Genesis HealthCare Letter of Violation Findings

September 7, 2012

REDACTED, Esq.
Genesis HealthCare
101 East State Street
Kennett Square, PA 19348

Re: Letter of Violation Findings to the Randallstown Center (a Genesis HealthCare facility), OCR Transaction No REDACTED

Dear Mr. REDACTED:

The Office for Civil Rights ("OCR") has completed its investigation of the complaint filed by Ms. REDACTED on behalf of her brother, Mr. REDACTED. In her August 11, 2010 complaint, Ms. REDACTED alleged that the Randallstown Center ("the Center"), a Genesis HealthCare ("Genesis") skilled nursing facility, discriminated against Mr. REDACTED based on his disability (deafness) while he was a resident at the Center from September 16, 2009 to March 24, 2010. Specifically, Ms. REDACTED alleged that throughout her brother's stay at this facility, the Center failed to provide Mr. REDACTED with any sign language interpreter services, which were essential to his understanding of important medical decisions and treatment options.

SUMMARY OF KEY FINDINGS

Based on an investigation of this complaint, OCR has made the following key findings:

- The Complainant's brother is a qualified individual with a disability.
- The Center was obligated under Section 504 of the Rehabilitation Act and its implementing regulation to provide the Complainant's brother equal access to its benefits and services.
- The Center also was obligated to communicate effectively with the Complainant's brother and to provide him with appropriate, effective auxiliary aids and services.
- A qualified sign language interpreter was necessary for the Center to communicate effectively with the Complainant's brother and to provide him equal access to its benefits and services.
- The Center failed to provide a qualified interpreter to the Complainant's brother at any time during his stay at the Center, and instead relied on written notes and gestures, which were ineffective.
- The Center discriminated against the Complainant's brother on the basis of disability in violation of the law when it decided, before he was admitted, that it would not provide him an interpreter, regardless of whether an interpreter was necessary for effective communication, and when it denied him a qualified interpreter throughout his stay at the Center.
- Both the Center and Genesis had inadequate policies and procedures to ensure effective communication with persons who are deaf or hard of hearing.

LEGAL AUTHORITY

Our investigation was conducted under the 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 recipients of Federal financial assistance through their participation in Title XIX of the Social Security Act (Medicaid) and Title XVIII of the Social Security Act (Medicare), Genesis facilities are obliged to comply with Section 504 and 45 C.F.R. Part 84.

The purpose of this investigation was to determine whether the Center discriminated against Mr. REDACTED in the provision of long term skilled nursing care. Based on the results of our investigation, we conclude that the Center violated Section 504 and 45 C.F.R. Part 84. A summary of our findings and basis for our conclusions are below.

BACKGROUND

Genesis is a national chain of skilled nursing and rehabilitation therapy providers. Its providers offer a variety of services including long term care, orthopedic rehabilitation, ventilator care, dialysis, and assisted living services in over 200 locations across 13 states. At issue in the instant complaint is a Genesis skilled nursing facility, the Randallstown Center located in Randallstown, Maryland. The Randallstown Center is a 172 bed long term care skilled nursing facility. It offers short stay and long term care, as well as onsite hemodialysis services. The facility also provides physical, occupational, and speech therapy.

COMPLAINANT'S AND RESPONDENT'S POSITIONS

The Complainant alleges that throughout Mr. REDACTED's stay, the Center failed to provide him with any sign language interpreter services, which were essential to his understanding of important medical decisions and treatment options. Specifically, the Complainant asserts that Mr. REDACTED was often angry and frustrated with the treatment staff due to the fact that he was unable to communicate effectively with them.

Genesis' position is that its staff felt confident they were able to communicate effectively with Mr. REDACTED and provide him with a full understanding of his medical condition and treatment options via written communication without the use of a sign language interpreter. Genesis asserts that written communication was the method of communication that Mr. REDACTED used at The Johns Hopkins Hospital ("Johns Hopkins") immediately prior to his admission to the Center, as well as with numerous providers who visited him throughout his time at the Center.

Furthermore, Genesis concedes that at some point during Mr. REDACTED's stay, the Complainant did indicate to the staff that she felt a sign language interpreter was necessary for Mr. REDACTED to communicate with the staff. However, Genesis asserts that Mr. REDACTED himself never requested a sign language interpreter, nor did he indicate to the staff that his communication needs were not being met. Furthermore, Genesis asserts that Mr. REDACTED seemed comfortable communicating with the staff solely through the use of pen and paper.

FINDINGS OF FACT

Mr. REDACTED (now deceased) was admitted to the Center on September 16, 2009 from Johns Hopkins. Upon his admission to the Center, Mr. REDACTED was REDACTED years old and had been diagnosed with multiple health conditions including REDACTED. As part of his care, Mr. REDACTED required dialysis treatment, which he received from the REDACTED located onsite within the Randallstown Center.

