



DEPARTMENT OF HEALTH & HUMAN SERVICES

Voice - (206) 615-2290, (800) 362-1710
TDD - (206) 615-2296, (800) 537-7697
(FAX) - (206) 615-2297
<http://www.hhs.gov/ocr/>

OFFICE OF THE SECRETARY

Office for Civil Rights, Region X
2201 Sixth Avenue, Mail Stop RX-11
Seattle, WA 98121-1831

Date: **JAN 16 2009**

Mr. William Hogan
Commissioner
Alaska Department of Health and Social Services
P.O. Box 110601
Juneau, Alaska 99811-0690

RE: OCR Transaction No. 03-18154

Dear Mr. Hogan:

The Office for Civil Rights (“OCR”) of the U.S. Department of Health and Human Services (“HHS”) has completed its investigation of a complaint filed by Ms. Marty Margeson (“Complainant”), on behalf of her father, Mr. William Margeson, against the Alaska Department of Health and Social Services (“DHSS”), Anchorage Pioneer Home (“APH”). The Complainant alleged that DHSS discriminated against her father in violation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* (“ADA”) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”). In addition, the Complainant later amended her complaint to allege that, as a result of filing a discrimination complaint with OCR, DHSS retaliated against her.

Based on its investigation, OCR has concluded that DHSS violated Title II of the ADA and Section 504. Specifically, OCR found that DHSS’ transportation policy, as applied by APH staff to residents with Alzheimer’s disease, limits their ability to participate in DHSS’ transportation services. Also, OCR has determined that DHSS violated Title II of the ADA and Section 504 by declining to consider a legitimate request for a reasonable modification to its transportation policies and practices to avoid discrimination on the basis of disability or demonstrate that the requested modification would fundamentally alter the nature of its transportation services or result in undue financial or administrative burdens.

In addition, OCR has concluded that DHSS retaliated against the Complainant when it issued a notice informing the Complainant that her father would be discharged in December 2004; filed a March 2005 motion to intervene in her father’s guardianship proceedings to have her power of attorney revoked; and unilaterally changed the frequency of her father’s therapeutic baths.

The bases for OCR’s findings are discussed in detail below.

Jurisdiction

OCR conducted its investigation pursuant to Section 504, and its implementing regulations codified at 45 C.F.R. Part 84, and Title II of the ADA, and its implementing regulations at 28 C.F.R. Part 35. As a recipient of Federal financial assistance, DHSS is obligated to comply with Section 504 and its implementing regulations. As a public entity, DHSS also is obligated to comply with Title II of the ADA and its implementing regulations.

Background

On September 5, 2003, the Complainant filed a complaint with OCR alleging that DHSS discriminates against her father on the basis of his disability, Alzheimer's disease, by denying him equal access to transportation services at its APH facility. Specifically, she alleged that DHSS requires her father to have a traveling companion ("escort") when she is unable to accompany him on trips when the APH van is used. She further alleged that because residents are responsible for the cost of the escort, this resulted in her father incurring additional and unnecessary expenses.

At the time of the complaint, the Complainant's father was 89 years old and had been a resident of APH since 1997. He was diagnosed with Alzheimer's disease in approximately 1996. Because of the progressive debilitating nature of the disease, his ability to walk, communicate, or perform routine activities of daily living decreased. When the complaint was filed, he could not walk; his communication skills consisted of unintelligible vocal noises; and he required extensive assistance with essentially all of the activities of daily living.

DHSS administers the State of Alaska's health and social service programs, including Behavioral Health, Health Care Services, Juvenile Justice, Office of Children's Services, Public Health, Public Assistance, Senior and Disabilities Services, and the Division of Alaska Pioneer Homes. There are six Alaska Pioneer Homes: Anchorage Pioneer Home, Fairbanks Pioneer Home, Juneau Pioneer Home, Ketchikan Pioneer Home, Alaska Veterans & Pioneers Home in Palmer, and Sitka Pioneer Home.

The Alaska Pioneer Homes have been licensed as assisted living facilities since 1996. Typically, residents are not able to live without some form of daily assistance, and may require nursing and other physical and emotional support services. Each Pioneer Home provides three levels of care to residents. Level 1 residents typically receive a private or semi-private room, three meals daily, opportunities for recreation, assistance with housecleaning, and emergency assistance when needed. Level 2 residents typically receive a similar package of services to those in Level 1, but may get added benefits such as assistance with activities of daily living and medication administration.¹ Level 3 residents receive more intensive assistance than Level 2 residents. This more intensive assistance may include APH staff performing the majority of a resident's

¹ Level 2 residents are presumed to be independent and capable of self-care during the evening hours.

activities of daily living during a 24 hour day. When her initial complaint with OCR was filed, the Complainant's father received Level 3 care at APH because of his advanced Alzheimer's disease and associated medical conditions.

On April 15, 2004, OCR issued a Letter of Notification informing DHSS that a complaint had been filed alleging that DHSS' transportation policy discriminated against certain APH residents on the basis of disability. DHSS stated that APH provides free van service on a first-come, first-serve basis to residents who are in Level 2 or Level 3 care. However, availability to ride the van is limited by APH's transportation policy. According to the policy:

Availability is dependent on multiple factors including, but not limited to, bus schedule, weather, *medical acuity*, equipment.

