



We have the legal right of way.

April 3, 2020

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Governor DeWine and Director Acton:

In many ways Ohio has set the standard for responding to the COVID-19 crisis, and we are proud of Ohio's leadership during this public health crisis. The state has the opportunity to lead the way in protecting its most vulnerable citizens from unfair—and illegal—rationing protocols, such as those that have occurred in other states. The undersigned organizations welcome the opportunity to be a part of developing Ohio's protocols for ensuring non-discriminatory access to COVID-19 care.

As you know, COVID-19 continues to impact the daily life of people with disabilities, just like every other Ohioan. But unlike other Ohioans, these individuals also carry the fear that their disabilities will be held against them when it comes to determining what level of care they will receive during this crisis—particularly if Ohio or its hospital systems start rationing medical services or equipment.

These fears are not unfounded. Other states have already established rationing protocols that discriminate against individuals with disabilities. That discrimination can be explicit—as is the case with Alabama's protocol, which "specifically singles out and excludes certain people with intellectual disabilities from access to ventilators in the event of rationing."<sup>i</sup> Discrimination can also be implicit—like the protocol that Washington State established, which "gives priority to treating people who are younger and healthier and leaves those who are older and sicker—people with disabilities—to die."<sup>ii</sup> Further, other states rely on inappropriate factors unrelated to the progression of COVID-19 in patients. For example,

Tennessee inexplicably relies on an individual’s need for assistance with activities of daily living as a basis to withhold life-saving treatment.<sup>iii</sup> Still other states have rationing protocols that deter individuals with disabilities from seeking lifesaving treatment—like New York’s protocol, which allow medical professionals to take personal ventilators from individuals with disabilities and reallocate them to “healthier” individuals.<sup>iv</sup>

These protocols fail to recognize the humanity and dignity of people with disabilities by devaluing their lives. They also violate, among other laws, the Americans with Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act (“Section 504”), and Section 1557 of the Affordable Care Act (“ACA”). On March 28, 2020, the Office for Civil Rights (“OCR”) at the U.S. Department of Health and Human Services issued a bulletin to remind covered entities of legal obligations under these federal civil rights laws that prohibit discrimination against people with disabilities.<sup>v</sup> Specifically that guidance states:

In this time of emergency, the laudable goal of providing care quickly and efficiently must be guided by the fundamental principles of fairness, equality, and compassion that animate our civil rights laws. This is particularly true with respect to the treatment of persons with disabilities during medical emergencies, as they possess the same dignity and worth as everyone else.

It is critical that any rationing of care that Ohio and covered entities develop specific to the COVID-19 crisis complies with the non-discrimination requirements of those laws. Failure to do so puts the lives of Ohioans with disabilities at risk as too often their lives are devalued by those in the medical profession. Unfortunately, studies have demonstrated widespread and persistent discrimination and biases against people with disabilities by medical providers making treatment decisions.<sup>vi</sup>

It is also extremely important that the rationing protocol and the choices that Ohio and the state’s healthcare systems make concerning the allocation of scarce medical resources (for example, the state has determined that it needs at least 40% more ventilators to meet anticipated needs) should be guided by the following principles set forth in OCR’s March 28, 2020 Bulletin and the Consortium for Citizens with Disabilities’ recent letter on this very issue<sup>vii</sup>:

1. The ADA and Section 504 require that decisions concerning whether an individual is a candidate for treatment should be based on individualized assessments of the person, using current objective medical evidence, and not based on generalized assumptions about a person’s disability.
2. The ADA and Section 504 prohibit treatment allocation decisions from being made based on misguided assumptions that people with disabilities experience a lower quality of life, or that their lives are not worth living.

3. The ADA and Section 504 prohibit treatment allocation decisions from being made based on the perception that a person with a disability has a lower prospect of survival.
4. The ADA and Section 504 prohibit treatment allocation decisions from being made based on the perception that a person's disability will require the use of greater treatment resources.
5. A person with COVID-19 is "qualified" for purposes of receiving COVID-19 treatment if he or she can benefit from the treatment (that is, can recover) and the treatment is not contraindicated.