Mr. REDACTED had multiple impairments which affected his ability to communicate with other individuals. REDACTED. Ms. REDACTED, a friend of Mr. REDACTED who had served as his sign language interpreter at various points in the past, similarly reported that Mr. REDACTED primarily communicated in ASL. Ms. REDACTED explained that during intermittent times when Mr. REDACTED's vision was severely impaired, she would use a combination of signs and writing in Mr. REDACTED's palm in order to communicate with him. Additionally, the record demonstrates that Mr. REDACTED always used sign language interpreters to communicate with his treatment providers at his various off-site medical appointments with Johns Hopkins' specialists while he was residing at the Center. Consistent with Ms. REDACTED's reports, the medical record shows that Mr. REDACTED used sign language interpreters effectively on a regular basis at John Hopkins despite his REDACTED. In fact, the record shows that Center staff would frequently call ahead to Mr. REDACTED's offsite John Hopkins treatment providers to ensure that an interpreter would be available for him at those appointments.

Immediately prior to becoming a resident at the Center, Mr. REDACTED was a patient at Johns Hopkins for close to one month. While Mr. REDACTED was an inpatient there, the staff primarily used sign language interpreters to communicate with him about his care. Specifically, from August 24, 2009 through September 16, 2009 (the date Mr. REDACTED was transferred from Johns Hopkins to the Center), invoices provided by Johns Hopkins show that it provided Mr. REDACTED with 495 hours of sign language interpreter services during his inpatient stay from Central Interpreter Referral Services. Interviews with the Complainant and Ms. REDACTED confirmed that Mr. REDACTED and Johns Hopkins' staff were able to communicate effectively with one another using these sign language interpreter services.

Before he became a resident at the Center, Genesis was aware of the severe nature of Mr. REDACTED's hearing impairment. Prior to Mr. REDACTED's admission, Genesis conducted its standard pre-admission assessment. As part of this assessment process, a Genesis External Care Coordinator (ECC) reviewed Mr. REDACTED's medical record, which documented that he had a longstanding history of deafness and of communicating using ASL via a sign language interpreter.

Additionally, the pre-admission assessment documents that the ECC spoke with one of Mr. REDACTED's physicians at Johns Hopkins who had cared for Mr. REDACTED for three weeks during his inpatient stay. According to the pre-admission assessment, Mr. REDACTED's physician at Johns Hopkins informed the ECC that he was able to communicate with Mr. REDACTED using large writing with a marker and flash cards, and that the patient was also able to communicate by writing on a pad. The pre-admission assessment failed to address in any way the fact that Mr. REDACTED had been communicating with Johns Hopkins staff primarily through a sign language interpreter as evidenced by the fact that he had received extensive sign

language interpreter services during his inpatient stay at Johns Hopkins. Moreover, the ECC who conducted the pre-admission assessment never spoke directly to Mr. REDACTED or his family in order to conduct an individualized assessment of his communication needs prior to his admission to the Center.

Mr. REDACTED's pre-admission assessment also documents that "[i]t was clearly explained to [Mr. REDACTED's physician at Johns Hopkins] that the [patient] would need to be able to communicate without an interpreter." In the course of OCR's investigation, the ECC explained she was instructed by the Center's Admissions Director that Mr. REDACTED could not be admitted to the Center unless he was able to communicate without an interpreter.

During the staff interview process, one of the Center's nurses indicated that Mr. REDACTED's family had informed her that they knew a family friend who could interpret for Mr. REDACTED. The nurse reported that when she attempted to address this issue with her superiors, she was told by the Director of Nursing and the Center's Administrator that Genesis does not provide interpreters. Additionally, a staff interview with the Center's dietician revealed that she spoke to her superiors about how to best communicate with Mr. REDACTED. She reported that the Administrator, the Medical Director, and the Director of Nursing told her that Mr. REDACTED did not need an interpreter.

Once Mr. REDACTED became a resident at the Center, staff was aware of the extent of Mr. REDACTED's significant hearing impairment. When Mr. REDACTED was transferred to the Center, staff noted on his admission form that he was both deaf and mute. Moreover, the medical record is replete with notations regarding Mr. REDACTED's various communication difficulties. For example, shortly after he was admitted to the Center, staff noted Mr. REDACTED "has impaired communication as evidenced by impaired hearing, difficulty making self-understood (expressive), and difficulty understanding others (receptive)." Elsewhere, the Center staff noted Mr. REDACTED's communication is "sometimes understood."

To address Mr. REDACTED's deafness, the Center elected to facilitate communication between Mr. REDACTED and staff almost exclusively through the exchange of written notes, or through writing notes on an erasable white board. The medical record indicates Mr. REDACTED "utilizes a white board with black markers so that others may write him short notes/messages. This appears functional." (Emphasis added). The Center also attempted to facilitate communication between staff and Mr. REDACTED by using informal "signs and gestures" and by "writing" words in Mr. REDACTED's hand (one letter at a time).

