

Via Email & U.S. Mail

November 23, 2020

Roger Severino
Director, Office for Civil Rights
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington D.C. 20201

Re: Texas Health and Human Services Commission's Emergency Rules Limiting Hospital Visitation Constitute Illegal Disability Discrimination

Dear Mr. Severino,

Disability Rights Texas, along with the fourteen undersigned state and national advocacy organizations and individual complainants, submit this Complaint against the Texas Health and Human Services Commission ("HHSC") for failing to ensure that persons with disabilities who are hospitalized receive reasonable accommodations during the COVID-19 pandemic. HHSC's most recent adoption on September 25, 2020, of an emergency rule (Title 25 Texas Administrative Code, Chap. 133 Hospital Licensing, § 133.51)¹ concerning visitor access during the COVID-19 pandemic, mandates that hospitals "shall limit visitors allowed in the facility to the extent the hospital determines such limitation is necessary to prevent or control a COVID-19-related health and safety risk." This emergency rule replaced a prior emergency rule (also § 133.51) adopted on April 3, 2020,² that allowed providers of "essential services," which included a single designated caregiver acting on the patient's behalf, entry to a hospital. By removing the provision assuring caregivers a right of entry to the hospital to support a patient with a disability requiring the presence of a support person, the new emergency rule denies individuals with disabilities equal access to medical treatment by:

- Denying individuals effective communication;
- Depriving individuals of their right to make informed decisions and provide informed consent;
- Subjecting individuals to the unnecessary use of physical and chemical restraints;
- Denying individuals adequate and necessary medical treatment and care; and,
- Subjecting individuals to substantial and lasting emotional harm.

¹ September 25, 2020 emergency rule attached as Ex. A.

² April 3, 2020 emergency rule attached as Ex. B.

As you know, many people with disabilities are at a higher risk of contracting COVID-19 and experiencing life-threatening complications for the virus. Many others with disabilities may need to be hospitalized for other reasons. It is therefore critical that such persons be able to effectively communicate with medical personnel while in the hospital.

To illustrate the immediacy and impact of COVID-19 in Texas, as of November 19, 2020, Texas reported 63,003 new cases of COVID-19 within the last 7 days.³ Further, as of November 19, 2020, Texas had 879 COVID-19 deaths in the last 7 days, the highest in the country.⁴

As the Protection & Advocacy system for Texas,⁵ Disability Rights Texas is authorized to pursue legal, administrative, and other appropriate remedies to ensure the protection of, and advocacy for, the rights of individuals with disabilities. 42 U.S.C. § 15043(a)(2)(A). This action is brought under the Americans with Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act (“ACA”). We urge you to immediately investigate and take swift action to resolve these allegations of disability discrimination.

Complainants

The below named individuals and organizations file this Complaint on behalf of themselves and their constituents, Texans with disabilities, who will likely suffer irreparable harm if they are denied their right to a needed support person while hospitalized due to the HHSC’s discriminatory emergency rule.

Disability Rights Texas (“DRTx”) is the organization designated pursuant to the federal Protection and Advocacy Acts by the State of Texas as the Protection and Advocacy system for residents of this State with physical, mental, and developmental disabilities. DRTx is charged under these laws with investigating incidents of abuse and neglect committed against persons with disabilities, advocating for such individuals to ensure protection of their rights, and pursuing legal remedies in furtherance of these rights. DRTx files this Complaint on behalf of itself and its constituents, individuals with disabilities who are at risk of harm due to HHSC’s restrictive hospital visitor rule, together with our co-complainants, individuals and advocacy organizations from across the state.

ADAPT of Texas, based in Austin, Texas, is a grassroots, statewide nonprofit disability rights organization that has groups throughout the state. ADAPT of Texas advocates for the rights of people with disabilities to live in the Community and have access to the same services, amenities, and programs as everyone else. ADAPT believes people with disabilities to be of equal value to any other person, to have the same right to live as anyone else, to have the same right to treatment

³ Centers for Disease Control and Prevention, CDC COVID Data Tracker, Data Table for Cases in last 7 Days by State/Territory, found at https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days (last accessed on November 19, 2020).

⁴ Centers for Disease Control and Prevention, CDC COVID Data Tracker, Data Table for Deaths in last 7 Days by State/Territory, found at https://covid.cdc.gov/covid-data-tracker/#cases_deathsinlast7days (last accessed on November 19, 2020).

⁵ See Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15041, *et seq.*; the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801, *et seq.*; and the Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e.

as anyone else, and that the value of the lives of people with disabilities is not tied to their abilities or impairments.

The Arc of Texas promotes, protects, and advocates for the human rights and self-determination of Texans with intellectual and developmental disabilities (“IDD”). As a statewide membership organization, The Arc of Texas works alongside and for Texans with IDD and their families to identify barriers to and solutions for inclusive education, competitive integrated employment, quality community-based services and supports, and access to civil rights and justice. The Arc of Texas supports its members in various ways, from informing state-level policies to training members to advocate for themselves at state agencies and the Texas Capitol. In addition to direct policy and advocacy work, The Arc of Texas organizes and facilitates numerous programs that train, educate, and connect diverse stakeholders. In its more than 65 years of existence, The Arc of Texas continuously proves that Texans with IDD are valuable members of their communities and can make decisions for themselves, particularly when proper supports and services are available. Unfortunately, The Arc of Texas must also work tirelessly to dispel harmful myths against Texans with IDD, including that they do not have a high quality of life. Denying individuals with disabilities their right to have a support person if needed is unacceptable, and The Arc of Texas joins others to demand that HHSC’s discriminatory rule be rescinded and replaced so as to protect persons with disabilities during the COVID-19 pandemic and all future emergencies.

The Coalition for Texans with Disabilities (“CTD”) is a statewide, non-profit, cross-disability advocacy organization founded in 1978 and directed by people with disabilities. In its policy work, CTD consistently advocates for access to health care in an environment that rejects discrimination based on disability.

Protect Texas Fragile Kids (“PTFK”) is a nonprofit organization founded and run by parents of medically fragile Texas children. PTFK’s stated mission is to give a voice to Texas’ most fragile citizens; to inform, educate, and support families of children with disabilities; to fight for what is right for children with special medical needs and disabilities; to champion public policy which supports and protects the well-being of children with disabilities and complex medical needs; to monitor existing and proposed legislation impacting children with disabilities; and to empower families with children who have disabilities and complex medical needs to connect with elected officials to promote understanding of this life. PTFK is particularly concerned that HHSC has removed the protections that allow parents and caregivers entry to the hospital to be with their children or young adults with disabilities.

The National Down Syndrome Society (“NDSS”) is the leading human rights organization for all individuals with Down syndrome. Many individuals with Down syndrome are at a higher risk for contracting COVID-19 because they have underlying medical conditions and/or live in group homes, long-term care facilities or other congregate settings. As a community, people with Down syndrome already face discrimination in access to health care, and we need to be vigilant in protecting their civil rights and ensuring equal access to necessary accommodations.

