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## Making Rights Meaningful: Advocating for Simple Changes in Federal Agency Practice to Promote Health Equity

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**MAKING RIGHTS MEANINGFUL: ADVOCATING FOR SIMPLE  
CHANGES IN FEDERAL AGENCY PRACTICE TO PROMOTE HEALTH  
EQUITY**

ABSTRACT

*Despite federal protections afforded by Title VI of the Civil Rights Act and Section 1557 of the Affordable Care Act, Americans still experience prohibited discrimination in health care on the basis of race, color, and national origin. The Department of Health and Human Services' Office for Civil Rights ("HHS OCR") investigates complaints and enforces protections when alleged discrimination occurs in health care covered entities receiving federal funding. The legal analyses produced in these investigations can be valuable tools for covered entities to utilize in their efforts to remain in compliance with civil rights laws, yet few are ever made public despite HHS OCR's legal authority to publish them. Failing to publish these analyses minimizes HHS OCR's commitment to protecting civil rights and wastes the high potential of its work to provide guidance to covered entities. HHS OCR can and should publish the results of its investigations to promote covered entities' compliance with civil rights laws, and to meaningfully enforce the right of Americans to be free from health care discrimination based on race, color, or national origin.*

## I. INTRODUCTION

In the United States, health-related programs and activities that receive federal financial assistance are prohibited from discriminating against individuals on the basis of race, color, national origin, sex, disability, and age.<sup>1</sup> Yet scientific research,<sup>2</sup> federal investigations,<sup>3</sup> and the personal experiences of many Americans<sup>4</sup> demonstrate that discrimination in health care continues to occur. Taking race as an example, rigorous academic studies show clear differences along racial lines in how, when, and whether health care is provided.<sup>5</sup> Nonwhite patients wait longer for service in the emergency department than white patients presenting with similar symptoms.<sup>6</sup> Nonwhite patients are less likely to be prescribed pain medication than white patients for the same reported level of pain.<sup>7</sup> Black patients, in particular, receive inferior

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1. See 42 U.S.C. § 18116(a)(1).

2. See, e.g., Evan Michael Shannon et al., *Racial/Ethnic Disparities in Interhospital Transfer for Conditions With a Mortality Benefit to Transfer Among Patients With Medicare*, JAMA NETWORK OPEN, Mar. 26, 2021, at 4, e213474 (discussing how Black patients have a lower rate of interhospital transfer than white patients); M. Norman Oliver et al., *Do Physicians' Implicit Views of African Americans Affect Clinical Decision Making?*, 27 J. AM. BD. FAM. MED. 177, 181 (2014) (discussing physicians' implicit racial biases in osteoarthritic care).

3. See U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Enforcement Success Stories Involving Race, Color, and National Origin*, HHS.GOV (Sept. 29, 2015), <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/examples/national-origin/index.html> (discussing selected compliance reviews and complaint investigations, including, for example, a voluntary resolution agreement the Department of Health and Human Services Office for Civil Rights reached with the University of Pittsburgh Medical Center about a civil rights violation occurring when an affiliated hospital in a predominantly African American community was closed).

4. See Vanessa Grubbs, *The Health Care System Has the Black Community in a Choke Hold*, CHCF BLOG (Aug. 4, 2020), <https://www.chcf.org/blog/health-care-system-has-black-community-choke-hold/> (providing examples of African Americans who experienced health care discrimination, including Gary Fowler who was “denied COVID-19 testing and hospital admission by three Detroit emergency rooms”); Averi Harper, *COVID-19 Exposes Mistrust, Health Care Inequality Going Back Generations for African Americans*, ABC NEWS (Apr. 28, 2020, 6:10 PM), <https://abcnews.go.com/Health/covid-19-exposes-mistrust-health-care-inequality-back/story?id=70370949> (providing additional examples of African Americans who experienced health care discrimination).

5. Erin Dehon et al., *A Systematic Review of the Impact of Physician Implicit Racial Bias on Clinical Decision Making*, 24 ACAD. EMERGENCY MED. 895, 896 (2017); Adil A. Shah et al., *Analgesic Access for Acute Abdominal Pain in the Emergency Department Among Racial/Ethnic Minority Patients: A Nationwide Examination*, 53 MED. CARE 1000, 1002 (2015); Paul I. Musey Jr. et al., *Characteristics of ST Elevation Myocardial Infarction Patients Who Do Not Undergo Percutaneous Coronary Intervention After Prehospital Cardiac Catheterization Laboratory Activation*, 15 CRITICAL PATHWAYS CARDIOLOGY 18–19 (2016); Oliver et al., *supra* note 2.

6. Dehon et al., *supra* note 5.

7. Shah et al., *supra* note 5.

cardiac care,<sup>8</sup> substandard osteoarthritic care,<sup>9</sup> and are less likely to be transferred to necessary specialized care as compared to white patients, even when controlling for moderating and mediating factors.<sup>10</sup>

Providing patients with different treatment based solely on their race, color, or national origin violates both Title VI of the Civil Rights Act of 1964 (“Title VI”)<sup>11</sup> and Section 1557 of the Patient Portability and Affordable Care Act (“Section 1557”).<sup>12</sup> Title VI states that “no 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.”<sup>13</sup> Section 1557 uses Title VI’s definition of discrimination and extends it to protect race, color, national origin, sex, age, or disability in “any *health* program or activity . . . receiving Federal financial assistance.”<sup>14</sup> Prohibited discrimination includes intentional actions and “methods of administration that have a disproportionate and adverse impact on the basis of” these protected classes.<sup>15</sup>

Determining whether different treatment in health care amounts to actual discrimination—and what to do about it—is the domain of the Department of Health and Human Services’ Office for Civil Rights (“HHS OCR”).<sup>16</sup> HHS OCR provides guidance to programs and activities receiving Federal funding (also known as “covered entities”) on how to prevent prohibited discrimination from

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8. See Musey, *supra* note 5 (noting nonwhite individuals are less likely to undergo percutaneous coronary catheterization).

9. See Oliver et al., *supra* note 2 (discussing how physicians’ implicit biases affect total knee replacement recommendations for patients based on race).

10. Shannon et al., *supra* note 2, at 1.

11. 42 U.S.C. § 2000d.

12. 42 U.S.C. § 18116(a).

13. 42 U.S.C. § 2000d.

14. 42 U.S.C. § 18116(a) (emphasis added).

