



**DEPARTMENT OF HEALTH & HUMAN SERVICES**

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**OFFICE OF THE SECRETARY**

**Office for Civil Rights, Region II**  
**Jacobe Javits Federal Building**  
**26 Federal Plaza, Suite 3312**  
**New York, NY 10278**

**FEB - 1 2013**

Matthew S. Bowman, Esq.  
Alliance Defending Freedom  
801 G Street, N.W.  
Washington, D.C. 20001

David Reich, M.D.  
Interim President  
The Mount Sinai Hospital  
One Gustave L. Levy Place  
New York, New York 10029

Reference Number: 10-109676

Dear Mr. Bowman and Dr. Reich:

The U.S. Department of Health and Human Services (HHS), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed by the Alliance Defending Freedom, formerly known as the Alliance Defense Fund (the complainant), on behalf of Catherina Lorena Cenzone-DeCarlo (the affected party) against The Mount Sinai Hospital (the Hospital). The complaint alleges that, on May 24, 2009, the Hospital forced the affected party to assist in the performance of an abortion procedure despite her express religious objections. The complaint also alleges that, because of the affected party's initial refusal to participate in the May 24, 2009 procedure, the Hospital discriminated against her by: (i) reducing the number of on-call shifts she received for the month of August 2009; and (ii) asking her to sign a statement of her willingness to participate in abortion procedures in emergencies as a condition to being assigned more on-call shifts for September 2009 than she was assigned for August 2009.

OCR initiated an investigation of this complaint consistent with its authority under the Church Amendments, 42 U.S.C. § 300a-7; Section 245 of the Public Health Service Act, 42 U.S.C. § 238n; and the Weldon Amendment, Consolidated Appropriations Act, 2008, Public Law 110-161, Div. G, § 508(d), 121 Stat. 1844, 2209 (collectively referred to as the Federal health care provider conscience statutes) and their implementing regulation, 45 C.F.R. Part 88.

According to information available on its website, the Hospital is a 1,171-bed tertiary-care teaching facility that oversees approximately 58,000 patients receiving inpatient care, 530,000 outpatient visits, and 98,000 emergency room visits each year. The Hospital is part of The Mount Sinai Medical Center. The Hospital receives federal financial assistance from HHS under the Public Health Service Act and through its participation in Medicare and Medicaid.

During the course of the investigation, OCR reviewed information submitted by the complainant and the Hospital. OCR interviewed the complainant, the affected party, Hospital staff and administration, and physicians providing services at the Hospital. OCR also coordinated the handling of the complaint with the staff of the HHS program(s) from which the Hospital receives HHS funding.

The complainant indicated that the affected party has been employed in the Hospital's Perioperative Services Care Center since August 9, 2004, and has strongly-held religious beliefs and moral convictions that she should not participate in abortion procedures. During the course of its investigation, OCR learned that elective abortion procedures are scheduled on weekdays at the Hospital, staffed by individuals who have agreed in advance to participate in such procedures. Urgent/non-elective abortion procedures that occur over the weekend are staffed by Operating Room (O.R.) nurses and surgical technicians who have signed up and are assigned to be "on call" for that specific weekend. The complainant indicated that the affected party was on on-call and called to the O.R. for a procedure to take place during the morning of Sunday, May 24, 2009. The complainant informed OCR that, shortly after the affected party learned that the case was an abortion procedure, she reminded her supervisor of her religious objection and asked to be excused from the case, but the Hospital insisted that she assist in the procedure.

During OCR's investigation of this matter, the Hospital stated that it did not force the affected party to assist in the performance of an abortion procedure, and that it did not discriminate or retaliate against her for her initial refusal to assist in the abortion procedure. Nonetheless, the Hospital also indicated that, since the events of May 24, 2009, it has implemented measures to address the administrative issues that prevented the Hospital from locating a replacement nurse for the affected party on the day of the procedure.

