



DEPARTMENT OF HEALTH & HUMAN SERVICES

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OFFICE OF THE SECRETARY

Office for Civil Rights, Region IX
90 7th Street, Suite 4-100
San Francisco, California 94103

Via Certified Mail

September 14, 2009

[REDACTED] M.D.
[REDACTED]

Re: OCR Transaction No. 06-56803

Dear Dr. [REDACTED]

The Department of Health and Human Services (HHS), Office for Civil Rights (OCR), has completed its investigation of the complaint filed by [REDACTED] (the Complainant) against [REDACTED] M.D. (the Recipient). The Complainant alleged that [REDACTED] discriminated against him on the basis of his disability (HIV), in violation of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and its implementing regulations at 45 C.F.R. Part 84 (Section 504). Specifically, the Complainant alleged that after Dr. [REDACTED] learned that he is HIV-positive, Dr. [REDACTED] refused to perform surgery on the Complainant's spine.

Based upon its investigation, OCR has concluded that Dr. [REDACTED] discriminated against the Complainant on the basis of his disability (HIV), in violation of Section 504, by denying him the surgery for which he was otherwise qualified.

I. Jurisdiction.

OCR conducted this investigation pursuant to its authority to enforce Section 504, which prohibits discrimination on the basis of disability by recipients of HHS financial assistance. Dr. [REDACTED] is a recipient of HHS funds through Medi-Cal, California's Medicaid program; and is therefore obligated to comply with Section 504.

II. Background.

Since March 28, 1983, Dr. [REDACTED] has been licensed by the Medical Board of California as a physician and surgeon. He specializes in neurological surgery and has an office in [REDACTED] California, with two employees. Dr. [REDACTED] performs surgery at various local hospitals, primarily at [REDACTED] which is across the street from his office.

In a letter dated [REDACTED] 2006, OCR notified Dr. [REDACTED] of this complaint; explained in detail OCR's authority to investigate; and requested a response and specific information. After

not receiving a response from Dr. [REDACTED] OCR issued a letter, requesting access to his office and records within 10 days of the date of the letter. OCR conducted an on-site visit to Dr. [REDACTED] office on February 13, 2008. On March 17, 2008, OCR received written responses from [REDACTED] dated February 13 and 26, 2008.

A. Complainant's Position.

The Complainant reports that he experienced chronic back pain for over 18 months, while being treated by his primary care physician, [REDACTED]. The Complainant's medical records indicate that he was diagnosed with Intervertebral Disc Disorder, and had appointments with Dr. [REDACTED] approximately every two weeks. The Complainant consistently told Dr. [REDACTED] that his level of pain was between 6 and 10, with 10 representing the highest level of pain. The Complainant usually described his pain as being at the 7 or 8 level. Dr. [REDACTED] treated the Complainant's pain with standard non-surgical therapy, but the pain only worsened.

The Complainant reports that he went to [REDACTED] California, for physical therapy to address his back pain. The therapy caused so much additional pain, however, that he and the therapist feared causing more damage and mutually agreed to stop the therapy.

After the standard non-surgical therapy proved ineffective, Dr. [REDACTED] referred the Complainant to [REDACTED] M.D., an orthopedic surgeon. After examining the Complainant on June 20, 2006, Dr. [REDACTED] determined that the Complainant needed neurosurgery and referred him to Dr. [REDACTED].

Complainant made an appointment with Dr. [REDACTED] for [REDACTED] 2006, at [REDACTED] a.m. When Complainant arrived for his appointment, Dr. [REDACTED] secretary asked him to complete forms requesting information about his medical history. The secretary also directed Complainant to point out the location of his pain on a generic illustration of the human body. The medical history forms did not specifically inquire as to Complainant's HIV status, but the forms referenced other medical conditions. Nonetheless, Complainant believed that he needed to disclose his HIV status in response to the forms' general inquiry about "other" medical conditions.

Complainant informed the secretary that he is HIV-positive, but that he was not comfortable including that information on the medical history form. Complainant reports that, at that time, the secretary assured him that it would not be a problem, and he believed that she would inform Dr. [REDACTED] that he is HIV-positive.