Given that the Center staff elected to communicate with Mr. REDACTED almost exclusively through writing, OCR investigated the frequency and extent of these written exchanges. The investigation revealed that the written exchanges between the staff and Mr. REDACTED were very limited in nature, covered only basic communications, and frequently consisted of only sentence fragments or phrases. For example, one exchange simply reads "ok?" with a reply of "ok." Another exchange asks "How do you feel," with what appears to be Mr. REDACTED responding "pain back." Other notes ask Mr. REDACTED simple questions such as, "Did you eat?" "Did you take your medicine?" and "Do you want to go to the hospital?"

Some of the notes reveal there were problems with communicating through the exchange of written notes. For example, in one note Mr. REDACTED writes "First nurse write thick Ink I

didn't know where is Black Ink So other Nurse come in my Room she write small Pen I TOLD her I can't read nothing [illegible] took ink [illegible and running off the page]." Additionally, several of the notes are unintelligible. For example, Mr. REDACTED wrote "Last time I hurry take pills make me [sic] REDACTED" and "who lady asked me about talk my foot?" And on another occasion he wrote, "meet me out my room ok" and "she think bossy." In response to a question as to whether he needed something, Mr. REDACTED wrote, "I scouse In scusse." In other notes Mr. REDACTED's writing is simply illegible "they [illegible] me [illegible]!" The most extensive notes exchanged involve Mr. REDACTED's requests for specific sodas to be stocked in the vending machines, as well as his requests to borrow money to use the vending machines.

Mr. REDACTED had limited abilities to communicate via written notes due to his REDACTED. The record shows that Mr. REDACTED was able to recognize large bold letters, but that at times, due to his loss of vision, Center staff members needed to communicate with him by writing messages, one letter at a time, in his palm instead of using written notes. According to the Complainant, due to his REDACTED, Mr. REDACTED had difficulty reading and writing, and at times his words would run off the page. Additionally, Center staff noted that Mr. REDACTED had trouble spelling words.

The medical record reveals that there were numerous instances involving complicated aspects of Mr. REDACTED's care where Center staff and Mr. REDACTED had no meaningful way to communicate effectively with each other. For example, because of his multiple health complications, Mr. REDACTED was placed on REDACTED. There is no documentation in the record that the Center's staff discussed with Mr. REDACTED the function of these REDACTED as treatment for his multiple health complications, or that the Center staff explained to him the health consequences of not adhering to the REDACTED.

The Center's REDACTED met regularly with Mr. REDACTED, but there was no meaningful way for her to discuss with him his REDACTED needs and treatment. The Center's dietician explained that she and other staff often used a dry erase board and marker to communicate with Mr. REDACTED. She stated that he could read the letters if staff wrote in large print. The REDACTED stated that Mr. REDACTED could also nod at suggestions or say "no" as well. She stated that, in her opinion, she found these methods of communication to be effective. However, the REDACTED admitted that she also obtained a "ton" of her information about Mr. REDACTED from Mr. REDACTED's sister or other nursing staff, rather than communicating directly with Mr. REDACTED himself.

Mr. REDACTED failed to comply with the three diets and Center staff was aware of his noncompliance. He routinely purchased soda and candy out of the Center vending machines. He also ate snacks and food brought in by his family that were not compliant with the REDACTED. Despite the complicated nature of the REDACTED, the significant impact of these diets on Mr. REDACTED's medical condition, and the fact that staff was aware Mr. REDACTED was noncompliant with these REDACTED, the Center dietician attempted to communicate with Mr. REDACTED about these medical treatment REDACTED through writing notes, palm writing, and informal signs and gestures.[1]

[1] Mr. REDACTED was at nutritional risk for a variety of reasons, including the fact that he was on REDACTED. REDACTED. In the context of this REDACTED and the REDACTED, the REDACTED's efforts to communicate with Mr. REDACTED were not commensurate with the complicated medical issues Mr. REDACTED was experiencing.

While at the Center, Mr. REDACTED was receiving approximately REACTED separate prescription medications, including REDACTED medication. Many of the prescription medications had potential side effects. Mr. REDACTED's attending physician at the Center, who prescribed all of Mr. REDACTED's medications, evaluated Mr. REDACTED in person approximately once a month. During their interactions, the physician reported that he used written notes to communicate with Mr. REDACTED. Again, despite the fact that complicated and interactive communications were necessary to monitor the potential side effects of all REDACTED of these prescription medications which were administered simultaneously and to discuss Mr. REDACTED's complex medical condition, the attending physician attempted to communicate with Mr. REDACTED through written notes, palm writing, and informal signs and gestures.

Shortly after his admission, the Center arranged for Mr. REDACTED to have a comprehensive REDACTED evaluation. Given that Center staff and Mr. REDACTED did not have any meaningful way of communicating with each other regarding his medical condition and treatment, the Complainant asked that the Center provide Mr. REDACTED with an ASL interpreter for purposes of the REDACTED evaluation. The Center insisted that the REDACTED evaluation could be performed effectively through an exchange of written notes between the psychiatrist and Mr. REDACTED. Ultimately, the evaluation was conducted without the use of an interpreter.