Anchorage Pioneer Home, *Transportation Policy*. (Nov. 2002) (emphasis added). The policy further specifies that residents "are not charged when Home vehicles are used for transportation," but also states that "any resident needing assistance must have an escort." When a family member or friend is unable to escort a resident, DHSS requires individuals to contract with private companies to provide the escort. The obligation to pay for the escort, however, remains the responsibility of the resident or his/her family. DHSS denied that it discriminates in the provision of transportation services to APH residents with Alzheimer's disease because its policy states that it does not provide escorts for any resident.

Between October of 2004 and April of 2005, the Complainant reported that in retaliation for her filing a complaint with OCR, DHSS had: (1) attempted to discharge her father from the APH facility in December of 2004; (2) filed a March 2005 motion to intervene in her father's guardianship proceedings to have her power of attorney revoked; (3) refused to bathe her father twice-weekly; (4) failed to change/toilet her father in the privacy of his own room; (5) declined to provide her father's primary care physician with weekly vital sign reports; (6) refused to provide her father with nutritional supplements; and (7) discharged her father from the APH facility in February 2007.

In February 2005, OCR conducted phone interviews with selected DHSS staff. On April 7 and 8, 2005, OCR conducted on-site interviews with APH staff and collected residents' medical records and other documentation, including copies of the Complainant's father's assisted living plans² and residential services contracts.³

² State law defines an "assisted living plan" as a written description of "the services to be provided to meet the person's reasonable wants and needs." Alaska Statutes (AS) 47.33.990(7)(C). For residents who receive health-related services, like the Complainant's father (e.g., skilled nursing care), such plans must be reviewed at three-month intervals. See AS 47.33.240.

³ Alaska Statutes Section 47.33.210 specifies that the execution of a residential service contract is a pre-conditional requirement to one's residency in a DHSS Pioneer Home, and such contracts must include a description of the services and accommodations to be provided, establish the policies and procedures for termination of the contract, as well as specifically describe the rights, duties, and obligations of the resident.

On June 16, 2006, OCR issued a second Letter of Notification to DHSS. In addition to reiterating the Complainant's original allegation of disability discrimination, this letter formally notified DHSS of the Complainant's retaliation allegations (which are set forth above). In September 2006, OCR visited all six of DHSS' Pioneer Homes, including a second on-site visit at APH. During the on-site visits, OCR conducted extensive interviews with staff and collected transportation logs and other records from all six homes.

On December 16, 2006, the Complainant's father was hospitalized at Providence Alaska Medical Center. He was discharged to the Mary Conrad Nursing Home on or about February of 2007. The Complainant subsequently amended her complaint to allege that her father's discharge in February of 2007 was also an act of retaliation by DHSS.

Complainant's and Respondent's Positions

The Complainant alleges that DHSS' transportation policy and practices discriminate against her father and other APH residents with Alzheimer's disease by requiring them to obtain escorts at their own expense when a family member cannot accompany them on the APH van. The Complainant also alleges that DHSS retaliated against her by taking several adverse actions against her and her father because she filed a discrimination complaint with OCR.

DHSS denies that it discriminates against APH residents on the basis of disability in the provision of transportation services. DHSS contends that its refusal to provide free escorts to APH residents with Alzheimer's disease does not constitute disability discrimination because DHSS does not provide escorts to any of its APH residents. DHSS also denies that it took any retaliatory actions against the Complainant or her father after it was notified by OCR that a discrimination complaint had been filed. Further, DHSS maintains that, in general, the actions that the Complainant has alleged to be retaliatory occurred before the discrimination complaint was filed with OCR, and, therefore, cannot legally constitute retaliation.

Issues Under Investigation

1. **Whether DHSS Discriminated Against Individuals on the Basis of Disability by Limiting Their Access to Free Transportation Services and Failing to Implement Reasonable Modifications**

In order to be protected under the ADA and Section 504, an individual must be a "qualified individual with a disability." An "individual with a disability" is a person who has a physical or mental impairment that substantially limits one or more major life activities. 28 C.F.R. § 35.104 and 45 C.F.R. § 84.3(j). A "qualified individual with a disability" means "an individual who, with or without reasonable modifications to rules, policies, or practices ... meets the essential eligibility requirements for receipt of services or participation in programs" conducted by a covered entity. 28 C.F.R. § 35.104 and 45 C.F.R. § 84.3(l)(4).

The Complainant's father meets the definition of an "individual with a disability" because he has mental and physical impairments (advanced Alzheimer's disease) that substantially limit one or more major life activities (i.e., he requires extensive assistance with all activities of daily living, e.g., walking, feeding, bathing, etc.). Transportation is a service that DHSS makes available to APH residents receiving Level 2 and Level 3 care. During the time period that he was an APH resident receiving Level 3 care, the Complainant's father met the essential eligibility requirements for receipt of transportation services, and was, therefore, a "qualified individual with a disability."

