

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW



Disability Rights Education & Defense Fund



April 22, 2020

Secretary Mark Ghaly, MD, MPH  
California Health and Human Services Agency  
1660 Ninth Street, Room 460  
Sacramento, California 95814

Sent via email to [Mark.Ghaly@chhs.ca.gov](mailto:Mark.Ghaly@chhs.ca.gov)

Dear Secretary Ghaly,

We, the undersigned organizations, write to express our opposition to the ageist and ableist policies found within the California SARS-CoV-2 Pandemic: Health Care Surge Crisis Care Guidelines (“CCG”). Such policies are unacceptable, and we ask that you immediately withdraw the guidelines and reissue them after they have been revised.

Despite repeated reminders against discrimination on the basis of age in providing care during COVID-19 – including [a bulletin](#) from the U.S. Department of Health and Human Services Office of Civil Rights, a [joint bulletin](#) from your own agency, and a [letter](#) we wrote to you on April 3 – the CCG uses certain factors reflective of age as well as categorical age cut-offs, in flagrant violation of federal anti-discrimination requirements.

We have reviewed the CCG that the California Department of Public Health (DPH) issued earlier this week, and believe that it violates the anti-discrimination provisions of the Affordable Care Act, which incorporate protections from the Age Discrimination Act of 1975 (“ADA of 1975”). By using certain factors reflective of age, the policy discriminates against older adults in the prioritization of the provision of life-saving treatment. Bias against older adults in the provision of health care violates federal law.

We request that you immediately withdraw the existing discriminatory policy and replace it with a revised, unbiased policy that relies solely on the individual’s likelihood of recovering from COVID-19, without regard to age, in the allocation of scarce medical resources.

## Overview of the California SARS-CoV-2 Pandemic: Health Care Surge Crisis Care Guidelines

The CCG document directs triage teams to allocate scarce resources through individualized patient assessments and are designed to advance two principles: (1) saving the most lives, and (2) saving the most life-years. CCG, pg. 24. Allocating scarce resources based on the second principle discriminates on the basis of age and disability.

This framework is operationalized in the priority scoring for adult patients by factoring in prognosis for long-term survival, including assessing an individual's major comorbid conditions and severely life-limiting conditions. *Id.* at Table 2. Examples of severely life limiting conditions include severe Alzheimer's disease or related dementia, cancer being treated with only palliative interventions, and others. CCG, pg. 25 at Table 3. In addition, the CCG resolves ties using "life-cycle considerations," granting higher priority to younger patients, and relegating older adults age 61-75 and 75 years-old or older to lower priority categories.

The CCG does not at any point remind health care providers that they are bound by federal and state anti-discrimination requirements and that such requirements are still in effect during the pandemic. Unlike other states' guidance, it does not expressly prohibit the use of factors like race, disability, gender, and immigration status in making decisions about access to care.<sup>1</sup> The only mention of some protected classes is in the context of when a provider needs to communicate a triage decision to a patient. In that communication, it is suggested that some protected classes are identified as irrelevant factors to the triage decision. CCG, pg. 22. Even then, age and disability are omitted in that list.

### Federal law prohibits discrimination based on age and disability by healthcare providers

Federal civil rights laws prohibit the use of categorical age criteria in policies and practices of healthcare providers.

The Affordable Care Act's anti-discrimination provision, also referred to as Section 1557, prohibits discrimination based on age, disability, sex, race, color, and national origin by incorporating protections from several key civil rights statutes, including the Age Discrimination Act of 1975. 42 U.S.C. § 6102; 42 U.S.C. § 6102. The ADA of 1975 establishes that "no person ... shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102. The purpose of the ADA of 1975 is to prohibit age discrimination in "programs or activities receiving federal financial assistance." Section 1557's incorporation of the ADA of 1975 expands those protections to all health programs and activities that receive federal financial assistance. 45 C.F.R. § 92.4.

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<sup>1</sup> See, for example, [Massachusetts's Crisis Standards of Care](#) guidelines, pg. 4 (prohibiting the consideration of race, disability, gender, sexual orientation, gender identity, ethnicity, ability to pay, socioeconomic status, perceived self worth, perceived quality of life, immigration status, incarceration status, homelessness, or past or future use of resources).