Additionally, there were junctures in Mr. REDACTED's care where he experienced symptoms and when it was extremely important to monitor whether or not he was experiencing symptoms. Yet, in both of these circumstances, Mr. REDACTED did not have a meaningful way to communicate with staff regarding his symptoms. For example, nursing staff noted that Mr. REDACTED "was observed to be in apparent distress. Resident was communicated with by writing. [Patient] presented with REDACTED. Mr. REDACTED was experiencing symptoms. Yet, the only method of communication that was afforded to him to communicate those symptoms was the limited method of writing notes. On another occasion, Mr. REDACTED received an REDACTED. Upon his return, the physician instructed that there should be a "low threshold to call the office" if Mr. REDACTED experienced any symptoms in his REDACTED following the injection: REDACTED. Despite the fact that complicated and interactive communications were necessary to monitor Mr. REDACTED's symptoms, Center staff chose to communicate with Mr. REDACTED through written notes, palm writing, and informal signs and gestures.

Throughout his stay at the Center, Mr. REDACTED frequently refused various types of medical treatment. Yet, the Center's attempts to educate Mr. REDACTED surrounding these treatment refusals were either nonexistent or performed only through limited means of written notes. For example, he intermittently refused REDACTED which were prescribed to REDACTED. REDACTED. There is no documentation in the record that the Center educated Mr. REDACTED surrounding the potential health consequences of his refusal of the REDACTED. Similarly, at various times, Mr. REDACTED refused REDACTED treatment for REDACTED. Additionally, at certain points he started to refuse to take his medication and he refused to eat meals. All of these treatment and care refusals carried serious consequences for Mr. REDACTED. However, the Center's attempts to educate Mr. REDACTED surrounding these refusals were either nonexistent or were performed without the use of a sign language interpreter. For example, on one occasion Mr. REDACTED refused REDACTED treatment and staff noted

"via writing in the palm of his hand the benefit of REDACTED was explain."[2]

The medical record shows that staff frequently and inappropriately relied on Mr. REDACTED's family to facilitate Center staff's communication with Mr. REDACTED because they could not communicate effectively with him. For example, the record shows that staff was not able to communicate effectively with Mr. REDACTED to educate him regarding how to use a REDACTED. REDACTED Staff attempts to communicate the proper use of this medical device were evidently ineffective because the next day, Mr. REDACTED's sister was visiting and the nurse noted, "[s]till working on resident using the [sic] REDACTED. His sister is visiting and trying to help [with] communicating the proper usage."

Ms. REDACTED visited Mr. REDACTED at the Center about once a week or 3-4 times per month. She explained that she and the Complainant tried several times to get the Center to provide Mr. REDACTED with an interpreter. She left her card at the nursing desk and specifically recommended to staff that Mr. REDACTED be provided an interpreter to meet with his doctor. When Ms. REDACTED visited Mr. REDACTED at the Center, staff would often approach her and ask her to communicate things to Mr. REDACTED for them. She told staff that she would be willing to serve as Mr. REDACTED's interpreter, but that she would expect to be paid for this as she lived some distance away from the facility. However, the Center never offered to hire her to serve as Mr. REDACTED's interpreter, and the nature of her visits to the Center remained social and informal throughout Mr. REDACTED's stay.

On November 25, 2009, the family purchased a Video Relay Service ("VRS") for Mr. REDACTED. A VRS is a machine that allows deaf individuals to communicate using an ASL interpreter and a videophone to place and receive telephone calls to anyone.[3] Mr. REDACTED's family had purchased the VRS so that they could communicate with Mr. REDACTED by phone while he was at the Center. However, Center staff started using the VRS in order to access the ASL interpreter so that Center staff could communicate with Mr. REDACTED in person. The Care Plan states:

> Mr. REDACTED still prefers to stay in his room. Though it was a little difficult to communicate with him his family has brought in a television device that can have a translator speak for us to communicate with him. He seems to be doing a lot better and we can know if he would like to attend activities.

Although Center staff initially tried to use the VRS in order to access the ASL interpreter through the service, the VRS ultimately prohibited Center staff from using the VRS for this purpose as it is intended for making and receiving telephone calls to and from deaf or hard of hearing individuals and is not intended to provide skilled nursing facility providers with free ASL interpreter services for in-person communication.

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[2] In some instances, the Center's documentation regarding efforts they made to communicate with Mr. REDACTED simply lacked credibility. For example, in one instance the nurse noted that she educated the resident on the importance of asking for assistance to have his REDACTED. The nurse noted, "writer spoke calmly to resident." Because Mr. REDACTED was completely deaf, either the nurse providing care to him was unaware of his deafness, or the notation lacks credibility.

[3] Video relay calls are placed through a videophone connected to a television monitor. The deaf user sees an ASL interpreter on the monitor and signs to the interpreter, who then calls the hearing user via a standard phone line and relays the conversation between them.