A. DHSS Uses Criteria That, as Applied by APH Staff, Screen Out or Limit Access and Participation in its Transportation Services

The Section 504 regulations specify at 45 C.F.R. § 84.4(b)(4) that recipients of Federal financial assistance are prohibited from, either directly or through contractual arrangements, utilizing criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability. Pursuant to the ADA regulations at 28 C.F.R. § 35.130(b)(8), public entities are prohibited from imposing or applying eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying any service, program or activity, unless such criteria can be shown to be necessary for the safe provision of the service being offered. It is well settled that, in the context of the ADA and Section 504, safety requirements must be based on actual risk and not on speculation, stereotypes, or generalizations about the effects of a particular disability. 28 C.F.R. Part 35, Appendix A. *See also School Board of Nassau County, Florida, et al. v. Arline*, 480 U.S. 273, 287 (1987) (individualized assessment of safety risks posed by an individual with a disability "is essential if § 504 is to achieve its goal of protecting disabled individuals from discrimination based on prejudices, stereotypes, or unfounded fears"); and *Bragdon v. Abbott*, 524 U.S. 624, 649-51 (1998).

According to DHSS' transportation policy, residents' "medical acuity" is assessed to determine whether they may ride the APH van unescorted. DHSS' transportation policy states that, "nursing staff is to assess the resident's need for an escort, i.e. [,] capability to perform routine tasks, paperwork, communication skills, etc." The policy also states that, "any resident requiring assistance must have an escort(s)." OCR requested clarification of the assessment process, and the policy was amended to state that

nursing staff is to perform a professional assessment of the resident's need for an escort based upon the anticipated situations during the outing which the resident may encounter and which may effect [sic] the resident's safety or capability to, [sic] perform routine tasks without assistance, paperwork, required communications, [and] remain [sic] independent mobility, etc.

OCR's investigation did not find any evidence that persuasively supports DHSS' assertion that nursing staff perform individualized assessments to determine which residents may safely ride the APH van without an escort. No assessment tools or Standard Operating Procedures were

provided, or otherwise referenced, during the investigation. Testimony from APH staff showed that no formal guidelines were applied when, or if, a resident's medical acuity was assessed. OCR's review of APH's records found no documentation indicating that assessments of "medical acuity" were conducted for the Complainant's father or any other APH resident with Alzheimer's disease.

As a result, DHSS' practices have the effect of limiting certain categories of persons with disabilities from being able to access transportation without the additional financial burden of securing an escort. For example, Ms. Bernadean Anselm, APH's former Assistant Administrator, stated that if the nurses did not feel that a resident could be transported safely without an escort, the resident needed an escort. Conditions that necessitated an escort included full code status,⁴ respiratory problems, the inability to communicate distress, and the inability to move the upper body without assistance. When asked how many of the residents in the Alzheimer's Disease and Dementia Unit required an escort, Ms. Anselm replied "everyone." Similarly, Connie Reimers, an APH nurse with a long history of caring for the Complainant's father and other Level 3 residents, stated that residents with Alzheimer's disease and advanced dementia *always* required escorts.

It is clear from OCR's investigation in this matter, that APH claims the Complainant's father could not ride the van unescorted based on the nursing staff's perception of his medical acuity. Although the use of "medical acuity" as an eligibility requirement was not a direct bar to the Complainant's father's use of the APH van, the manner in which APH staff implement that requirement limits his ability to participate in, or fully enjoy the benefits of, the free transportation services. For example, the Complainant stated that her father had exhausted all of his personal finances, and, thus, she complained that "he has no money to pay for a traveling companion for the APH bus." The Complainant asserted that the cost for a private escort to ride the APH van with the Complainant's father sometimes ran as high as \$560 a month. The evidence further indicates that the frequency of APH residents needing a travel escort to ride with them on van trips was significant, and in fact, during a randomly chosen three-month period, the average number of residents requiring an escort per month was approximately 16. DHSS stated that the cost for escorts from local private companies ranged from \$25 to \$30 per hour. Clearly, for residents like the Complainant's father who live on a fixed and limited income, being required to pay the additional costs associated with private escorts limits their access to, and opportunity to participate equally in, DHSS' transportation services.

As stated above, the ADA and Section 504 regulations prohibit DHSS from imposing or applying eligibility criteria that screen out or tend to screen out individuals with disabilities or any class of individuals with disabilities from fully enjoying any service, program or activity, unless such criteria can be shown to be necessary for the safe provision of the service being offered. Based on the evidence gathered, OCR finds that, as applied by APH staff, the "medical acuity" eligibility requirement in DHSS' transportation policy tends to screen out or limit APH residents with Alzheimer's disease from receiving transportation services. DHSS failed to

⁴ "Full code" means that the individual requests all life-saving procedures be utilized. APH instituted this practice in February 2005.

provide any evidence to substantiate its claim that APH nursing staff perform individualized assessments of the “medical acuity” of residents with Alzheimer’s disease, or apply any consistent standards in determining that a resident requires an escort to safely ride the APH van. The facts show that APH nursing staff rely on stereotypes or generalizations about the effects of Alzheimer’s disease and impose a blanket requirement that residents with that disease always have an escort accompany them on the APH van. In addition, DHSS has not shown that requiring APH residents with Alzheimer’s disease to demonstrate that they do not exceed some unspecified level of “medical acuity” is necessary to ensure the safe operation of its transportation services. Even assuming that DHSS could demonstrate that allowing residents with Alzheimer’s disease to ride the APH van without escorts would pose additional safety risks to its transportation services, under Title II of the ADA and Section 504, DHSS is obligated to determine whether those safety risks could be mitigated by reasonable modifications to its policies and practices. Therefore, OCR finds that DHSS discriminates against APH residents with Alzheimer’s disease on the basis of disability in the provision of transportation services, and is in violation of 28 C.F.R. § 35.130(b)(8) of the ADA regulations and 45 C.F.R. §§ 84.4(b)(4) and 84.52 of the Section 504 regulations.