In particular, OCR learned that the Hospital adopted a revision to its O.R. scheduling policies and procedures, effective August 2009, which requires abortion procedures to be scheduled with the O.R. with as much notice as possible. The revised policy also establishes a process wherein the Hospital maintains: (i) contact information for the O.R. nurses and surgical technicians, and (ii) a list indicating which nurses and surgical technicians are willing to participate, and which are not willing to participate, in abortion procedures. Further, the revised policy instructs O.R. scheduling staff and on-duty nurse managers that, in the event on-call O.R. nurses or surgical technicians must be called in for an abortion procedure, the O.R. scheduling staff must inform the on-duty nurse manager. If the scheduled on-call O.R. nurse or surgical technician is listed as

being unwilling to assist, the scheduling staff (and the nurse manager) will use the aforementioned lists to contact and secure an O.R. nurse or surgical technician, as appropriate, who is willing to assist in the performance of an abortion.

Subsequently as a result of OCR's investigation, the Hospital has agreed to take certain other actions to ensure and strengthen its commitment and ongoing compliance with the applicable Federal health care provider conscience statutes. OCR notes that the Hospital has taken significant affirmative steps to address the compliance concerns identified in the complaint, and the following listed actions provide additional safeguards for objecting health care personnel while ensuring patients have access to needed health care. Specifically, the Hospital has agreed in writing to:

1. Comply with the provisions of the Church Amendments, 42 U.S.C. § 300a-7 *et seq.*
2. Continue to use its best efforts to ensure that non-objecting health care personnel are available to perform their job duties with respect to abortion procedures, including any abortion procedures that occur over the weekend;
3. Revise Human Resources Policy No. 15.3, titled "Exclusion from Patient Care – Employee Rights," to state that "The Mount Sinai Hospital does not discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or in the extension of staff or other privileges to any physician or other health care personnel, because he or she performed or assisted in the performance of a lawful sterilization procedure or abortion, or because he or she refused to perform or assist in the performance of such a sterilization procedure or abortion on the grounds that his performance or assistance would be contrary to his religious beliefs or moral convictions."
4. Continue to post the Hospital's Human Resources Policy No. 15.3, titled "Exclusion from Patient Care – Employee Rights," electronically on the Hospital's intranet and post in hard copy on the Operating Room notice board; and
5. Train O.R. managers, nurses and surgical technicians about the Hospital's obligations to comply with the Church Amendments and train Surgical Admitting Planning office administrative staff to ensure that O.R. nurses' and surgical technicians' objecting or non-objecting status is properly recorded.

In addition, OCR provided the Hospital with technical assistance regarding its grievance procedure and its list identifying whether O.R. nurses and surgical technicians are willing or not to participate in abortion procedures. The Hospital incorporated OCR's technical assistance, further ensuring the Hospital's compliance with the applicable Federal health care provider conscience statutes.

Based on the above-described commitments and actions, OCR finds that the Hospital took steps, subsequent to May 24, 2009, and during the course of OCR's investigation,

which have sufficiently addressed and resolved the allegation regarding the May 24, 2009 procedure.

With respect to the allegation that the Hospital discriminated against the affected party by reducing the amount of weekend on-call shifts to which she was assigned for August 2009, the evidence gathered during OCR's investigation did not support such a finding. The affected party asserted that there were multiple sign-up sheets and she had signed up for approximately 7-8 on-call shifts for August 2009. The Hospital indicated that there was only one set of sign-up sheets, and the affected party signed up for a single shift, which the Hospital assigned to her. While the Hospital's documentation does not definitively establish that there was not a second set of sign-up sheets for August 2009, OCR's interviews of multiple O.R. nurses indicate that O.R. nurses and surgical technicians signed up at a single location on a single set of sign-in sheets. Accordingly, OCR has determined that there is insufficient evidence to conclude that the Hospital discriminated against the affected party when assigning on-call shifts for the month of August 2009.

The complainant also alleged that the Hospital discriminated against the affected party by asking her to sign a statement of her willingness to participate in abortion procedures in emergencies as a condition to being assigned more on-call shifts for September 2009 than she was assigned for August 2009. After interviewing the affected party and other staff involved in the alleged conversations, OCR found that at least one conversation occurred on or about July 16, 2009, involving a request for the affected party to sign a statement. However, there was substantial dispute as to the substantive content of any conversation, including the content of any requested statement. Based on our review of the facts and circumstances of this matter, including that the affected party did not agree to sign any statement and the Hospital subsequently assigned her on-call shifts for September 2009 after she signed up for them, OCR has determined that there is insufficient evidence to substantiate the claim that the Hospital discriminated against the affected party by asking her to sign such a statement.

