March 20, 2020

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| The Honorable Alex M. AzarSecretaryDepartment of Health and Human Services200 Independence Avenue, S.W. Washington DC 20201 | The Honorable William BarrAttorney GeneralDepartment of Justice950 Pennsylvania Avenue, NW, Room 1145 Washington, DC 20530 |

Dear Secretary Azar and Attorney General Barr:

As COVID-19 spreads across our communities, medical resources, including hospital beds, supplies, and personnel, have been overwhelmed. With media reports suggesting that rationing of care is inevitable, we urge the Department of Health and Human Services (HHS) to clarify the obligation of States and covered entities to adhere to existing anti-discrimination laws when responding to COVID-19, with particular focus on those populations who might otherwise be targets of rationing care.

In Italy, which is further along in its experience with widespread COVID-19 infection, the rationing response has been borne in large part by the population of people with disabilities. This is true even in instances in which those people with disabilities are well-positioned to benefit from being treated.[[1]](#footnote-1) Media reports in both *The Washington Post* and the *New York Times* have suggested that states around the U.S. are already considering similar decision-making formulas.[[2]](#footnote-2)

The National Council on Disability, an independent federal agency specializing in policy matters affecting the lives of people with disabilities, recently released a series of reports demonstrating that, even in the absence of a crisis, examples abound of disability bias and discrimination within medical decision making.[[3]](#footnote-3) Several of these reports call on the HHS Office for Civil Rights (OCR) to issue guidance clarifying the applicability of existing disability nondiscrimination laws to instances of such bias and discrimination.

In light of the COVID-19 pandemic, we urge your Department to act quickly to notify states that as they review and create their "crisis standards of care,"[[4]](#footnote-4) they must not authorize or promote any form of disability discrimination that would violate the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. This would include incorporating denials of care, lower prioritization of care, or denial of or limitation of healthcare resources on the basis of one's disability, severity of disability, need for resource-intensive services and supports, or the perception of a lower quality of life on the basis of disability. Similarly, denial of care or lower prioritization of care for patients who require auxiliary communication or other supports during and after treatments would also represent illegal discrimination in violation of existing law.

Our letter comes to you at a time in which we recognize that the COVID-19 outbreak is placing mounting strain on our nation's healthcare system. While we recognize that it may be appropriate for healthcare providers to delay non-essential care, life-sustaining treatments should not be denied from people with disabilities who are able to clinically benefit from them. Please be proactive rather than reactive in notifying the States that their obligations under existing disability nondiscrimination laws are not waiveable during the outbreak.

Thank you for all your Department is doing during this healthcare crisis.

Sincerely,

Christopher H. Smith

MEMBER OF CONGRESS

1. Marco Vergano et al., “IN CONDIZIONI ECCEZIONALI DI SQUILIBRIO TRA NECESSITÀ E RISORSE DISPONIBILI,” March 6, 2020. <http://www.siaarti.it/SiteAssets/News/COVID19%20-%20documenti%20SIAARTI/SIAARTI%20-%20Covid19%20-%20Raccomandazioni%20di%20etica%20clinica.pdf> [↑](#footnote-ref-1)
2. Ezekiel J. Emanuel, James Phillips, and Govind Persad, “Opinion: How the Coronavirus May Force Doctors to Decide Who Can Live and Who Dies,” The New York Times (March 12, 2020). Accessed on March 17, 2020. [https://www.nytimes.com/2020/03/12/opinion/coronavirus-hospital-shortage.html](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.nytimes.com_2020_03_12_opinion_coronavirus-2Dhospital-2Dshortage.html&d=DwMF-g&c=L93KkjKsAC98uTvC4KvQDdTDRzAeWDDRmG6S3YXllH0&r=FCxWzXsWDBGX-qO7OyDb5GtKT64pnBL6bMbiQprAiA3hsREwCf79m24oSZdtxY_t&m=PTDw8B6ZHLdbLd7yOesJdkNiwzWoAk5GnssJiuuXsGY&s=mSAf1dR-FYrInRDaSvyfWWZ1-0z55FnLWrMRmJCx048&e=).

Ariana Eunjung Cha, "Spiking  U.S. Coronavirus Cases Could Force Rationing Decisions Similar to Those Made in Italy, China,” Washington Post (March 15, 2020). Accessed on March 17, 2020. [https://www.washingtonpost.com/health/2020/03/15/coronavirus-rationing-us/](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.washingtonpost.com_health_2020_03_15_coronavirus-2Drationing-2Dus_&d=DwQF-g&c=L93KkjKsAC98uTvC4KvQDdTDRzAeWDDRmG6S3YXllH0&r=FCxWzXsWDBGX-qO7OyDb5GtKT64pnBL6bMbiQprAiA3hsREwCf79m24oSZdtxY_t&m=PTDw8B6ZHLdbLd7yOesJdkNiwzWoAk5GnssJiuuXsGY&s=VwqkEOSOX4kS3x2wV3ml9SZBes7NrpQU7FXdXBV3iHs&e=) [↑](#footnote-ref-2)
3. National Council on Disability, Bioethics and Disability report series. Accessed March 16, 2020, [https://ncd.gov/publications/2019/bioethics-report-series](https://urldefense.proofpoint.com/v2/url?u=https-3A__ncd.gov_publications_2019_bioethics-2Dreport-2Dseries&d=DwMF-g&c=L93KkjKsAC98uTvC4KvQDdTDRzAeWDDRmG6S3YXllH0&r=FCxWzXsWDBGX-qO7OyDb5GtKT64pnBL6bMbiQprAiA3hsREwCf79m24oSZdtxY_t&m=PTDw8B6ZHLdbLd7yOesJdkNiwzWoAk5GnssJiuuXsGY&s=CEKD8ld63THhvY6PsCUoRJFLl5QX1Y5dslW0czDmlB4&e=). [↑](#footnote-ref-3)
4. Thomas D. Kirsch, "The nightmare of rationing health care," Washington Post (March 15, 2020). Accessed March 16, 2020, [https://www.washingtonpost.com/opinions/2020/03/15/nightmare-rationing-health-care/](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.washingtonpost.com_opinions_2020_03_15_nightmare-2Drationing-2Dhealth-2Dcare_&d=DwQF-g&c=L93KkjKsAC98uTvC4KvQDdTDRzAeWDDRmG6S3YXllH0&r=FCxWzXsWDBGX-qO7OyDb5GtKT64pnBL6bMbiQprAiA3hsREwCf79m24oSZdtxY_t&m=PTDw8B6ZHLdbLd7yOesJdkNiwzWoAk5GnssJiuuXsGY&s=ZNXiTgQcD3-ALhJql28efGKK77UOjpIZgtWCGQ0dCOo&e=). [↑](#footnote-ref-4)