B. DHSS Failed to Consider a Legitimate Request for a Reasonable Modification to its Transportation Policy and Practices

The ADA regulations state that a “public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity,” 28 C.F.R. § 35.130(b)(7), or cause “undue financial and administrative burdens,” 28 C.F.R. § 35.150.

Section 504’s regulations also require recipients of Federal financial assistance to make reasonable modifications to their existing programs or services to accommodate otherwise qualified disabled persons. *See Alexander v. Choate*, 469 U.S. 287, 300 (1985); *Guckenberger v. Boston University*, 974 F. Supp.106, 134 (D. Mass 1997). Accordingly, DHSS has an obligation to consider legitimate requests for reasonable modifications to its services and programs to avoid discrimination on the basis of disability.

The evidence shows that as early as December 2002, the Complainant notified a DHSS’ nurse consultant, Ms. Collette Grower, of the need for a reasonable modification in APH’s transportation policy. Through a series of written communications, the Complainant advised Ms. Grower that she could no longer act as an escort for her father and that someone else would have to perform that duty whenever he rode APH’s van.⁵ In response, Ms. Grower told the Complainant to use Transcare Services whenever she could not escort her father.⁶

⁵ The investigation revealed that the Complainant stopped escorting her father to appointments after she was told by DHSS that she could no longer bring her newly adopted daughter on trips because APH’s insurance carrier would not make provisions for transporting the baby on the van.

⁶ Transcare Services is a private medical transportation service used by some APH residents, which DHSS listed in its May 7, 2004 reply to OCR.

OCR interviewed APH staff regarding whether any consideration had been given to possible modifications to DHSS' transportation policies and procedures to ensure that APH residents with Alzheimer's disease were not being denied an equal opportunity to benefit from APH's transportation services. During OCR's September 2006 on-site visit, Mr. David Frain, APH Administrator, stated that no changes had been recommended or contemplated, nor had any changes been made to the transportation policy since the removal of the escort requirement for residents in wheelchairs.⁷

OCR's investigation revealed that the other five Pioneer Homes were able to provide staff escorts, as needed, for residents being transported to and from appointments. For instance, Sitka's transportation policy called for staff to provide "transportation for physician office visits, dental visits, and other necessary times if family cannot provide this service."⁸ Sitka's policy also required nursing staff to accompany a resident when a resident was incapable of performing certain functions (e.g., alert the driver about a serious problem).⁹ In addition, the Palmer facility used a recreation assistant as the designated driver and escort when needed. At the Ketchikan facility, various Certified Nurse Aides (CNAs) drove and escorted residents. The home in Ketchikan also utilized "on-call" CNAs when regularly scheduled staff were unavailable. At the Juneau facility, the Assisted Living Coordinator and Social Worker were the most commonly used staff for driving and escorting residents, but CNAs were also available to drive and escort residents when needed. At the Fairbanks facility, the Supply Technician and the Physical Therapy Aide were the ones primarily responsible for driving and escorting residents. Staff from Fairbanks' Social Work, Housekeeping, and Activities departments were also occasionally assigned to help with patient transportation, including serving as escorts.

Nevertheless, Ms. Rebecca Polizzotto, Assistant Attorney General, State of Alaska, maintains that APH cannot be accurately compared to the other Pioneer Homes and does not have the resources to provide staff escorts:

Whereas the communities of some of the Pioneer Homes are small and most residents go to the same health clinics/physicians, APH residents travel all over this large city [Anchorage]. This combined with the sheer number of residents needing transportation/escorts each necessitate the need to limit our transportation services To assign more of our staff to transport and escort residents to appointments would result in fewer staff to provide care to the residents within the Home. This would result in a decrease in our ability to admit new residents.

⁷ An earlier version of APH's transportation policy included a blanket requirement that all residents using wheelchairs must have an escort accompany them on the facility's van. However, according to Mr. Frain, this requirement was removed at the recommendation of the Disability Law Center since singling out wheelchair users could be seen as a proxy for imposing extra restrictions on those with disabilities in mobility.

⁸ Only Anchorage and Sitka have written transportation policies.

⁹ At the Sitka home, escorts were typically a Certified Nurse Aide or an Assisted Living Aide.

E-mail from Rebecca Pollizotto, Assistant Attorney General, State of Alaska, to HHS/OCR (Aug. 4, 2006). DHSS did not provide any evidence to support its contentions. The same holds true for the argument that use of APH staff to escort residents would result in financial or staffing problems for DHSS.

