



DEPARTMENT OF HEALTH & HUMAN SERVICES

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OFFICE OF THE SECRETARY

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San Francisco, California 94103

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

December 9, 2009

Mr. Lawrence E. Feigen
Chief Operating Officer
Windsor Rosewood Care Center, LLC
9200 W. Sunset Boulevard, Suite 725
West Hollywood, CA 90069-3602

Re: OCR Transaction No. 06-45479

Dear Mr. Feigen:

The U.S. Department of Health and Human Services (HHS), Office for Civil Rights (OCR), has completed its investigation of the complaint filed by the Hawkins Center¹ (the Complainant), on behalf of an individual with HIV/AIDS (the Affected Party), against the Windsor Rosewood Care Center (WRCC²), a for-profit, skilled nursing facility with 113 beds.³

During its investigation, OCR found that:

1. In early October 2005, the Affected Party, a Medi-Cal⁴ beneficiary, was hospitalized at Contra Costa Regional Health Center.
2. On October 27, 2005, the Affected Party was discharged from the hospital, but still needed skilled nursing care.

¹ The Hawkins Center provides free civil legal services to people living with HIV/AIDS in Contra Costa County, California, through its Contra Costa HIV Legal Services Project. The Hawkins Center has merged with Rubicon Programs, Inc., and is now known as the Hawkins Center of Rubicon Programs.

² Throughout this letter, OCR will refer to the skilled nursing facility as WRCC, even though the facility has had different names during the course of OCR's investigation.

³ The State of California licensee for WRCC is Windsor Rosewood Care Center, LLC. See California Secretary of State: Business Portal (<http://kepler.sos.ca.gov/list.html>) (accessed Nov. 13, 2009).

⁴ Medi-Cal is the California Medicaid program administered by the California Department of Health Care Services.

3. The Affected Party's case manager was looking for a skilled nursing facility that would accept the Affected Party's Medi-Cal benefits. When the case manager telephoned WRCC on October 27, 2005, Administrator [REDACTED] informed her that WRCC had a "Medi-Cal bed" available and began to work with her on admitting the Affected Party. The case manager then disclosed that the Affected Party had HIV/AIDS and [REDACTED] refused to admit him.
4. Without access to WRCC or another skilled nursing facility, the Affected Party was placed in a board and care facility that was legally prohibited⁵ from providing him with injections or intravenous (IV) care.⁶
5. On [REDACTED] 2005, fifty days after being denied admission to WRCC, the Affected Party was admitted to Vintage Estates of Richmond, another skilled nursing facility.
6. On [REDACTED] 2006, while a resident of Vintage Estates, the Affected Party died at the age of forty-five.

Based upon its investigation, OCR has concluded that by denying the Affected Party admission to its skilled nursing facility, WRCC discriminated against him on the basis of his disability (HIV/AIDS), 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).

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. WRCC is a recipient of HHS funds through Medicare and Medi-Cal, California's Medicaid program, and is therefore obligated to comply with Section 504.

II. Background.

The initial discrimination complaint, on behalf of the Affected Party, was filed with OCR on December 2, 2005. In a December 21, 2005 letter, OCR notified WRCC of the complaint, explained OCR's authority to investigate, and issued written data requests. After WRCC responded to the data requests, OCR interviewed, on August 23, 2006, WRCC staff, including:

⁵ Pursuant to the California Code of Regulations, Title 22 § 80075, a board and care facility or a community care facility may not administer injections or provide IV care.

⁶ IV care is often necessary for effective pain management in terminally ill patients. See, e.g., Miller KE, Miller MM, Jolley MR. Challenges in pain management at the end of life. Am Fam Physician 2001 Oct 1;64(7):1227-34.

██████████ Vice President and Chief Operating Officer for Helios Healthcare, LLC (██████████); ██████████ Human Resources Director for Helios Healthcare, LLC; ██████████ WRCC Admissions and Marketing Director; ██████████, WRCC Director of Nursing; and ██████████ WRCC Administrator.

