

Compliance Today – January 2021 HHS guidelines address racial disparities in COVID-19 testing and treatment

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The year 2020 will certainly be remembered for at least two events: the COVID-19 pandemic and the far-reaching and sustained movement against racial inequality in America. These two events metaphorically intersect in guidance from the U.S. Department of Health & Human Services (HHS) Office for Civil Rights (OCR) designed to help providers ensure that their COVID-19 testing and treatment services do not discriminate on the basis of race, color, or national origin.

Racial disparities in healthcare in the US

It has been strongly argued that healthcare is one of several US systems whose origins include elements of institutional racism.^[1] As a consequence, this institutional racism begets racial disparities in healthcare delivery and outcomes.^[2] Although these inequities have been observed, studied, and the subject of discussion, research, policies, and even laws,^[3] the COVID-19 pandemic is a crisis that provides a devastating, firsthand, real-time case study of how this institutional racism—not race itself—results in disparities in healthcare access, treatment, and outcomes for racial and ethnic minorities in our country.

Providers, members of Congress called upon HHS for action

Healthcare providers and members of Congress encouraged HHS to address the racial disparities in America's COVID-19 response since data^[4] emerged demonstrating those differences early in the pandemic. Five members of Congress wrote a letter to HHS Secretary Alex Azar on March 27, 2020, urging him to order the Centers for Disease Control and Prevention (CDC) to begin collecting and reporting racial and ethnic demographic data from patients receiving COVID-19 tests.^[5] The letter requested these data so that policymakers and researchers could identify and address racial disparities in America's response to the pandemic, which the CDC reportedly began doing at least by April 8, 2020.^[6] The letter also outlined several risk factors for COVID-19 that disproportionately affect communities of color, including comorbidities such as obesity, diabetes, and asthma; lack of insurance coverage; shortages of quality providers in the local communities; and socioeconomic factors such as unemployment, food insecurity, and housing issues. Further, the congressional letter stated that “a history of discrimination and marginalization has left some people of color distrustful of the medical system, making them less likely to seek out timely care.”

The American Hospital Association, the American Medical Association, and the American Nurses Association also wrote a joint letter to Secretary Azar on April 16, 2020, citing “alarming” reports that communities of color had disproportionately higher levels of COVID-19 infections and deaths than the general population.^[7] These associations urged, on behalf of their members, that the secretary, among other things, (1) have the CDC collect additional information about COVID-19 patients of color, such as comorbidities and ventilator usage, so that the

causes of the racial disparities can be better understood, and (2) establish a toll-free, nurse-staffed hotline so that patients without insurance can discuss their symptoms and receive direct referrals for COVID-19 testing when appropriate without going through a primary care physician, given the documented disparities in insurance coverage and access to care for patients of color.

Providers must provide nondiscriminatory care under current law

Healthcare providers and hospitals that participate in federal healthcare programs such as Medicare must comply with Title VI of the Civil Rights Act of 1964, which states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”^[8]

According to Title VI’s implementing regulations, providers who receive federal funds cannot discriminate against federal healthcare patients based on race, color, or national origin either intentionally or through policies or practices that disproportionately and adversely affect patients on the basis of those traits.^[9] The regulations further explain providers’ obligations to provide care free of discrimination: “[Providers who receive Federal healthcare funds] may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”^[10] A “recipient” is also defined to include any private agency, organization, or individual who receives federal financial assistance, such as Medicare payments.^[11]

Moreover, the Patient Protection and Affordable Care Act of 2010 prohibits healthcare providers who receive federal financial assistance from HHS from discriminating on the bases of race, color, national origin, sex, age, or disability in providing those services.^[12]

Medicare’s conditions of participation also incorporate Title VI’s mandate that healthcare providers who treat Medicare beneficiaries must do so without discrimination based on race, color, or national origin.^[13]

Under this existing body of law, providers clearly have a legal duty to provide treatment and testing during the COVID-19 pandemic that is free from discrimination based on race, color, national origin, sex, age, or disability. Because the US’s response to COVID-19 has had a disproportionate impact on people of color, the bulletin later released by OCR focused only on Title VI and discrimination based on race, color, or national origin.

