

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW



April 27, 2020

The Honorable Larry Hogan, Governor
State of Maryland
100 State Circle,
Annapolis, MD 21401
via first class mail
And via e-mail to: hannah.schaeffer@maryland.gov

Re: Maryland Framework for the Allocation of Scarce Life-Sustaining Medical Resources in Catastrophic Public Health Emergencies and related guidance

Dear Governor Hogan,

Justice in Aging is a nonprofit national advocacy organization that advocates for the rights of low-income older adults. Disability Rights Maryland, a non-profit organization, is the state's federally mandated Protection & Advocacy agency created to advocate for the legal rights of people with disabilities. We write today to express our recognition of the tremendous challenges Maryland has faced since the onset of the Coronavirus pandemic, particularly in the context of prioritizing care where resources may be insufficient to meet the need. During this challenging time, we want to remind you of the obligation of states like Maryland to enact policies that do not discriminate on the basis of age or disability.

We have reviewed the Maryland Framework for the Allocation of Scarce Life-Sustaining Medical Resources in a Catastrophic Public Health Emergency ("Framework") issued on August 24, 2017, 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"). In addition, the Framework or Crisis Standards of Care must comply with disability anti-discrimination provisions of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and related provisions in the Affordable Care Act. Our issues with the Framework are set forth below.

We are aware that your administration is considering adopting the Framework, with potential modifications, and we thank you for taking this step to improve existing practices. However, we are concerned the many problems existing in the Framework will not be sufficiently resolved. The new policy must include an unbiased process that relies solely on the individual's likelihood of recovering from coronavirus in the near term, without limiting care based on age or disability in allocating scarce medical resources.

[Overview of the Maryland Framework](#)

The Framework includes individualized patient assessments in allocating resources. While individualized assessments are a necessary tool, the Framework requires assessments to be made within the context of both 1) saving the most lives, and 2) maximizing life years saved. Framework, pg. 7. The Framework is operationalized in the priority scoring for adult patients by factoring in a patient's longer-term prognosis and other age-related considerations, like the use of age to break ties in patient scores. Framework, pg. 13. For example, the Framework, on its face applies "life-cycle considerations," granting lower priority to older adults age 65-80 and 80 years-old or older to the lowest priority categories. Framework, pgs. 15-16.

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

Federal civil rights laws prohibit the use of categorical age cutoffs 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, 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 who receive federal financial assistance. 45 C.F.R. § 92.4.

On April 8, 2020, the 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.¹ The actual language in the now-defunct Alabama policy provided that once the State reached Tier Three of the crisis continuum, hospitals could include "restrictions of treatment based on disease-specific epidemiology and survival data for patient subgroups," explicitly including consideration of age-based criteria ("may include age-based criteria").² In response to this language and 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."

Maryland's Framework violates federal anti-discrimination requirements

The age-based categorizations in the Framework are at least as problematic as Alabama's previous policy. The Framework's bias against older adults and the use of categorical age cutoffs are contrary to Section 1557, the ADA of 1975, and OCR guidance. The categorical life-cycle considerations are irrational and arbitrary in the context of providing life-saving treatment. For example, a patient between

¹ See HHS OCR website, <https://www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html>.

² [Alabama Triage Guidelines](#) (April 9, 2010), pg. 9.

the ages of 50 and 69 is granted higher priority over another patient aged 70-84.³ There is little clinical difference between patients aged 69 and 70, yet placement in a “50-69” category immediately gives that patient higher preference for life-saving treatment. These age-based considerations are impermissibly biased against older adults on their face because they are anticipated to have fewer years of life remaining.

By emphasizing the number of life-years saved, the current Framework discriminates against older adults in the prioritization of the provision of life-saving treatment. The use of certain factors directly tied to age, such as estimates of number of years remaining and prognosis for long-term survival, discriminate against older adults for receiving life-saving treatment when supply is limited. The Framework expressly identifies that prioritizing “life-years saved” disproportionately impacts already disadvantaged groups⁴, and also is biased against older adults.