Blake Pyron is 24 years old, and he lives with Down syndrome, a heart condition, and sleep apnea. Blake lives at home with his parents in Denton County. After graduating from high school, Blake started his own business, Blake’s Snow Shack, in Sanger, Texas. Blake is a Texas Ranger’s fan

and loves country music. As a self-advocate, Blake lobbied the Texas Legislature for fair wages for persons with disabilities, which culminated in the passage of a minimum wage bill for persons with disabilities. As a National Down Syndrome Society Ambassador, Blake spoke at a United Nations conference on the employment of persons with disabilities and rang the opening bell at the New York Stock Exchange. Recently, on behalf of Blake and other persons with disabilities, his mother participated in a public service announcement called “Coronavirus: Loved Ones of Those at Risk.”⁶ Blake is worried about what will happen to him should he need to be hospitalized during the COVID-19 pandemic, now that HHSC’s new emergency rules removed language protecting his right to have a support person with him. Blake and his mother are very concerned that he could be alone in the hospital without the presence of his caregiver, who he needs with him to assist with communication and ensure equal access to needed healthcare. Blake’s family believes that should he be hospitalized, it is crucial that he have a support person with him for his safety.

M.B. is 30 years old and has cerebral palsy, a tracheostomy, scoliosis, a gastrostomy tube, and is non-verbal. In July 2020, M.B. was hospitalized with pneumonia unrelated to COVID-19. The hospital only allowed M.B.’s mother to be her necessary support person for one hour per day. Advocacy was provided using the April 2020 emergency rules from HHSC, among other things, and as a result, the hospital allowed M.B.’s mother much greater access to assist M.B. with communication and provide emotional support. However, due to the emergency rules enacted by HHSC on September 25, 2020, M.B.’s parents and legal guardians have a reasonable fear of not being able to serve as her necessary support person if M.B. is hospitalized again.

C.J. is 82 years old and has cerebral palsy, intellectual disability, hypertension, chronic obstructive pulmonary disease (COPD), tremors, and scoliosis. C.J. and his guardian J.L. are worried about what will happen to him if he is admitted to the hospital without access to a necessary support person. J.L. states “what a horror that would be, if C.J. were hospitalized and one of his main support people (me and his HCS provider Cheryl) could not be on hand to interpret his speech...it has taken me 25 years to learn his speech....”

C.P. is 31 years old and has cerebral palsy, epilepsy, and cognitive and language (receptive and expressive) delays. C.P. and her parents are worried about what would happen to her if she is admitted to the hospital without the necessary support needed to understand and make decisions about her medical care/treatment. C.P.’s mother “can’t imagine what would happen if C.P. was hospitalized and her natural supports (her dad or I) were unable to be with her to interpret medical jargon and her response.”

E.J. is a 55-year-old man with Down syndrome, intellectual disability, and anxiety. Currently stable, E.J. will need to be hospitalized in the near future for dental work. Experience from past hospitalizations demonstrates that E.J. will need continuous support from his family or HCS support staff. With limited communication skills and significant reactions to medications and medical procedures, E.J. has a history becoming animated and physically uncontrollable. Subjecting E.J. to the added trauma of being surrounded by unfamiliar people is unimaginable for

⁶ The video is available at <https://youtu.be/uEKqjQVdyKg>.

both E.J. as well as the hospital staff who would likely have no choice but to physically and medically restrain him.

J.D. is 18-years-old and has Down syndrome, non-verbal autism, and ADHD. He has aggressive and self-injurious behaviors. J.D. receives extensive support on a daily basis for behavior management and activities of daily living. J.D. is currently scheduled for a surgical procedure November 30, 2020, and will need to be hospitalized for 3 to 4 days for intravenous pain management. J.D. will need both parents or a parent and a caregiver for the duration of his stay. Even with two adults supporting him through this process, it will be extremely difficult at best, and with limited support, virtually impossible.

The Devolution of HHSC's Emergency Rules Concerning Hospital Visitation

HHSC's April 3 Emergency Rules Allowed a Designated Caregiver Entry to a Hospital as a Person Providing Critical Assistance

On April 3, 2020, HHSC adopted emergency rule 25 Tex. Admin. Code § 133.51 concerning hospital response to COVID-19. The April 3 rule, in relevant part, states:

(a) Based on state law and federal guidance, HHSC deems COVID-19 a health and safety risk to hospital patients, staff, and the public and requires a hospital to take the following measures. The screening required by this section does not apply to emergency services personnel entering the hospital in an emergency situation.

(b) A hospital must implement and enforce written policies and procedures in accordance with this section regarding the visitation rights of patients and setting forth any clinically necessary or reasonable restriction or limitation on such rights and the reasons for the clinical restriction or limitation.

(c) A hospital must implement and enforce written policies and procedures regarding the entry of its workforce to protect the health and safety of patients, employees and staff, and the public.

(d) In this section:

(1) *Providers of essential services include, but are not limited to, contract doctors, contract nurses, hospice workers, other contract healthcare providers, persons providing a survivor of sexual assault with services required by Health and Safety Code Chapter 323, and a single designated caregiver acting on the patient's behalf.*

(2) Persons with legal authority to enter include, but are not limited to, government personnel performing their official duties and an attorney or other legally authorized representative of a patient.

(3) *Persons providing critical assistance include providers of essential services, persons with legal authority to enter, a clergy member authorized by the hospital,*

one parent of a minor who is a patient, and family members and friends of a patient at the end of life or presenting at the emergency department, subject to the hospital's policies and procedures.

(e) A hospital must prohibit visitors, except as provided by subsection (f) of this section.

(f) *A hospital may allow entry of persons providing critical assistance, unless the person meets one or more of the following screening criteria:*

(1) Fever or signs or symptoms of a respiratory infection, such as cough, shortness of breath, or sore throat;

(2) Contact in the last 14 days with someone who has a confirmed diagnosis of COVID-19, someone who is under investigation for COVID-19, or someone who is ill with a respiratory illness; or

(3) International travel within the last 14 days to countries with ongoing community transmission. For updated information on affected countries visit: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notice.html>.

April 3, 2020 Emergency Rule § 133.51 (emphasis added).

In response to a letter from Disability Rights Texas over concerns that this rule was not specific enough to inform facilities of their obligations, HHSC asserted in its May 1 letter (attached as Ex. C) that its April 3 rules explicitly “allow support persons for people with disabilities to act as persons providing critical assistance and be allowed entry into a hospital if they pass screening. Support persons for people with disabilities could be allowed entry to a hospital under multiple categories of allowed visitors in the emergency rule[.]” While not perfect, the April 3 emergency rule did seem to afford some protections to adults and children with disabilities who, due to the specifics of their disabilities, need the assistance of a support person while hospitalized.

HHSC’s September 25 Emergency Rules Removed the Language Permitting Designated Caregivers Entry to a Hospital, but Retained the Language Permitting Government Personnel

On September 25, HHSC adopted a new emergency rule, 25 Tex. Admin. Code § 133.51, which inexplicably removed all the language HHSC had previously touted as ensuring that individuals with disabilities retain their rights to reasonable accommodations under federal law, including the ADA, Section 504, and the ACA.⁷ The September 25 emergency rule now states, in its entirety, that:

⁷ To our knowledge, HHSC adopted these new emergency rules without seeking input from the disability community.