HHS’ response to COVID-19 racial disparities

Data collected during the pandemic show a disturbing trend of disparities in COVID-19 infections and deaths among people of color. For example, the CDC COVID Data Tracker shows that even though African Americans make up 13.4% of the United States’ population,^[14] 15.7% of COVID-19 cases and 19.7% of COVID-19 deaths have been African American patients.^[15] Similarly, Hispanic/Latino Americans comprise 18.5% of the country’s population,^[16] but 26.4% of America’s COVID-19 cases have been Hispanic/Latino patients.^[17]

On July 20, 2020, OCR issued a bulletin for hospitals, other healthcare providers, and state and local agencies that receive federal financial assistance to address “Civil Rights Protections Prohibiting Race, Color and National Origin Discrimination During COVID-19.”^[18] OCR’s bulletin provides valuable guidance for compliance officers and all healthcare providers to ensure they comply with Title VI and provide COVID-19 testing and treatment in an equitable manner.

In this bulletin, OCR reminds all healthcare providers and state and local agencies that receive federal financial assistance that they must comply with Title VI. The bulletin then recaps some of the actions HHS had taken to date to enhance COVID-19 prevention, testing, and treatment for racial and ethnic minority groups that the pandemic has affected on a disproportionately negative basis. HHS concluded that the racial and ethnic demographic data the CDC began collecting in April “suggest a disproportionate burden of illness and death among racial and ethnic minority groups,” such as the African American, Hispanic, and Native American populations. In response, the CDC appointed a COVID-19 chief health equity officer and further expanded COVID-19 data collection.

In addition, the National Institutes of Health provided funding opportunities for urgent research regarding the pandemic’s disproportionate impact on these minority populations. HHS Office of Minority Health executed a \$40 million cooperative agreement with the Morehouse School of Medicine to build the National Infrastructure for Mitigating the Impact of COVID-19 within Racial and Ethnic Minority Communities Initiative. HHS has also funded expansions of testing opportunities in vulnerable communities.

The bulletin’s specific recommendations

The bulletin advises that healthcare providers and state and local agencies that receive federal funds should take several actions to continue to combat racial disparities in America’s COVID-19 response and to “help ensure Title VI compliance during the COVID-19 public health emergency.” Those recommendations address providers’ policies and procedures, assignment of staff and resources, and internal governance. Also, several of the OCR’s recommendations specifically address patients’ access to care.

Policies and procedures

OCR recommends that providers “[a]dopt policies to prevent and address harassment or other unlawful discrimination on the basis of race, color, or national origin” and verify that their internal policies and procedures pertaining to COVID-19 treatment and testing “do not exclude or otherwise deny persons on the basis of race, color, or national origin.”

In so doing, compliance officers and committees should vigilantly assess whether routine policies may negatively and disproportionately affect patients of color to guard against discrimination. Accordingly, committee members should consider risk factors that disproportionately affect racial and ethnic minorities in America, such as comorbidities, lack of insurance coverage, and socioeconomic factors, when adopting and evaluating their policies and procedures, particularly regarding COVID-19 treatment and testing.

Assignment of staff and resources

OCR also advises that providers should not assign staff, beds, or rooms in a discriminatory manner. Specifically, staff assignments should be made regardless of race, color, or national origin, and providers “should not honor a patient’s request for a same-race physician, nurse, or volunteer caregiver.” Similarly, providers should assign hospital beds and rooms without consideration of race, color, or national origin and should not honor patients’ racial preferences regarding roommates.

Compliance officers should incorporate these specific recommendations within their compliance plans and annual compliance training modules for providers and staff, especially for personnel most likely to receive patients’ requests to accommodate their prohibited racial preferences.

Internal governance

For internal governance, OCR recommends that healthcare providers appoint individuals to serve on a planning or advisory body, such as a board or a committee, without excluding potential members on the basis of race, color, or national origin. The advisory body should be “an integral part” of the provider’s operations. OCR also recommends that providers make information available to patients discussing their compliance with the law by not discriminating on the basis of race, color, or national origin.

Compliance officers should evaluate whether membership on their compliance committees, for example, is racially representative of the practice’s community. Also, compliance officers should consider including a COVID-19 nondiscrimination policy statement with patients’ first visit registration paperwork, particularly if a patient is seeking treatment for COVID-19 or its symptoms.

Access to care

Finally, three of OCR’s recommendations directly address access to care for minority patients. First, providers who operate community-based testing sites and alternate care sites should ensure that racial and ethnic minority patients can access those resources. The bulletin suggests walk-in testing sites in urban areas and home visitation testing services in rural areas to provide assistance to racial and ethnic minorities to overcome any transportation obstacles.