In order to comply with federal anti-discrimination requirements and to remedy the bias in the criteria, the guidance should focus solely on saving lives and not “saving life years.” It should direct health care providers to allocate resources to the patient most likely to survive the coronavirus, irrespective of how many years of life they may expect to have remaining, and without regard to the patient’s age or disability.

The Framework should also be clear that it is not legal to deny medical resources to patients with specific conditions (including advanced and irreversible neurologic condition as referenced in Framework). Each decision must be individualized and reference to the presence of conditions as factors or as determinative is not legal.

It is important to affirmatively recognize that older adults and individuals with disabilities who may use ventilators in their daily lives must be allowed to continue to use this equipment if they receive COVID-19 treatment at a hospital. We must not discourage people who rely on ventilators from seeking treatment due to fears of being denied treatments or having their ventilator reallocated. The Framework must reference legal obligations to provide reasonable accommodations. This affirmative obligation includes provision of interpreter services or other modifications or additional services needed due to a disability, such as permitting a support person to accompany the individual when needed and appropriate or permitting a person to continue using a ventilator for additional time where an underlying disability means that additional time is necessary for recovery. Omission of such obligations will result in an improper denial of the right to treatment.

Maryland needs to address these issues in the Framework to ensure Maryland and its emergency preparedness programs are not violation of federal anti-discrimination laws. Health care providers who follow a state policy whereby healthcare is distributed based on categorical age cuts off, long-term survivability, or other aged-based factors that are used to deny services to older adults and people with disabilities would also in violation of the same anti-discrimination requirements.

³ See [Framework](#), pg. 15 (second priority given to ages 50-69, while third priority is given to ages 70-84).

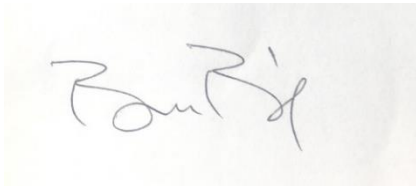
⁴ See [Framework](#), pg. 13 explaining that using age is not “an appropriation criterion in determining who receives access to basic medical care in *normal* circumstances” (emphasis added). The Framework also identifies the prioritization of long-term survivability may “further disadvantage people who are already disadvantaged” including poor people and people of color who are more likely to have co-morbidities.

Maryland should not abandon its fundamental role of protecting susceptible populations

Older adults and persons with disabilities in Maryland are at serious risk of unnecessary death unless changes are made to the Framework. 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.⁵ Maryland has issued strong social distancing and stay at home orders necessary to shield older adults and others similarly susceptible to severe complications from this virus. From school closures to social distancing measures, Marylanders are working to protect the lives of older adults and those with underlying health conditions at great personal expense. Yet, Maryland's Framework 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 resources are scarce. 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 these considerations in drafting the new policy to rectify Maryland's scarce resource allocation policy to comply with the anti-discrimination requirements under Section 1557 of the Affordable Care Act, the Age Discrimination Act of 1975 and the Americans with Disabilities Act. We would like to work with you to address the issues we have raised in this letter. Please contact Lauren Young at LaurenY@disabilityrightsmd.org or Regan Bailey at rbailey@justiceinaging.org so that we may arrange a time to discuss.

Sincerely,



Regan Bailey
Litigation Director
Justice in Aging
1444 I Street, NW, St 1100
Washington DC 20005-6253
202-289-6976
rbailey@justiceinaging.org



Robin C. Murphy
Executive Director
Disability Rights Maryland
1500 Union Ave. Rm 2000
Baltimore, MD 21211
410-727-6253
robinm@disabilityrightsmd.org

cc: Carol Beatty, Secretary, Maryland Department of Disabilities
Rona E. Kramer, Secretary, Maryland Department of Aging

⁵ See [Proclamation: Declaration of State of Emergency](#), (Mar. 5, 2020).