15. HHS OFF. FOR CIV. RTS. IN ACTION, CIVIL RIGHTS PROTECTIONS PROHIBITING RACE, COLOR AND NATIONAL ORIGIN DISCRIMINATION DURING COVID-19: APPLICATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 at 1 (2020), <https://www.hhs.gov/sites/default/files/title-vi-bulletin.pdf>.

16. U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *How OCR Enforces Civil Rights Discrimination Laws and Regulations*, HHS.GOV (Sept. 29, 2015), <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/enforcement-process/index.html> [hereinafter *How OCR Enforces Civil Rights Discrimination Laws and Regulations*]. Similar Offices for Civil Rights serve corresponding functions in other federal agencies, guarding against prohibited discrimination in public schools (Department of Education OCR), housing vouchers and tax credits (Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity), and prisons and abortion access (Department of Justice Civil Rights Division), among others. U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Civil Rights Enforcement Through Other Agencies*, HHS.GOV (Oct. 16, 2021), <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/enforcement-other-agencies/index.html>.

occurring in their programs and administration.<sup>17</sup> HHS OCR also receives, investigates, and adjudicates civil rights complaints against covered entities and completes compliance reviews of covered entities to ensure compliance.<sup>18</sup>

The extent of HHS OCR's activities, however, seems shrouded in secrecy. While HHS OCR selectively publishes press releases to highlight its recent successes in civil rights patient protection,<sup>19</sup> the number of published press releases is significantly lower than the number of complaints HHS OCR investigates and closes.<sup>20</sup> Two problems jump out with HHS OCR only publishing a fraction of the investigatory findings it produces each year. First, withholding this information denies covered entities important examples to look to for guidance on how HHS OCR identifies and corrects prohibited discrimination. Second, the selected press releases fail to illustrate to covered entities and the public the full extent to which HHS OCR prioritizes enforcing *all* protected civil rights: race, color, national origin, sex, age, and disability.

HHS OCR should change its current enigmatic practice of only publishing select press releases, and instead publish all investigative findings and voluntary resolution agreements ("VRAs") from each investigation it has closed. Evidence from HHS OCR's own practices, as well as those from other OCRs, indicate that publishing investigative findings and VRAs is a straightforward and low-cost change in practice. In fact, HHS OCR already publishes all its findings relating to HIPAA violations, and other OCRs, including those in the Department of Justice ("DOJ"),<sup>21</sup> Department of Education ("DOE"),<sup>22</sup> and the Environmental

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17. How OCR Enforces Civil Rights Discrimination Laws and Regulations, *supra* note 16; U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Examples of Health Care and Social Services Agencies That Could be Covered Entities Under the Nondiscrimination Laws Enforced by OCR*, HHS.GOV (Dec. 15, 2015), <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/enforcement-process/examples-of-covered-entities/index.html> (listing examples of covered entities).

18. How OCR Enforces Civil Rights Discrimination Laws and Regulations, *supra* note 16.

19. See U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Civil Rights News Releases & Bulletins*, HHS.GOV, <https://www.hhs.gov/civil-rights/newsroom/index.html> (last visited Aug. 4, 2022) (listing published press releases).

20. See discussion *infra* Part II; U.S. COMM. ON CIV. RTS., ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 211–13 (2019), <https://www.usccr.gov/files/pubs/2019/11-21-Are-Rights-a-Reality.pdf>; 45 C.F.R. § 80.7(c) (2022).

21. U.S. DEP'T OF JUST. OFF. OF CIV. RTS., *Investigative Findings*, U.S. DEP'T OF JUST., <https://www.ojp.gov/program/civil-rights/investigative-findings#2g1oqa> (last visited Aug. 4, 2022).

22. U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., *Reading Room*, U.S. DEP'T OF EDUC. (Jan. 18, 2022), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html> (Department of Education findings) [hereinafter Reading Room]; Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with Effective Protection against Sex Discrimination through Title IX Complaints*, 125 YALE L.J. 2132, 2137–38 (2016); U.S. DEP'T EDUC. OFF. FOR CIV. RTS., *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools*, U.S. DEP'T OF EDUC. (Aug. 3, 2022), <https://www2.ed.gov/about>

Protection Agency (“EPA”),<sup>23</sup> publish their civil rights investigatory findings publicly. Publishing investigative findings and VRAs adds negligible work, because HHS OCR has already written the documents and need only post them to its website.

This Article discusses why and by what authority HHS OCR should publish all its investigative findings and VRAs. First, Section II discusses HHS OCR’s work in the context of prohibited health care discrimination by race in the United States today. Then, Section III explains HHS OCR’s legal authority and process for preventing and responding to prohibited discrimination in health care, using select examples of recent successes available from the HHS OCR newsroom. Section IV proposes the solution of publishing investigative findings and VRAs. Finally, this Article concludes with a call to action. HHS OCR must do all it can to protect civil rights in health care—and by not publishing *all* its investigative findings and VRAs, HHS OCR is squandering a rich opportunity to provide covered entities with important guidance, emphasize how it prioritizes enforcing civil rights, and improve its ability to protect Americans from discrimination on the basis of race, color, national origin, sex, disability, and age.

## II. PREVALENCE OF PROHIBITED DISCRIMINATION IN U.S. HEALTH CARE TODAY

Despite federal protections, Americans still experience prohibited discrimination in health care.<sup>24</sup> Discrimination can be defined as different treatment, on the basis of a protected class, which often results in “unfair or

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/offices/list/ocr/docs/investigations/open-investigations/index.html (Department of Education findings) [hereinafter DOE Pending Cases Currently Under Investigation]; U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., THE WASHINGTON UNIVERSITY RESOLUTION AGREEMENT NO. 07192100 (2019), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07192100-b.pdf> [hereinafter WASHINGTON UNIVERSITY RESOLUTION].

23. U.S. ENV’T PROT. AGENCY OFF. OF GEN. COUNS., *External Civil Rights Compliance Office – New Developments*, U.S. ENV’T PROT. AGENCY (Aug. 1, 2022), <https://www.epa.gov/ogc/external-civil-rights-compliance-office-new-developments> (Environmental Protection Agency findings) [hereinafter Civil Rights Compliance Office—New Developments]; U.S. ENV’T PROT. AGENCY OFF. OF GEN. COUNS., *Proposed Consent Decrees and Draft Settlement Agreements*, U.S. ENV’T. PROT. AGENCY (Aug. 11, 2022), <https://www.epa.gov/ogc/proposed-consent-decrees-and-draft-settlement-agreements> (Environmental Protection Agency findings) [hereinafter Proposed Consent Decrees]; U.S. ENV’T PROT. AGENCY OFF. OF GEN. COUNS., *External Civil Rights Compliance Office (Title VI)*, U.S. ENV’T PROT. AGENCY (July 13, 2022), <https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi> (Environmental Protection Agency findings) [hereinafter External Civil Rights Compliance Office].