Further, on February 4, 2011, the complainant contacted OCR to report an alleged act of retaliation by the Hospital against the affected party for the filing of this complaint. Following the May 24, 2009 procedure that is the subject of this matter, the affected party sought assistance from the Employee Assistance Program (EAP) at the Hospital. The complainant alleged that, on February 3, 2011, the Hospital informed the affected party that it would not provide her with a copy of her EAP records unless she first obtained a court order, because the affected party had filed OCR and judicial complaints against the Hospital. A claim that the Hospital's actions with respect to the affected party's EAP records amounts to another act of discrimination under the Church Amendments is not supported by the evidence. During OCR's investigation of the complainant's associated HIPAA Privacy Rule complaint, TN 11-123374, OCR learned that all employees of the Hospital who seek to obtain a copy of their EAP records must first obtain a court order or subpoena, regardless of whether: (i) the employee has or has not filed a complaint or lawsuit against the Hospital, or (ii) the employee has or has

not refused to assist with an abortion procedure, and irrespective of what the employee's religious beliefs are about abortion.

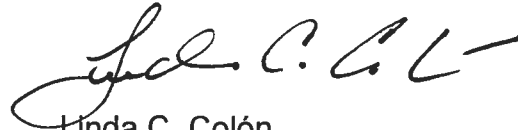
This determination of compliance is not intended, nor should it be construed, to cover any issues, regarding the Hospital's compliance status with the Church Amendments, that are not specifically addressed in this letter. It neither covers issues or authorities not specifically addressed herein nor does it preclude future determinations of compliance that are based on subsequent investigations.

Please take all necessary steps to ensure that no adverse action is taken against the complainant, the affected party, or any other individual for the filing of this complaint, providing information to OCR, or otherwise participating in this investigation.

Under the Freedom of Information Act, it may be necessary for OCR to release this document and related correspondence and records upon request. In the event OCR receives such a request, we will seek to protect, to the extent provided by law, personal information the disclosure of which would constitute an unwarranted invasion of privacy.

If you have additional questions or concerns, please contact Frank J. Musumici, M.S., Supervisory Equal Opportunity Specialist at (212) 264-3321.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda C. Colón", with a stylized flourish at the end.

Linda C. Colón  
Regional Manager

cc: Bettina B. Plevan, Esq. (via facsimile only, 212-969-2900)  
Proskauer Rose LLP



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**FEB - 1 2013**

Matthew S. Bowman, Esq.  
Alliance Defending Freedom  
801 G Street, NW  
Washington DC 20001

Our Reference number: 11-123374

Dear Mr. Bowman:

On February 4, 2011, the U.S. Department of Health and Human Services (HHS), Office for Civil Rights (OCR) received a complaint from the Alliance Defending Freedom, formerly known as the Alliance Defense Fund (the complainant), filed on behalf of Catherina Lorena Cenzone-DeCarlo, R.N. (the affected party), alleging a violation of the Federal Standards for Privacy of Individually Identifiable Health Information and/or the Security Standards for the Protection of Electronic Protected Health Information (45 C.F.R. Parts 160 and 164, Subparts A, C, and E, the Privacy and Security Rules) by the Mount Sinai Medical Center Employee Assistance Program (the EAP).<sup>1</sup>

Specifically, the complaint alleges that, on February 3, 2011, the affected party sought to fill out a written request for a copy of her patient records from the EAP. The complaint alleges that the Program Director of the EAP told the affected party that the EAP would not provide her with a copy of her records unless she first obtained a court order, because the affected party had filed OCR and judicial complaints against the Mount Sinai Hospital (the covered entity), the affected party's employer.

OCR enforces the Privacy and Security Rules, and also enforces Federal civil rights laws which prohibit discrimination in the delivery of health and human services because of race, color, national origin, disability, age, and under certain circumstances, sex and religion.

On April 1, 2011, OCR notified the covered entity of the complaint.