As part of its investigation, OCR reviewed the California Advocates for Nursing Home Reform (CANHR) website, which publishes skilled nursing facilities' responses to CANHR survey questions. OCR subsequently requested that CANHR release documents submitted by WRCC for publication on the CANHR website. According to the documents produced by CANHR, on November 22, 1996, ██████████ then WRCC Administrator, submitted a response to a CANHR "Consumer Information Service Survey." When responding to the survey question, "What types of residents are accepted," ██████████ responded by checking the "yes" box for a patient with HIV/AIDS and signed the document.

On ██████████ 2004, ██████████ was hired as the WRCC Administrator. On May 2, 2005, ██████████ submitted a signed response to a CANHR "California Consumer Information Questionnaire for Nursing Facilities." For the survey question, "Admissions: Types of Residents Accepted," the submitted response had "no" checked for a patient with HIV/AIDS and it was signed by ██████████

When the CANHR document signed by ██████████ was submitted on May 2, 2005, it also indicated that WRCC would accept a patient with Huntington's, Multiple Sclerosis, Spinal cord injury, Naso-Gastro-intestinal tube, Oxygen Therapy Dependent, Psychiatric (Primary), Respite, IV Care, Wound Care, and Medically Complex conditions; and that WRCC offers a secure Alzheimer's Unit.

Eight months after being notified of OCR's investigation, WRCC sent CANHR an August 30, 2006 letter to "correct the misinformation contained on CANHR's Nursing Home Guide web page for Rosewood." Letter to OCR from Counsel for WRCC (Sept. 19, 2006).

A. Complainant's Position.

From 1997 through 2005, ██████████ served as a case manager in the HIV/AIDS Case Management program at New Connections, a Contra Costa County nonprofit specializing in community behavioral healthcare. In her February 3, 2008 declaration submitted to OCR, ██████████ explained that while employed by New Connections, she served as case manager for the Affected Party. When the Affected Party was ready to be discharged from Contra Costa Regional Health Center in October 2005, ██████████ began looking for a skilled nursing facility that would accept his Medi-Cal benefits.

On October 27, 2005, the day that the Affected Party was discharged from the hospital, ██████████ called WRCC in an attempt to find him a suitable placement in a skilled nursing facility. ██████████ was referred to an individual named "██████████," who identified herself as the Administrator. ██████████ explains:

I contacted Sunbridge Rosewood Care in Pleasant Hill, California and began the

administrative process of intake with "[REDACTED]" the . . . administrator. I was told that they had a MediCal-funded bed available. I then ran through the client's medical needs and conditions in order to assure that his medical needs would be met. [REDACTED] and I were planning [the client's] admission to the facility, but when I mentioned that [the client] was HIV+, I was told that he would not be able to be admitted. I inquired as to why this was the case and was told merely that "staff couldn't psychologically handle that" and that "they (staff) would freak out." No specific medical or logistic[al] reason was given for this denial of services.

I was not able to find another MediCal-funded bed before [the client's] discharge, and he left the hospital without a suitable placement. [The client] ultimately ended up in a board and care facility ill-equipped to meet his needs.

Declaration of [REDACTED] (Feb. 3, 2008).

On [REDACTED] 2005, the Affected Party was admitted to Vintage Estates of Richmond, a skilled nursing facility. The Affected Party's "[REDACTED] 2005 Record of Admission" indicates that [REDACTED], M.D., was his primary physician. At the time of admission, the Affected Party had the following diagnoses: AIDS; Dementia; Schizophrenia; Congestive Heart Failure; and Seizure Disorder. On [REDACTED] 2006, while a resident of Vintage Estates, the Affected Party died at the age of forty-five.

B. Recipient's Position.

In a January 19, 2006 letter to OCR signed by WRCC Administrator [REDACTED], the Administrator stated that the facility does not discriminate against persons with AIDS or HIV disease because of their disability; and employs universal precautions when providing care to all patients. [REDACTED] explained that she has no record of receiving a referral from any agency for admission of a patient with AIDS or HIV disease; that "[w]e do not track the diagnoses of each referral and the reason for the denial of admission"; and that she could not determine the number of patients admitted to WRCC with AIDS or HIV disease because "[w]e do not track such data." Letter from [REDACTED] to OCR (Jan. 19, 2006).