24. See U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *supra* note 3 (discussing selected compliance reviews and complaint investigations related to discrimination based on race, color, and national origin).

unjustified . . . harms [to] individuals and groups.”<sup>25</sup> Intentional discrimination occurs when a covered entity or its agents “act[], at least in part, because of the actual or perceived race, color, or national origin” of the patient.<sup>26</sup> Evidence that intentional discrimination continues to occur despite the protections of Title VI, Section 1557, and other civil rights laws comes from three sources: (1) statistical research, (2) personal experiences, and (3) federal findings of violations.

First, while individual discrimination cases may hinge on direct or circumstantial evidence, statistical evidence is “critical” to show patterns of health care discrimination in populations.<sup>27</sup> Health statistics tell a compelling story of the persistence of prohibited discrimination in American health care settings. Black Americans, in particular, face significant disparities in access to treatment and quality of health care compared to white Americans. Physicians take longer to diagnose Black children with acute appendicitis, a time-sensitive and possibly fatal condition, likely contributing to Black children’s mortality in emergency departments being three times that of white children.<sup>28</sup> Poor birth outcomes—including a higher rate of maternal morbidity and mortality among Black mothers than white mothers—are associated with Black mothers’ experiences of racism and discrimination by health care providers.<sup>29</sup> The COVID-19 pandemic has only augmented these disparities.<sup>30</sup> The result? Black

25. U.S. DEP’T OF HEALTH & HUM. SERVS., *Social Determinants of Health Topic Area: Discrimination*, HEALTHYPEOPLE.GOV (Feb. 6, 2022), <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/discrimination>.

26. U.S. DEPT. OF JUST. CIV. RTS. DIV., TITLE VI LEGAL MANUAL (UPDATED), SECTION VI: PROVING DISCRIMINATION – INTENTIONAL DISCRIMINATION 3 (2021), <https://www.justice.gov/crt/fcs/T6Manual6>. While Title VI and Section 1557 arguably prohibit facially *neutral* policies that result in harm (“adverse impact”), this article focuses on *intentional* discrimination. See HHS OFF. FOR CIV. RTS. IN ACTION, *supra* note 15 (“Title VI prohibits both intentional discrimination and methods of administration that have a disproportionate and adverse impact on the basis of race, color, or national origin.”).

27. U.S. DEPT. OF JUST. CIV. RTS. DIV., *supra* note 26, at 5; N.B., each outcome reported in this Part is a statistically significant odds ratio (OR). Statistical significance is a measure of how likely the outcome is due to random chance; here, for each source being cited, each outcome is less than 0.1% likely to be due to random chance. See Priya Ranganathan et al., *Common Pitfalls in Statistical Analysis: Clinical Versus Statistical Significance*, 6 PERSPS. IN CLINICAL RSCH. 129, 129 (2015) (defining statistical significance).

28. Claudia Wallis, *Black Children, as Well as Other Minority Kids, Fare Worse Than White Children in Common Surgeries*, SCI. AM., <https://www.scientificamerican.com/article/black-children-as-well-as-other-minority-kids-fare-worse-than-white-children-in-common-surgeries/> (last visited Feb 2, 2022); Monika K. Goyal et al., *Racial and Ethnic Disparities in the Delayed Diagnosis of Appendicitis Among Children*, 28 ACAD. EMERG. MED. 949, 952 (2021).

29. Danielle Wishart et al., *Racial and Ethnic Minority Pregnant Patients with Low-Income Experiences of Perinatal Care: A Scoping Review*, 5 HEALTH EQUITY 554, 566 (2021).

30. See U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Guidance on Federal Legal Standards Prohibiting Race, Color and National Origin Discrimination in COVID-19 Vaccination Programs*, HHS.GOV (Dec. 20, 2021), <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-federal-legal-standards-covid-19-vaccination-programs>

Americans are turned away from emergency rooms,<sup>31</sup> are discharged fatally early,<sup>32</sup> and, in many cities, are the first to die of new infectious diseases.<sup>33</sup>

Second, even without statistics, reports from individuals belonging to protected classes attest to discrimination in health care. Women are eighty-eight percent more likely than men to report a lifetime incidence of health care discrimination.<sup>34</sup> Compared to white Americans, Native Americans are 2.7 times as likely and Black Americans are 3.6 times as likely to report facing discrimination in health care.<sup>35</sup> Indeed, HHS OCR received over 7,000 complaints in Fiscal Year (“FY”) 2018 from private citizens and organizations reporting alleged instances of prohibited civil rights discrimination in health care, 691 of which were based on race, color, or national origin.<sup>36</sup>

Finally, HHS OCR’s investigations have determined that a number of these complaints concerned instances of actual prohibited discrimination. In Washington State, an HHS OCR investigation of the Department of Social and Health Services (“DSHS”) determined that DSHS’s sole factor for assigning children to a certain service provider, the Office of African American Children’s

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/index.html (noting data suggest health care disparities are a driver of the disparate toll the COVID-19 pandemic has had on Black Americans and other racial and ethnic minorities).

31. Gabrielle Masson, *Missouri Man Dies In Hospital Parking Lot After Being Repeatedly Denied Care, Family Says*, BECKER’S HOSP. REV. (Jan. 29, 2021), <https://www.beckershospitalreview.com/patient-safety-outcomes/missouri-man-dies-in-hospital-parking-lot-after-being-repeatedly-denied-care-family-says.html>.

32. See Grubbs, *supra* note 4 (providing examples of African Americans who died shortly after being discharged from the hospital, including Reginald Reif and Kimora Lynum).