In addition, despite the fact that Mr. REDACTED was his own legal decision maker for health care decisions, documentation in the record reveals that Center staff contacted Mr. REDACTED's family regarding health care decisions instead of dealing directly with Mr. REDACTED himself because of the inability of staff to communicate effectively with him. For example, on September 25, 2009, Center staff called Mr. REDACTED's brother to obtain his consent to administer a REDACTED to Mr. REDACTED instead of consulting with Mr. REDACTED himself. Additionally, Mr. REDACTED's REDACTED at Johns Hopkins recommended that Mr. REDACTED consider REDACTED. Center staff attempted to contact Mr. REDACTED's brother on four occasions and attempted to contact his sister on two occasions to find out from Mr. REDACTED's family whether Mr. REDACTED was going to elect to have the REDACTED. On the contrary, there is no documentation in the record of any attempts that the Center staff made to communicate with Mr. REDACTED himself to determine whether or not he had elected to undergo the REDACTED.

Indeed, the Center was cited with a violation by the Maryland Department of Health and Mental Hygiene Office of Health Care Quality for denying Mr. REDACTED the opportunity to participate in decisions about his care and treatments. The Statement of Deficiencies (CMS Form 2567) for a survey completed April 25, 2011 specifically found that, notwithstanding the fact that he was deaf, Mr. REDACTED had been deemed capable to make informed health care decisions for himself. The violation finding was based on the survey finding that, on multiple occasions, the Center bypassed the resident and, instead, contacted his family members to obtain consent for various health care treatments, including medication changes. Ultimately, the Maryland Department of Health and Mental Hygiene found that, "[f]ailure of the facility staff to consult the resident and include him in participating in family or care plan meetings denied him the opportunity to make decisions about care and treatments."

Furthermore, Mr. REDACTED was frequently frustrated with the treatment staff as a direct result of his inability to effectively communicate with them. For example, in one instance, Mr. REDACTED was noted to be yelling and banging on a door. Staff later determined that he was acting out because he was hungry. Once Center staff provided him with some food, he calmed down. In other instances, Mr. REDACTED frequently became upset with staff because the nurses required that he take his medications in front of them. Apparently this made Mr. REDACTED feel that staff was treating him like a baby and, as a result, he felt strongly that he wanted to take his medication privately. In these instances Mr. REDACTED yelled at the nurses, hit them, and spit on them. While it was appropriate for staff to insist that the medication be administered only in the presence of a nurse because of the inherent risks of leaving prescription medication unattended, the Center staff's efforts to educate Mr. REDACTED regarding this safety policy concerning medication administration were communicated only through short written notes.

Staff interviews and Mr. REDACTED's medical record revealed that the Center did not hire a qualified sign language interpreter to communicate with Mr. REDACTED regarding his medical treatment during the entirety of his stay at the Center from September 16, 2009 through March 24, 2010.

During the relevant period covered by the investigation, Genesis represented that it had policies and procedures in place concerning the provision of interpreter services for deaf or hard of hearing patients. Genesis provided a copy of "Policy 1.21 Communication: Special Needs."

("Policy 1.21"). This policy states that Genesis will make arrangements to obtain services for patients who have special needs that are not provided for within the normal scope of services, including the need for "sign language." The policy states that the Director of Social Services at the facility will maintain a list of resources to be contacted when a need is identified, and that special communication needs will be noted on appropriate assessments and followed-up at care conferences. However, a review of the Center's list of resources revealed that there were no sign language interpreter services listed. OCR confirmed with Genesis counsel that the Center does not contract with any sign language interpreter service providers.[4]

Additionally, Genesis provided OCR with another policy entitled, "2.8 Provision of Interpreters and Translators." ("Policy 2.8"). This policy states that Social Services will arrange for an interpreter for any customer who cannot make his or her needs known using the English language, whether due to impairment or lack of English speaking ability. The policy states that Social Services should assess the customer to identify the customer's need for language interpretation. Additionally, the policy states that the "use of the customer's normal support group, friends or family is encouraged. Center staff's possessing language or sign knowledge is favored; however, language fluency is not required." If the patient has no "language facilitator" in his or her "normal support group," the policy stipulates that the Center must provide an interpreter for at least the following points of care: the admission process; care plan conferences; physician visits; discharge planning conferences; and "as needed." Despite this policy, the Center concedes that it never provided Mr. REDACTED with a sign language interpreter at any point during his care.

The effective date of Policy 1.21 is June 1, 1996, with a revision date of April 1, 2003. The effective date of Policy 2.8 is June 1, 2001, and there is no revision date listed on this policy. Counsel for Genesis advised OCR that these policies were in place at the Randallstown Center as well as all Genesis facilities nationwide during the time period of the events described in the complaint. However, prior to the date of the events described in the instant complaint, Genesis had submitted different versions of Policy 1.21 and Policy 2.8 to OCR as part of a Civil Rights Corporate Agreement that it entered into with OCR for purposes of demonstrating its compliance with various civil rights regulations in order to obtain approval for Genesis' participation in the Medicare Part A Program. On January 11, 2008, as part of this Civil Rights Corporate Agreement, Genesis provided versions of Policy 1.21 and Policy 2.8 that had a revision date of January 31, 2008. At that time, Genesis also represented to OCR that these policies were applicable to all Genesis HealthCare locations.