Second, the OCR recommends that providers ensure that they do not subject racial and ethnic minority groups to excessive wait times or greater rejections for hospital or intensive care unit admission in comparison to nonminority patients in similar situations.

Third, if a healthcare provider offers ambulance services, nonemergency medical transportation, or home health services, the bulletin provides that those services must be provided to all neighborhoods within the applicable service area and without consideration of race, color, or national origin.

Compliance committees should take action on OCR’s bulletin by evaluating their organization’s policies, procedures, and outcomes to avoid discriminatory impacts upon racial and ethnic minorities generally. Compliance officers should also ensure that the specific provision of ambulance services, medical transportation, and home healthcare, along with wait times and hospital or intensive care unit admissions, are similarly evaluated.

Conclusion

Racial and ethnic disparities in the delivery of healthcare in the United States are highlighted in the COVID-19 pandemic. In addition to existing laws, OCR’s bulletin provides vital guidance to help healthcare providers and state and local agencies that receive federal financial assistance to ensure that their delivery and compensation for healthcare services, including treatment and testing for COVID-19, are free from discrimination based on race, color, or national origin. By following the bulletin and implanting its recommendations as discussed above, compliance officers can take important steps to minimize the risk of discriminatory impacts upon minorities in the delivery of healthcare services—both generally and in the provision of COVID-19 treatment.

Takeaways

- The COVID-19 pandemic has highlighted racial and ethnic disparities in healthcare in the United States and reflected a disproportionate impact in COVID-19 testing and treatment for racial and ethnic minority populations.
- Risk factors such as comorbidities and socioeconomic factors disproportionately affect racial and ethnic

minorities in America, contributing to higher COVID-19 infection and death rates in those populations.

- Healthcare providers, hospitals, and state and local agencies that receive federal financial assistance (e.g., Medicare) have a legal obligation not to discriminate in their provision of healthcare services.
- U.S. Department of Health & Human Services' Office for Civil Rights has issued guidance to address racial disparities in America's response to COVID-19.
- Compliance officers should review and follow the Office for Civil Rights' guidance to avoid discrimination in the provision of healthcare services to COVID-19 patients.

1 Camara Phyllis Jones, "Confronting Institutionalized Racism," *Phylon* 50, no. 1/2 (2002), 7–22, <https://bit.ly/3kuP4b5>.

2 Camara Phyllis Jones, "Levels of racism: a theoretic framework and a gardener's tale," *American Journal of Public Health* 90, no. 8 (August 2000), 1212–1215, <https://bit.ly/35t2Xlw>.

3 Maria Trent, Danielle G. Dooley, and Jacqueline Dougé, "The Impact of Racism on Child and Adolescent Health," *Pediatrics* 144, no. 2 (August 2019), <https://bit.ly/36Me1dg>.

4 Monica Webb Hooper, Anna María Nápoles, and Eliseo J. Pérez-Stable, "COVID-19 and Racial/Ethnic Disparities," *The Journal of the American Medical Association* 323, no. 24 (May 11, 2020), 2466–2467, <https://bit.ly/3eXfL6O>.

5 Elizabeth Warren et al., "Letter to HHS re racial disparities in COVID response," letter, March 27, 2020, <https://bit.ly/2IsuNpE>.

6 David Waldstein, "C.D.C. Releases Early Demographic Snapshot of Worst Coronavirus Cases," *The New York Times*, April 8, 2020, <https://nyti.ms/3kzQVv6>.

7 American Hospital Association, American Medical Association, American Nurses Association, "Letter to HHS Secretary Alex Azar," April 16, 2020, <https://bit.ly/3eZowNV>.

8 42 U.S.C. § 2000d.

9 45 C.F.R. § 80.3(a), (b).

10 45 C.F.R. § 80.3(b)(2).

11 45 C.F.R. § 80.13(i).

12 42 U.S.C. § 18116.

13 42 C.F.R. § 489.10(b)(1).

14 "QuickFacts: United States," United States Census Bureau, last accessed November 13, 2020, <https://bit.ly/38FSrcF>.

15 "CDC COVID Data Tracker," Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, last updated November 13, 2020, <https://bit.ly/3kwmpCa>.

16 "QuickFacts: United States," United States Census Bureau.

17 "CDC COVID Data Tracker," Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention.

18 HHS Office for Civil Rights in Action, "Bulletin: Civil Rights Protections Prohibiting Race, Color and National Origin Discrimination During COVID-19," July 20, 2020, <https://bit.ly/3lwkgPA>.

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