33. Taylor Tiamoyo Harris & Kim Bell, *St. Louis County Records First COVID-19 Death: ‘Beloved Member’ of St. Mary’s Hospital Family*, STLTODAY.COM (Mar. 21, 2020), [https://www.stltoday.com/news/local/metro/st-louis-county-records-first-covid-19-death-beloved-member-of-st-mary-s-hospital/article\\_99007d03-8d55-52f0-9b26-6a9e6de2e46f.html](https://www.stltoday.com/news/local/metro/st-louis-county-records-first-covid-19-death-beloved-member-of-st-mary-s-hospital/article_99007d03-8d55-52f0-9b26-6a9e6de2e46f.html); Cary Spivak, *First Milwaukee Coronavirus Death: Retired Firefighter Lawrence Riley*, MILWAUKEE J. SENTINEL (Mar. 27, 2020, 7:00 AM), <https://www.jsonline.com/story/news/local/2020/03/27/first-milwaukee-coronavirus-death-retired-firefighter-lawrence-riley/2919395001/>; Maudlyne Ihejirika, *Patricia Frieson Was More Than the 1st COVID-19 Death in Illinois. She Was Their Sister.*, CHICAGO SUN-TIMES (Mar. 18, 2020, 8:19 PM), <https://chicago.suntimes.com/coronavirus/2020/3/18/21186000/patricia-frieson-1st-coronavirus-covid-19-death-illinois-quarantine-family-sister> (last visited Jan 24, 2022).

34. Paige Nong et al., *Patient-Reported Experiences of Discrimination in the US Health Care System*, 3 JAMA NETWORK OPEN, Dec. 21, 2020, at 5, e2029650.

35. Corey M. Abramson, Manata Hashemi & Martín Sánchez-Jankowskic, *Perceived Discrimination in U.S. Healthcare: Charting the Effects of Key Social Characteristics Within and Across Racial Groups*, 2 PREVENTIVE MED. REPS. 615, 617 (2015).

36. U.S. COMM. ON CIV. RTS., ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 212–13 (2019), <https://www.usccr.gov/files/pubs/2019/11-21-Are-Rights-a-Reality.pdf>.



Services, was race.<sup>37</sup> DSHS voluntarily renamed the office and implemented new measures to ensure children were not categorized nor discriminated against by race.<sup>38</sup> In Ohio, HHS OCR determined that the Hamilton County Department of Human Services (“HCDHS”) had a practice of refusing to place non-Black children with Black adoptive parents.<sup>39</sup> Although the state refused to admit any wrongdoing, it voluntarily agreed to implement administrative rules and procedures to avoid discriminatory practices, and was subject to continued monitoring to ensure compliance.<sup>40</sup> Lastly, an HHS OCR investigation in Wisconsin discovered that the Department of Children and Families (“DCF”) discriminated by race in whether to sanction families receiving TANF (“Temporary Assistance for Needy Families”).<sup>41</sup> Wisconsin DCF was presented with a significant list of changes to its practices in order to prevent further discrimination, which it adopted voluntarily.<sup>42</sup>

HHS OCR has also found prohibited discrimination resulting from facially neutral practices.<sup>43</sup> In a claim against the University of Pittsburgh Medical Center (“UPMC”), a city alderperson challenged the closure of a hospital in a minority-majority neighborhood because its closure overwhelmingly affected Black citizens.<sup>44</sup> HHS OCR found that the selection of that hospital, and the statistical showing of a disparity affecting a large number of individuals, proved discrimination.<sup>45</sup> Although UPMC did close the hospital, HHS OCR

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37. U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES LETTER OF FINDING NO. 06-47685 at 1 (2010), [https://www.hhs.gov/sites/default/files/oaacs\\_ra.pdf](https://www.hhs.gov/sites/default/files/oaacs_ra.pdf).

38. *Id.*

39. U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., OHIO DEPARTMENT OF JOB AND FAMILY SERVICES LETTER OF FINDING NO. 05997026 at 2 (2003), <https://www.hhs.gov/sites/default/files/05997026lof.pdf>.

40. *Id.* at 58–59.

41. U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES LETTER OF FINDING NO. 02-00727 at 1, 5 (2010), <https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/examples/TANF/witanfagreement.pdf>. TANF provides States, Territories, and Tribal nations with Federal funding to support low-income families with children. Families receive cash assistance for services that promote in-home childcare, job preparation, planned pregnancies, and others. ADMIN. FOR CHILD. & FAMS. OFF. OF FAM. ASSISTANCE, *About TANF*, HHS.GOV (June 28, 2022), <https://www.acf.hhs.gov/ofa/programs/tanf/about>.

42. *See generally id.* at 13–30.

43. *See* U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *supra* note 30 (stating Title VI and Section 1557—the laws that HHS OCR enforces—also apply to facially neutral policies that have a discriminatory effect).

44. U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., UNIVERSITY OF PITTSBURGH MEDICAL CENTER LETTER OF FINDING NO. 10-106043 at 1–2, (2010), <https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/upmcra.pdf>.

45. *Id.* at 2.

successfully negotiated for additional services in the community to meaningfully retain community members' access to health care.<sup>46</sup>

HHS OCR plays a critical role in protecting Americans from prohibited discrimination in health care, but this discrimination still happens. In each of the above examples, HHS OCR found a violation, worked with the offending covered entity to correct the practices that led to the prohibited discrimination, and shared the lessons publicly. Sharing more—or better yet, all—of HHS OCR's investigative findings and VRAs may go a long way in reducing the incidence of prohibited discrimination in health care.

### III. LEGAL AUTHORITY OF HHS OCR AND ITS PROCESSES FOR SAFEGUARDING CIVIL RIGHTS IN HEALTH CARE

As previously discussed, covered entities are prohibited from discriminating in health care on the basis of race, color, and national origin,<sup>47</sup> sex,<sup>48</sup> disability,<sup>49</sup> and age.<sup>50</sup> Covered entities include “hospitals, health clinics, health insurance issuers, state Medicaid agencies, community health centers, physician’s practices and home health care agencies,” among others.<sup>51</sup> These entities must carefully consider how to comply with federal laws protecting civil rights, especially those provisions enumerating specific discriminatory practices. For example, section 80.3 of Title VI provides a laundry list of actions that are prohibited if carried out on the basis of race, color, or national origin, such as denying or differently administering any service, financial aid, or benefit,<sup>52</sup> or selecting site locations that purposefully or inadvertently exclude groups.<sup>53</sup>

HHS OCR is a resource for covered entities, providing guidance on how to comply with these civil rights protections and to prevent prohibited discrimination.<sup>54</sup> But HHS OCR is also a law enforcement agency, responding to alleged prohibited discrimination through investigation and monitoring of covered entities, and enforcing compliance with civil rights protections when

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46. *Id.* at 2–3, 5–17.

47. 42 U.S.C. § 2000d.

