



The Protection & Advocacy System for South Carolina

April 10, 2020

VIA U.S. MAIL and ELECTRONIC MAIL (twalker@governor.sc.org; erin.boyce@scdhhs.gov; readjh@dhec.sc.gov; sbatson@emd.sc.gov)

The Honorable Henry McMaster
Governor of South Carolina
c/o Trey Walker, Chief of Staff
South Carolina State House
1100 Gervais Street
Columbia, SC 29201

Joshua D. Baker, Director
SC Department of Health and Human Services
c/o Erin Boyce, Chief of Staff
P.O. Box 8206
Columbia, SC 29202

Rick Toomey, Director
SC Dept. of Health and Environmental Control
c/o Jennifer Read, Chief of Staff
2600 Bull Street
Columbia, SC 29201

Kim Stenson, Director
SC Emergency Management Division
c/o Steve Batson, Chief of Staff
2779 Fish Hatchery Road
West Columbia, SC 29172

Re: Protection of People with Disabilities –
Rationing of Medical Care

Governor McMaster, Director Baker, Director Toomey and Director Stenson:

Thank you for your leadership and the tremendous efforts during the COVID-19 crisis. Thank you for your commitment to the people of South Carolina. State agencies have done a very good job in planning, implementation and communication.

Protection and Advocacy for People with Disabilities, Inc. (P&A) appreciates the efforts that you are taking to protect the most vulnerable adults in this state during this crisis. This includes your efforts to secure adequate medical care and supplies for this state. However, we recognize that despite these efforts, the possibility exists that medical providers may face decisions about rationing medical care. P&A wants to ensure that they are aware of the existing legal protection for people with disabilities. South Carolina has the opportunity to lead the way in protecting its most vulnerable citizens from unfair and illegal ration protocols that have happened in other states. Our organization welcomes that opportunity to be a part of developing state protocols for insuring non-discriminatory access to medical care.

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The Honorable Henry McMaster
Joshua D. Baker, Director
Rick Toomey, Director
Kim Stenson, Director
April 10, 2020
Page Two

COVID-19 continues to affect the daily life of people with disabilities, just like every other resident. However, people with disabilities 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 medical systems start to ration medical services or equipment. P&A as the federal and state-mandated protection and advocacy system for South Carolina, is responsible for protecting the rights of individuals, which includes access to medical care.

- a. South Carolina and federal laws recognize the legal rights of people with disabilities: The South Carolina “Bill of Rights for Handicapped Persons” guarantees “full and equal use of public accommodations [and] public services without discrimination” and declares that this is a “civil right.” SC Code of Laws 43-33-520.
- b. The federal Americans with Disabilities Act bars discrimination in public accommodations such as hospitals and medical offices and Section 504 of the Rehabilitation Act precludes discrimination in any activity that receives federal funding such as Medicare/Medicaid and federal grants.

On March 28, 2020, the Office of Civil Rights, the US Health and Human Services, issued a “Bulletin on Civil Rights and the COVID-19 Emergency.”¹ A copy is attached to this letter. It reminds medical providers that the civil rights of all Americans continue to be protected even under our current conditions. HHS explicitly states that:

...[p]ersons with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person’s relative ‘worth’ based on...disabilities..... Decisions...for treatment should be based on an individualized assessment of the patient based on the best available objective medical evidence. (Emphasis supplied.)

All medical facilities, including licensed hospitals should receive this bulletin.

P&A has been monitoring rationing protocols in other states 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.”² 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.”³ 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.⁴ Still other States have rationing protocols that deter individuals with disabilities from seeking lifesaving

The Honorable Henry McMaster
Joshua D. Baker, Director
Rick Toomey, Director
Kim Stenson, Director
April 10, 2020
Page Three

treatment—like New York’s protocol, which allows medical professionals to take personal ventilators from individuals.⁵ South Carolina has an opportunity to develop an overall state plan for medical care in emergencies. We recognize that this will take time and involve multiple state agencies and medical providers. We offer to participate in such an effort. Attached to this letter are bio-ethics resources that may be helpful in creating a state plan and guiding local hospital plans.

Medical bio-ethics is complex. A wide range of issues must be addressed, including initiation of medical care, the amount of treatment, placement of Do Not Resuscitate Orders, and even removal from on-going treatment. In the current COVID-19 pandemic, we see that national areas of concern include hospital admission, access to intensive care beds, availability of ventilators, and medications needed in connection with ventilators.

The COVID-19 Virus has presented very difficult decisions in many areas. We believe that by communicating the OCR Bulletin to medical facilities, and creating a state plan, we will ensure that the lives of people with disabilities are not devalued. We look forward to your assistance in providing a reminder to hospitals of their existing legal duties and then developing a comprehensive plan for the future.

Sincerely,



Beth Franco
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Encls: HHS Office of Civil Rights Bulletin 3-28-2020
Bio-ethics resource listing

cc: Thornton Kirby, FACHE, President and CEO, SC Hospital Association via email (tkirby@scha.org)

The Honorable Henry McMaster
Joshua D. Baker, Director
Rick Toomey, Director
Kim Stenson, Director
April 10, 2020
Page Four

¹ <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>.

² 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 (last visited Apr. 1, 2020).

³ 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 (last visited Apr. 1, 2020).

⁴ 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%20for%20the%20Ethical%20Allocation%20of%20Scarce%20Resources.pdf).

⁵ 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).