Dr. [REDACTED] called Complainant into his office and examined his back. Dr. [REDACTED] informed Complainant that he could refer him for therapy or that he could seek approval from Medicaid to perform surgery. Complainant informed Dr. [REDACTED] that he had already tried therapy but since it was unsuccessful in relieving his pain, he preferred surgery. During the appointment, Dr. [REDACTED] also examined the Magnetic Resonance Imaging (MRI) film of Complainant's back, which Complainant had provided. Dr. [REDACTED] reviewed the MRI and identified a specific location on the Complainant's spine, proclaimed that the problem was at that location, and said that he could take care of Complainant's back pain with surgery. Dr. [REDACTED]

████████ informed Complainant that he would submit a Treatment Authorization Request to the California Department of Health Services¹ Medicaid (Medi-Cal) Office for approval of the surgery. Dr. ██████████ also completed a form notifying Dr. ██████████ of the results of Dr. ██████████ examination of Complainant and Dr. ██████████ decision to perform surgery. Complainant provided OCR with a copy of this form.

On July 20, 2006, Dr. ██████████ staff called Complainant and made an appointment for him to see the doctor on ██████████ 2006, at 10:00 a.m. Complainant reports that during the appointment, Dr. ██████████ immediately said to him that: "You should have told me your situation. At the hospital where I do my surgeries, we do not have the facilities or medication for people like you. I think you should go to the county and they can handle people like you." Complainant said, "Excuse me?" Dr. ██████████ said "Yeah, at the hospital where I work, we don't have the facilities or the medication for your kind of people." Complainant reports that the secretary stood in the doorway and heard Dr. ██████████ comments. As Complainant was leaving the office, the secretary apologized to him for Dr. ██████████ behavior and comments.

After Dr. ██████████ declined to perform the surgery on his spine, Complainant states that he continued to suffer from constant and increasing pain, difficulty walking, stress and depression.

Complainant informed OCR that the surgery on his spine was performed on ██████████ 2007, by ██████████ M. D., of the ██████████ at ██████████ ██████████. Complainant reports that the surgery was successful and resulted in a significant reduction in his pain and other symptoms.

B. Recipient's Position.

In his ██████████ 2008 interview with OCR, Dr. ██████████ explained that the Complainant was referred to him by another physician in June 2006; and that his staff made an appointment with Complainant for ██████████ 2006. During the interview, Dr. ██████████ also reported that he had examined Complainant and determined that he needed surgery. Dr. ██████████ stated that after the Complainant left the office, his secretary, ██████████ asked him if he knew that Complainant is HIV-positive.

Dr. ██████████ staff made an appointment for him to see Complainant on ██████████ 2006. During this appointment, Dr. ██████████ asked Complainant if he is HIV-positive and Complainant responded affirmatively. Dr. ██████████ told OCR that he informed Complainant that he is not fully equipped to deal with other problems and advised him to go to the county hospital for treatment. Complainant left the office after Dr. ██████████ informed him that he would not provide the surgery.

Dr. ██████████ told OCR that he became very skeptical regarding the patient's honesty and changed his mind because Complainant failed to disclose to him directly that he has HIV. Dr.

¹ The California Department of Health Services has now been reorganized into two separate state agencies: (1) the Department of Health Care Services, which administers California Medicaid or Medi-Cal; and (2) the California Department of Public Health.

██████████ stated that he does not test patients for HIV prior to surgery. He thought the hospital might perform pre-surgical testing, including for HIV. He explained that he is concerned about patients who report pain being dishonest and seeking pain medication for other reasons. Dr. ██████████ stated that he determined that the Complainant has a back problem, but he decided not to perform surgery because the Complainant was not honest and forthcoming in their initial meeting due to his failure to disclose his HIV status.

Dr. ██████████ denied that Ms. ██████████ informed him of Complainant's HIV status at the patient's request. He did admit, however, that Ms. ██████████ asked him if Complainant had discussed his HIV status.

According to Dr. ██████████ pain medication was not mentioned or discussed by either party during the two appointments. Dr. ██████████ also added that he thought the Complainant may have been seeking pain prescriptions because in his training he observed patients agreeing to any surgical procedure, including amputation of their toes, in order to obtain pain medication and admission to shelters, even if the patients did not actually need surgery.

According to Dr. ██████████ he does not request past medical records for patients, only their MRI films. Dr. ██████████ does not have written eligibility criteria for his services nor does he have a written policy of nondiscrimination; thus, he does not provide notice to his patients or post a nondiscrimination policy. Dr. ██████████ states that he does not ask patients whether they are HIV-positive and does not require HIV test results prior to agreeing to surgery.

OCR also interviewed ██████████ Dr. ██████████ secretary. She stated that Complainant appeared to be very nervous when he appeared for the first appointment on ██████████ 2006. She noticed that at first Complainant did not fully complete the medical history forms and that she had to prompt him to do so. Ms. ██████████ stated that the Complainant disclosed his HIV status to her in private and indicated that he was not comfortable disclosing that information on the medical history form. Ms. ██████████ reported that she went over the questions on the form with Complainant and encouraged him to write down his HIV status, but she could not recall what he wrote on the form specifically. She said that Complainant told her that he would inform Dr. ██████████ of his HIV status.