(a) Based on Governor Greg Abbott's March 13, 2020, declaration of a state of disaster in all Texas counties, the Texas Health and Human Services Commission adopts this emergency rule to establish continuing requirements and flexibilities to protect public health and safety during the COVID-19 pandemic. The requirements and flexibilities established in this section are applicable during an active declaration of a state of disaster in all Texas counties due to the COVID-19 pandemic, declared pursuant to §418.014 of the Texas Government Code.

(b) In order to protect the health and safety of patients, hospital staff, and the public, *a hospital shall limit visitors allowed in the facility to the extent the hospital determines such limitation is necessary to prevent or control a COVID-19-related health and safety risk.*

(c) In order to protect the health and safety of patients, hospital staff, and the public, a hospital shall adopt, implement, and enforce written policies and procedures to screen each person entering the hospital, using criteria based on state, local, and federal guidance in the event of a public health disaster, and prohibit entry of any person who does not meet the screening criteria.

(d) A hospital shall implement and enforce written policies and procedures in accordance with this section regarding:

(1) the visitation rights of patients;

(2) any clinically necessary or reasonable restriction or limitation on such rights; and

(3) the reasons for the clinical restriction or limitation.

(e) A hospital may not prohibit government personnel performing their official duty, from entering the hospital, unless the individual fails to meet the hospital's screening criteria.

(f) If an executive order or other direction is issued by the Governor of Texas, the President of the United States, or another applicable authority that is more restrictive than this section or any minimum standard relating to a hospital, the hospital must comply with the executive order or other direction.

September 25, 2020 Emergency Rule 25 Tex. Admin. Code § 133.51 (emphasis added).

Pursuant to this new emergency rule, hospitals “shall limit visitors allowed in the facility to the extent the hospital determines such limitation is necessary to prevent or control a COVID-19-related health and safety risk.” By removing subsections (d)(1)-(3), (e), and (f) from the April 3 emergency rule, HHSC’s September 25 emergency rule now permits hospitals to deny access to caregivers supporting persons with disabilities. In other words, by striking provisions requiring hospitals to allow support persons (designated as persons providing critical assistance), HHSC has

given its imprimatur to hospitals to deny entry to such persons, in violation of federal disability law.

In response to the issues raised in this Complaint, HHSC contends that the September rules expand visitation rights and that the provisions explicitly protecting the right of hospital entry for support persons were no longer necessary.⁸ This is a specious argument.

First, the September rules could have provided hospitals with flexibility to tailor their visitation policies based on local conditions *and* ensured that there are still protections for hospitalized persons with disabilities. HHSC, however, only chose to do the former.

Second, whereas a “no visitor” policy would have clearly violated the April rules, a hospital could now defend such a blanket policy by pointing to the rule change; while the April rules recognized an exception for patients who require a person providing “critical assistance,” the September rules no longer even reference that exception. In other words, a hospital could now claim that its implementation of a “no visitor” policy is consistent with State rules. This will no doubt harm hospitalized persons with disabilities who require a support person.

Third, while HHSC now claims that it removed the provisions explicitly protecting the right of hospital entry for support persons as unnecessary because the September rules allegedly allow for greater visitation rights, HHSC in its September rules retained the provision from the April rules protecting hospital entry for government personnel.⁹ If the September rules truly allowed for greater visitation rights, as HHSC claims, then there was no need to retain the express protections allowing hospital entry for government personnel.

Fourth, HHSC argues that the September rules do not discriminate because they apply generally to patients throughout Texas and do not treat patients any differently than others. HHSC, however, misunderstands the accommodation and modification provisions in the American with Disabilities Act and Section 504. In *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J, concurring) (citations and brackets omitted), the Supreme Court recognized that “Congress understood in shaping the ADA [that it] would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation. Central to the Act’s primary objective, Congress extended the statute’s range to reach all government activities, and required “reasonable modifications to rules, policies, or practices.” The Fifth Circuit Court of Appeals has also recognized that the ADA’s accommodation obligation “sets it apart from most other anti-discrimination legislation. . . . By requiring reasonable accommodation, the ADA shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities.” *Riel*

⁸ HHSC’s letter dated November 17, 2020, attached as Ex. E.

⁹ The April 3, 2020 Emergency Rule, 25 Tex. Admin. Code § 133.51(g), and the September 25, 2020 Emergency Rule, 25 Tex. Admin. Code § 133.51(e), both state that “A hospital must not prohibit government personnel performing their official duty from entering the hospital, unless the individual meets the above screening criteria.”

v. Elec. Data Sys. Corp., 99 F.3d 678, 681 (5th Cir. 1996) (Title I). The opinions of other courts reflect the same recognition. *See, e.g., Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1262 (11th Cir. 2007) (“The district court’s implication that Holly was required to prove disparate treatment reflects, we believe, a misunderstanding of the fundamental nature of a reasonable accommodation claim under the ADA.”).

Further, UMC hospital systems in Lubbock, Texas, has a restrictive visitor policy dated November 10, 2020, that affords no right of hospital entry for support persons for COVID patients with disabilities over the age of 17.¹⁰ UMC could now certainly claim that its visitor policy complies with HHSC’s September Emergency Rule § 133.51(b) because the rule states that a hospital “shall limit visitors allowed in the facility to the extent the hospital determines such limitation is necessary to prevent or control a COVID-19-related health and safety risk.” Under § 133.51(d)(1)&(3) of the April Emergency Rule, however, a patient could have rightfully claimed that UMC’s visitor policy violated the protections afforded to patients with disabilities who require the assistance of a support person. Thus, contrary to HHSC’s assertions, its September 25 rules do harm patients with disabilities as they expressly removed the protections afforded such patients.¹¹

Finally, rules are meant to provide guidance while still complying with federal and state law. Rule § 133.51(b) fails to do that, and instead will lend itself to more facilities violating the rights of patients with disabilities. There is also insufficient time for a patient to make a regulatory complaint before their rights are violated.

Legal Standards

The Americans with Disabilities Act,¹² Section 504 of the Rehabilitation Act,¹³ and Section 1557 of the Affordable Care Act¹⁴ protect patients with disabilities and entitle them to reasonable modifications and accommodations to ensure equal access to treatment.

Title II of the ADA prohibits public entities (such as state and local governments) from excluding people with disabilities from their programs, services, or activities, denying them the benefits of those services, programs, or activities, or otherwise subjecting them to discrimination. 42 U.S.C. §§ 12131-12134. Unlawful discrimination under Title II includes, *inter alia*: using eligibility criteria that screen out or tend to screen out individuals with disabilities, failing to make reasonable modifications to policies and practices necessary to avoid discrimination, and perpetuating or aiding discrimination by others. 28 C.F.R. §§ 35.130(b)(1)-(3), 35.130(b)(7)-(8).

Moreover, the United States Department of Justice has explicitly instructed that Title II of the ADA applies to emergency preparedness efforts of state and local governments, writing:

¹⁰ UMC Visitor Guidelines dated Nov. 10, 2020, attached as Ex. F.

¹¹ UMC is not alone in having a visitation policy that restricts the entry of support persons. For example, Odessa Regional Medical Center has a no visitor policy with no exceptions for support persons (effective October 26). It is available at <https://www.odessaregionalmedicalcenter.org/services-directory/covid-19>.

¹² 42 U.S.C. §§ 12131-12134, 12181-12189; 28 C.F.R. §§ 35.130, 35.160, 36.302 and 36.303.