48. 20 U.S.C. § 1681.

49. 29 U.S.C. § 794.

50. 42 U.S.C. § 6101.

51. U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Section 1557: Frequently Asked Questions*, HHS.GOV (May 18, 2017), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html>.

52. 45 C.F.R. § 80.3(b)(1) (2022).

53. *See* 45 C.F.R. § 80.3(b)(3) (2022) (prohibiting “determining the site or location of facilities . . . with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination . . . on the basis of race, color, or national origin” (emphasis added)).

54. 42 U.S.C. § 2000d–1 (legislation which authorizes HHS OCR to issue “rules, regulations, or orders of general applicability” on civil rights laws).

necessary.<sup>55</sup> In executing each of these three duties—(1) prevention, (2) investigation, and (3) enforcement—HHS OCR analyzes unique fact patterns to determine what practices count as prohibited discrimination and how to rectify them. The legal analyses produced in these processes can be valuable tools for covered entities to utilize in their efforts to remain in compliance with civil rights laws, yet few of these analyses are published.<sup>56</sup>

*A. Preventing Prohibited Discrimination: Providing Guidance for Covered Entities*

HHS OCR is “authorized and directed to effectuate the provisions of” Title VI and other civil rights acts through issuing “rules, regulations, or orders of general applicability” which serve to promote the intentions of civil rights laws.<sup>57</sup> As part of this directive, HHS OCR periodically releases guidance for covered entities to follow.<sup>58</sup> While not legally binding, this guidance assists covered entities in modifying their current processes to prevent prohibited discrimination.<sup>59</sup> For example, in 2006, HHS OCR released a letter with other HHS Offices and the Department of Agriculture to advise states on how to avoid discriminating on the basis of national origin.<sup>60</sup> One recommendation was that state agencies not ask about immigration status unless it was legally required for the implementation of the program, in part because—while state agencies may, in certain circumstances, legally ask that question—the presence of the question could serve to deter a qualified applicant from seeking services.<sup>61</sup>

55. See U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *About Us*, HHS.GOV (Dec. 8, 2021), <https://www.hhs.gov/ocr/about-us/index.html>.

56. See U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Recent Civil Rights Resolution Agreements & Compliance Reviews*, HHS.GOV (Feb. 3, 2022), <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/index.html> (stating that the list of published resolutions represents only “some” recent examples); see also DEP’T OF HEALTH & HUM. SERVS., OFF. FOR CIV. RTS., COMPLAINT CONSENT FORM 1, 5 (2019), (<https://www.hhs.gov/sites/default/files/ocr-60-day-fm-cr-crf-complaint-forms-508r-11302022.pdf>) (stating that HHS OCR’s files are controlled by the Freedom of Information Act (FOIA) and that it “may” release redacted information if required upon public request) [hereinafter HHS COMPLAINT CONSENT FORM].

57. 42 U.S.C. § 2000d–1.

58. U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *For Providers of Health Care and Social Services*, HHS.GOV (Oct. 27, 2021), <https://www.hhs.gov/civil-rights/for-providers/provider-obligations/index.html#ocrres>; U.S. DEP’T OF HEALTH & HUM. SERVS. & U.S. DEP’T OF AGRIC., POLICY GUIDANCE REGARDING INQUIRIES INTO CITIZENSHIP, IMMIGRATION STATUS AND SOCIAL SECURITY NUMBERS IN STATE APPLICATIONS FOR MEDICAID, STATE CHILDREN’S HEALTH INSURANCE PROGRAM (SCHIP), TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF), AND FOOD STAMP BENEFITS 1, 1 (Mar. 24, 2006), [https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/specialtopics/origin/triagencyq&as\\_pdf.pdf](https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/specialtopics/origin/triagencyq&as_pdf.pdf).

59. U.S. DEP’T OF HEALTH & HUM. SERVS. & U.S. DEP’T OF AGRIC., *supra* note 58 at 1.

60. *Id.*

61. *Id.* at 8.

*B. Responding to Alleged Discrimination: Investigations and Compliance Reviews of Covered Entities*

HHS OCR is authorized to collect and investigate complaints, as well as perform periodic compliance reviews to ensure covered entities' compliance to civil rights laws.<sup>62</sup> HHS OCR's role as investigator and adjudicator is particularly important because private individuals have limited options in pursuing civil claims against health care entities whom they allege committed prohibited discrimination.<sup>63</sup>

Private individuals or groups can submit complaints through HHS OCR's online "Complaint Portal Assistant."<sup>64</sup> HHS OCR reports that civil rights violation complaints are increasing; for example, complaints increased from 24,523 in FY 2016 to well over 30,000 in FY 2018.<sup>65</sup> HHS OCR is then statutorily required to review every complaint submitted and to make a "prompt" investigation of every complaint that falls under its jurisdiction.<sup>66</sup> HHS OCR may then take action on a complaint if it satisfies four conditions: (1) the complaint "must be filed against an entity that is under [HHS] OCR's jurisdiction" (i.e. a federally funded health care program or activity); (2) the complaint must "allege an action, policy or procedure covered by relevant laws and regulations prohibiting discrimination"; (3) the complaint must be filed within 180 days of the complainant learning of the alleged discrimination; and (4) there must be enough information for HHS OCR to follow up on the complaint, including the complainant's name.<sup>67</sup> Former HHS OCR Director Leon Rodriguez reported that the Office finds most complaints do not satisfy these requirements, and thus are not pursued at all.<sup>68</sup>

HHS OCR is also required to periodically perform compliance reviews.<sup>69</sup> Compliance reviews allow OCR to look at systematic issues, particularly those

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62. 45 C.F.R. § 80.7(a)–(c) (2022); U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *What OCR Considers During Intake and Review of a Complaint*, HHS.GOV (Mar. 28, 2022), <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/enforcement-process/in-take-and-review-of-complaint/index.html>.

63. See *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that individuals do not have a private right of action to enforce Title VI disparate impact regulations, but rather must rely on federal agencies to enforce them.)

64. U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Complaint Portal Assistant*, HHS.GOV, <https://ocrportal.hhs.gov/ocr/smartscreen/main.jsf> (last visited Aug. 7, 2022).

65. U.S. DEP'T OF HEALTH & HUM. SERVS., PUTTING AMERICA'S HEALTH FIRST: FY 2019 PRESIDENT'S BUDGET FOR HHS 124 (2018), <http://www.hhs.gov/budget>.