Ms. ██████████ informed OCR that on ██████████ 2006, after Complainant's initial appointment, she went through the forms that Dr. ██████████ had completed regarding history and recommendations for surgery and noticed that he did not mention Complainant's HIV status on the forms. Since everyone was gone, she asked Dr. ██████████ if the patient told him he was HIV-positive. He said no and they did not discuss it further.

Ms. ██████████ stated that since no one was in the office for Complainant's ██████████ appointment, the examining room door was left open and she observed the meeting between Dr. ██████████ and Complainant. She recalled that during this second appointment, Dr. ██████████ and ██████████ Complainant discussed Complainant's failure to disclose his HIV status during the ██████████ 2006 appointment and that Complainant expressly stated to Dr. ██████████ that he is HIV-positive during the ██████████ 2006 appointment. Ms. ██████████ informed OCR that she does not recall more details of what transpired at the ██████████ 2006 appointment.

C. Proceedings Before the Medical Board of California.

In response to a grievance filed by the Complainant, the Medical Board of California issued a [REDACTED] 2007 Citation Order (No: [REDACTED] against Dr. [REDACTED] finding that he had “agreed to perform back surgery upon the patient,” but then “discriminated against this patient by refusing to continue as his treating physician upon learning that he had a history of HIV” As the basis for its finding, the Board listed the California Business and Professions Code Section 125.6, which states in part that:

[E]very person who holds a license under the provisions of this code is subject to disciplinary action under the disciplinary provisions of this code applicable to that person if, because of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code, he or she refuses to perform the licensed activity . . . or if, because of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code, he or she makes any discrimination, or restriction in the performance of the licensed activity.

Cal. Bus. and Prof. Code § 125.6.

Section 51 of the California Civil Code, the Unruh Civil Rights Act, states, in subdivision (b), that:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Unruh Civil Rights Act, Cal. Civ. Code § 51(b).

Through the Citation Order, the Medical Board of California issued an administrative fine of \$350.00. On May 4, 2007, Dr. [REDACTED] sent the following response to the Board:

Sir/ Madam;

In compliance with the citation order I am enclosing a check for \$350.00.

I am appealing this citation. I believe that your conclusion of discrimination is unfounded. The first principle I used in turning down to care for Mr. [REDACTED] is based on the accepted norm that you expect accurate information from any body filling out a legal document. He did not: he omitted the fact that he has AIDS. I have no problem taking care of AIDS patients. In fact I had taken care of patients suspected of the human equivalent of mad cow disease. I was made to believe by the courts that my medical records are legal documents and as such I am prohibited from making alterations without proper annotations. Another principle that I have applied is my experience when I applied

for my green card; any omission or false information written invalidates the claim. I have other reasons, discrimination is not even considered.

Please notify me of your decision, so I can respond appropriately.

Very Truly Yours,

/s/

██████████ MD

On ██████████ 2007, Dr. ██████████ paid the administrative fine for the Citation Order. The California Medical Board deemed payment of the fine a satisfactory resolution and closed the matter on ██████████ 2007.

III. Issue Under Investigation: Whether Dr. ██████████ discriminated against the Complainant on the basis of his disability by denying him medical services.

A. Legal Standards.

The Section 504 regulations specify that:

(a) General. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service

45 C.F.R. §§ 84.4(a) and (b)(1)(i).

Under Section 504, recipients are prohibited from, on the basis of disability, denying a qualified individual with a disability any aid, benefit, or service provided under programs or activities that receive Federal financial assistance. See 45 C.F.R. §§ 84.4(a) and (b)(1)(i).

B. Dr. ██████████ denied the Complainant medical services because of the Complainant's disability.

A prima facie case of disability discrimination is established by evidence showing that: (1) the Complainant is a person with a disability under Section 504; (2) the Complainant is "otherwise qualified" to receive the medical services in question; (3) Dr. ██████████ receives Federal financial assistance; and (4) Dr. ██████████ denied the Complainant medical services solely because of the Complainant's disability. See Zukle v. Regents of the Univ. of Cal., 166 F.3d

1041, 1045 (9th Cir. 1999). If a prima facie case is established, Dr. [REDACTED] must articulate a legitimate non-discriminatory reason for the termination of medical services. Finally, if Dr. [REDACTED] articulates a legitimate non-discriminatory reason for the termination of medical services, OCR examines whether the stated reason was not the true reason for his actions, but a mere pretext for discrimination. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973).