¹³ 29 U.S.C. § 794; 45 C.F.R. §§ 84.4 and 84.52; 28 C.F.R. § 41.51.

¹⁴ 42 U.S.C. § 18116; 45 C.F.R. §§ 92.101(a) and 92.101(b)(2)(i); 45 C.F.R. § 92.205.

One of the primary responsibilities of state and local governments is to protect residents and visitors from harm, including assistance in preparing for, responding to, and recovering from emergencies and disasters. State and local governments must comply with Title II of the ADA in the emergency and disaster-related programs, services, and activities they provide.¹⁵

Section 504 of the Rehabilitation Act similarly bans disability discrimination by recipients of federal financial assistance, which includes most hospitals and health care providers. 29 U.S.C. § 794(a). The breadth of Section 504's prohibition on disability discrimination is co-extensive with that of the ADA including failing to make reasonable modifications in policies, practices or procedures when necessary to avoid discrimination. *See, Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273-76 (2d Cir. 2003).

Section 1557 of the ACA provides that no health program or activity that receives federal funds may exclude from participation, deny the benefits of their programs, services or activities, or otherwise discriminate against a person protected under Section 504 of the Rehabilitation Act, 42 U.S.C. § 18116; 45 C.F.R. §§ 92.101(a) and 92.101(b)(2)(i). This includes an obligation to make reasonable modifications in policies, practices, and procedures necessary to avoid discrimination. 45 C.F.R. § 92.205.

The Office for Civil Rights' March 28, 2020 Bulletin specifically discusses the obligations of entities covered under federal disability laws to ensure equal access to medical treatment and "effectively address[] the needs of at-risk populations."¹⁶ This includes providing effective communication, meaningful access to information, and making reasonable modifications to address the needs of individuals with disabilities.¹⁷

As you know, on June 9, 2020, the Office for Civil Rights resolved a complaint after the State of Connecticut and a private hospital took action to safeguard the rights of persons with disabilities to have reasonable access to support persons in hospital settings during the COVID-19 pandemic. As part of the resolution, Connecticut issued an executive order requiring that hospital patients "with disabilities that may include, but not be limited to, altered mental status, physical, intellectual or cognitive disability, communication barriers or behavioral concerns, who need assistance due to the specifics of their disability, may have one designated support person with them to support their disability related needs."¹⁸ The order continued that such designated support persons "may be a family member, personal care assistant, similar disability service provider, or other individual knowledgeable about the management of their care, to physically or emotionally assist them or to

¹⁵ DOJ, Emergency Management Under Title II of the Americans with Disabilities Act at 1 (July 26, 2007), available at <https://www.ada.gov/pcatoolkit/chap7emergencygmt.htm>. *See also*, Department of Health and Human Services (HHS) Office for Civil Rights, Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease (COVID-19), 1-3 (Mar. 28, 2020) (available at: https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf?fbclid=IwAR351WokrC2uQLIPxDR0eiAizAQ8Q-XwhBt_0asYiXi91XW4rnAKW8kxcog) (hereinafter "OCR Bulletin").

¹⁶ OCR Bulletin at 2.

¹⁷ *Id.*

¹⁸ Connecticut's June 9, 2020 Order, and OCR's resolution, attached as Ex. D.

ensure effective communication during their stay in such Facility, provided proper precautions are taken to contain the spread of infection.”¹⁹

HHSC’s new emergency rule is wholly at odds with the non-discrimination standards cited above. Instead of ensuring that all individuals with disabilities are afforded reasonable accommodations when hospitalized, HHSC, by rule, is giving license to hospitals to deny individuals equal access to the benefit of hospital services. Hospitals following this new rule may now discriminate against persons with disabilities by denying them effective communication; depriving them of their right to make informed decisions and provide informed consent; subjecting them to the unnecessary use of physical and chemical restraints; denying them adequate and necessary medical treatment and care; and, subjecting them to substantial and lasting emotional harm.

It is critical that all reasonable steps be taken to ensure support persons such as guardians, family members, and health care agents are afforded an equal opportunity to communicate with the disabled individual and their treating clinicians. Communication supports may include accommodations such as access to interpreters and specialized assistive technology, including telephonic or video technology; they may also include the presence of a family member, personal care assistant, or trained disability service provider if that is what the patient with a disability requires. Support persons not only assist with communication but can also provide critically important physical and emotional support necessary for the patient to receive equal access to the medical treatment the hospital provides to others without disabilities.

Accordingly, Disability Rights and the other complainants and signatories request that the Office for Civil Rights immediately investigate and issue findings that HHSC’s current emergency rules on hospital visitation unlawfully discriminate against persons with disabilities. We further request that OCR advise HHSC that it must rescind and replace its current emergency rules for hospital visitation to unambiguously allow patient support providers within hospital settings during this public health emergency, even if the patient has COVID-19. People with disabilities face significantly heightened risks during this pandemic and it is essential that their right to equal hospital services is enforced.

We greatly appreciate your prompt consideration of this urgent matter. You can contact us at the numbers or emails below concerning any questions about this Complaint. We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter Hofer', with a stylized flourish at the end.

Peter Hofer
Beth Mitchell
Terry Anstee
Disability Rights Texas
2222 West Braker Lane

¹⁹ *Id.*

Austin, Texas 78757
512.407.2745
512.454.3999
phofer@drtx.org
bmitchell@drtx.org
tanstee@drtx.org

Regan Bailey
Gelila Selassie
Justice in Aging
1101 I Street NW, Suite 1100
Washington, DC 20036
(202) 683-1990
rbailey@justiceinaging.org
dchan@justiceinaging.org
gselassie@justiceinaging.org

Steven Schwartz
Alison Barkoff
Center for Public Representation
22 Green St.
Northampton, MA 01060
(413) 586-6024
sschwartz@cpr-ma.org
abarkoff@cpr-us.org

Shira Wakschlag
The Arc of the United States
1825 K Street NW, Suite 1200
Washington, DC 20006
(202) 534-3708
wakschlag@thearc.org

cc: Cecile Young, Executive Commissioner, HHSC (via U.S. Mail)
Karen Ray, General Counsel, HHSC (via email)

EXHIBIT A

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 133. HOSPITAL LICENSING

SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.51

The Executive Commissioner of the Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 25 Texas Administrative Code, Chapter 133 Hospital Licensing, new §133.51, concerning Visitor Screening and Access During the COVID-19 Pandemic. This emergency rule will provide guidance to hospitals regarding limiting and screening visitors in order to reduce the risk of COVID-19 transmission.

As authorized by Texas Government Code §2001.034, the Commission may adopt an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency rulemaking is to support the Governor's March 13, 2020, proclamation certifying that the COVID-19 virus poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses would continue providing essential services. The Commission accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this emergency rule, Visitor Screening and Access During the COVID-19 Pandemic.

To protect patients and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to require hospitals to adopt, implement, and enforce written policies and procedures to screen each person entering the hospital and to restrict visitor access as determined necessary by the hospital to limit the spread of COVID-19. The emergency rule also specifies that a hospital may not prohibit government personnel performing their official duty from entering the hospital, unless they fail to meet the hospital's screening criteria.

STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §2001.034 and §531.0055 and Texas Health and Safety Code §241.026. Texas Government Code §2001.034 authorizes the adoption of an emergency rule without prior notice and hearing if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Health and Safety Code §241.026 authorizes the Executive Commissioner of HHSC to adopt rules governing the development, establishment, and enforcement of standards for the construction, maintenance, and operation of licensed hospitals.

This new rule implements Texas Government Code §531.0055 and Texas Health and Safety Code Chapter 241.

§133.51. Visitor Screening and Access During the COVID-19 Pandemic.

(a) Based on Governor Greg Abbott's March 13, 2020, declaration of a state of disaster in all Texas counties, the Texas Health and Human Services Commission adopts this emergency rule to establish continuing requirements and flexibilities to protect public health and safety during the COVID-19 pandemic. The requirements and

flexibilities established in this section are applicable during an active declaration of a state of disaster in all Texas counties due to the COVID-19 pandemic, declared pursuant to §418.014 of the Texas Government Code.

(b) In order to protect the health and safety of patients, hospital staff, and the public, a hospital shall limit visitors allowed in the facility to the extent the hospital determines such limitation is necessary to prevent or control a COVID-19-related health and safety risk.

(c) In order to protect the health and safety of patients, hospital staff, and the public, a hospital shall adopt, implement, and enforce written policies and procedures to screen each person entering the hospital, using criteria based on state, local, and federal guidance in the event of a public health disaster, and prohibit entry of any person who does not meet the screening criteria.

(d) A hospital shall implement and enforce written policies and procedures in accordance with this section regarding:

(1) the visitation rights of patients;

(2) any clinically necessary or reasonable restriction or limitation on such rights; and

(3) the reasons for the clinical restriction or limitation.

(e) A hospital may not prohibit government personnel performing their official duty, from entering the hospital, unless the individual fails to meet the hospital's screening criteria.

(f) If an executive order or other direction is issued by the Governor of Texas, the President of the United States, or another applicable authority that is more restrictive than this section or any minimum standard relating to a hospital, the hospital must comply with the executive order or other direction.

The agency certifies that legal counsel has reviewed the emergency adoption and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 25, 2020.

TRD-202004012

Karen Ray

Chief Counsel

Department of State Health Services

Effective date: September 25, 2020

Expiration date: January 22, 2021

For further information, please call: (512) 834-4591

EXHIBIT B

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 133. HOSPITAL LICENSING

SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.51

The Executive Commissioner of the Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 25, Texas Administrative Code, Chapter 133 Hospital Licensing, new §133.51, concerning an emergency rule in response to COVID-19, in order to reduce the risk of transmission of COVID-19. As authorized by Government Code, §2001.034, the Commission may adopt an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency rulemaking is to support the Governor's March 13, 2020 proclamation certifying that the COVID-19 virus poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses would continue providing essential services. The Commission accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this Emergency Rule for Hospital Response to COVID-19.

To protect patients and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to restrict entry into a hospital and require screening of certain persons authorized to enter a hospital.

STATUTORY AUTHORITY

The emergency rulemaking is adopted under Government Code, §2001.034 and §531.0055, and Health and Safety Code, §241.026. Government Code, §2001.034, authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Government Code, §531.0055, authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Health and Safety Code, §241.026, authorizes the Executive Commissioner of HHSC to adopt rules governing the development, establishment, and enforcement of standards for the construction, maintenance, and operation of licensed hospitals.

§133.51. Emergency Rule for Hospital Response to COVID-19.

(a) Based on state law and federal guidance, HHSC deems COVID-19 a health and safety risk to hospital patients, staff, and the public and requires a hospital to take the following measures. The screening required by this section does not apply to emergency services personnel entering the hospital in an emergency situation.

(b) A hospital must implement and enforce written policies and procedures in accordance with this section regarding the visitation rights of patients and setting forth any clinically necessary or reasonable restriction or limitation on such rights and the reasons for the clinical restriction or limitation.

(c) A hospital must implement and enforce written policies and procedures regarding the entry of its workforce to protect the health and safety of patients, employees and staff, and the public.

(d) In this section:

(1) Providers of essential services include, but are not limited to, contract doctors, contract nurses, hospice workers, other contract healthcare providers, persons providing a survivor of sexual assault with services required by Health and Safety Code Chapter 323, and a single designated caregiver acting on the patient's behalf.

(2) Persons with legal authority to enter include, but are not limited to, government personnel performing their official duties and an attorney or other legally authorized representative of a patient.

(3) Persons providing critical assistance include providers of essential services, persons with legal authority to enter, a clergy member authorized by the hospital, one parent of a minor who is a patient, and family members and friends of a patient at the end of life or presenting at the emergency department, subject to the hospital's policies and procedures.

(e) A hospital must prohibit visitors, except as provided by subsection (f) of this section.

(f) A hospital may allow entry of persons providing critical assistance, unless the person meets one or more of the following screening criteria:

(1) Fever or signs or symptoms of a respiratory infection, such as cough, shortness of breath, or sore throat;

(2) Contact in the last 14 days with someone who has a confirmed diagnosis of COVID-19, someone who is under investigation for COVID-19, or someone who is ill with a respiratory illness; or

(3) International travel within the last 14 days to countries with ongoing community transmission. For updated information on affected countries visit: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notice.html>.

(g) A hospital must not prohibit government personnel performing their official duty from entering the hospital, unless the individual meets the above screening criteria.

(h) If this emergency rule is more restrictive than any minimum standard relating to a hospital, this emergency rule will prevail so long as this emergency rule is in effect.

(i) If an executive order or other direction is issued by the Governor of Texas, the President of the United States, or another applicable authority, that is more restrictive than this emergency rule or any minimum standard relating to a hospital, the hospital must comply with the executive order or other direction.

The agency certifies that legal counsel has reviewed the emergency adoption and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 3, 2020.

TRD-202001351

Karen Ray

Chief Counsel

Department of State Health Services

Effective date: April 3, 2020

Expiration date: July 31, 2020

For further information, please call: (512) 834-4591

EXHIBIT C



TEXAS
Health and Human
Services

Texas Health and Human Services Commission

Phil Wilson
Executive Commissioner

May 1, 2020

Mr. Richard LaVallo
Disability Rights Texas
Legal Director
rlavallo@disabilityrightstx.org

Dear Mr. LaVallo:

Thank you for your April 17, 2020, letter to Executive Commissioner Wilson expressing concerns regarding the guidance to hospitals on visitors providing critical assistance. Your correspondence was forwarded to me for response because as Chief Policy and Regulatory Officer at the Health and Human Services Commission (HHSC), I oversee the division that regulates hospitals in Texas.

The guidance you reference has been superseded by emergency rules regarding visitor access to hospitals and psychiatric facilities found in the Texas Administrative Code, 25 TAC §133.51, Emergency Rule for Hospital Response to COVID-19, and 26 TAC §510.48, Emergency Rule for Facility Response to COVID-19.

Your request recommends additional language to specifically identify support persons for people with disabilities as persons providing critical assistance and to prohibit hospitals from excluding support persons for people with disabilities when acting as a person providing critical assistance.