On April 8, 2020, the U.S. Department of Health and Human Services Office of Civil Rights (“OCR”) resolved a complaint filed by disability advocates regarding Alabama’s ventilator triaging guidelines. As a result of the OCR intervention, Alabama will ensure that the prior discriminatory criteria are not in effect and that it will not include similar provisions singling out certain disabilities for unfavorable treatment or use categorical age cutoffs in future guidelines.<sup>2</sup> In resolving the complaint, OCR expressed concern with the use of “blunt age categorizations, such that older persons might automatically be deemed ineligible for life-saving care without any individualized assessment or examination and based solely on missing a strict age cutoff.”

### California’s CCG violates federal anti-discrimination requirements and state guidance

The CSC’s bias against older adults and the use of categorical age cutoffs in the case of a tie are contrary to Section 1557, the ADA of 1975, OCR guidance, and your agency’s own bulletin. These age-based considerations are impermissibly biased against older adults and people with disabilities because they are anticipated to have fewer years of life remaining. Furthermore, the life-cycle considerations are irrational and arbitrary in the context of providing life-saving treatment. For example, a patient between the ages of 41-60 is granted higher priority over another patient aged 61-75.<sup>3</sup> There is little clinical difference between patients aged 60 and 61, yet placement in the “41-60” category immediately gives that patient higher preference for life-saving treatment.

In order to comply with federal anti-discrimination requirements and your agency’s own bulletin, and to remedy the bias in the criteria, the guidance should focus solely on saving lives. The guidelines must direct providers to allocate resources to the patient most likely to survive COVID-19 in the near term, irrespective of how many years of life they may expect to have remaining because such criteria on their face work against older adults. It must also include an express prohibition on considering protected classes like age and disability and a reminder that healthcare providers are bound by federal and state anti-discrimination requirements.

If DPH does not take swift action to remedy the problems in the CCG, California will be in violation of federal anti-discrimination laws should life-saving preventative treatment be distributed in a way that discriminates based on age.<sup>4</sup> Healthcare providers who follow a state policy whereby healthcare is distributed based on categorical age cuts off or other aged-based factors that are used to deny services to older adults are also in violation of the same anti-discrimination requirements.

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<sup>2</sup> See Department of Health and Human Services Office of Civil Rights website, <https://www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html>.

<sup>3</sup> See CCG, pg. 25 (second priority given to ages 41-60, while third priority is given to ages 61-75).

<sup>4</sup> The CCG may also run afoul of state anti-discrimination laws that prohibit discrimination on the basis of age and other protected classes in any program or activity conducted, operated, or administered by a state agency or receives state financial assistance. CA Govt Code § 11135.

California should not abandon its fundamental role of protecting susceptible populations

Older adults and people with disabilities in California are at serious risk of unnecessary death unless changes are made to the existing policy. This population already faces a high risk of death and complications from COVID-19, which is a basis for the self-isolation and social distancing measures taking place.<sup>5</sup> Tens of millions of Americans are facing significant disruptions to their daily lives to shield seniors and others similarly susceptible to severe complication from this virus. From school closures to extreme social distancing measures, individuals are prioritizing the lives of older adults and those with underlying conditions at great personal expense. Yet, California's policy fails to follow the sound policy underlying those measures by denying critical care to the very people most at risk of dying from COVID-19 complications. When the crisis abates and we consider how we responded and who suffered the greatest harm, if higher mortality rates are experienced by older adults and people with disabilities, it should not be because discriminatory bias led to denial of care.

We urge you to take immediate action to rectify the CCG to comply with the anti-discrimination requirements under Section 1557 of the Affordable Care Act and the ADA of 1975. We would like to work with you to address the issues we have raised in this letter. Please contact Kevin Prindiville so that we may arrange a time to discuss.

Sincerely,



Kevin Prindiville, Executive Director  
Justice in Aging



Susan Henderson, Executive Director  
Disability Rights Education and Defense Fund



Andrew J. Imparato, Executive Director  
Disability Rights California

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<sup>5</sup> See [Executive Order N-33-20 Stay at Home Order](#) (Mar. 10, 2020).

CC: Kim McCoy Wade, California Department of Aging  
Dr. Sonia Y. Angell, California Department of Public Health