

All Cancers Congress

April 21, 2020

To the Governors and State Health Directors of these United States:

The undersigned organizations are members or supporters of the All Cancers Congress (ACC), a coalition of cancer non-profits dedicated to working together for the benefit of all cancer patients. As states, cities, and individual hospitals confront and prepare for an unprecedented influx of Covid-19 patients, we are concerned by the development of triage plans, also known as crisis standard of care plans or pandemic plans, that may illegally discriminate against people with disabilities such as cancer. We seek your assurance that any plan adopted in your state will comply with all applicable federal laws by neither denying nor disparately impacting cancer patients' rights to receive potentially life-saving treatment due to their disability.

We recognize that healthcare providers and state health departments are facing difficult circumstances and are adopting triage plans to prepare for the possibility of insufficient resources to meet the rising demands of COVID-19. These challenging times would present a scenario ripe for injustice in a society that, unlike the United States, did not specifically prohibit discrimination on the basis of disability. The Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act (ACA) prohibit any COVID-19 triage plan from allocating healthcare based on the designation of certain patients as a lower priority for the receipt of life-saving care, or on a system that has the disparate impact of designating certain patients as a lower priority, by reason of his or her disability. In addition, a triage plan that uses age as a factor may violate the Age Discrimination Act, which prohibits discrimination on the basis of age in U.S. Department of Health and Human Service (HHS) funded programs and activities.ⁱ

Cancer is considered a disability under the ADA through 42 USC § 12102.ⁱⁱ Many cancers affect bodily functions and cancer treatment may compromise a person's immune system. An estimated 16.9 million Americans were living with a cancer diagnosis in 2019, with 1.8 million new cancer cases expected to be diagnosed in 2020.ⁱⁱⁱ

Virtually all healthcare providers in the United States are subject to the disability nondiscrimination mandates of the ADA,^{iv} Section 504^v and/or Section 1557 of the ACA.^{vi} Medical providers, offices, and hospitals operated by a state or local government are subject to Title II of the ADA,^{vii} and private medical providers, offices, and hospitals are subject to Title III of the ADA.^{viii} All healthcare providers and facilities that accept federal financial assistance (including Medicare and Medicaid reimbursements) and all facilities operated by federal agencies are covered by Section 504 of the Rehabilitation Act.^{ix} Additionally, all health care programs and activities, any part of which accept federal financial assistance (including most private healthcare providers and insurance companies), are subject to Section 1557 of the ACA.^x

Healthcare providers and state health departments should note that the Office for Civil Rights (OCR) at HHS issued a bulletin on March 28th of this year addressing the issue of triage programs to reinforce the enduring nature of the aforementioned federal laws through this pandemic. The bulletin reaffirms that

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“...persons 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 the presence or absence of disabilities or age. Decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individualized assessment of the patient and his or her circumstances, based on the best available objective medical evidence.”^{xi}

The discriminatory triage plans being made by state and local hospital officials during this pandemic in no way prevent the spread of a contagious disease for the public health or the public safety, but rather prioritize one life over another based on a perception of which life is more valued. Not only do such plans not protect public health or secure public safety, they strip away well-defined legal protections that would seriously impair or may cause the death of individuals with cancer and other disabilities. The undersigned organizations generally support the use of the [Evaluation Framework for Crisis Standard of Care Plans](#) developed by the Center for Public Representation in conjunction with a number of leading experts in healthcare law and policy.^{xii} The Framework provides six clear and concise questions to ask when evaluating triage plans and other allocation criteria, and how particular allocation criteria amount to discrimination or risk being discriminatory. Use of this Framework will ensure states remain within the bounds of the law while crafting efficient and effective triage plans for the current pandemic and future crises.

As it stands, individual states cannot and should not infringe on the legally protected rights of cancer patients established under the ADA, Section 504 or Section 1557 of the ACA. We appreciate your efforts to ensure that all your state’s residents are treated with fairness, dignity, and respect as we work together to overcome the impacts of the Covid-19 pandemic.

Please let us know how we may assist or support you in your efforts to ethically and efficiently manage care. Contact Raymond Wezik at rwezik@myeloma.org, Kim M. Czubaruk at kczubaruk@cancersupportcommunity.org, Carole Florman at cflorman@cancercare.org or Elridge Proctor at eproctor@go2foundation.org with questions or for more information on how this issue can impact cancer patients.

Respectfully,

Academy of Oncology Nurse and Patient Navigators
Cancer Support Community
Cancer Support Community Arizona
Cancer Support Community Central Indiana
Cancer Support Community Greater Philadelphia
Cancer Support Community Los Angeles
Cancer Support Community North Texas
Cancer Support Community of the Greater Lehigh Valley
CancerCare
Fight Colorectal Cancer
Gilda's Club Chicago
Gilda's Club Quad Cities
GO2 Foundation for Lung Cancer

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International Myeloma Foundation
LUNgevity Foundation
Susan G. Komen
ZERO - The End of Prostate Cancer

ⁱ 45 CFR § 91.11

ⁱⁱ 42 USC 12102 (Defines disability as a physical or mental impairment that “substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment.” Major life activities include “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” The National Cancer Institute recognizes cancer as a collection of diseases related by their abnormal cell growth.)

ⁱⁱⁱ Siegel, R., Miller, K., & Jemal, A. (2020, January 08). Cancer statistics, 2020. Retrieved from <https://doi.org/10.3322/caac.21590> (Approximately 40/100 men and 39/100 women will develop cancer during their lifetime. Advances in diagnosis and treatment have substantially increased the 5-year relative survival rate for all cancers combined to 70% and 64% among whites and blacks, respectively, up from 39% and 27% from the early 1960’s)

^{iv} 42 U.S.C. §§ 12101–12213 (2010)

^v 29 U.S.C. § 794

^{vi} 42 U.S.C. § 18116

^{vii} Id. §§ 12131(1) (public entities include “any State or local government” and “any department, agency, special purpose district, or other instrumentality” of such governments), 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”); see also 28 C.F.R. Part 35, App. B, § 35.102 (“title II applies to anything a public entity does”)

^{viii} 42 U.S.C. §§ 12181(7)(F) (a “professional office of a health care provider, hospital, or other service establishment” are public accommodations), 12182(a) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”); accord 28 C.F.R. § 36.104

^{ix} See 29 U.S.C. § 794

^x 42 U.S.C. § 18116

^{xi} U.S. Department of Health and Human Services. (2020, March 28). OCR Issues Bulletin on Civil Rights Laws and HIPAA Flexibilities That Apply During the COVID-19 Emergency. Retrieved from <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>

^{xii} Center for Public Representation, et al. (2020, April 8). Evaluation Framework for Crisis Standard of Care Plans. Retrieved from <https://www.centerforpublicrep.org/wp-content/uploads/2020/04/Evaluation-framework-for-crisis-standards-of-care-plans-4.9.20-final.pdf>