We believe the emergency rules allow support persons for people with disabilities to act as persons providing critical assistance and be allowed entry into a hospital if they pass the screening. Support persons for people with disabilities could be allowed entry to a hospital under multiple categories of allowed visitors enumerated in the emergency rule; in addition, the lists in the rules are not exclusive. If a hospital determines a support person for a person with a disability is providing critical assistance, the hospital could allow entry following screening.

Mr. Richard LaVallo

May 1, 2020

Page 2

The rule does not require that all hospitals permit all visitors providing critical assistance to enter at all times. This is an acknowledgement that there are other health and safety reasons that a specific hospital may need to limit visitation beyond the screening tool provided in the emergency rule.

We believe these rules balance the rights of patients with the precautions necessary to prevent the spread of COVID-19 to protect the health and safety of the public. We do not plan to amend the rules at this time, but we appreciate your feedback and continue to welcome it in the future.

If you have any additional questions, please contact Rachel Ashworth-Mazerolle, Manager of Policy, Rules, and Training for Health Care Regulation, at HCQ_PRT@hhsc.state.tx.us.

Sincerely,

A handwritten signature in black ink, appearing to read 'Victoria Ford', with a stylized, cursive script.

Victoria Ford, MPA
Chief Policy and Regulatory Officer

EXHIBIT D

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC HEALTH

Deidre S. Gifford, MD, MPH
Acting Commissioner



Ned Lamont
Governor
Susan Bysiewicz
Lt. Governor

ORDER

Whereas, on March 10, 2020, Governor Ned Lamont (the Governor), in response to the global pandemic of 2019 Coronavirus disease (COVID-19), declared a public health and civil preparedness emergency throughout the State of Connecticut pursuant to Sections 19a-131a and 28-9 of the Connecticut General Statutes, to remain in effect through September 9, 2020, unless sooner terminated by the Governor; and

Whereas, the Governor's Executive Order No. 7K, dated March 23, 2020, authorized the Commissioner of Public Health (the Commissioner) to temporarily waive, modify or suspend any regulatory requirements adopted by the Commissioner or any Boards or Commissions under Chapters 368a, 368d, 368v, 369 to 381a, inclusive, 382a, 383 to 388, inclusive, 398 to 399, inclusive, 400a, 400c and 474 of the Connecticut General Statutes as the Commissioner deems necessary to reduce the spread of COVID-19 and to protect the public health; and

Whereas, due to the COVID-19 pandemic, many health care facilities have restricted access to their premises and their patients to prevent the further spread of the disease; and

Whereas, such restrictions prevent family members, personal care assistants or similar disability service providers from accompanying a patient with disabilities through his or her stay at the facility, causing such patient with disabilities to experience barriers to obtaining the care they require as well as inconvenience and distress.

Now, Therefore, in an effort to reduce the spread of COVID-19 and to protect the public health, and, in accord with the authority set forth above, for the duration of the public health and civil preparedness emergency, unless sooner modified or terminated by me or unless the Governor sooner repeals or modifies Executive Order No. 7K or the declared public health and civil preparedness emergency, **I hereby order that, effective June 15, 2020:**

Sections 19-13-D3 (Short-term hospitals, general and special), 19-13-D4a (Short-term hospitals, Children's General), 19-13-D45 to 19-13-D53 (Outpatient Clinics), 19-13-D55a (Outpatient dialysis unit) and 19-13-D56 (Outpatient surgical facility) (Facility or Facilities) of the Regulations of Connecticut State Agencies are hereby modified by adding the following provisions to each such section:

(a) Patients in such Facility with disabilities that may include, but not be limited to, altered mental status, physical, intellectual or cognitive disability, communication barriers or behavioral concerns, who need assistance due to the specifics of their disability, may have one designated support person with them to support their disability related needs.



Phone: (860) 509-7101 • Fax: (860) 509-7777
Telecommunications Relay Service 7-1-1
410 Capitol Avenue, P.O. Box 340308
Hartford, Connecticut 06134-0308
www.ct.gov/dph

Affirmative Action/Equal Opportunity Employer



(b) Such designated support person may be a family member, personal care assistant, similar disability service provider, or other individual knowledgeable about the management of their care, to physically or emotionally assist them or to ensure effective communication during their stay in such Facility, provided proper precautions are taken to contain the spread of infection.

(c) When the period of time any such patient with disabilities will remain in such Facility will be longer than one day, such patient or his or her family or caregiver may designate two support people, provided only one support person may be present at a time. This restriction must be explained to the patient and support person in plain terms, upon arrival or, ideally, prior to arriving at the Facility. Facility staff should ensure that the patient or his or her family or caregiver fully understands this restriction, allowing the patient to decide who he or she wishes to identify as his or her support person. Notice of the Facility's support person policy including the requirements contained herein shall be posted at patient entry points in the Facility, on the Facility's website and be provided to the patient at the time services are scheduled or initiated.

(d) Any such support person must be asymptomatic for, or not have previously been confirmed positive for, COVID-19. Facility staff must screen any support person for symptoms of COVID-19 (e.g., fever, cough, shortness of breath, or potential exposure to individuals testing positive for COVID-19) and conduct a temperature check prior to entering the clinical area and every twelve hours thereafter. Any support person suspected of having been exposed to COVID-19¹, may be denied access where attendant risks of such access cannot be reasonably mitigated.

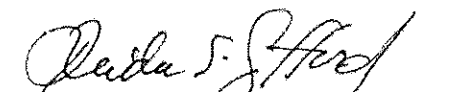
(e) The Facility shall provide appropriate Personal Protective Equipment (PPE) to be worn by the designated support person as instructed by the Facility for the duration of the visit. If the Facility does not have PPE for the support person, PPE supplied by the support person that the Facility finds adequate may be used. The Facility shall determine and inform the patient and the designated support person of any policy governing the designated support person attendance including the entrance and exit policy of the Facility. Any such support person who leaves the Facility shall be screened as provided in subsection (d) above upon his or her re-entry.

(f) The support person shall comply with all reasonable requirements imposed by the Facility to minimize the potential spread of infection.

(g) Notwithstanding the foregoing, every effort shall be made to support the patient with disabilities employing virtual communication options whenever possible.

Nothing in this order should be interpreted as altering facility obligations to provide patients with effective communication supports or other required services, regardless of the presence of a designated support person or other reasonable accommodation, consistent with applicable federal or state law and regulations.

Ordered this 9th day of June 2020.



Deidre S. Gifford, MD, MPH
Acting Commissioner

¹ The determination of potential exposure shall be based upon CDC Guidance, as updated, on Community Related Exposure. See <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

FOR IMMEDIATE RELEASE

June 9, 2020

Contact: HHS Press Office

202-690-6343

media@hhs.gov

OCR Resolves Complaints after State of Connecticut and Private Hospital Safeguard the Rights of Persons with Disabilities to Have Reasonable Access to Support Persons in Hospital Settings During COVID-19

Today, the Office for Civil Rights (OCR) at the U.S Department of Health and Human Services (HHS) announces that it has reached an Early Case Resolution (ECR) with the State of Connecticut after the state issued an executive order regarding non-visitation policies for short-term hospitals, outpatient clinics, and outpatient surgical facilities to ensure that people with disabilities are not denied reasonable access to needed support persons. OCR also reached an ECR with Hartford Hospital after it agreed to grant a 73-year old woman with aphasia access to support persons to help with her communication and comprehension in her treatment.

