United States Senate
WASHINGTON, DC 20510

April 10, 2020

The Honorable Alex Azar
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Washington, DC 20201

Seema Verma
Administrator
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Roger Severino
Director
Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Washington, DC 20201

Dear Secretary Azar, Administrator Verma and Director Severino:

We write to urge your agencies to continue to use your legal authorities to ensure the equitable distribution of health care during the coronavirus disease 2019 (COVID-19) pandemic. This unprecedented public health emergency has exposed the concerning scarcity of medical treatment, resources, and equipment in areas hit hardest by the pandemic—raising questions regarding who has access to those resources and how decisions are made to distribute them. Protecting those with the greatest need, including people with disabilities and older adults, is a moral imperative.

As the novel coronavirus spreads and tests health care systems around the world, other countries have already announced treatment priorities that would allocate scare medical resources to those most likely to survive. On Thursday, March 12, 2020, the Italian College of Anesthesia, Analgesia, Resuscitation and Intensive Care Unit issued guidelines regarding the rationing of medical care in response to the overwhelming number of COVID-19 patients flooding Italian hospitals.[1] Italian physicians have made use of these clinical guidelines, limiting access to medical resources for older people in favor of younger people, even when such individuals are likely to benefit from treatment.[2]

We applaud the U.S Department of Health and Human Services (HHS) Office for Civil Rights (OCR) March 28, 2020 bulletin, which states that the provision of medical care "must be guided by the fundamental principles of fairness, equality, and compassion" and emphasizes compliance with

[1] New York Times, "Italy's Health Care System Groans Under Coronavirus -- a Warning to the World," Jason Horowitz, March 12, 2020, https://www.nytimes.com/2020/03/12/world/europe/12italy-coronavirus-health-care.html.
[2] NPR, "People with Disabilities Say Rationing Care Policies Violate Civil Rights," Joseph Shapiro, March, 23, 2020, https://www.npr.org/2020/03/23/820398531/people-with-disabilities-say-rationing-care-policies-violate-civil-rights.

Section 1557 of the Affordable Care Act and Section 504 of the Rehabilitation Act.[3] Here in the United States, some medical ethicists have argued for limiting treatment to those who are most likely to survive.[4] Traditionally, American health care policy and treatment approaches have largely been driven by the concepts of cost-effectiveness analysis (CEA) and quality-adjusted life year (QALY).[5] But these approaches are inherently discriminatory. They devalue the life of people with disabilities and older adults.

We urge you to use your legal authority to ensure the United States health care system and our health care professionals abstain from using disability and aging characteristics to limit access to necessary medical treatment. Denying treatment for COVID-19 related illnesses based on disability or age alone is completely unacceptable, even in the face of shortages. The Americans with Disabilities Act of 1990 (ADA) makes clear that discrimination based on disability is illegal. This is a principle we must uphold, especially in the face of difficult times. Specifically, we believe HHS should ensure the implementation of the following principles:

- **Prohibit Perceptions of Quality of Life of People with Disabilities and Older Adults From Being Used to Deny or Give Lower Relative Priority for Care**
  In times of resource scarcity, it is particularly important to emphasize that people with disabilities and older adults have a right to non-discrimination, regardless of severity of impairment. Many people with disabilities and older adults are confronted with the prejudice that their lives are less valuable than others. This perception can and does translate into the misguided perception that their lives are not worth living or that they are worthy of scarce medical resources.

- **Prohibit Denial or Lower Relative Priority for Care Based on Relative Non-Negligible Survival Probabilities**
  Proposals to exclude people from treatment whose underlying disabilities mean they have a lower (but non-negligible) probability of survival are a serious source of concern. The ADA and Section 504 mean that turning away individuals from life-sustaining treatment on the basis of their disability in order to prioritize those with higher survival probabilities would be illegal discrimination on the basis of disability. While providers should not be obligated to deliver care to those they believe are unlikely to survive, they should not be permitted to discriminate against the disabled who are also likely to benefit from treatment.

- **Prohibit Denial or Lower Relative Priority for Care Based on Resource Intensity**
  Hospitals and health care providers should be able to prioritize those with a greater urgency of need but should not be permitted to give lower relative priority to those whose anticipated intensity of use of scarce medical resources exceeds that of other current or anticipated

[3] HHS Office for Civil Rights in Action, "BULLETIN: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19)," March 28, 2020, https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf?fbclid=IwAR08W4Y9980ZbPb40v0BK6M_fKiTGlNjb-WgGzm5a-peDX7wfG-bfCSBI0U.
[4] New York Times, "How the Coronavirus May Force Doctors to Decide Who Can Live and Who Dies," Ezekiel J. Emanuel, James Phillips, and Govind Persad, March 12, 2020, https://www.nytimes.com/2020/03/12/opinion/coronavirus-hospital-shortage.html.
[5] *See* Stanford Encyclopedia of Philosophy, "Disability and Health Care Rationing," January 29, 2016, https://plato.stanford.edu/entries/disability-care-rationing/.

patients. When dealing with patients who require care with a similar level of urgency, covered entities should maintain existing practice of "first come, first serve" rather than prioritizing those with the least resource-intensive needs.

- **Require Individualized, Evidence-Based Assessment**
  Though there are a variety of factors that hospitals and health care providers may consider in the allocation of scarce medical resources, each of these must be evaluated within the context of an individualized, evidence-based assessment of the patient. Hospitals and other covered entities should not be permitted to make broad-based determinations to exclude or give lower relative priority for access to care solely on a person having a disability or being over a certain, arbitrary age.

We recognize the current COVID-19 outbreak will place serious stress on the country's health care systems. While it is appropriate for providers to delay non-essential care, people with disabilities and older adults should not face discrimination in the allocation of life-sustaining treatment from which they are able to clinically benefit. Given the challenges anticipated in the coming weeks and months, we ask you to continue to protect the rights of people with disabilities.

We look forward to an expedient response on this critical issue.

Sincerely,

Elizabeth Warren
United States Senator

Robert P. Casey, Jr.
United States Senator

Margaret Wood Hassan
United States Senator

Kirsten Gillibrand
United States Senator

Chris Van Hollen
United States Senator

Christopher S. Murphy
United States Senator

Sherrod Brown
United States Senator

Tim Kaine
United States Senator