LEGAL STANDARD

The Rehabilitation Act of 1973 (29 U.S.C. § 705), as amended by the Americans with Disabilities Act Amendments Act of 2008 (P.L. No. 110-325) (Sept. 25, 2008), incorporates the definition of disability found in 42 U.S.C. § 12102:

(1) Disability

[4] OCR's investigation revealed that the Center staff has access to the following auxiliary aids: amplified headset; large print materials for individuals who are blind or who have low vision; alphabet boards and communication boards; flash cards; paper and pencil; taped materials for the blind; and access to the State Telecommunications Relay Service.

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment . . . .

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The regulation implementing Section 504 provides that 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).

The Section 504 regulation provides, at 45 C.F.R. §§ 84.4(a) and (b)(1):

(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 or benefits from Federal financial assistance.

(b)(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;

(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 . . .

Further, 45 C.F.R. § 84.52(d) provides that:

(1) A recipient to which this subpart 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.…

(3) For the purposes of this paragraph, auxiliary aids may include brailed and taped material, interpreters, and other aids for persons with impaired hearing or vision.

Pursuant to Section 504, recipients of Federal financial assistance must ensure that persons who are deaf or hard of hearing are provided equal access to health care services. Where necessary to afford equal access to health care services, recipients must provide auxiliary aids and services. Such auxiliary aids and services, which must be provided at no cost to the person who is deaf or

hard of hearing, may include: formal arrangements with interpreters who can accurately and fluently express and receive in sign language; supplemental hearing devices; written communication; flash cards; staff available to provide basic sign language expressions relevant to emergency treatment; and at least one telecommunication device for the deaf or teletypewriter (TDD/TTY) or arrangement to share a TDD/TTY line with another healthcare facility.

The method of communication and the auxiliary aids that the recipient must provide will vary depending upon the abilities of the person receiving services and the complexity and nature of the communications that are required. *See* U.S. Department of Justice, *ADA Business Brief: Communicating with Persons Who Are Deaf or Hard of Hearing in Hospital Settings* (Oct. 2003) (http://www.ada.gov/hospcombr.htm). As a result, the recipient should consult with each deaf or hard of hearing person to determine what auxiliary aids are necessary to provide effective communication in his or her particular situation. This decision should be based on an individualized assessment of the person's communication needs and a determination regarding what is necessary to ensure effective communication, such that an otherwise qualified person with a disability is not denied benefits or services.

The Department of Justice guidance explains that "effective communication is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment." 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 advised that for more complicated and interactive communications, such as discussion of symptoms or treatment options with patients, it may be necessary to provide a qualified sign language interpreter.[5] In addition, the process of writing back and forth can be arduous and time-consuming for both the provider and the patient. As a result, such messages may be abbreviated, resulting in incomplete communication.

ISSUE

Whether the Center discriminated against the affected individual on the basis of his disability by failing to provide sign language interpreter services in connection with his long term skilled nursing care in violation of 45 C.F.R. §§ 84.4(a) and (b)(1)(i), and §§ 84.52(d)(1) and (2).

DISCUSSION AND ANALYSIS

As Medicaid and Medicare providers that employ 15 or more persons, Genesis facilities are obligated to comply with the non-discrimination requirements of Section 504 and 45 C.F.R. Part 84.

OCR finds that Mr. REDACTED meets the definition of a person with a disability and the definition of a qualified person with a disability, as he was deaf and was qualified to receive health care services at the Center. More specifically, Mr. REDACTED had a physical impairment (deafness) which "substantially limit[ed] one or more major life activities."[6] 45 C.F.R. § 84.3 (j)(1).

[5] 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.

[6] The regulation specifies that a "physical or mental impairment" includes any physiological disorder or condition affecting the special sense organs. 45 C.F.R. § 84.3(j)(2)(i)(A). Additionally, the regulation identifies "hearing" as a major life activity. 45 C.F.R. § 84.3(j)(2)(ii).

As a result, the Center had an obligation under Section 504 and 45 C.F.R. §§ 84.4(a) and (b)(1) to ensure that it effectively communicated with Mr. REDACTED such that he had the opportunity to benefit from the long term skilled nursing care that the Center offers commensurate to the opportunity offered to persons who are not deaf or hard of hearing. The evidence demonstrates that, based on his individual needs, Mr. REDACTED required a sign language interpreter in order to communicate effectively with his treatment providers at the Center. As explained more fully above, the evidence demonstrates that: 1) Mr. REDACTED's primary form of communication was sign language; 2) Johns Hopkins Hospital and other Johns Hopkins treatment facilities where Mr. REDACTED received care prior to and during his residency at the Center communicated with Mr. REDACTED primarily using a sign language interpreter and such communication was effective; 3) Mr. REDACTED needed a sign language interpreter to communicate effectively with others; 4) Center staff was able to communicate more effectively with Mr. REDACTED when an ASL interpreter was present as evidenced by staff attempts to use REDACTED as an ASL interpreter when she was visiting Mr. REDACTED and staff attempts to access an ASL interpreter through Mr. REDACTED's VRS; and 5) the complex nature of Mr. REDACTED's medical condition, symptoms, and treatment required complicated and interactive communications between Mr. REDACTED and Center staff which could be achieved only by using an ASL interpreter, not through written notes.