We also ask that you provide Disability Rights Ohio, Ohio's designated protection and advocacy system, with copies of any state guidance on rationing care developed for or being used in responding to the COVID-19 crisis, along with copies of hospital plans submitted to the state that include plans for rationing care. We are willing to work with the state and covered entities to review these issues as they arise, and thank you for your strong leadership thus far on COVID-19.

Thank you for the opportunity to provide information on issues regarding rationing protocols that discriminate against people with disabilities. The undersigned organizations advocate for individuals with disabilities to live where they choose, with the people they choose, and with the ability to participate fully in their communities. If you have any questions or wish to discuss these issues further feel free to reach out to me or any of the undersigned organizations.

Respectfully,

Kerstin Sjoberg  
Executive Director  
Disability Rights Ohio

National Multiple Sclerosis Society  
Ohio Brain Injury Program  
Ohio Developmental Disabilities Council  
Ohio Association of Area Agencies on Aging  
Ohio Statewide Independent Living Council  
The Ohio State University Nisonger Center  
University of Cincinnati Center for Excellence in Developmental Disabilities

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<sup>i</sup> See Rhonda Brownstein, et al., *Complaint of Alabama Disabilities Advocacy Program and The Arc of the United States* (Mar. 24, 2020) [https://adap.ua.edu/uploads/5/7/8/9/57892141/al-ocr-complaint\\_3.24.20.pdf](https://adap.ua.edu/uploads/5/7/8/9/57892141/al-ocr-complaint_3.24.20.pdf) (last visited Apr. 1, 2020).

<sup>ii</sup> See David Carlson, et al., *Complaint of Disability Rights Washington, et al.* (Mar. 23, 2020) [https://adap.ua.edu/uploads/5/7/8/9/57892141/al-ocr-complaint\\_3.24.20.pdf](https://adap.ua.edu/uploads/5/7/8/9/57892141/al-ocr-complaint_3.24.20.pdf) (last visited Apr. 1, 2020).

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<sup>iii</sup> See Tennessee Altered Standards of Care Workgroup, *Guidance for the Ethical Allocation of Scarce Resources during a Community-Wide Public Health Emergency as Declared by the Governor of Tennessee* (Jul. 2016) [https://www.tn.gov/content/dam/tn/health/documents/Guidance\\_for\\_the\\_Ethical\\_Allocation\\_of\\_Scarce\\_Resources.pdf](https://www.tn.gov/content/dam/tn/health/documents/Guidance_for_the_Ethical_Allocation_of_Scarce_Resources.pdf) (last visited Mar. 27, 2020).

<sup>iv</sup> See Timothy A. Clune, Esq., Letter from Disability Rights New York to Governor Andrew Cuomo (Mar. 26, 2020) (available upon request); see also Joseph Shapiro, *HHS Warns States Not To Put People With Disabilities At The Back Of The Line For Care* (Mar. 28, 2020) <https://www.npr.org/2020/03/28/823254597/hhs-warns-states-not-to-put-people-with-disabilities-at-the-back-of-the-line-for> (last visited Apr. 1, 2020).

<sup>v</sup> HHS Office for Civil Rights in Action, *BULLETIN: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19)* (Mar. 29, 2020) <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf> (last visited Apr. 1, 2020).

<sup>vi</sup> See Samuel R. Bagenstos, *May Hospitals Withhold Ventilators from COVID-19 Patients with Pre-Existing Disabilities? Notes on the Law and Ethics of Disability-Based Medical Rationing* (Mar. 27, 2020) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3559926](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559926) (last visited Mar. 27, 2020) (“Medical professionals’ biases often lead them to make unduly negative prognoses regarding their disabled patients.”).

<sup>vii</sup> See Jennifer Mathis, et al., *Letter from Consortium for Citizens with Disabilities to Secretary Alex Azar and Director Roger Severino* (Mar. 20, 2020) <http://www.c-c-d.org/fichiers/Letter-re-COVID-19-and-Disability-Discrimination-final.pdf> (last visited Mar. 27, 2020).