In determining whether a request for a modification to policies, practices and procedures would result in “a fundamental alteration in the nature of a service, program, or activity” or an undue financial and administrative burden, a covered entity must consider all resources available for use in funding and operating of that particular service or program. *See* 28 C.F.R. Part 35.150(a) (3) & Appendix A. As interpreted by the courts, the term “undue burden” means “significant difficulty or expense.” Courts have declined to find that every modification to a program or service that requires additional outlays of funds to accommodate individuals with disabilities is tantamount to a fundamental alteration. *See Frederick L. v. Department of Public Welfare*, 422 F.3d 151, 155 (3d Cir. 2005); *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1183 (10th Cir. 2003).

Under the ADA and Section 504 regulations, DHSS is obligated to consider legitimate requests for reasonable modifications to its policies and procedures to avoid discriminating against individuals with disabilities. In this case, DHSS has acknowledged that it has not considered any possible modifications to its transportation policies or procedures that would ensure that APH residents with Alzheimer’s disease, like the Complainant’s father, have an equal opportunity to participate in the transportation services available at the facility.¹⁰ As a result of DHSS’ refusal to consider the Complainant’s legitimate request for a modification in its transportation policy and practices through the provision of escorts, OCR finds that DHSS has failed to comply with the reasonable modification requirements established under the ADA and Section 504.

2. Whether DHSS Retaliated Against the Complainant Because of the OCR Complaint

The ADA and Section 504 implementing regulations contain prohibitions against retaliation by a public entity or a recipient of Federal funding. *See* 28 C.F.R. § 35.134 and 45 C.F.R. § 80.7(e), incorporated by reference at 45 C.F.R. § 84.61. The legal standard for analyzing retaliation cases is well established. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973); *Davis v. Team Electric Co.*, 520 F.3d 1080, 1093-94 (9th Cir. 2007). A prima facie case of retaliation is established by evidence showing that (1) the Complainant engaged in a protected activity; (2) DHSS took adverse action(s) against her or her father; and (3) there was a causal connection between the protected activity and the adverse action(s). *See Davis*, 520 F.3d at 1093-94. If a prima facie case is established, DHSS must articulate a legitimate non-discriminatory reason for the adverse action imposed. *Davis*, 520 F.3d at 1094. Finally, if DHSS articulates a legitimate

¹⁰ One possible modification was raised during the September 2006 on-site: OCR interviewed the Director of the Activities Department at APH, who is responsible for the volunteer program; he indicated that community volunteers could be given responsibility for escorting residents to medical appointments. In addition, APH could give the responsibility for escorting residents to CNAs, recreation assistants, housekeepers, social workers or assisted living coordinators, as do the five other Pioneer Homes.

non-discriminatory reason for taking the challenged action, OCR examines whether the stated reason was not the true reason for its actions, but a pretext for discrimination. Applying this legal standard, it is clear that any claims regarding actions taken by DHSS that pre-date the Complainant's request for a reasonable modification for her father's disability and the filing of her complaint with OCR cannot, as a matter of law, be retaliatory in nature.

As set forth above, between October of 2004 and April of 2005, the Complainant notified OCR that in retaliation for her filing a complaint with OCR, DHSS had (1) attempted to discharge her father from the APH facility in December of 2004; (2) filed a March 2005 motion to intervene in her father's guardianship proceedings to have her power of attorney revoked; (3) refused to bathe her father twice-weekly; (4) failed to change/toilet her father in the privacy of his own room; (5) declined to provide her father's primary care physician with weekly vital sign reports; (6) refused to provide her father with nutritional supplements; and (7) discharged her father from the APH facility in February 2007.

A. Retaliation Claims Supported by Evidence

1. Attempted Discharge in December 2004 and Motion to Intervene Filed in March of 2005¹¹

DHSS maintains that it did not retaliate against the Complainant, when it (1) attempted to discharge her father from the APH facility in December 2004; and (2) filed a March 2005 motion to intervene in her father's guardianship proceedings to have her power of attorney revoked. In its letter of July 23, 2007, DHSS stated that it had issued the Complainant "a notice of discharge on December 20, 2004, because ... [she] refused to execute a residential services contract and an assisted living plan for ... [her father], both of which are required by state law." DHSS claims that after she had "refused to execute the requisite residential services contract and assisted living plan," she then filed, on or about December 26, 2003 and January 7, 2004, "a complaint with DHSS, Division of Public Health, Certification and Licensing Section ('Assisted Living Licensing') for APH's failure to have a residential services contract and updated assisted living plan" for her father. *See id.* As a result of that complaint, the Assisted Living Licensing Division issued a May 6, 2004 finding that APH was out of compliance with State Licensure requirements, in particular, provisions AS 47.33.220 and AS 47.33.230 concerning the proper execution of assisted living plans. Thus, DHSS argued that:

[B]ecause of its concerns for ... [the Complainant's father's] care and safety, the APH took the extraordinary step of intervening in a pending guardianship petition, seeking the appointment of a guardian, other than ... [the Complainant], to represent ... [her father's] best interest. The State's Motion to Intervene was filed because, absent the appointment of a guardian, the APH was faced with choosing to either: (1) violate state law, or (2) discharge ... [the Complainant's father].