<sup>1</sup> As a threshold matter, OCR contacted the covered entity to determine whether the EAP was (i) a separate and distinct entity from the covered entity such that it was not a covered health care provider under the Privacy Rule, or (ii) part of a single legal entity that has elected to be a "hybrid entity" such that the EAP is not the list of health care components designated in writing as performing covered functions. OCR learned from the covered entity that it is neither separate from the EAP, nor a hybrid entity. The covered entity indicated that the EAP is part of the "organized health care arrangement" that is The Mount Sinai Hospital, Mount Sinai School of Medicine and Mount Sinai Diagnostic and Treatment Center. More specifically, during the course of OCR's investigation, OCR learned that the EAP is a division of the covered entity's Human Resources Department.

We have reviewed the matters raised in the complaint. OCR has spoken with both the complainant and the covered entity and reviewed documentation, including Privacy Rule related materials from the covered entity, in particular, copies of its policies and procedures regarding an individual's right to inspect and obtain a copy of his/her protected health information.

The complainant stated to OCR that, in 2009, the affected party received psychological counseling from a counselor to whom she was referred by the EAP. The complainant indicated that, when the affected party spoke with the EAP Director on February 3, 2011, her intent was to request a copy of her patient records, which the complainant and affected party believed were in the EAP's possession. The covered entity's version of events differs from the complainant's version, in that the EAP Director stated that, during his conversation with the affected party on or about February 3, 2011, the affected party asked him how her attorney (the complainant) could access her EAP file. In response: (i) he told her that it is the EAP's practice not to release client records absent a court order or subpoena; (ii) he gave her a form titled, "Employee Authorization for Release of Information," which authorizes the EAP to release information about a specific intake visit or counseling session; (iii) he informed her that she must complete such form; and (iv) he gave her his business card and told her that her attorney could contact her directly if he had any questions. In the EAP Director's written statement, dated March 2, 2011, he indicated that he has not been contacted by the affected party's attorney, received a completed form, or received a formal request, subpoena or court order for the EAP records.

Regardless of the content of the conversation between the affected party and the EAP Director on or about February 3, 2011, the details of which OCR cannot substantiate with any degree of certainty, at issue in this complaint is whether the affected party has a right under Section 164.524 of the Privacy Rule to obtain a copy of the records in possession of the EAP.

During the course of its investigation, OCR reviewed the covered entity's policy titled, "Human Resources Policy: Employee Assistance Program #9.1," last revised on October 25, 2002 and reviewed on March 1, 2010. The policy describes the EAP as a free, confidential, voluntary short-term counseling and referral service available to Medical Center employees who have any personal-behavioral concerns including family problems or resource needs which may affect work performance. The policy indicates that EAP records are kept in a confidential manner "as would any employee health records," and that records are maintained for purposes of continuity of care for the individual and for program evaluation. The policy specifies that the records are maintained within the EAP and "do not become a part of the Personnel or the Employee Health Service records, and "[t]he content of the interviews between an employee and an EAP staff member are revealed only upon the written authorization of the employee or as required by law, in accordance with procedure of releasing medical records."

OCR clarified with the covered entity that – despite the ambiguous language in the policy which reads as if the EAP “counseling” records may include treatment records documenting or analyzing the content of a patient’s counseling session with a mental health professional – when an employee seeks psychological counseling services, the EAP only provides referral services to the employee. More specifically, the EAP refers the employee to a health care provider (the Counselor) for psychological counseling services, as it did for the affected party. The EAP does not directly provide such psychological counseling services (or any other health care services) to the employee. OCR confirmed with the covered entity that, in such a case, the Counselor is not a part of the covered entity’s organized health care arrangement, thus, the covered entity and its EAP do not have access to the Counselor’s records of his/her treatment of the patient. The covered entity specified that the treatment/patient records are created and maintained by the Counselor, and not by the covered entity or its EAP.

The covered entity explained to OCR that any records that the EAP created and maintained regarding the affected party’s 2009 request for (and receipt of a referral to) psychological counseling services are employment/human resources records, as opposed to the treatment/patient records which are created and maintained by the Counselor. OCR learned that the covered entity’s practice is to require all employees who are seeking copies of their employment/human resources files to first obtain a court order or subpoena prior to the covered entity releasing such files, including, but not limited to any EAP records.

