



DEPARTMENT OF HEALTH & HUMAN SERVICES

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OFFICE OF THE SECRETARY

Office for Civil Rights, Region III
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Philadelphia, PA 19106-3499

Our Reference: 08-85961

August 17, 2009

[REDACTED]

Charles R. Artz, Esquire
Artz Health Law
200 N. Third Street
12th Floor, Suite 12-B
Harrisburg, PA 17101

Re: [REDACTED] v. Orthopedic Institute of Pennsylvania

Dear [REDACTED] and Mr. Artz:

The Office for Civil Rights (OCR) has completed its investigation of the complaint filed by [REDACTED] against the Orthopedic Institute of Pennsylvania (hereafter also referred to as “OIP”). In his complaint, which OCR received July 11, 2008, [REDACTED] alleged that on November 30, 2007 OIP discriminated against him based on his disability (deafness) in telling him that it would not provide a sign language interpreter. Consequently, [REDACTED] did not make an appointment at OIP.

LEGAL AUTHORITY:

Our investigation was conducted under provisions of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504), and its implementing regulation, found at 45 C.F.R. Part 84, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance. As a recipient of Federal financial assistance through its participation in Title XIX of the Social Security Act (Medicaid), OIP is obliged to comply with Section 504 and 45 C.F.R. Part 84.

The purpose of this investigation was to determine whether OIP discriminated against the complainant in the provision of consultative medical services. Based on the results of our investigation, we conclude that OIP violated Section 504 and 45 C.F.R Part 84. A summary of our findings and basis for our conclusion are below.

Complainant’s Position

[REDACTED] alleges that OIP discriminated against him on the basis of disability when it refused to provide him with a sign language interpreter. He states he was told by OIP to bring an interpreter to an appointment. As a result, he did not proceed to make an appointment.

COPY

Recipient's Position

The recipient asserts that it will provide reasonable accommodations to persons with hearing disabilities, including note taking, providing written materials, or allowing the deaf individual to bring his or her own interpreter, but that as a matter of policy it does not provide or pay for interpreters for deaf or hard of hearing individuals.

FINDINGS OF FACT:

OIP is a sub-specialized orthopedic surgical practice, providing consultative medical and surgical services in orthopedic medicine. These services include general orthopedic surgery, treating trauma and fractures, sports medicine, spinal surgery, joint replacement, children's orthopedics, and hand surgery. Member surgeons do not perform surgery in their offices. OIP employs 133 full-time equivalent staff and 14 part-time staff. It participates in the Medicaid program.

The complainant is deaf and uses American Sign Language as his primary means of communication. He became deaf at the age of one year as a result of meningitis. A copy of his 1992 hearing evaluation from the Model Secondary School for the Deaf indicates that [REDACTED] has a profound bilateral sensorineural hearing impairment. It also indicates that his ability to identify spoken words through hearing and vision is fairly limited.

OIP confirmed by correspondence with OCR on September 19, 2008, that the complainant contacted OIP to request a consultation on whether he needed carpal tunnel surgery.¹ The complainant requested that a sign language interpreter be provided. OIP stated that it informed the complainant that it would not provide him with a sign language interpreter. OIP stated that it offered the complainant reasonable accommodations, but declined to provide a sign language interpreter, as the complainant requested. The complainant advised OCR that it was difficult for him to write because of soreness in his hands. The complainant also stated that he does not trust lip-reading because it can result in his being confused or misunderstood.

OIP stated that it will see patients without regard to disability, physical or mental, in the delivery of health care. It provided OCR a copy of its Policy # 200 in response to our data request. This policy, which concerns the provision of services to deaf and hard of hearing patients, became effective August 15, 2007. The policy states that if a patient presents at or calls the office for an appointment and asks for a sign language interpreter, OIP will inform the patient that: "(a) we are happy to see the patient in the office; (b) we do not provide paid sign language interpreters, but we are happy to discuss what we can do to accommodate the patient and help us communicate; (c) the patient is welcomed to bring a trusted friend or relative to interpret or [OIP] will be happy to have someone help with note writing; and (d) we can supply written materials for the patient."

LEGAL STANDARD

The Section 504 implementing regulation provides that "[n]o qualified handicapped person shall, on the basis of handicap,² be excluded from participation in, be denied the benefits of, or otherwise be subjected to

¹ The complainant states this took place on November 30, 2007. OIP does not provide a date certain for the contact.

² The Americans with Disabilities Act of 1990 (ADA) 42 U.S.C. 12,201-12,213 amends Section 504 by replacing the term "handicap" with "disability." The ADA's definition of "disability" is essentially identical to Section 504's definition of

discrimination under any program or activity which receives or benefits from Federal financial assistance.” 45 C.F.R. § 84.4(a). The regulation further provides:

“A recipient, in providing any aid, benefit, or service, may not, ... on the basis of handicap: (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;...

