HHS Office of Civil Rights Reinforces Preclusion of Discriminatory Treatment Denials

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Facing an onslaught of patients which is expected to exceed hospital capacity, as well as supplies and equipment availability, several recent reports indicate healthcare institutions are considering basing treatment decisions on factors such as age, pre-existing immunocompromising conditions, disabilities and post-treatment quality of life. On March 28, 2020, the Office for Civil Rights at the Department of Health and Human Services (OCR), which enforces the anti-discrimination sections under the Affordable Care Act and Rehabilitation Act, issued a bulletin reminding healthcare providers of their obligation to follow those laws and regulations when treating COVID-19 patients and preparing emergency plans. Those laws prohibit discrimination on the basis of disability and age, among other bases, in HHS-funded programs.

The OCR notes care "must be guided by the fundamental principles of fairness, equality and compassion" and "this is particularly true with respect to the treatment of persons with disabilities during medical emergencies as they possess the same dignity and worth as everyone else." The agency went further stating "persons with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person's relative 'worth' based on the presence or absence of disabilities." Instead, treatment decisions should be based on individual assessments and best objective medical evidence, including when treating those with disabilities and immunosuppressed patients. Providers must address their needs and include them in emergency planning.

The director of the OCR, Roger Severino, stated "[p]ersons with disabilities, with limited English skills, or needing religious accommodations should not be put at the end of the line for health services during emergencies. Our civil rights laws protect the equal dignity of every human life from ruthless utilitarianism." Thus, providers must ensure that systems are in place to (1) ensure effective communication with deaf, blind or visually impaired patients; (2) provide interpreters when necessary; (3) ensure emergency messaging is readily available and accessible to all people; and (4) respect requests for religious accommodations.

What is not clear from the OCR's bulletin is what circumstances warrant departure from these actions and accommodations. It notes that HHS's prior March 17, 2020 "Declaration Under the Public Readiness and Emergency Preparedness Act" may apply with respect to some private claims and may provide immunity in certain circumstances from civil liability under civil rights laws. The OCR also points out the required "actions or accommodations may not be required on the basis that they may fundamentally alter the nature of the program, pose an undue financial and administrative burden, or pose a direct threat." No further guidance is provided on what "fundamentally alters" a healthcare program, what is considered an "undue financial and administrative burden" or what constitutes a "direct threat." It appears that these categories do not include, or address, the most difficult and pressing decision providers must make in treating COVID-19 patients with limited supplies – which patients get the limited supplies?. For instance, if a hospital only has one ventilator and two critically ill COVID-19 patients, can the hospital consider age when deciding which patient it will place on the ventilator as part of objective analysis given that it impacts successful treatment? The OCR may issue further guidance on these issues in the near future, though it has not given any indication that further guidelines will be issued at this time.

The OCR also addresses medical supplies. Per the bulletin, healthcare facilities should consider adopting, "as circumstances and resources allow," practices to ensure that facilities are stocked with "items that will help people to maintain independence, such as hearing aid batteries, canes, and walkers." The OCR does not offer guidance on how healthcare providers should balance addressing

shortages of life-saving equipment, such as ventilators and protective face masks, with obtaining items such as hearing aid batteries and canes.

In addition to providing guidance regarding covered entities' obligations with regard to people with disabilities, elderly people, people with limited English proficiency and members of diverse faith communities, the March 28, 2020 Bulletin also reminds covered entities of recent HIPAA and telehealth flexibilities made by HHS in response to the COVID-19 pandemic.

According to the CDC, "social distancing" means remaining out of congregate settings (*i.e.* crowded public places where close contact with others may occur, such as shopping centers, movie theaters and stadiums), avoiding mass gatherings and maintaining distance (approximately 6 feet, or 2 meters) from others when possible. The CDC recommends that certain people at risk of contracting COVID-19 practice social distancing, and various state and local governments across the country have also issued orders requiring social distancing in their various jurisdictions. CMS has recognized that, in the face of widespread social distancing, it may become difficult for people to access necessary healthcare services, and so has "broadened access to Medicare telehealth services so that beneficiaries can receive a wider range of services from their doctors without having to travel to a healthcare facility."

OCR also relaxed certain HIPAA requirements in response to the COVID-19 emergency, so that covered entities may utilize expanded telehealth capabilities, and may also share certain information related to COVID-19. According to OCR, covered healthcare providers will not be subject to penalties for violations of the HIPAA Privacy, Security, and Breach Notification Rules that occur in the good faith provision of telehealth during the COVID-19 nationwide public health emergency. OCR also issued guidance on when the HIPAA Privacy Rule permits a covered entity to disclose the protected health information of an individual who has been infected with, or exposed to, COVID-19, with law enforcement, paramedics, other first responders and public health authorities without the individual's authorization.

If you have questions or would like further information, please contact Debra A. Weinrich (weinrichd@whiteandwilliams.com; 215.864.6260) or another member of our Healthcare Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.