WEST VIRGINIA CODE CHAPTER 16 ARTICLE 65

WV Legislature

§16-65-1. Legislative intent.

The Legislature finds that:

(1) A mental or physical disability does not diminish a person's right to health care;

(2) The "Americans with Disabilities Act of 1990" prohibits discrimination against persons with disabilities, yet many individuals with disabilities still experience discrimination in accessing critical health care services;

(3) Individuals with mental and physical disabilities have historically been denied life-saving organ transplants based on assumptions that their lives are less worthy, that they are incapable of complying with post-transplant medical regimens, or that they lack adequate support systems to ensure such compliance;

(4) Although organ transplant centers must consider medical and psychosocial criteria when determining if a patient is suitable to receive an organ transplant, transplant centers that participate in Medicare, Medicaid, and other federally funded programs are required to use patient selection criteria that result in a fair and nondiscriminatory distribution of organs; and

(5) West Virginia residents in need of organ transplants are entitled to assurances that they will not encounter discrimination on the basis of a disability.

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§16-65-2. Definitions.

As used in this article:

“Anatomical gift” means a donation of all or part of a human body to take effect after the donor’s death for the purpose of transplantation or transfusion.

“Auxiliary aids and services” means an aid or service that is used to provide information to a person with cognitive, intellectual, neurological, or physical disability and is available in a format or manner that allows the person to better understand the information and may include:

(1) Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Provision of information in a format that is accessible for individuals with cognitive, neurological, developmental, and/or intellectual disabilities;

(4) Provision of supported decision-making services;

(5) Acquisition or modification of equipment or devices; and

(6) Other similar services and actions.

“Covered entity” means:

(1) Any licensed provider of health care services, including licensed health care practitioners, hospitals, nursing facilities, laboratories, intermediate care facilities, psychiatric residential treatment facilities, institutions for individuals with intellectual or developmental disabilities, and prison health centers; or

(2) Any entity responsible for matching anatomical gift donors to potential recipients.

“Disability” has the same meaning set forth in the Americans with Disabilities Act of 1990, as amended by the ADA Amendments Act of 2008, at 42 U.S.C. § 12102.

“Organ transplant” means the transplantation or transfusion of a part of a human body into the body of another for the purpose of treating or curing a medical condition.

“Qualified individual” means an individual who has a disability and meets the essential eligibility requirements for the receipt of an anatomical gift with or without any of the following:

(1) Individuals or entities available to support and assist the person with an anatomical gift

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or transplantation;

(2) Auxiliary aids or services; or

(3) Reasonable modifications to the policies or practices of a covered entity.

"Reasonable modifications to policies or practices" may include:

(1) Communication with individuals responsible for supporting an individual with post-surgical and post-transplantation care, including medication; or

(2) Consideration of support networks available to the individual, including family, friends, and home and community-based services, including home and community-based services funded through Medicaid, Medicare, another health plan in which the individual is enrolled, or any program or source of funding available to the individual, in determining whether the individual is able to comply with post-transplant medical requirements.

"Supported decision-making" includes use of a support person or persons in order to assist an individual in making medical decisions, communicate information to the individual, or ascertain an individual's wishes, including:

(1) Inclusion of the individual's attorney-in-fact, health care proxy, or any person of the individual's choice in communications about the individual's medical care;

(2) Permitting the individual to select a person of his or her choice for the purposes of supporting that individual in communicating, processing information, or making medical decisions;

(3) Provision of auxiliary aids and services to facilitate the individual's ability to communicate and process health-related information, including use of assistive communication technology;

(4) Provision of information to persons designated by the individual, consistent with the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §1301 *et seq.*, and other applicable laws and regulations governing disclosure of health information;

(5) Provision of health information in a format that is readily understandable by the individual; or

(6) If the individual has a court-appointed guardian or other individual responsible for making medical decisions on behalf of the individual, any measures to ensure that the individual is included in decisions involving his or her own health care and that medical decisions are in accordance with the individual's own expressed interests.

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§16-65-3. Discrimination prohibited.

(a) A covered entity may not, solely on the basis of a qualified individual's mental or physical disability:

(1) Determine a qualified individual ineligible to receive an anatomical gift or organ transplant;

(2) Deny a qualified individual medical and associated services related to organ transplantation, including evaluation, surgery, counseling, post-operative treatment, and services;

(3) Refuse to refer the qualified individual to a transplant center or other related specialist for the purpose of evaluation or receipt of an organ transplant;

(4) Refuse to place a qualified individual on an organ transplant waiting list, or place the individual at a lower-priority position on the list than the position at which he or she would have been placed if not for his or her disability; or

(5) Decline insurance coverage to a qualified individual for any procedure associated with the receipt of the anatomical gift, including post-transplantation care.

(b) Notwithstanding subsection (a) of this section, a covered entity may take an individual's disability into account when making treatment or coverage recommendations or decisions, solely to the extent that the physical or mental disability has been found by a physician or surgeon, following an individualized evaluation of the potential recipient, to be medically significant to the provision of the anatomical gift. The provisions of this section shall not be considered to require referrals or recommendations for, or the performance of, medically inappropriate organ transplants.

(c) If an individual has the necessary support system to assist the individual in complying with post-transplant medical requirements, an individual's inability to independently comply with those requirements shall not be considered to be medically significant for the purposes of subsection (b) of this section.

(d) A covered entity shall make reasonable modifications in policies, practices, or procedures when such modifications are necessary to make services such as transplantation-related counseling, information, coverage, or treatment available to qualified individuals with disabilities, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the services.

(e) A covered entity shall take steps necessary to ensure that a qualified individual with a disability is not denied services such as transplantation-related counseling, information, coverage, or treatment because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking those steps would fundamentally alter the nature of the services being offered or would result in an undue burden.

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(f) A covered entity shall otherwise comply with the requirements of Titles II and III of the Americans with Disabilities Act of 1990, as amended by the Americans with Disabilities Act Amendments Act of 2008.

(g) The provisions of this section apply to each part of the organ transplant process.

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§16-65-4. Enforcement.

(a) The remedies for violations of this article are the same as those available under Titles II and III of the Americans with Disabilities Act, 42 U.S.C. §§12131-12189.

(b) The court shall accord priority on its calendar and expeditiously proceed with an action brought to seek any remedy authorized by law for purposes of enforcing compliance with the provisions of this article.

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