During OCR's August 23, 2006 site visit, [REDACTED], Helios Vice President, [REDACTED] Helios Human Resources Director, and [REDACTED], WRCC Admissions and Marketing Director, each indicated that WRCC does not restrict admission to its skilled nursing facility based on HIV status. [REDACTED] explained that when a patient is referred to WRCC, she reviews the patient's medical records; consults with the WRCC Business Office, the WRCC Director of Nursing, and the WRCC Administrator. [REDACTED] stated that a patient is not admitted to WRCC unless all three offices agree.

When interviewed on August 23, 2006, former WRCC Director of Nursing [REDACTED] also stated that Rosewood would not deny admission to a patient solely because they have AIDS. [REDACTED] clearly remembered that one HIV-positive patient was admitted in 1996. In addition, [REDACTED] explained that WRCC provides IV care, hydration, wound care, and basic nursing health care; and that part of the admissions process is determining whether WRCC

can provide the care that the patient needs.

In an August 8, 2008 letter to OCR signed by WRCC Counsel, WRCC stated that [REDACTED] is not aware of the admission of any patients with HIV/AIDS to WRCC. In addition, the August 8, 2008 letter reported that [REDACTED] does not recall having a conversation with a case manager from New Connections regarding admission of an HIV-positive patient; that [REDACTED] has reviewed the facility's records and has found no documents indicating that a referral was made by New Connections; and that the facility did not maintain a referral log, denial log, or admissions log for the October 2005 time period.

III. Issue Under Investigation: Whether Windsor Rosewood Care Center discriminated against the Affected Party on the basis of his disability by denying him admission to its skilled nursing facility.

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. Windsor Rosewood Care Center denied the Affected Party admission to its skilled nursing facility because of the Affected Party's disability.

A prima facie case of disability discrimination is established by evidence showing that: (1) the Affected Party was a person with a disability under Section 504; (2) the Affected Party was "otherwise qualified" to be admitted to WRCC for skilled nursing care; (3) WRCC receives Federal financial assistance; and (4) WRCC denied the Affected Party admission to its skilled nursing facility solely because of the Affected Party'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, WRCC must articulate a legitimate non-discriminatory reason for the denial of admission. Finally, if WRCC articulates a legitimate non-discriminatory reason for the denial of admission, OCR examines whether the stated reason was not the true reason for WRCC's 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 the Affected Party's Section 504 claim, it has long been held that HIV/AIDS 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 Affected Party was "otherwise qualified" to receive skilled nursing care at the WRCC. Pursuant to 45 C.F.R. § 84.3(l)(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. According to his medical records, the Affected Party met the essential eligibility requirements for receipt of skilled nursing services, as he was diagnosed with AIDS, Dementia, Schizophrenia, Congestive Heart Failure, and Seizure Disorder.

As to the third element, WRCC's acceptance of Medicare and Medicaid funds makes it 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 WRCC Administrator [REDACTED] decision -- after being informed that the Affected Party had HIV/AIDS -- not to admit him to the WRCC skilled nursing facility was solely because of the Affected Party's disability. OCR concludes that it was.

OCR's investigation revealed that on October 27, 2005, the Affected Party's case manager, [REDACTED], telephoned WRCC Administrator [REDACTED] in an effort to place the Affected Party at WRCC. [REDACTED] initially indicated that WRCC had a Medi-Cal bed available and worked with [REDACTED] to plan the Affected Party's admission to WRCC. However, [REDACTED] then disclosed that the Affected Party had HIV/AIDS. In response, [REDACTED] informed [REDACTED] that the Affected Party could not be admitted to WRCC, because "the staff couldn't psychologically handle that" and that "they (staff) would freak out." Declaration of [REDACTED] (Feb. 3, 2008).

