



April 24, 2020

Andrea Palm, Secretary-Designee  
Wisconsin Department of Health Services  
PO Box 7850  
Madison, WI 53707-7850

Re: Age-Based Health Care Rationing: Wisconsin Ventilator Allocation Advisory Work Group Recommendations

Dear Secretary-Designee Palm:

As hospitals, clinics, and other medical facilities develop policies that dictate allocation of scarce medical resources during the COVID-19 pandemic, it is imperative that great care be taken to prevent those policies from adversely affecting people simply because they have reached a certain age. We, the undersigned organizations, write to ask you to ensure that Wisconsin’s ventilator allocation guidelines do not discriminate on the basis of age.

Justice in Aging is a nonprofit national advocacy organization that advocates for the rights of low-income older adults. The Coalition of Wisconsin Aging & Health Groups is a statewide nonprofit that has served Wisconsin seniors since 1977. We help Wisconsin seniors and people with health conditions (some are disabled) achieve healthy aging and receive medications, care and supports. We also provide crime victim and elder abuse services.

### Background on Wisconsin’s Ventilator Allocation Guidelines

On April 9, the State Disaster Medical Advisory Committee discussed the Wisconsin Ventilator Allocation Advisory Work Group’s [recommended Guidelines](#). We applaud your April 11 letter to the SDMAC Chair and directive to start over in developing Ventilator Allocation Guidelines that do not discriminate against people with disabilities and other historically marginalized groups.

However, the recommended April 9<sup>th</sup> Wisconsin Guidelines include “blunt age categorizations.” Within Wisconsin’s Tiered Allocation strategy, patients are grouped into three tiers with age cutoffs for exclusion of ventilators. For example, all patients over age 70 with COVID-19 are in the Orange tier. Those below 70 are excluded only if they have been ventilated for a specified time period and have not improved or worsened.<sup>1</sup> Once patients are allocated to the tiers (stages), older patients within a tier are excluded from receiving a ventilator solely based on their age, per page 6 of the attached

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<sup>1</sup> See p. 3, Mortality Categories in Guidelines

Guidelines. Prioritizing people based on life years, quality of life adjusted years, and long-term survivability (e.g. a preference for younger over older people) as biased against older adults.

### Federal law prohibits states and healthcare providers from engaging in age discrimination

Health care providers who follow a Wisconsin state policy whereby healthcare is distributed based on categorical age cut offs, long-term survivability, or other aged-based factors that are used to deny services to older adults and people with disabilities are in violation of federal anti-discrimination law. Specifically, Section 1557 of the Affordable Care Act 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, including Wisconsin as a recipient of Medicaid and Medicare funds. 45 C.F.R. § 92.4.

The HHS Office of Civil Rights (OCR), in announcing its [March bulletin on discrimination](#), said:

Today, the Office for Civil Rights (OCR) at the U.S Department of Health and Human Services (HHS) is issuing a bulletin to ensure that entities covered by civil rights authorities keep in mind their obligations under laws and regulations that prohibit discrimination on the basis of race, color, national origin, disability, age, sex, and exercise of conscience and religion in HHS-funded programs, including in the provision of health care services during COVID-19.

OCR recently settled a disability discrimination complaint against the State of Alabama regarding allegations of discrimination in its Ventilator Allocation Guidelines. The complaint itself addressed disability discrimination, but OCR added age discrimination as an issue.

Alabama’s now-defunct 2010 criteria addressed age-based prioritization of resources by stating a hospital’s Tier 3 allocations could include “age-based criteria” in restricting treatment.

In announcing its settlement with the State of Alabama, OCR said:

OCR has reviewed the complaint and determined that, as a recipient of HHS funds, Alabama is required to comply with the civil rights statutes listed above. OCR is concerned that following the 2010 Criteria could result in discrimination against persons with disabilities by denying or

stopping ventilator services simply because an individual has an intellectual disability. **Another concern is the potential for the 2010 Criteria to be used to impose 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.** (bold supplied)

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

### Wisconsin's current ventilator guidelines discriminate against older adults

The Guidelines' 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, and OCR guidance. The guidelines include similar "blunt age categorizations" that OCR found problematic in Alabama's previous guidance. Life years, quality of life adjusted years, and long-term survivability are other examples of criteria that discriminate based on age. These age-based considerations are impermissibly biased against older adults on their face because they are anticipated to have fewer years of life remaining. The life cycle considerations demonstrate the irrational and arbitrary nature of the guidelines where a 69 year old would be more entitled to a ventilator than a 70 year old with better clinical scores.

We ask you to direct SDMAC to issue guidelines that do not discriminate against older people. Any guidance issued by the Department should specifically acknowledge federal civil rights laws prohibiting age and other discrimination in the provision of health care – including the Age Discrimination Act of 1975, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act.

The Guidelines explain that triage should not give priority to younger patients by using life-years because to do so would discriminate by race and disability.<sup>2</sup> The Guidelines do not acknowledge, however, that it also discriminates against older people, stating:

However, one problem with preferring "save the most life years" over "save the most lives" is that it may exacerbate preexisting inequalities. A person's life expectancy at a given age is influenced by social determinants of health. Patients who were born and grew up in poverty are more likely, through no fault of their own, to have life-limiting medical problems due to lack of access to basic health care, environmental hazards, crime, hazardous work or unemployment, and many other factors. Moreover, these disadvantaged patients are more likely to come from racial or ethnic groups that are victims of other forms of wrongful discrimination, or to have disabilities that have subjected them to discrimination, in the workplace, in access to health care, and so on.

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<sup>2</sup> See pp. 6-7, Guidelines

The Work Group specifically identifies prioritizing life-years saved disproportionately effects low-income populations, and racial and ethnic minorities due to differences in life expectancy.<sup>3</sup> Adopting a policy that not only discriminates against age and disability but further propels racial and social inequalities contradicts the directive to institute a non-discriminatory resource allocation policy.

The Work Group seeks to avoid having their recommended Guidelines be seen as biased by coming up with a “fair innings” justification to preferring younger over older patients (see Guidelines page 6, attached).

There is, however, a different reason for preferring a younger patient; namely, the “fair innings” principle. Based on a baseball metaphor (each team is entitled to the same number of chances to bat), this principle endorses the view that a 60-year-old person has already had her chance to live multiple chapters of a life, whereas a 20-year-old person has not had that opportunity. Thus, if these two patients have the same prospects for survival, the younger patient should be preferred.

Their “fair innings” justification for giving priority to younger patients does not change the fact that preferring younger patients discriminates on the basis of age, sex and race.

The new guidelines should clearly articulate that denial of care based on age or other protected factors is impermissible and that age biased criteria be removed. We are happy to work with you in crafting this language.

Please contact Rob Gundermann at [gundermann@cwag.org](mailto:gundermann@cwag.org) to arrange a time to discuss.

Sincerely,

/s/

Regan Bailey, esq.  
Litigation Director  
Justice in Aging

/s/

Sara Buscher, esq.  
Chair of the Board  
Coalition of Wisconsin Aging & Health Groups

/s/

Rob Gundermann  
President & CEO  
Coalition of Wisconsin Aging & Health Groups

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<sup>3</sup> See also, [CDC Finding on Life Expectancy by Race, Ethnicity, and Sex](#)