

DISABILITY RIGHTS CENTER - NH

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March 24, 2020

VIA FIRST-CLASS MAIL AND EMAIL

Commissioner Lori Shibinette
NH Department of Health and Human Services
129 Pleasant Street
Concord, NH 03301

Re: COVID-19 and Allocation of Resources

Dear Commissioner Shibinette:

The COVID-19 pandemic presents the State with very difficult circumstances, placing extraordinary demands on the Department of Health and Human Services (DHHS) and the Governor, as well as social and health care providers across the State. It is at this critical time that you and the Governor can provide valuable guidance to those providers to ensure that, if the current pandemic requires decisions about how to ration or allocate scarce medical resources, such decisions are made without discriminating on the basis of disability.

As you likely are aware, news sources have widely reported that allocation or rationing decisions are being made as the COVID-19 pandemic overwhelms health care service capacity. These decisions are affecting the administration of COVID-19 tests, the provision of medical supplies including PPEs, and the allocation of staff and hospital capacity. Some of the decision models being employed are based on principles that risk disadvantaging persons with disabilities. See, e.g., Ezekiel J. Emanuel, James Phillips, and Govind Persad, “Opinion | How the Coronavirus May Force Doctors to Decide Who Can Live and Who Dies,” *The New York Times*, March 12, 2020, <https://www.nytimes.com/2020/03/12/opinion/coronavirus-hospital-shortage.html>.

You are uniquely positioned to guard against such discrimination in New Hampshire and we urge you to do so by issuing guidance for all health care providers to follow. This can be done by issuing a directive to health plans and insurers, hospitals, and other medical providers on maintaining their obligations under state and federal disability nondiscrimination laws during the coronavirus crisis, including in the allocation of scarce medical resources. Such guidance should include the following basic principles:

- The presence of a disability, including a significant disability, is not a permissible basis for denying persons access to care or giving them a lower priority for care.
- Although the possibility of a person’s survival may receive some consideration in allocation decisions, that consideration must be based on the prospect of surviving the condition for which the treatment is designed – in this case, COVID-19 – and not other

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disabilities. In addition, it must be based on a clear indication from the person's circumstances that the person is unlikely to survive or to benefit from treatment.

- The fact that a person with a disability may require reasonable accommodations during treatment, or more intensive treatment, is not a permissible basis for denying care or allocating the person a lower priority for care.
- All medical decisions about providing care must be based on current objective medical evidence, and not based on generalized assumptions about a person's disability. Treatment decisions may not be made based on misguided assumptions that persons with disabilities experience a lower quality of life.

Covered entities should be permitted to prioritize those with a greater urgency of need and delay non-urgent care. They need not allocate scarce resources to persons with no chance of survival. But persons with disabilities should not face discrimination in seeking life-sustaining care that they will benefit from. The lives of persons with disabilities are equally valuable to those without disabilities, and healthcare decisions based on devaluing the lives of persons with disabilities are discriminatory.

I appreciate that you are dealing with a wide range of critical issues. I remain available to participate in discussions related to these issues impacting persons with disabilities.

Thank you.

Sincerely,

A handwritten signature in black ink that reads "Stephanie Patrick". The signature is written in a cursive, flowing style.

Stephanie Patrick

Cc: Hon. Christopher Sununu (via email and first-class mail)