66. 45 C.F.R. § 80.7(c).

67. U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *supra* note 62.

68. Health Care Beat, *Patient Civil Rights and the Biden Administration*, Seyfarth Shaw at 8:25 (June 24, 2021), <https://www.seyfarth.com/news-insights/health-care-beat-episode-9-patient-civil-rights-and-the-biden-administration-important-considerations-for-the-health-care-industry.html> (interview with Leon Rodriguez, Former Director, HHS OCR).

69. 45 C.F.R. § 80.7(a) (2022).

that affect a larger population that might not be addressed effectively through an individual complaint.<sup>70</sup> This practice is particularly important to uncover instances of prohibited discrimination whose effect can only be shown by a covered entity's pattern of behavior against a protected class—that is, “methods of administration that have a disproportionate and adverse impact.”<sup>71</sup>

### C. Responding to Actual Discrimination: Enforcement

When HHS OCR finds instances of prohibited discrimination, it will initiate an escalating series of steps to address the problem.<sup>72</sup> HHS OCR is required to resolve the matter by “informal means whenever possible.”<sup>73</sup> Thus, HHS OCR's first step is to attempt to work directly with the offending entity to correct the discriminatory practice through a VRA, offering guidance and technical assistance.<sup>74</sup> This is how OCR resolves the majority of violations it discovers.<sup>75</sup> If the agency does not voluntarily resolve the discriminatory practice to HHS OCR's satisfaction, HHS OCR will issue a Letter of Findings outlining why the entity is not in compliance and identifying what HHS OCR plans to do to resolve the issue.<sup>76</sup> These plans can include referring the case to the DOJ for enforcement or initiating an administrative hearing to terminate the entity's Federal funding.<sup>77</sup>

### D. HHS OCR's Other Responsibilities: HIPAA Compliance

It is important to note that in addition to preserving protected civil rights in health care, HHS OCR is also tasked with enforcing patient data privacy rights under the Health Information Portability and Accountability Act of 1996 (HIPAA).<sup>78</sup> Part of HHS OCR's duties include publishing all HIPAA data

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70. See U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Delivering on the Promise: OCR's Compliance Activities Promote Community Integration*, HHS.GOV (Nov. 30, 2013), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/community-living-and-olmstead/compliance-activities-promote-integration/index.html> (discussing an HHS OCR intervention of the Delaware Department of Health and Social Services and Delaware Psychiatric Center, which ultimately resulted in the State of Delaware taking action to address both individual and systemic issues).

71. HHS OFF. FOR CIV. RTS. IN ACTION, *supra* note 15.

72. How OCR Enforces Civil Rights Discrimination Laws and Regulations, *supra* note 16.

73. 45 C.F.R. § 80.7(d)(1) (2022).

74. 45 C.F.R. § 80.6(a) (2022); *see also* How OCR Enforces Civil Rights Discrimination Laws and Regulations, *supra* note 16 (discussing how HHS OCR will try to resolve issues with a covered entity voluntarily).

75. Health Care Beat, *supra* note 68 at 8:50.

76. How OCR Enforces Civil Rights Discrimination Laws and Regulations, *supra* note 16.

77. 45 C.F.R. § 80.8 (2022); *see also* How OCR Enforces Civil Rights Discrimination Laws and Regulations, *supra* note 16.

78. U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *How OCR Enforces the HIPAA Privacy & Security Rules*, HHS.GOV (Jun. 7, 2017), <https://www.hhs.gov/hipaa/for->

privacy breaches to a public website,<sup>79</sup> colloquially known as the “wall of shame.”<sup>80</sup> HHS OCR must “post a list of breaches of unsecured protected health information affecting 500 or more individuals,”<sup>81</sup> in order to ensure that covered entities “proper[ly] safeguard . . . the private information entrusted to their care.”<sup>82</sup> HHS OCR’s statutory requirement to publish privacy violations may explain why it resolved one hundred percent of its 25,089 cases of alleged HIPAA violations in 2018, as opposed to resolving less than sixty percent of alleged race, color, national origin, sex, disability, and age discrimination cases.<sup>83</sup> The large number of HIPAA complaints and the priority HHS OCR gives to resolving them means the Office devotes seventy-five percent of its enforcement budget to investigating and reviewing entities for HIPAA compliance.<sup>84</sup> Unfortunately, that means only a quarter of HHS OCR’s enforcement budget is left to enforce civil rights based on race, color, national origin, sex, disability, and age.

#### IV. HHS OCR CAN—AND SHOULD—PUBLISH ALL INVESTIGATORY FINDINGS AND VOLUNTARY RESOLUTION AGREEMENTS

HHS OCR’s current practices fail to properly signal a strong commitment to protecting civil rights in health care. Health care-related prohibited discrimination happens,<sup>85</sup> and HHS OCR receives complaints about such discrimination (over 7,000 in 2018 alone).<sup>86</sup> HHS OCR investigates each complaint,<sup>87</sup> and, although the majority of cases (about eighty-five percent) are closed without investigation, a significant number of cases *are* investigated (858

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professionals/compliance-enforcement/examples/how-ocr-enforces-the-hipaa-privacy-and-security-rules/index.html.

79. HITECH Act of 2009, Pub. L. No. 111-5, 123 Stat. 261 § 13402(e)(4).

80. Health Care Compliance Ass’n, *OCR Breach ‘Wall of Shame’ Tells Tales Of Woe Mixed with Paths to Redemption*, 17 REP. PATIENT PRIV. Dec. 2017, at 2.

81. *Breach Portal: Notice to the Secretary of HHS Breach of Unsecured Protected Health Information*, U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., [https://ocrportal.hhs.gov/ocr/breach/breach\\_report.jsf](https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf) (last visited Aug. 4, 2021).

82. U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *HITECH Breach Notification Interim Final Rule*, HHS.GOV (Mar. 11, 2015), <https://www.hhs.gov/hipaa/for-professionals/breach-notification/laws-regulations/final-rule-update/hitech/index.html>.

83. See U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *Enforcement Results by Year*, HHS.GOV (July 19, 2022), <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/data/enforcement-results-by-year/index.html>; see also U.S. COMM. ON CIV. RTS., *supra* note 36, at 211 (showing that although HHS OCR had 10,322 cases open in FY 2018, only 5,739 (55.6%) were closed out; 858 cases were investigated and closed and 4,881 were *not* investigated but closed).