As to the first element of Complainant's Section 504 claim, it has long been held that HIV-positive status is a disability for purposes of the Rehabilitation Act. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

As to the second element, OCR has concluded that the Complainant was "otherwise qualified" to receive the medical services (e.g., surgery on his spine) from Dr. [REDACTED]. Pursuant to 45 C.F.R. § 84.3(1)(4), a "qualified individual with a disability" means an individual who, with or without reasonable modifications to rules, policies, or practices "meets the essential eligibility requirements for receipt of such services" or participation in programs conducted by a covered entity. In the opinion of Dr. [REDACTED] and Dr. [REDACTED] the Complainant needed and was qualified to receive the surgery. Dr. [REDACTED] opinion is evidenced by his examination of the Complainant and subsequent referral to Dr. [REDACTED]. Similarly, Dr. [REDACTED] opinion is evidenced by: (1) his signed statement indicating that after he examined the Complainant on [REDACTED] 2006 and reviewed his MRI, he concluded that the Complainant needed surgery and agreed to provide it; and (2) his informing the Complainant that he would submit a Treatment Authorization Request to Medicaid with the expectation that the Complainant would be deemed eligible for surgery. See Woolfolk v. Duncan, 872 F.Supp. 1381, 1389 (E.D.Pa. 1995) (holding that a managed healthcare plan participant is "otherwise qualified" for medical services if he satisfies the plan eligibility requirements).

As to the third element, Dr. [REDACTED] acceptance of Medicaid funds makes him a recipient of Federal financial assistance for purposes of the Rehabilitation Act. See, e.g., Lesley v. Chie, 250 F.3d 47, 53 (1st Cir. 2001).

The question to be determined by OCR arises from the fourth element: Whether or not Dr. [REDACTED] decision – after being informed that Complainant is HIV-positive – not to perform the surgery on the Complainant's spine was solely because of the Complainant's disability. OCR concludes that it was.

OCR's investigation revealed that at some point after the Complainant's [REDACTED] 2006 appointment with Dr. [REDACTED] the doctor learned that the Complainant is HIV-positive. Indeed, during her interview by the OCR investigator, Dr. [REDACTED] secretary confirmed that she mentioned the Complainant's HIV-positive status to Dr. [REDACTED] at the end of the day on [REDACTED] 2006.

On [REDACTED] 2006, Dr. [REDACTED] informed the Complainant that he would not perform the surgery and referred the Complainant to the local county hospital. Dr. [REDACTED] initial determination to provide surgery to the Complainant and the reversal after learning of the

Complainant's disability – his HIV-positive status – support OCR's finding that Dr. [REDACTED] decision not to perform the surgery was based on the Complainant's HIV status.

- C. Dr. [REDACTED] allegedly non-discriminatory reasons for denying Complainant medical services were not the true reasons, but were a mere pretext for discrimination.

Dr. [REDACTED] has provided, at various points in time, different reasons for not performing the surgery on Complainant's spine. OCR, however, has concluded that these allegedly non-discriminatory reasons were not the true reasons, but were a pretext for Dr. [REDACTED] discrimination against the Complainant on the basis of his disability.

1. Lack of candor.

Dr. [REDACTED] now claims that his decision to not perform the surgery was due to the Complainant's alleged lack of candor about his HIV-positive status. This claim, however, is inconsistent with the statements of both the Complainant and Dr. [REDACTED] secretary at the initial appointment on [REDACTED] 2006. The Complainant stated that he disclosed his HIV-positive status to Dr. [REDACTED] secretary, which she confirmed. The secretary stated that she, in turn, informed Dr. [REDACTED] of the Complainant's HIV-positive status. If the Complainant had intended to conceal his HIV-positive status, he would not have disclosed his status to Dr. [REDACTED] secretary on his first visit. In addition, this rationale is inconsistent with Dr. [REDACTED] statement in his [REDACTED] 2008 interview with OCR, in which he explained that he had decided not to perform the surgery because he believed that Complainant was merely seeking drugs for his back pain. On these facts, OCR does not find Dr. [REDACTED] claims to be credible.