Based on the above-described facts, OCR has concluded that a qualified sign language interpreter was necessary in order to provide Mr. REDACTED an equal opportunity to communicate effectively with the Center staff regarding his treatment, and to participate in and benefit from the health care services that the Center offers. Furthermore, OCR has determined that the Center was aware that Mr. REDACTED needed an interpreter to effectively communicate about his care with the Center's staff. Despite this, the Center failed to provide him with one at any time during his stay, in violation of 45 C.F.R. §§ 84.4(a) and (b)(1)(i).

The evidence further demonstrates that the Center discriminated against Mr. REDACTED on the basis of his disability in violation of 45 C.F.R. § 84.4(a) and (b)(1)(i) when it determined before Mr. REDACTED was admitted that it would not provide him with an ASL interpreter at the Center, regardless of whether or not it was necessary to afford him an equal opportunity to benefit from the skilled nursing services in question. As described more fully above, during the pre-admission evaluation assessment process, Genesis staff did not appropriately assess which auxiliary aids Mr. REDACTED needed for effective communication. Instead of assessing Mr. REDACTED's individual needs, Genesis staff determined from the outset that Mr. REDACTED "would need to be able to communicate without an interpreter" or else he would not be admitted. Even as Center staff struggled to communicate with Mr. REDACTED and tried to discuss their communication difficulties with Administrative staff at the Center, the Administrator and Director of Nursing categorically refused to provide Mr. REDACTED with an ASL interpreter. As a result, Genesis and the Center foreclosed the possibility of providing an ASL interpreter to Mr. REDACTED, regardless of whether or not it was necessary to afford him an equal opportunity to benefit from the skilled nursing services in question. The Center's failure to consider providing ASL interpreting services even where it was necessary for effective communication constituted discrimination under 45 C.F.R. §§ 84.4(a) and (b)(1)(i).

Additionally, the evidence demonstrates that the Center failed to provide appropriate auxiliary aids in accordance with 45 C.F.R. § 84.52(d) to be able to communicate effectively with Mr. REDACTED in the context of his treatment. As explained more fully above, the Center chose to

address Mr. REDACTED's deafness by communicating with him using written notes which, as the evidence shows, were ineffective. Specifically, the notes were very limited, sometimes unintelligible, and sometimes illegible.

In particular, the written notes were a wholly inadequate method of communication for the more complicated and interactive communications that were required given Mr. REDACTED's medical condition, treatment, and symptoms. There were numerous complicated aspects of Mr. REDACTED's medical condition, treatment, and symptoms. Yet, Mr. REDACTED and Center staff had no meaningful way to communicate with one another regarding his medical condition, treatment, and symptoms. As described more fully above, Center staff had no meaningful way to educate Mr. REDACTED on the REDACTED that were implemented to address his multiple diagnoses (i.e., the REDACTED for his REDACTED). Nor did the Center have any meaningful way to communicate with Mr. REDACTED to try to secure his compliance surrounding these REDACTED.

Additionally, the Center's attending physician had no meaningful way to communicate with Mr. REDACTED concerning his multiple complex health conditions. Nor did the Center's attending physician have a meaningful way to communicate with Mr. REDACTED in order to monitor the 15 medications he had prescribed for Mr. REDACTED. Moreover, Mr. REDACTED did not have a meaningful way to communicate symptoms he was experiencing to staff and, as such, had to communicate his symptoms through informal hand gestures and short written notes. Similarly, Center staff did not have a good way to monitor more complex symptoms that Mr. REDACTED may have been experiencing such as subtle changes in his vision including REDACTED.

Furthermore, the evidence demonstrates that Center staff did not employ effective means of communicating with Mr. REDACTED in order to educate him surrounding all of his various treatment and care refusals. As explained more fully above, at various times, Mr. REDACTED refused: REDACTED. Indeed, even where staff did attempt to educate Mr. REDACTED concerning these treatment and care refusals, such education was attempted only through the limited means of written notes. This method of communication was not commensurate with the complex and interactive communications that were necessary to address treatment and care refusals.

The evidence further demonstrates that the Center failed to provide appropriate auxiliary aids in accordance with 45 C.F.R. § 84.52 (d) to be able to communicate effectively with Mr. REDACTED in that the Center inappropriately relied on Mr. REDACTED's family members, inappropriately relied on his friend who was fluent in ASL, and inappropriately tried to use his VRS to facilitate communication. As described more fully above, staff was not able to communicate effectively with Mr. REDACTED regarding the REDACTED and, as a result, inappropriately relied on his sister to facilitate communication with Mr. REDACTED regarding the proper use of this medical device.