84. U.S. COMM. ON CIV. RTS., *supra* note 36, at 200.

85. See discussion *supra* Part II.

86. U.S. COMM. ON CIV. RTS., *supra* note 36 at 33.

87. 45 C.F.R. § 80.7(c).

in 2018).<sup>88</sup> HHS OCR must, by the very nature of its work, produce legal analyses for each unique fact pattern. At the very least, the Office reviews each complaint, decides whether the complaint has merit, and notifies the accused covered entity.<sup>89</sup> Yet HHS OCR has published to its website only a small number of informal resolution agreements, Letters of Findings, official resolutions, and notices of administrative hearings; for 2018, that number was zero.<sup>90</sup>

This is a missed opportunity for HHS OCR. The dearth of published investigative findings and VRAs minimizes HHS OCR's commitment to protecting civil rights and wastes the high potential of its work to provide guidance to covered entities. But HHS OCR has the power change its secretive current practices and begin publishing all its investigative findings and VRAs.<sup>91</sup> As discussed in the following sections, HHS OCR has the legal authority to publish these findings, and doing so is a best practice of other OCRs. Furthermore, it adds a negligible amount of work to HHS OCR's already-heavy workload. Finally, it would lead to a number of significant benefits, the most important of which are providing covered entities with additional technical assistance and signaling HHS OCR's strong commitment to civil rights.

#### A. *Legal Authority for HHS OCR to Publish Investigative Findings and VRAs*

In the course of preventing, investigating, and responding to prohibited civil rights discrimination, HHS OCR collects data, some of it protected health information ("PHI"). PHI—individually identifiable health information<sup>92</sup>—that is held by HHS OCR is protected by HIPAA<sup>93</sup> and the Privacy Act of 1974.<sup>94</sup> HHS OCR can only disclose this information with signed, informed consent from the person to whom the information applies<sup>95</sup> or when required to by law.<sup>96</sup> In order to improve the efficiency of investigations, HHS OCR advises each complainant sign a voluntary release form allowing HHS OCR to share PHI as

88. U.S. COMM. ON CIV. RIGHTS, *supra* note 36 at 211 (showing that of the 5,730 cases HHS OCR closed in FY 2018, only 858 (85.0%) were investigated before being closed).

89. *See* discussion *supra* Section III.B (explaining HHS OCR's minimum legal obligations to respond to complaints).

90. *See* U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *OCR News Releases & Bulletins*, HHS.GOV (2022), <https://www.hhs.gov/ocr/newsroom/index.html> (listing fifteen publications from 2018, none of which concerned complaint investigations regarding race, color, national origin, sex, disability, or age; two publications were guidance documents and thirteen were HIPAA-related resolutions).

91. *See* discussion *infra* Section IV.A (discussing the legal authority of HHS OCR).

92. 45 C.F.R. § 160.103 (2022).

93. *See id.*; U.S. DEP'T OF HEALTH & HUM. SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 1 (2003), <https://www.hhs.gov/sites/default/files/privacysummary.pdf>.

94. 45 C.F.R. § 5b.1 (2022) (drawing authority from 5 U.S.C. 552a (1975)).

95. *See* HHS COMPLAINANT CONSENT FORM, *supra* note 56, at 4.

96. *Id.* at 7 (explaining that HHS OCR can refer a case to another agency without permission if the "complaint indicates a violation or a potential violation of law").

needed for the investigation.<sup>97</sup> However, outside of protecting PHI, HHS OCR is under no obligation to keep investigative findings and VRAs confidential—at least in the context of Title VI-based complaints.<sup>98</sup> Moreover, HHS OCR can redact PHI from investigative findings and VRAs in the interest of publishing them.<sup>99</sup> It already does this for PHI both in the select VRAs published to the HHS OCR website and in data breach cases published to the HIPAA “wall of shame.”<sup>100</sup>

Furthermore, other OCRs publish their investigatory findings and VRAs, indicating that HHS OCR can follow their lead.<sup>101</sup> HHS OCR already follows other OCRs’ best practices.<sup>102</sup> For example, of the escalating steps HHS OCR uses to enforce compliance—informal resolution, then formal Letter of Findings, then referral for administrative arbitration—the middle step is not required by statute, at least in cases involving Title VI.<sup>103</sup> But HHS OCR adds that step,<sup>104</sup> borrowing the practice from other OCRs which are required to send a formal Letter of Findings.<sup>105</sup> Similarly, HHS OCR can look to the practices of other OCRs that publish their investigatory findings and VRAs, such as the DOJ,<sup>106</sup> DOE, and EPA OCRs. DOE OCR publishes a list of Letters of Findings and VRAs, searchable by state and type of violation,<sup>107</sup> and took the “unprecedented” step<sup>108</sup> of creating a database listing schools with *open*

97. *Id.* at 3.

98. *See* 45 C.F.R. § 80.7(e) (2022) (specifying only that the identity of complainants will be kept confidential).

99. *See, e.g.*, U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS., *supra* note 39, at 1 (noting that the Letter of Findings “uses pseudonyms in order to protect personal privacy”).

100. *Id.*; *see also* Health Care Compliance Ass’n, *supra* note 80 (discussing the “wall of shame”); *Breach Portal: Notice to the Secretary of HHS Breach of Unsecured Protected Health Information*, *supra* note 81 (discussing the list of protected health information breaches).

101. Reading Room, *supra* note 22; Peterson & Ortiz, *supra* note 22; DOE Pending Cases Currently Under Investigation, *supra* note 22; WASHINGTON UNIVERSITY RESOLUTION, *supra* note 22; Civil Rights Compliance Office—New Developments, *supra* note 23; Proposed Consent Decrees, *supra* note 23; External Civil Rights Compliance Office, *supra* note 23.

102. *See* 24 C.F.R. § 6.11(8) (Department of Housing & Urban Development OCR regulations); 28 C.F.R. § 35.172(c) (Department of Justice OCR regulations); 29 C.F.R. § 38.65(c) (Department of Labor OCR regulations).

103. *See* 45 C.F.R. § 80.7(d) (2022) (noting action will be taken if the complaint cannot be resolved by informal means pursuant to 45 C.F.R. § 80.8); *see also* 45 C.F.R. § 80.8 (2022) (describing the action(s) that will be taken if informal means cannot resolve the complaint).

104. *See* How OCR Enforces Civil Rights Discrimination Laws and Regulations, *supra* note 16.