2. Drug-seeking behavior.

During OCR's [REDACTED] 2008 interview, Dr. [REDACTED] alleged that the Complainant might have been seeking drugs for his pain. However, nothing in the medical records submitted by the Complainant's other physicians, Dr. [REDACTED] and Dr. [REDACTED] indicated a pattern of drug-seeking behavior. Moreover, nothing in Dr. [REDACTED] records of his [REDACTED] 2006 examination of the Complainant indicated a suspicion of drug-seeking behavior. This alleged suspicion of drug-seeking behavior appears to have arisen only after the secretary informed Dr. [REDACTED] that the Complainant is HIV-positive. This allegation is also inconsistent with Dr. [REDACTED] statements provided to the Medical Board of California. Given that the alleged suspicion of drug-seeking behavior only arose after the disclosure of the HIV-positive status and was not included in Dr. [REDACTED] reply to the Medical Board of California, OCR concludes that this rationale is a pretext for Dr. [REDACTED] actions based on the Complainant's disability. We cannot sustain this rationale as a legitimate non-discriminatory reason for Dr. [REDACTED] to deny surgery to the Complainant.

3. More-conservative treatment.

In his [REDACTED] 2008 written response to OCR's data requests, Dr. [REDACTED] indicated that he reconsidered his decision to perform surgery because he felt that the Complainant had not attempted more conservative non-surgical forms of pain management. This statement is contradicted directly by Dr. [REDACTED] statements to the Complainant during the initial [REDACTED] 2006 appointment. At that time, Dr. [REDACTED] was satisfied with the Complainant's explanation that he had tried physical therapy and found it to be ineffective; and concluded that the Complainant needed surgery on his spine. This statement is also inconsistent with Dr. [REDACTED] statement to the Medical Board, which did not include any such rationale. Moreover, the Complainant's explanation of alternative treatment was consistent with the notes found in the medical records of his referring physician, Dr. [REDACTED]. Again, because the allegation that Complainant had not attempted more-conservative treatment only arose after the disclosure of HIV-positive status and was not included in Dr. [REDACTED] reply to the Medical Board of California, OCR concludes that this rationale is a pretext for Dr. [REDACTED] to deny surgery to the Complainant.

IV. Conclusion.

Based upon its investigation, OCR has concluded that Dr. [REDACTED] violated 45 C.F.R. §§ 84.4(a) and (b)(1)(i) by denying medical services to the Complainant. OCR finds that the Complainant is a person with a disability; that Complainant was otherwise qualified to receive surgery from Dr. [REDACTED] a recipient of Federal financial assistance; that Dr. [REDACTED] initially agreed to perform surgery on the Complainant's spine; and that three days after his secretary informed him that the Complainant is HIV-positive, Dr. [REDACTED] decided to not perform the surgery because of the Complainant's disability. In addition, OCR finds that Dr. [REDACTED] has taken inconsistent positions in two different forums, and changed, on at least two occasions, his alleged non-discriminatory reasons for not performing the surgery. As a result, OCR has concluded that Dr. [REDACTED] stated reasons for the denial of surgery were not the true reasons for actions, but a mere pretext for discrimination against the Complainant on the basis of HIV-positive status.

Dr. [REDACTED] has **thirty (30) calendar days** from the date of this letter to respond and **sixty (60) calendar days** from the date of this letter to negotiate an acceptable Settlement Agreement with OCR. To that end, we have enclosed a proposed Settlement Agreement for your consideration. If compliance has not been secured by the end of the sixty day negotiation period, OCR will be required to undertake appropriate measures to effectuate Dr. [REDACTED] compliance with Section 504. Such measures may include the initiation of enforcement proceedings to suspend Federal financial assistance to Dr. [REDACTED] a referral to the Department of Justice for enforcement action, or by other means authorized by law. For this reason, we propose a meeting to discuss the proposed Settlement Agreement within thirty (30) calendar days of the date of this letter.

V. Advisements.

Please be advised that a Recipient may not harass, coerce, intimidate, or retaliate against an individual because he or she has filed a complaint or participated in any manner in the investigation of this complaint. If this happens, the individual may file a complaint alleging such harassment or intimidation, which will be handled pursuant to the Section 504 regulations codified at 45 C.F.R. § 80.7(e).

Under the Freedom of Information Act, it may be necessary to release this letter and other documents upon request by the public. In the event OCR receives such a request, we will make every effort permitted to protect information that identifies individuals or that, if released, would constitute an unwarranted invasion of privacy.

If you have any questions, please do not hesitate to contact Brock Evans, Senior Equal Opportunity Specialist, at (213) 534-1431, extension 104, or by e-mail at Brock.Evans@hhs.gov, or me at (415) 437-8310. Thank you for your cooperation in this matter.

Sincerely,

Michael F. Kruley
Regional Manager

Enclosure: Settlement Agreement Between the
U.S. Department of Health and Human
Services, Office for Civil Rights, and
[REDACTED] [REDACTED] M.D.

cc: Complainant (w/o enclosure)

Mr. David Sayen (w/o enclosure)
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Mr. Dean Lan (w/o enclosure)
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California Department of Health Care Services
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