital Visitation Policy – Revised

<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Guidance%20on%20Hospital%20Responses%20to%20COVID-19.pdf>

## DRP Healthcare Rationing Fact Sheet

<https://www.disabilityrightspa.org/wp-content/uploads/2020/04/2-MEDICAL-RATIONING-.pdf>

## DRP Hospital Visitor Policy Fact Sheet

<https://www.disabilityrightspa.org/wp-content/uploads/2020/04/COVID-Hospital-Visitation.pdf>