

JUSTICE IN AGING

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Center for
Medicare Advocacy

MedicareAdvocacy.org

April 14, 2020

The Honorable Charlie Baker, Governor
Commonwealth of Massachusetts
Massachusetts State House
24 Beacon Street, Room 360
Boston, MA 02133

Dear Governor Baker,

Justice in Aging is a nonprofit national advocacy organization that advocates for the rights of low-income older adults. We, along with our partner organizations, write today to express our recognition of the tremendous challenges Massachusetts 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 Massachusetts to enact policies that do not discriminate on the basis of age or disability.

We have reviewed the Crisis Standards of Care (“CSC”) Planning Guidance for the COVID-19 Pandemic you issued on April 7, 2020, and believe that it violates the antidiscrimination provisions of the Affordable Care Act, which incorporate protections from the Age Discrimination Act of 1975 (“ADA of 1975”).¹ By emphasizing an allocation framework that maximizes the number of life-years saved, the policy discriminates against older adults in the prioritization of the provision of life-saving treatment. The use of certain factors correlated with 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. Bias against older adults in the provision of health care violates federal law. We request immediate amendment of the policy in favor of an unbiased process that relies solely on the individual’s

¹ See also Department of Health and Human Services Office of Civil Rights [Bulletin Civil Rights, HIPAA, and the Coronavirus 2019](#).

likelihood of recovering from coronavirus without regard to age in allocating scarce medical resources.

Overview of the Massachusetts Crisis Standards of Care (CSC)

The Crisis Standards of Care document 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. CSC, pg. 10. This framework is operationalized in the priority scoring for adult patients by factoring in a patient's longer-term prognosis. CSC, pg. 15-16. In addition, the CSC on its face resolves ties using "life-cycle considerations," granting higher priority to younger patients, and relegating older adults age 65-80 and 80 years-old or older to lower priority categories. CSC, pg. 20.

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.² 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."

Massachusetts' CSC guidance violates federal anti-discrimination requirements

² 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>.

The CSC's bias against older adults and the use of categorical age cutoffs are contrary to Section 1557, the ADA of 1975, and OCR guidance. These age-based considerations are impermissibly biased against older adults on their face 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 50 and 65 is granted higher priority over another patient aged 65-80.³ There is little clinical difference between patients aged 65 and 66, yet placement in a "50-65" category immediately gives that patient higher preference for life-saving treatment.

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, that is, 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.

If Massachusetts does not take swift action to remedy the problems in the CSC guidance, Massachusetts and its emergency preparedness programs would be in violation of federal anti-discrimination laws should life-saving preventative treatment be distributed in a way that discriminates based on age. 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 persons are also in violation of the same anti-discrimination requirements.

Massachusetts should not abandon its fundamental role of protecting susceptible populations

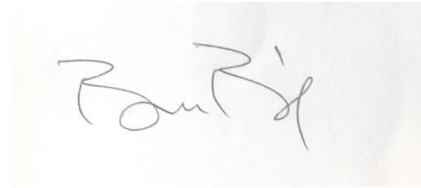
Older adults in Massachusetts are at serious risk of unnecessary death unless changes are made to the existing policy. This population already faces a high risk of death and complications from COVID-19, which is a basis for the self-isolation and social distancing measures taking place.⁴ Tens of millions 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, Massachusetts' 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 it should not be because discriminatory bias led to denial of care.

We urge you to take immediate action to rectify the CSC to comply with the anti-discrimination requirements under Section 1557 of the Affordable Care Act and the Age Discrimination Act of 1975. We would like to work with you to address the issues we have raised in this letter. Please contact Regan Bailey at rbailey@justiceinaging.org so that we may arrange a time to discuss.

³ See [CSC](#), pg. 20 (third priority given to ages 50-65, while fourth priority is given to ages 65-80).

⁴ See [Executive Order No. 591: Declaration of a State of Emergency to Respond to COVID-19](#) (Mar. 10, 2020).

Sincerely,

A handwritten signature in black ink, appearing to read "Regan Bailey", on a light-colored background.

Regan Bailey
Litigation Director
Justice in Aging

/s/ Alice Bers

Alice Bers
Litigation Director
Center for Medicare Advocacy

A handwritten signature in black ink, appearing to read "Robert Greenwald", on a light-colored background.

Robert Greenwald
Faculty Director and Clinical Professor of Law
Center for Health Law and Policy Innovation
Harvard Law School

/s/ Daniel Manning

Daniel Manning
Litigation Director
Greater Boston Legal Services

CC: The Honorable Elizabeth Warren
The Honorable Ed Markey
The Honorable Joe Kennedy, III
The Honorable Ayanna Pressley
Maura Healey, Massachusetts Attorney General
Eric M. Gold, Assistant Attorney General
Daniel Tsai, Acting Secretary of the Executive Office of Health & Human Services