45 C.F.R. § 84.4(b)(1) (ii). Elsewhere, the Section 504 regulation states:

In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap: ... (2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered non-handicapped persons.

45 C.F.R. § 84.52(a)(2). The regulation further provides:

A recipient to which this subject applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

45 C.F.R. § 84.52(d)(1). Finally, the regulation provides that such “auxiliary aids may include ... interpreters ... and other aids for persons with impaired hearing 45 C.F.R. § 84.52(d)(3).

The Section 504 regulation defines a person who has a disability as any person who:

(i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

45 C.F.R. § 84.3(j)(1)(i)-(iii). A qualified person with a disability, with respect to the provision of health, welfare, and social services, is a person “who meets the essential eligibility requirements for the receipt of such services.” 45 C.F.R. § 84.3(k)(4).

DISCUSSION AND ANALYSIS

As a participant in Medicaid, OIP is obliged to comply with the non-discrimination requirements of Section 504 and 45 C.F.R. Part 84. We find that the complainant meets the definition of a person with a disability and the definition of a qualified person with a disability. Therefore, the remaining question is whether OIP discriminated against the complainant in violation of Section 504 and 45 C.F.R. Part 84.

OCR finds that OIP’s blanket policy of not providing sign language interpreters serves to deny, to those persons who need a qualified sign language interpreter to participate in the recipient’s program, the opportunity to participate in or benefit from the programs and services OIP offers equal to the opportunity offered to persons without hearing disabilities, in violation of 45 C.F.R. §§ 84.4 (a) and (b)(1) (ii) and 45

“handicap.” We use the term “disability” in this letter of findings except when we quote the Section 504 regulation, which uses the term “handicap.”

C.F.R. §§ 84.52(a)(2) and (d)(1). In this context, such persons with hearing disabilities are denied an equal opportunity to communicate effectively with OIP and to participate in and benefit from the health care services that OIP offers.

OCR further finds that, by denying the complainant's request for a sign language interpreter, OIP discriminated against the complainant in violation of Section 504 and its implementing regulation at 45 C.F.R. §§ 84.4 (a) and (b)(1)(ii) and 45 C.F.R. §§ 84.52(a)(2) and (d)(1). When the complainant requested a qualified sign language interpreter, OIP had a duty to engage in an interactive process with the complainant to assess the nature of his disability, determine whether an auxiliary aid was necessary in order to give the complainant an equal opportunity to participate in its program and, if so, determine an appropriate auxiliary aid.³ OIP also had a duty to provide an appropriate auxiliary aid where necessary to provide the complainant with an opportunity to participate in and benefit from its programs that was equal to the opportunity provided to persons without hearing disabilities.

The evidence shows that the complainant is profoundly deaf, has limited ability to understand the spoken word, did not trust lip-reading because it could result in his being confused or misunderstood, and had difficulty writing because of soreness in his hands. The soreness in complainant's hands was sufficiently serious that it was the basis for his request for a consultation with OIP regarding possible carpal tunnel surgery. Further, the complainant's primary means of communication is ASL. These factors make lip-reading and note-taking of limited use for the complainant as alternatives to a qualified language interpreter in certain circumstances.

Generally, the practice of exchanging hand-written notes between a health care provider and a deaf or hard of hearing individual will likely be effective only for brief and relatively simple face-to-face conversations. The Department of Justice has counseled that for more complicated and interactive communications, such as discussion of symptoms or treatment options with patients and/or family members, it may be necessary to provide a qualified sign language interpreter.⁴ In addition, the process of writing back and forth can be arduous and time consuming for both the provider and the patient or family. As a result, such messages may be abbreviated, resulting in incomplete communication.

In this case, the complainant contacted OIP and requested a qualified sign language interpreter for purposes of facilitating communication between himself and a health professional specializing in orthopedic surgery, regarding the advisability of surgery due to soreness in his hands that caused him difficulty with writing. Such a conversation can reasonably be expected to be interactive and complex. Given the available evidence of the nature of the complainant's disability and the nature of the anticipated communication with OIP, OCR concludes that a qualified sign language interpreter was necessary in order to provide the complainant an equal opportunity to communicate effectively with OIP regarding treatment, including surgery, for his health condition, and to participate in and benefit from the health care services that OIP offers.

³ See, Vinson v. Thomas, 288 F.3d 1145 (9th Cir. 2002), in which the U.S. Court of Appeals for the Ninth Circuit, concluded that under Section 504, a recipient of Federal funds has a duty to engage in an interactive process to clarify the individual's needs and determine an appropriate accommodation for a beneficiary of its services, upon notification of the disability and the desire for an accommodation. In relying on case law developed under the Americans with Disabilities Act of 1990 (ADA), the court in Vinson stated that there was no significant difference in the analysis of rights and responsibilities created by Section 504 and the ADA. Id. at 1152 n.7.