105. OCRs with statutory requirements to issue Letters of Findings include: the Department of Housing & Urban Development (24 C.F.R. § 6.11(8)); Department of Justice (28 C.F.R. § 35.172(c)); and Department of Labor (29 C.F.R. § 38.65(c)).

106. U.S. DEP’T OF JUST. OFF. FOR CIV. RTS., *supra* note 21.

107. Reading Room, *supra* note 22.

108. Peterson & Ortiz, *supra* note 22.



investigations.<sup>109</sup> EPA OCR publishes not only its investigative findings and VRAs,<sup>110</sup> but also a comprehensive list of every complaint it receives.<sup>111</sup>

HHS OCR should publish closed investigatory findings and VRAs; whether it should do more, like DOE OCR and EPA OCR, is beyond the scope of this paper. Statutory guidance and the behavior of other OCRs indicate that HHS OCR *can* publish its investigatory findings and VRAs. The next section explains *why* HHS OCR should do so.

### B. HHS OCR Should Publish Investigative Findings and VRAs

The act of publishing investigatory findings and VRAs is a low-cost strategy, especially in proportion to the potential for significant rewards. Publishing these reports would provide covered entities with important technical guidance and send a strong message that HHS OCR diligently pursues civil rights violation claims.

#### 1. An Easily Implemented Practice

Implementing the practice of publishing investigatory findings and VRAs would not require much additional staff time and effort within HHS OCR. The heavy lifting—writing legal analyses—is already completed. Staff would need to complete two new, but quick, tasks: redact PHI as needed and post the documents to a webpage. HHS OCR already does this for every HIPAA case it closes, as discussed in Section IV.A. Because the number of civil cases that HHS OCR closes is smaller than the number of HIPAA cases it closes, publishing civil case findings and VRAs is possible and practical.

#### 2. Providing Real-Life Guidance to Covered Entities

Publishing investigative findings and VRAs has a number of benefits. Perhaps most importantly, these reports offer nuanced, detailed analyses of real-life situations where OCRs did—or did not—find violations of civil rights, making them a helpful tool for guiding covered entities' compliance with civil rights laws. Moreover, VRAs can include actual tools, checklists, or implementation plans for a covered entity that would be valuable for others to utilize. For example, in the case of DOE OCR, a recent investigatory finding found Washington University in violation of Title VI by creating race-based scholarships.<sup>112</sup> The VRA between DOE OCR and Washington University

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109. DOE Pending Cases Currently Under Investigation, *supra* note 22.

110. See Civil Rights Compliance Office—New Developments, *supra* note 23 (listing External Civil Rights Compliance Office developments); see also Proposed Consent Decrees, *supra* note 23 (stating “certain proposed settlements [will be] available for public review and comment after” government approval).

111. External Civil Rights Compliance Office, *supra* note 23.

112. WASHINGTON UNIVERSITY RESOLUTION, *supra* note 22.

included a plan for the university to create race-based measures.<sup>113</sup> This finding is useful to other universities that may have implemented similar race-based scholarships; but if DOE OCR did not publish its investigatory findings, it would have denied those universities an important tool. In its current practice, HHS OCR denies its covered entities the benefits of this concrete learning from others.

Publishing only *closed* investigatory findings and VRAs protects the reputations of covered entities from unfounded complaints because only documents with findings of fact and legal conclusions are published. This practice vindicates covered entities found to be in compliance with civil rights laws. Even in cases with a finding of no violation, other covered entities can gain valuable insight into how HHS OCR defines specific civil rights violations. But this practice also serves as a warning in the case of covered entities found to be in violation of civil rights law. The prospect of facing publicity for civil rights violations can serve as an incentive for health care agencies to inspect their policies and systems to protect their patients' civil rights. This type of warning adds an additional level of accountability to covered entities, who can use these concrete examples to proactively analyze their own policies for suspect practices.

Empowering covered entities to proactively analyze their own policies—i.e., “do the right thing”—could lead to lighter caseloads for HHS OCR. Concrete examples would allow entities to identify practices that HHS OCR has explicitly stated to be civil rights violations. When there is no ambiguity in whether a practice qualifies as a violation, there is little to no argument that a covered entity should continue with the practice. Changing the practice can prevent civil rights discrimination from happening.

### 3. Emphasizing the Importance of Protecting Civil Rights

Finally, publishing investigative findings and VRAs would signal HHS OCR's strong commitment to civil rights protections in health care. The selective nature of HHS OCR's current publishing practices not only obscures the compliance and accountability process, but it also downplays the work HHS OCR does to protect civil rights in health care. The limited number of published VRAs on HHS OCR's website disguises the much larger number of complaints it receives, investigates, and resolves each year.<sup>114</sup>

Publishing investigative findings and VRAs to the HHS OCR website would also illuminate HHS OCR's specific enforcement priorities. The cases that are pursued and found to be in violation provide covered entities with a better understanding of the types of investigations HHS OCR pursues. A better understanding of the types of investigations makes transparent what providers

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113. *Id.*

114. *See* discussion *supra* notes 87–91 and accompanying text.

and policymakers should prioritize. As a layer of accountability for HHS OCR itself, this better understanding would also allow providers, policymakers, and the public to see what OCR is ignoring, either purposefully or accidentally. This, in turn, could lead to HHS OCR identifying gaps in its own practices, and an opportunity for HHS OCR to improve its own policies.

Ultimately, HHS OCR is legally authorized to publish investigatory findings and VRAs. It would benefit immensely from the practice through encouraging covered entities to change their own practices proactively, preventing civil rights violations and thus reducing HHS OCR's heavy caseload.

#### V. CONCLUSION

Prohibited civil rights discrimination in health care has enormous human costs. HHS OCR must collect, investigate, and resolve all reported complaints of alleged civil rights discrimination, but has failed to publish these investigatory findings or voluntary resolution agreements (VRAs). Following the example of other OCRs and building off the legal analysis work that HHS OCR staff must already complete, HHS OCR should publish all its investigatory findings and VRAs to its website. This straightforward practice is easily implemented and would provide numerous benefits. It would provide covered entities with important roadmaps to proactively monitor and fix practices that HHS OCR has specifically called out as prohibited discrimination. Even more so, this practice would send a strong message to the covered entities it oversees, and the public it is meant to protect, that HHS OCR prioritizes civil rights enforcement. This message is critical, because without enforcement, the civil rights of Americans—to be free from discrimination in health care on the basis of race, color, national origin, sex, disability, or age—are meaningless.

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