Additionally, the auxiliary aids the Center had in place to communicate with Mr. REDACTED were ineffective as evidenced by the fact that staff frequently approached, Mr. REDACTED's friend who was fluent in ASL, when she visited Mr. REDACTED at the Center, to facilitate communication between him and staff. Furthermore, the auxiliary aids the Center had in place to communicate with Mr. REDACTED were ineffective as evidenced by the fact that staff

inappropriately tried to rely on the ASL interpreters through Mr. REDACTED's VRS in order to facilitate communication between him and staff. Indeed, staff even commented how Mr. REDACTED had improved as a result of staff members accessing the ASL interpreters through the VRS because they were able to communicate with him in basic ways such as finding out if he wanted to participate in activities. Moreover, the auxiliary aids the Center had in place to communicate with Mr. REDACTED were ineffective as evidenced by the fact that staff inappropriately relied on communicating with Mr. REDACTED's family because they could not communicate effectively with Mr. REDACTED himself. And, staff at the Center inappropriately ignored the fact that Mr. REDACTED was fully capable of making his own health care decisions. Instead, Center staff communicated with Mr. REDACTED's family regarding various health care decisions such as consent for REDACTED. The Maryland Department of Health and Mental Hygiene cited the Center for its failure to communicate with Mr. REDACTED directly regarding his own care decisions and inappropriate reliance on his family members to make such decisions. The Center's failure to afford Mr. REDACTED the opportunity to make decisions about care and treatment was, at least in part, attributable to the fact that staff had no meaningful way to communicate with Mr. REDACTED surrounding these important health care decisions.

The evidence further demonstrates Mr. REDACTED was frequently frustrated with the treatment staff as a result of his inability to communicate effectively with them. The complainant reported that Mr. REDACTED's frustration with the treatment staff was largely connected to his inability to communicate effectively with them due to the Center's failure to provide him with sign language interpreter services.

Accordingly, OCR has determined that the Center's failure to provide Mr. REDACTED with a qualified sign language interpreter at any point during his treatment from September 16, 2009 to March 24, 2010 and its failure to ensure effective communication denied Mr. REDACTED the opportunity to participate in or benefit from the services the Center offers equal to the opportunity offered to persons without hearing impairments, in violation of 45 C.F.R. §§ 84.4(a) and (b)(1)(ii) and 45 C.F.R. §§ 84.52(a)(2) and (d)(1).

Finally, it is important to note that Randallstown Center had very basic and incomplete policies and procedures for communicating with patients who are deaf or hard of hearing in place at the time of the events described in the complaint. Furthermore, OCR found that the Center had not implemented these policies, as there were no sign language interpreter service resources to communicate effectively with patients who are deaf or hard of hearing and who may require such services. Indeed, Counsel for Genesis conceded that there were no arrangements in place to ensure that qualified interpreters were readily available.

Moreover, OCR's investigation uncovered evidence that Genesis had policies and practices in place that raised significant concerns. The pre-admission assessment conducted by Genesis revealed that Genesis determined Mr. REDACTED would not be provided an interpreter, without assessing his individual needs and whether or not he needed an interpreter to communicate effectively. Also, in the course of the investigation, Genesis supplied policies to OCR that differed from policies that Genesis had supplied to OCR in 2008 pursuant to a Corporate Agreement with OCR, which were represented at that time to be in effect in all Genesis facilities. As a result of its failure to develop or implement adequate policies and procedures for communicating with patients who are deaf or hard of hearing, Genesis may be failing to provide such persons with appropriate auxiliary aids and services in order to ensure

effective communication in the long term skilled nursing care setting. Consequently, it will be necessary for Genesis to resolve the issues raised in this case and renegotiate the Corporate Agreement with OCR. Failure to do so may result in OCR exercising its discretion to terminate the Corporate Agreement.

CONCLUSION

For the reasons stated above, OCR finds that the Randallstown Center's failure to provide Mr. REDACTED with a qualified sign language interpreter at any point during his treatment denied Mr. REDACTED the opportunity to participate in or benefit from the services the Center offers equal to the opportunity offered to persons who are not deaf or hard of hearing, in violation of 45 C.F.R. §§ 84.4(a) and (b)(1)(ii) and 45 C.F.R. §§ 84.52(a)(2) and (d)(1). Where, as is the case here, there has been a finding of discrimination, 45 C.F.R. § 84.6 requires a recipients to take remedial action to overcome the effects of the discrimination.[7]

Genesis 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 Genesis 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) and 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. Jamie Rahn Ballay, Investigator, at 215-861-4432 or via email at jamie.rahn@hhs.gov. Thank you for your cooperation in this matter.

[7] This requirement applies notwithstanding the fact that REDACTED. 45 C.F.R. § 84.6(a)(3).

Sincerely,

/s/

Frank Campbell
Acting Regional Manager

Enclosure: Settlement Agreement
cc: Complainant (w/o enclosure)