In May 2020, OCR received complaints from Disability Rights Connecticut, CommunicationFIRST, the Arc of Connecticut, Independence Northwest: Center for Independent Living of Northwest CT, Center for Public Representation, and The Arc of the USA alleging that Connecticut guidance regarding hospital visitation for people with disabilities violates the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act and Section 1557 of the Affordable Care Act, which are enforced by OCR.

The complainants alleged that Connecticut guidance concerning hospital “no visitor” policies during the COVID-19 pandemic allowed only narrow exceptions for support persons for individuals with disabilities receiving certain services from the state Department of Developmental Services (DDS), leaving large groups of persons with disabilities unable to avail themselves of the exception. The complainants alleged that without support persons, specific patients with disabilities in Connecticut facilities were being denied equal access to medical treatment, effective communication, the ability to make informed decisions and provide consent, and that they were being unnecessarily subjected to physical and pharmacological restraints.

Complainants also alleged that Hartford Hospital, a 937-bed facility in the state, unlawfully failed to provide a reasonable modification to the hospital’s no-visitor policy to a 73-year old patient with aphasia and severe short-term memory loss, who is mostly non-verbal, and was denied in-person access to support persons able to help with her communication and comprehension during care. The patient did not fall under the exception to no-visitor policies under Connecticut’s guidance because she did not receive services from the state DDS.

EXHIBIT E



November 17, 2020

Peter Hofer
Senior Litigation Attorney
Disability Rights Texas
1500 McGowen, Suite 100
Houston, TX 77004

Via Electronic Mail

Re: Civil Rights Complaint

Dear Mr. Hofer:

This letter responds to your e-mail dated November 11, 2020 to Karen Ray, HHSC Chief Counsel. Thank you for providing a copy of the draft complaint that Disability Rights Texas intends to file with the Office for Civil Rights ("Complaint"). As further explained below, the allegations in the Complaint are based on erroneous interpretations of the emergency rule at issue. We therefore request that Disability Rights Texas reconsider the filing of its Complaint.

The health and safety of Texans, including persons with disabilities, and their equal access to safe and effective medical treatment and services remain of paramount importance to HHSC. As the COVID-19 contagion continues to spread within the state of Texas, HHSC has enacted emergency regulations to protect health care facility patients and public health, safety, and welfare during the pandemic; the currently effective rule concerning hospital visitations, at 25 Texas Administrative Code §133.51 (Visitor Screening and Access During the COVID-19 Pandemic) (effective September 25, 2020), ("Emergency Rule") is an example of such emergency regulations that balance patient and individual rights with the safeguards needed to prevent the spread of the COVID-19 virus and the resulting illnesses and deaths.

Contrary to the allegations in the Complaint, the Emergency Rule, and the removal of the references to categories of visitors providing critical assistance, neither strip protections from persons with disabilities nor give hospitals HHSC's "imprimatur" to restrict all visitors. Properly interpreted, the Emergency Rule actually *expands* visitation rights by replacing the broad restrictions in the previous April 2020 version of the rule with a new rule that allows hospitals to implement more expansive and flexible visitation policies. Under the April 2020 version of the Emergency Rule, hospitals "must prohibit visitors," except for the expressly specified categories of visitors providing critical assistance to patients.¹ In contrast, the currently effective Emergency Rule allows hospitals to impose only those visitation restrictions and limitations that the hospital determines are "necessary to prevent or control a COVID-19-related health and safety risk."² HHSC did not remove the provisions in the

¹ See 25 Tex. Admin. Code §133.51(e) (Emergency Rule for Hospital Response to COVID-19) (effective April 3, 2020 and withdrawn September 25, 2020).

² See Emergency Rule at §133.51(b).

April 2020 rule specifying certain categories of visitors in order to restrict such visitors, as alleged in the Complaint; instead, those provisions were removed because it became no longer necessary to specify categories of visitors as exceptions to the visitation prohibition after the prohibition itself was removed from the rule.

HHSC's updates to the Emergency Rule allow hospitals to effectively balance patient visitation rights with the need to prevent and control COVID-19 spread in light of the ever-evolving nature of the pandemic. As is the case nationally, the spread of the COVID-19 virus has not been uniform within the state of Texas. Certain areas, such as El Paso County, currently experience high levels of community spread that have caused the number of patients in local hospitals to swell.³ Other areas within Texas, such as Bexar County, are experiencing comparatively low levels of infection.⁴ Moreover, within the same area, infection rates can ebb and flow from one week or month to the next.

Rather than continue to restrict all hospital visitations statewide, the current Emergency Rule provides individual hospitals the flexibility to tailor visitation policies based on current levels of local community spread, so that visitation restrictions are implemented only if the hospital determines that such restrictions are necessary to prevent or control COVID-19 threats to patient health and safety, given current local infection rates within the community in which the hospital sits.⁵ Where the hospital concludes that a clinically necessary or reasonable visitation restriction is necessary to protect the health and safety of patients and the public, the hospital must explain the reasons for the restriction in its written policies.⁶ Thus, the Emergency Rule returns to hospitals the ability to control their own visitation policies and to implement only those restrictions and limitations that are deemed necessary by each hospital, as was the case prior to the pandemic.

Furthermore, the Emergency Rule does not violate the anti-discrimination standards in the Americans with Disabilities Act, the Rehabilitation Act, or the Affordable Care Act. The Emergency Rule applies generally to hospitals and patients throughout Texas and does not

³ See Texas COVID-19 Dashboard, Texas Department of State Health Services, *Daily New Confirmed Cases in El Paso County, Fatalities by Date of Death in El Paso County, and Total Confirmed Cases Per 1,000 persons in El Paso County*, available at <https://tabexternal.dshs.texas.gov/t/THD/views/COVIDExternalQC/COVIDTrends?:isGuestRedirectFromVizportal=y&:embed=y> (last visited Nov. 16, 2020).

⁴ See Texas COVID-19 Dashboard, Texas Department of State Health Services, *Daily New Confirmed Cases in Bexar County, Fatalities by Date of Death in Bexar County, and Total Confirmed Cases Per 1,000 persons in Bexar County*, available at <https://tabexternal.dshs.texas.gov/t/THD/views/COVIDExternalQC/COVIDTrends?:isGuestRedirectFromVizportal=y&:embed=y> (last visited Nov. 16, 2020).

⁵ See Emergency Rule at §133.51(b).

⁶ See Emergency Rule at §133.51(d)(3).

Peter Hofer
November 17, 2020
Page 3

treat patients with disabilities differently than others. Nothing in the Emergency Rule allows hospitals to restrict visitations by reason of the patient's disability.⁷

In addition, anti-discrimination laws include a safe harbor provision applicable to safety requirements. Under the safe harbor, "[a] public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities;" in doing so, "the public entity must ensure that its safety requirements are based on actual risks, not mere speculation, stereotypes, or generalizations about individuals with disabilities."⁸ Because the Emergency Rule requires that any visitation restriction or limitation be based on actual risks posed by the spread of COVID-19 in hospitals, the safety requirements safe harbor provision would apply to any discrimination claim.