¹¹ In its written reply to OCR, dated July 23, 2007, DHSS relied on the same facts to rebut the Complainant's claims that retaliation occurred when DHSS attempted to discharge her father in December 2004 and filed a motion to intervene in March 2005. Consequently, the legal analysis of these issues is combined.

As to the motion to intervene, court records indicate that DHSS, Division of Alaska Pioneer Homes, filed the motion to intervene on March 29, 2005. In its motion, DHSS requested that the court revoke the Complainant's power of attorney and replace her with a court-appointed guardian. In support of its motion, DHSS submitted a sworn affidavit from Mr. Frain that attested to the Complainant's history of non-cooperation and disruptive behavior as the reasons why she was an inappropriate legal representative for the Complainant's father. As examples of her inappropriate behavior, Mr. Frain cited her refusal to sign legally required documents such as residential services contracts (AS 47.33.210) and assisted living plans (AS 47.33.220) that resulted in APH receiving a violation notice. According to Mr. Frain, receipt of this notice resulted in his "decision to discharge ... [the Complainant's father] on December 20, 2004."¹² (David Frain Aff., Mar. 29, 2005). Mr. Frain goes on to reference the fact that APH is "currently responding to various complaints filed by ... [the Complainant] with the Office of Civil Rights" as an additional reason why the Complainant was incapable of acting in her father's best interest, and, therefore, why her power of attorney should be revoked. *See id.*

OCR concludes that the evidence establishes a prima facie case of retaliation. The evidence shows that the original guardianship petition was filed in 2002. The Complainant engaged in protected activity by filing a complaint with OCR on September 5, 2003. After DHSS was notified of the complaint on April 15, 2004, it took the adverse actions of (1) issuing a November 24, 2004 notice informing the Complainant that her father's contract with APH would end in December 2004; and (2) filing, on March 29, 2005, a motion to intervene in her father's guardianship proceedings to have her power of attorney revoked. The causal connection between the protected activity and the adverse actions is evidenced through Mr. Frain's statement about the pending OCR complaint in his affidavit and the relatively short passage of time between DHSS' notice of the protected activity and its adverse actions toward the Complainant and her father. DHSS' explanation that it had legitimate non-discriminatory reasons for taking those actions is not persuasive, and OCR finds DHSS' proffered reasons for its actions to be a pretext for discrimination.

Residential Services Contracts: DHSS' explanation that it was justified in its attempted discharge action in December 2004 and court action to revoke Complainant's power of attorney due to her failure to sign a residential services contract is not supported by the evidence. DHSS' documentation shows that APH provided services to the Complainant's father for years despite there being only two residential services contracts signed by the Complainant.¹³ Neither the Alaska statute nor its implementing regulations contain any requirements on how frequently such contracts must be executed. In fact, the full text of AS 47.33.210(a) only specifies that:

A person may not *begin* residency in an assisted living home unless a representative of the home and either the person or the person's representative sign a residential services

¹² The decision to discharge was appealed by the Complainant, but a final decision in the matter was never rendered.

¹³ The first contract was executed on June 14, 2002, and the second one was completed on or about July 18, 2005.

contract that complies with the provisions of this section. Upon signing of the contract, the home shall give the resident and the resident's representative, if any, a copy of the contract and place a copy of the contract in the resident's file.

AS 47.33.210(a) (emphasis added). The Complainant and DHSS properly executed a residential services contract for the Complainant's father on June 14, 2002. There is no evidence that the failure to enter into subsequent contracts provided a basis for the actions that DHSS took. According to AS 7.33.210, the residential services contracts need to be signed only one time, and both parties properly executed such a contract on June 14, 2002. Therefore, DHSS' explanation that it relied on the absence of properly executed residential services contracts is not credible.

Assisted Living Plans: In addition, DHSS' explanation that it acted against the Complainant and her father because it had no choice is not supported by the evidence. The evidence shows the Complainant and APH had properly executed assisted living plans that complied with state law on March 12, 1998; August 12, 1998; July 8, 1999; January 19, 2000; and November 21, 2002. Alaska Statutes 47.33.240 requires that for residents who receive health-related services, such as Complainant's father, APH must review their plans on a quarterly basis in order to determine if the plan is suitable to the resident. Furthermore, AS 47.33.220 mandates that the resident or his representative participate in the plan's development.

APH failed to have a signed assisted living plan for more than a year when the Complainant filed her complaint with Assisted Living Licensing. It continued without a signed assisted living plan through May 6, 2004, when Assisted Living Licensing issued its violation notice, and through August 6, 2004, the date given by Assisted Living Licensing to come into compliance. There is no evidence that compliance with State law required discharge of the Complainant's father or an action to revoke the Complainant's power of attorney. Nothing in the Assisted Living Licensing notice suggests that these actions against the Complainant and her father were contemplated prior to Complainant's filing of her complaint with OCR. Although steps to obtain a signed assisted living plan from the Complainant were within APH's discretion, intervening in an action to revoke her power of attorney was wholly disproportionate, given that it would affect an existing legal relationship in areas outside of any scope of interest of DHSS.