Based upon its investigation, OCR has concluded that [REDACTED] declaration is credible and that WRCC Administrator [REDACTED] decided not to admit the Affected Party to the WRCC skilled nursing facility because he had HIV/AIDS. During the investigation, OCR located a copy of WRCC Administrator [REDACTED] May 2, 2005 signed survey response to CANHR stating that WRCC does not accept patients with HIV/AIDS. Relying on WRCC's August 8, 2008 letter and its employees' witness statements, OCR has found that the WRCC Administrator had the authority to independently decide not to admit HIV-positive patients. Moreover, the former Director of Nursing's witness statement indicates that she only clearly remembers one HIV-positive patient at WRCC who was admitted in 1996; and the August 8, 2008 letter to OCR, signed by WRCC Counsel, states that [REDACTED] is not aware of the admission of any patients with HIV/AIDS to WRCC. As of November 12, 2009, no patients with HIV/AIDS reside at WRCC.

██████████ declaration indicates that ██████████ decision to deny the Affected Party's admission to WRCC was motivated by her perception that staff "couldn't psychologically handle" it or would have stereotyped responses to a resident disabled by AIDS. In short, ██████████ comments, taken alone, indicate an unjustifiable and discriminatory response to the Affected Party's disability. See, e.g., *Pact v. Clayton County, Georgia*, 1993 WL 837007 (N.D.Ga. Aug. 27, 1993) (finding that the county violated the Americans with Disabilities Act by denying a conditional use permit to an AIDS hospice, where the county responded to a "public outcry based on, among other things, stereotyped responses to the intended residents' disabilities").

WRCC has not articulated any legitimate non-discriminatory reasons for denying the Affected Party admission to its skilled nursing facility. In a January 19, 2006 letter to OCR signed by WRCC Administrator ██████████ the Administrator asserted that she had no record of receiving a referral from any agency for admission of a patient with AIDS or HIV disease; that "[w]e do not track the diagnoses of each referral and the reason for the denial of admission"; and that she could not determine the number of patients admitted to WRCC with AIDS or HIV disease because "[w]e do not track such data."

OCR does not find ██████████ claims to be credible. ██████████ claim that WRCC does not track the diagnoses of each referral is undermined by WRCC Admissions Director ██████████ August 23, 2006 statement that when she receives a referral, she reviews the patient's medical records; and consults with the WRCC Business Office, the WRCC Director of Nursing and the WRCC Administrator. Based on ██████████ statement, ██████████ may not track the diagnosis of each referral, but she apparently is made aware of the referral's diagnosis, either by: (1) ██████████; (2) the referral source; or (3) her own review of the patient's medical records.

In addition, ██████████ claims that she cannot determine the number of patients admitted to WRCC with AIDS or HIV disease. This claim is not credible, since skilled nursing facilities routinely maintain comprehensive resident assessment records for developing, reviewing, and revising each resident's plan of care. In fact, the HHS Centers for Medicare & Medicaid Services' (CMS) regulations, which apply to skilled nursing facilities such as WRCC, require an individual plan of care and complete medical records for each resident. See 42 C.F.R. §483.75(l) (clinical records).

IV Conclusion.

In light of the information uncovered during the investigation and WRCC's failure to articulate a legitimate non-discriminatory reason for its actions, OCR has concluded that WRCC violated 45 C.F.R. §§ 84.4(a) and (b)(1)(i) by denying the Affected Party admission to its skilled nursing facility. OCR finds that the Affected Party is a person with a disability; that the Affected Party was otherwise qualified to receive skilled nursing care at WRCC, a recipient of Federal financial assistance; that WRCC Administrator ██████████ the Affected Party's case manager that a Medi-Cal bed was available and initially worked with her to admit the Affected Party; and that after the case manager disclosed that the Affected Party had HIV/AIDS, ██████████ refused to admit him to WRCC because of his disability.

WRCC 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 WRCC's 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 WRCC's compliance with Section 504. Such measures may include the initiation of enforcement proceedings to suspend Federal financial assistance to WRCC, 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 Sibylle O'Malley, Equal Opportunity Specialist, at (415) 437-8316, or by e-mail at Sibylle.O'Malley@hhs.gov, or me at (415) 437-8310. Thank you for your cooperation in this matter.

Sincerely, . /s/

Michael F. Kruley
Regional Manager

Enclosure: Settlement Agreement Between the
U.S. Department of Health and Human
Services, Office for Civil Rights, and
Windsor Rosewood Care Center, LLC

cc Complainant (w/o enclosure)

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