⁴ See, ADA Business Brief: Communicating with People Who Are Deaf or Hard of Hearing in Hospital Settings, U.S. Department of Justice, <http://www.ada.gov/business.htm>.

OIP admits that it denied the complainant's request for a qualified interpreter for his appointment but offered the complainant an opportunity to bring his own interpreter. However, under Section 504, the responsibility to provide a qualified sign language interpreter, when needed to afford a qualified person with a disability the opportunity to participate in or benefit from the program in question, rests with the recipient of Federal financial assistance, not the individual seeking the service. Thus, in failing to provide the complainant a qualified sign language interpreter, OIP violated Section 504 and its implementing regulation as noted above.

OIP raises three defenses of its policy of not providing sign language interpreters and denial of a sign language interpreter to the complainant. First, OIP argues that it is not a public accommodation and therefore is not subject to the regulation implementing Title III of the Americans with Disabilities Act (ADA) at 28 C.F.R. Part 36, which prohibits discrimination on the basis of disability by public accommodations. Second, notwithstanding OIP's assertion that it is not covered by the Title III regulation, OIP cites to the Title III regulation at 28 CFR § 36.303(b) and states that it offered [REDACTED] reasonable accommodations by offering to communicate with note takers, allowing him to bring his own interpreter, and offering to make available to him written materials on issues related to carpal tunnel surgery. The Title III regulation at 28 CFR § 36.303(b), lists examples of "auxiliary aids and services" including not only qualified interpreters, but also "note takers, computer aided transcription services, written materials ... or other effective methods of making aurally delivered materials available to individuals with hearing impairments."

In response to OIP's first and second defenses, Title III of the Americans with Disabilities Act and its implementing regulation at 28 Part 36 are enforced by the Department of Justice, not by OCR. We note, however, that a place of public accommodation is defined in the regulation implementing Title III of the ADA as including a "professional office of a health care provider..." 28 C.F.R. § 36.104. While OCR does not have authority to determine compliance under Title III of the ADA, OIP may find instructive the guidance that DOJ has issued on communicating with deaf and hard of hearing persons, as discussed above and cited at footnote 4. Furthermore, it is clear, as discussed above, that OIP's policy and OIP's treatment of the complainant is inconsistent with Section 504 and its implementing regulation at 45 C.F.R. Part 84, which OCR does enforce, and to which OIP is subject as a recipient of federal financial assistance, through the Medicaid program.

As its third defense, OIP cites a four-factor assessment contained in guidance issued by OCR, set forth at 67 Fed. Reg. 41455, 41459 – 41461 (June 18, 2002) -- *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient (LEP) Persons.* The *Guidance* considers (1) the number or proportion of people eligible for such services, (2) the frequency with which such individuals come in contact with the covered entity, (3) the nature and importance of services provided, and (4) the resources available and costs. OIP argues that it has very few persons in its sub-specialized patient population who have ever requested or demanded an American Sign Language interpreter, to justify not providing an interpreter for the complainant. The *Guidance* relates to the non-discrimination provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulation at 45 CFR Part 80, and does not apply to issues related to the requirements of 45 C.F.R. Part 84 for persons with disabilities. The requirements for ensuring that recipients of Federal financial assistance, like OIP, do not discriminate against persons on the basis of their disabilities, such as the complainant's deafness, are set forth in the Section 504 regulation, 45 C.F.R. Part 84. It is that

regulation, not the *Guidance* cited by OIP, which governs here. OIP's policy fails to meet the requirements of the Section 504 regulation.

CONCLUSION:

For the reasons stated above, OCR finds that OIP's blanket policy of refusing to provide sign language interpreter services for persons who are deaf or hard of hearing and seek consultative services and/or treatment by an OIP physician violates 45 C.F.R. §§ 84.4 (a) and (b)(1) (ii) and 84.52(a)(2) and (d)(1). Further, OCR finds that the denial of a sign language interpreter to the complainant, the placement of the responsibility for providing a sign language interpreter on the complainant, and the failure to engage in an interactive process with the complainant to determine an appropriate auxiliary aid violate 45 C.F.R. §§ 84.4(a) and (b)(1)(ii) and 84.52(a)(2), and (d)(1).

OIP 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 a 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 may initiate formal enforcement action by commencing administrative proceedings, or by other means authorized by law. These proceedings could result in the termination of Federal financial assistance to the recipient.

ADVISEMENTS

Please be advised that OIP 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 ADA regulations and the Section 504 regulations respectively codified at 28 C.F.R. §35.134 and 45 C.F.R. § 80.7(e), incorporated by reference in Section 504 at 45 C.F.R. § 84.61.

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 Ms. Marlene Rey, Team Leader at 215.861.4447 or by e-mail at marlene.rey@hhs.gov. Thank you for your cooperation in this matter.

Sincerely,

Paul F. Cushing
Regional Manager

cc: Mr. Alan Davidson
Administrative Manager