OCR is not persuaded by DHSS' proffer that it had legitimate nondiscriminatory reasons for (1) issuing a November 24, 2004 notice informing the Complainant that her father would be discharged in December of 2004; and (2) filing, on March 29, 2005, a motion to intervene in her father's guardianship proceedings to have her power of attorney revoked. The evidence supports the conclusion that DHSS' actions, which were taken after the April 15, 2004 OCR notification letter was sent to DHSS, amount to retaliation against the Complainant for filing a discrimination complaint against DHSS. OCR therefore finds that DHSS is in violation of the retaliation prohibitions in the ADA implementing regulations at 28 C.F.R. § 35.134, and Section 504's implementing regulations at 45 C.F.R. § 80.7(e), incorporated by reference at 45 C.F.R. § 84.61.

2. Change in Twice-Weekly Bathing Schedule

OCR has determined that DHSS retaliated against the Complainant when it unilaterally changed her father's twice weekly bath schedule in July of 2004, approximately three months after OCR issued its Letter of Notification.¹⁴ DHSS contends that the Complainant had been notified, as early as July of 1998, that APH's policy was to provide one full immersion bath per week, and therefore this issue "pre-dates the complaint and cannot be retaliatory in nature." See DHSS Letter to OCR (July 23, 2007). However, the facts show that, in spite of this policy, the Complainant's father had received a bath or shower twice a week from 1999 until 2004 as documented in the assisted living plans maintained by APH. Although the Complainant alleged that her father's bathing schedule was discontinued in October of 2004, OCR's review of APH's assisted living plans indicate that her father's baths were reduced to one time per week on or about July 15, 2004.

In response to the Complainant's inquiry about why APH changed her father's bathing schedule, Mr. Frain initially indicated that the weekly bathing schedule was the result of research and geriatric care standards that took into account the climate, dermatological concerns of the elderly, as well as the emotional stress inherent with bathing. Mr. Frain also made the following argument: "Frankly, we must also take into account staffing level and the time it takes to bathe an elder in need of full assistance. This is not the reason we have a one bath per week schedule, but rather why we cannot accommodate your request for more frequent bathing by our staff." Letter from David Frain to Complainant (Nov. 8, 2004).¹⁵

Mr. Frain's argument, however, was not supported by OCR's review of Complainant's father's medical records, as provided by his primary care provider, Lynn Hornbein, M.D. Dr. Hornbein's medical records concerning the Complainant's father for the 2003 to 2006 period indicated that the twice-weekly bathing schedule had been implemented for therapeutic reasons, i.e., to assist in managing his pain. Although Dr. Hornbein's records did not include any initial orders on his bathing/showering schedule, her medical records do contain the following admonishment to APH staff for unilaterally changing the Complainant's father's bathing schedule: "I do *not* agree with monthly vital signs or once weekly bathing, and I did not order these changes." APH Physician Visit Record (Dec. 8, 2004) (emphasis in the original). Records also document the following exchange of information between Dr. Hornbein and APH nursing staff, Tom Rogers, R.N.:

Question from Tom Rogers to Dr. Hornbein: You have not given a medical reason for this order. Our Elders at APH do receive a bath weekly and a... morning refresh. Is

¹⁴ The Complainant indicated that her father's schedule was changed in October 2004. However, OCR's review of her father's assisted living plans revealed that DHSS actually reduced his bath schedule in July 2004, a circumstance that the Complainant may not have become aware of until October 2004. Regardless of whether the change in schedule occurred in July or October 2004, it does not change the basis for our finding with respect to this issue, as APH was notified of the OCR complaint in April 2004.

¹⁵ Mr. Frain's statements are corroborated in DHSS' reply to OCR dated July 23, 2007.

there an indication for this order? Also do you have a time line for this order such as one or two months?

Response from Dr. Hornbein: In the past, he got 2 whirlpool/jacuzzi baths per week for treatment of arthritis pain, which I bet he still feels!

Facsimile from Lynn Hornbein, M.D., to Tom Rogers, R.N. (Dec. 13, 2004). The evidence clearly reflects Dr. Hornbein's disagreement with DHSS' decision to change her patient's bathing schedule. Furthermore, the medical records show that Dr. Hornbein knew that in the past her patient had received two baths per week, and that she had ordered the baths not simply for hygienic reasons, but for therapeutic reasons (i.e., personal comfort and pain management).

These facts support a prima facie case of retaliation. First, it is clear that the Complainant engaged in a protected activity when she filed her complaint with OCR. Second, the discontinuance of DHSS' long-term practice of providing the Complainant's father with twice-weekly therapeutic and hygienic baths (despite medical orders and the apparent objections of his primary care physician) supports a reasonable inference that it was done to retaliate against the Complainant. Lastly, the causal connection between the protected activity and the adverse action is evidenced by the short passage of time (i.e., three months, at the earliest, or approximately seven months, at the latest) after OCR issued its Letter of Notification to DHSS.