Based on the foregoing, we do not see any legitimate basis for a complaint to the Office for Civil Rights. Please confirm that Disability Rights Texas will not proceed with filing its Complaint. If you have additional questions or concerns, I can be reached at taryn.lam@hhs.texas.gov.

Sincerely,



Taryn Lam
Attorney
Litigation Department, Legal Services Division

⁷ See, e.g., *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011) ("A plaintiff states a claim for relief under Title II if he alleges: (1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) *that such discrimination is by reason of his disability.*" (Emphasis added.)).

⁸ 28 C.F.R. § 35.130.

EXHIBIT F

UMC VISITOR GUIDELINES

UMC, UMCP & TTUHSC ARE CERTIFIED AS LUBBOCK SAFE!

**PLEASE DO NOT ENTER IF YOU ARE EXPERIENCING FEVER, LOSS OF TASTE, LOSS OF SMELL,
UNCONTROLLABLE COUGH OR DIFFICULTY BREATHING.**

STEPS UMC IS TAKING TO ENSURE PATIENTS ARE SAFE IN OUR HOSPITAL:

- Temp screening of all visitors, staff, and government personnel on official business at monitored entrances
 - Anyone with a temperature greater than 100.4 will not be allowed to enter and encouraged to:
 - Visit their Primary Care Physician
 - Visit UMC Virtual Care by downloading the MyTeamCareNOW App
- Hospital provides masks to patients if they are seeing a doctor
- Conservative visitation policies and usage of PPE
- 7-step cleaning process that includes Clorox electrostatic disinfectant

UMC will continue to exceed CDC guidelines as it pertains to visitation.

VISITATION LIMITATIONS:

NON-COVID PATIENTS (INCLUDING ISOLATION) CAN HAVE:

- One visitor per patient **PER DAY** for patients 18 years of age and older
 - Medical tent visitation hours: 9AM – 9PM
- One visitor per patient **PER DAY** for EC, Outpatient procedures and treatment areas
- Two visitors per patient **PER DAY** for patients under 18 years of age, and OBGYN patients
 - NICU (mother + one other support person)
- End of Life: 5 visitors at a time

COVID PATIENTS (POSITIVE OR INVESTIGATION) CANNOT HAVE VISITORS UNLESS:

- Family Birth Center (can have one coach or partner per patient)
- Patients under 18 years of age may have 2 visitors at all times in all inpatient and outpatient units
- Two visitor per patient **PER DAY** for patients under 18 years of age
 - NICU (mother + one other support person)
- End of Life: 2 visitors at a time

VISITOR REQUIREMENTS:

- Visitors are required to wear a mask inside University Medical Center and must provide their own
- Inpatient visitors will receive armband after checking in
- Visitors are encouraged to remain in patient rooms during visitation
- Visitors staying overnight must recheck-in with the Information Desk by 9AM

NO VISITOR UNDER 18 YEARS OF AGE WILL BE PERMITTED TO OUR FACILITIES, UNLESS THEY ARE HERE TO RECEIVE MEDICAL TREATMENT OR HAVE BEEN EMANCIPATED AS AN ADULT & ARE HERE IN A PARENTAL CAPACITY.

*University Medical Center is taking these necessary steps to protect your loved ones, our community and UMC staff.
Thank you for your understanding and for adhering to these important policies during this challenging time.*



DIRECTRICES PARA VISITANTES DEL CENTRO MÉDICO UNIVERSITARIO (UMC)

UMC, UMCP Y TTUHSC ESTÁN CERTIFICADOS COMO LUBBOCK SEGURO!

POR FAVOR, NO ENTRE SI USTED ESTÁ EXPERIMENTANDO FIEBRE, Pérdida de SABOR, Pérdida de OLOR, TOS INCONTROLABLE O DIFICULTAD PARA RESPIRAR.

PASOS QUE UMC ESTÁ TOMANDO PARA ASEGURARSE LA PROTECCIÓN NUESTROS PACIENTES:

- Control de temporal para todos; visitantes, empleados y personal del gobierno en negocios oficiales
 - Cualquier persona con temperatura superior a 100.4° F. no se le permitirá la entrada y se le recomendará que:
 - Visite a su médico de atención primaria
 - Visite UMC Cuidado de Atención Virtual, descargando la aplicación en MyTeamCare now
- El hospital proporciona cubrebocas a los pacientes siempre y cuando estén atendiendo citas médicas
- Políticas con visitas limitadas y preservación de Equipo de Protección Personal EP
- Proceso de 7 pasos de limpieza que incluye desinfectante electrostático Clorox

UMC SEGUIRÁ EXCEDIENDO LAS DIRECTRICES DEL CENTRO PARA EL CONTROL Y PREVENCIÓN DE ENFERMEDADES (CDC) EN LO QUE SE REFIERE A LAS VISITAS

LIMITACIONES DE VISITAS:

LOS PACIENTES SIN COVID (INCLUYENDO LOS DE AISLAMIENTO) PUEDEN TENER:

- Un visitante por paciente **POR DÍA** para pacientes de 18 años de edad y mayores de 18
 - Horario de visitas a tiendas médicas: 9 a.m. – 9 p.m.
- Un visitante por paciente **POR DÍA** en el Centro de Emergencias (EC), procedimientos ambulatorios y áreas de tratamiento
- Dos visitantes por paciente **POR DÍA** para pacientes menores de 18 años, y pacientes de Ginecología y Obstetricia (OBGYN)
 - Unidad de Cuidados Intensivos Neonatales, NICU (madre + otra persona de apoyo)
- Etapa Final de la vida: 5 visitantes a la vez

LOS PACIENTES CON COVID (POSITIVOS O EN INVESTIGACIÓN) NO PUEDEN TENER VISITAS A MENOS QUE:

- Estén en el Centro de Nacimiento Familiar, FBC (puede tener un entrenador o pareja por paciente)
- Los pacientes menores de 18 años de edad podrán tener 2 visitantes en todas las unidades hospitalarias y ambulatorias
- Dos visitantes por paciente **POR DÍA** para pacientes menores de 18 años de edad
 - Unidad de Cuidados Intensivos Neonatales, NICU (madre + otra persona de apoyo)
- Etapa Final de la vida: 2 visitantes a la vez

REQUISITOS PARA LOS VISITANTES:

- Los visitantes deben proporcionar sus propios tapabocas y usarlos dentro del Centro Médico Universitario
- Los visitantes hospitalarios recibirán un brazalete después de registrarse
- Se le recomienda a los visitantes permanecer en las habitaciones de los pacientes durante las visitas
- Los visitantes pernoctando/pasando la noche, deben volver a registrarse en el mostrador de información, antes de las 9 a.m.

NO SE PERMITIRÁ NINGÚN VISITANTE MENOR DE 18 AÑOS EN NUESTRAS INSTALACIONES, A MENOS QUE TENGAN TRATAMIENTO MÉDICO O HAYAN SIDO EMANCIPADOS COMO ADULTOS Y ESTÉN AQUÍ EN CALIDAD DE PADRES.

El Centro Médico Universitario está tomando estas medidas necesarias para proteger a sus seres queridos, nuestra comunidad y a nuestros empleados. Gracias por su comprensión y por adherirse a estas políticas importantes durante estos momentos difíciles