Under Section 164.524 of the Privacy Rule, an individual has the right to inspect and obtain a copy of “protected health information” about the individual in a “designated record set,”<sup>2</sup> with certain limited exceptions. Section 160.103 of the Privacy Rule defines “protected health information” as “individually identifiable health information”<sup>3</sup>

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<sup>2</sup> With respect to hospitals, like the covered entity, the Privacy Rule defines the term “designated record set” to mean a group of records maintained by or for the hospital that is either (i) the medical records and billing records about individuals or (ii) used, in whole or in part, by or for the hospital to make decisions about individuals. For purposes of this definition, the term “record” means any item, collection, or grouping of information that includes protected health information and is maintained, collected, used or disseminated by or for the hospital. It should also be noted that an individual’s right to access protected health information in a designated record set extends not only to protected health information actually created by the hospital itself, but also to protected health information received by the hospital from another source.

<sup>3</sup> “Individually identifiable information” is defined as “information that is a subset of ‘health information,’ including demographic information collected from an individual, and: “(1) is created or received by a health care provider, health plan [or] employer...and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) that identifies that individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.” “Health information” is defined as “any information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider, health plan...[or] employer...; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual.”



that is transmitted or maintained in electronic media or any other form or media, but specifically excludes “employment records held by a covered entity in its role as employer.” Thus, the EAP records regarding the affected party’s 2009 request for (and receipt of a referral to) psychological counseling services may be “individually identifiable health information,” but because they are employment records held by the covered entity in its role as an employer, they are specifically excluded from the “protected health information” to which the affected party may have a right to access under Section 164.524 of the Privacy Rule.

Thus, because the EAP records are employment records held by the covered entity in its role as the employer, the affected party does not have a right under the Privacy Rule to obtain a copy of the EAP records. Accordingly, OCR has determined that the covered entity did not violate the provisions of the Privacy and Security Rules regarding an individual’s right to access his/her protected health information. Therefore, OCR is closing this matter.

Please be advised that the affected party may have a right to inspect or copy certain of her protected health information maintained by the mental health professional to whom the EAP referred her in 2009. Such a request for access should be made to the mental health professional directly, and not to the EAP. The right to access would depend, among other things, on whether the mental health professional, for any of his/her patients, transmits health information electronically in accordance with any of the transactions for which HHS has adopted standards, even if he/she did not do so with respect to the affected party’s health information. It should also be noted that an individual’s right to inspect or obtain a copy of his/her protected health information does not extend to “psychotherapy notes,” which are defined as the “notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a privacy counseling session...and that are separated from the rest of the individual’s medical record.” Nonetheless, subject to certain exceptions, an individual may still inspect or copy “medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.”

OCR’s determination as stated in this letter applies only to the allegations in this complaint that were reviewed by OCR.

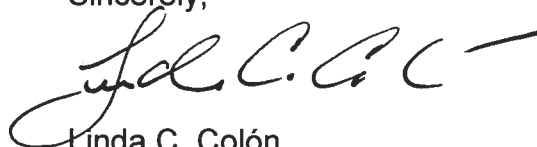
Please be advised that, for administrative purposes, HHS is separately processing the associated complaint filed with OCR under the Federal health care provider conscience statutes (reference number 10-109676), and will be corresponding with you about that complaint under separate cover. Please note that the complainant’s allegation that the EAP Director’s actions on or about February 3, 2011 constitute retaliation because the complainant, on behalf of the affected party, filed OCR complaint 10-109676 is addressed as part of OCR complaint 10-109676, and not this Health Information Privacy Complaint (reference number 11-123374).

Page 5 – Matthew S. Bowman, Esq.

Under the Freedom of Information Act, we may be required to release this letter and other information about this case upon request by the public. In the event OCR receives such a request, we will make every effort, as permitted by law, to protect information that identifies individuals or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

If you have any questions, please contact Frank J. Musumici, M.S., Supervisory Equal Opportunity Specialist, at (212) 264-3321.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda C. Colón", with a long horizontal flourish extending to the right.

Linda C. Colón  
Regional Manager