Applying the legal standard for analyzing retaliation claims, once a prima facie case is established, DHSS must proffer a legitimate non-discriminatory explanation for the adverse action(s) taken. DHSS has not done this so far, and the closest approximation to such a reply can be found in DHSS' letter of July 23, 2007. In that reply, however, DHSS contends that a prima facie case cannot be established because the Complainant was notified in July of 1998 that APH's policy was to provide one full immersion bath per week, and, therefore, this issue "pre-dates the OCR complaint and cannot be retaliatory in nature." DHSS Letter to OCR (July 23, 2007). However, DHSS has not provided any explanation for why it continued the twice-weekly practice for more than six years after the 1998 notice to the Complainant regarding its official practice and did not discontinue that practice until three months after being notified of the OCR complaint.

B. Retaliation Claims Not Supported by Evidence

With respect to the Complainant's four remaining retaliation claims, OCR concluded that they were either unsubstantiated or predated the initial complaint filed with OCR.

Regarding the Complainant's allegation that DHSS retaliated against her by refusing to change/toilet her father in the privacy of his own room, OCR found that DHSS had a legitimate nondiscriminatory reason for its action. DHSS explained that the Complainant's father was changed/toileted in the changing room because it was larger than her father's room and prevented odors associated with changing undergarments. OCR also found no evidence that the Complainant's father was treated any differently than other APH residents regarding this issue.

As to the Complainant's allegation that DHSS retaliated against her by not providing Dr. Hornbein with weekly vital signs reports, the evidence shows that DHSS provided those reports consistent with Dr. Hornbein's orders.

OCR finds the Complainant's allegation that DHSS retaliated against her by refusing to provide her father with nutritional supplements and by modifying his Lifestyle Plan of Care unsupported because these actions were originally taken in 2001, which predates the Complainant's reasonable modification request and the filing of her OCR complaint.

OCR also concluded that DHSS' discharge of the Complainant's father from the APH facility in February of 2007 was not retaliation against her because of the OCR complaint. In its letter of July 23, 2007, DHSS proffered that, at the time of the Complainant's father's discharge, his medical condition required services beyond the scope of those provided by APH. Therefore, OCR finds that DHSS had a legitimate nondiscriminatory reason for its action.

For the reasons stated above, OCR finds that, with respect to these allegations, DHSS did not violate the retaliation prohibitions in the ADA regulations at 28 C.F.R. § 35.134 and the Section 504 regulations at 45 C.F.R. § 80.7(e), incorporated by reference at 45 C.F.R. § 84.61.

Conclusions

Based upon its investigation, OCR concluded that DHSS violated Title II of the ADA and Section 504 by discriminating against the Complainant's father and other APH residents with Alzheimer's disease on the basis of disability in the provision of transportation services. OCR found that staff at DHSS' APH facility do not conduct individualized assessments to determine whether residents with Alzheimer's disease have a level of "medical acuity" which precludes their ability to ride the APH van without an escort. Therefore, OCR has concluded that, as applied by APH staff, the "medical acuity" eligibility criterion in DHSS' transportation policy tends to screen out or limit residents with Alzheimer's disease from fully enjoying or benefiting from APH's free transportation services. In addition, DHSS has declined to consider a legitimate request for a modification in its transportation policy and practices through the provision of escorts to avoid discrimination on the basis of disability against APH residents with Alzheimer's disease.

OCR has also concluded that DHSS retaliated against the Complainant in violation of Title II of the ADA and Section 504 when it issued a notice informing the Complainant that her father would be discharged in December of 2004; and filed a March 2005 motion to intervene in the proceeding to determine the guardianship of Complainant's father. In addition, OCR found that DHSS' unilateral decision to change the bathing schedule that had been followed for the Complainant's father from 1998 to 2004 over the objections of his treating physician was an act of retaliation against the Complainant.

DHSS has **thirty (30) calendar days** from the date of this letter to respond and **sixty (60) calendar days** from the date of this letter to negotiate an acceptable Settlement Agreement with

OCR. To that end, we have enclosed a proposed Settlement Agreement for your consideration. If compliance has not been secured by the end of the sixty day negotiation period, OCR will initiate formal enforcement action by commencing administrative proceedings, or by other means authorized by law.

Advisements

Please be advised that DHSS may not harass, coerce, intimidate, or retaliate against an individual because he or she has filed a complaint or participated in any manner in the investigation of this complaint. If this happens, the individual may file a complaint alleging such harassment or intimidation, which will be handled pursuant to the ADA regulations and the Section 504 regulations respectively codified at 28 C.F.R. § 35.134 and 45 C.F.R. § 80.7(e), incorporated by reference in Section 504 at 45 C.F.R. § 84.61.

Under the Freedom of Information Act, it may be necessary to release this letter and other documents upon request by the public. In the event OCR receives such a request, we will make every effort permitted to protect information that identifies individuals or that, if released, would constitute an unwarranted invasion of privacy.

If you have any questions, please do not hesitate to contact Calvin Low, Deputy Regional Manager, at (206) 615-2290 or by e-mail at Calvin.Low@hhs.gov. Thank you for your cooperation in this matter.

Sincerely yours,

Linda Yuu Connor
Regional Manager

Enclosure: Settlement Agreement
By Certified & Regular Mail

cc: Rebecca Polizzotto, Assistant Attorney General, State of Alaska
David Frain, Administrator, APH
Complainant