



April 14, 2020

Office of the Governor  
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Dear Governor Little,

I am an attorney at Disability Rights Idaho (DRI), Idaho's Protection and Advocacy System. DRI protects and promotes the rights of individuals with disabilities throughout the state. I am writing today to ensure that the rights of individuals with disabilities are included in any emergency or triage treatment policies that the state develops to address the novel coronavirus and resultant respiratory infection, COVID-19.

Individuals with disabilities are some of Idaho's most vulnerable citizens. We commend you for issuing the March 25, 2020, stay-home order in an effort to protect Idaho's citizens from unnecessary novel coronavirus infection. We appreciate your effort to make your COVID-19 briefings accessible by providing a sign language interpreter as well as features to make the Idaho Government website accessible. We are sure that you join with us in our effort to protect individuals with disabilities from discriminatory COVID-19 triage policies.

As I am sure you are aware, other states have already developed discriminatory triage policies that have necessitated complaints to the United States Health and Human Services Office of Civil Rights (HHS and OCR). For example, prior to OCR intervention on April 8, 2020, outdated guidance from Alabama's Department of Public Health website specifically named patients with, "severe or profound mental retardation, moderate to severe dementia, and severe traumatic brain injury [as] unlikely candidates for ventilator support." Alabama Disability Advocacy Program, The Arc of the United States, and other disability advocacy organizations filed a complaint with OCR alleging that such language was discriminatory.

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The OCR intervened quickly, and Alabama clarified that it had revised the policy from February of this year and agreed to take the outdated guidance off of all official websites. In response to Alabama's quick action, OCR Director Roger Severino stated, "Persons with disabilities have equal worth and dignity and should not be deprioritized for healthcare based on a supposedly lower 'quality of life' compared to persons without disabilities."

News of these discriminatory policies has reached the disability community in Idaho, and DRI has already received emails from individuals with disabilities and organizations who support them that are worried that they will be denied life-saving care if they contract COVID-19 and are subject to such policies.

While DRI understands that triage policies are necessary in times of natural disasters or pandemics, federal laws including Section 1557 of the Affordable Care Act (ACA), Section 504 of the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA) require that these policies set neutral decision-making rules based on the individual medical condition of the patient.

HHS OCR issued a bulletin on March 28, 2020, titled "Civil Rights, HIPPA and Coronavirus Disease 19 (COVID-19). It is enclosed with this letter. OCR enforces the ACA and Section 504, which prohibit discrimination on the basis of disability by HHS-funded health programs and activities. These civil rights protections remain in effect in emergency situations like the present one. In the bulletin, the OCR noted 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 the presence or absence of disabilities. Decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individual assessment of the patient based on the best available objective medical evidence." Additionally, OCR director Roger Severino stressed that, "Our civil rights laws protect the equal dignity of every human life from ruthless utilitarianism."

The Consortium for Citizens with Disabilities (CCD) wrote to HHS in response to the OCR bulletin and outlined a number of principles that would lead toward inclusive triage policies. It is also enclosed with this letter. This is particularly important because DRI is concerned that if the State leaves individual hospitals and hospital systems to establish their own policies and protocols, these individual policies will leave out procedures for making non-discriminatory determinations regarding the receipt of medical care. To avoid such discriminatory policies in Idaho, DRI urges the State to immediately adopt and disseminate mandatory statewide guidelines based on the CCD letter which clarify the following:

1. That the ADA and Section 504 require government decisions regarding the allocation of treatment/life-saving resources to be made based on individualized determinations, using current objective medical evidence, not generalized assumptions about a person's disability;

2. That the ADA and Section 504 prohibit treatment allocation decisions based on misguided assumptions that people with disabilities experience a lower quality of life, or that their lives are not worth living;
3. That the ADA and Section 504 prohibit treatment allocation decisions based on the perception that a person with a disability has a lower prospect of survival;
4. That the ADA and Section 504 prohibit treatment allocation decisions based on the perception that a person's disability will require the use of greater treatment resources;
5. That a person is "qualified" for purposes of receiving COVID-19 treatment if they can benefit from the treatment (that is, can recover) and the treatment is not contraindicated.

Some counties in Idaho already have already begun transferring infected individuals to facilities in other counties in an effort to avoid exceeding their capacity for ICU beds and ventilators.<sup>1</sup> And certainly, Idaho continues to see daily increases in number of individuals infected as well as number of individuals who have died.<sup>2</sup> DRI urges you to take action to ensure equal access to medical care for all of Idaho's citizens by implementing the above principles in any upcoming triage plans.

We understand that a number of groups as well as physicians, nurse practitioners, nurses, and bioethicists will provide input in developing these policies, and we urge inclusion of the disability community, whose very lives are in peril, as imperative in the creation of these protocols.

Due to the urgency of this matter, please let us hear from you by April 17, 2020.

Sincerely,



Lessie R. Brown  
Staff Attorney

Cc: Idaho Council on Developmental Disabilities  
American Civil Liberties Union  
ADA Task Force

Enc.: Letter re: COVID-19 and Disability Discrimination  
OCR Bulletin 3-28-20

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<sup>1</sup> <https://www.boisestatepublicradio.org/post/blaine-county-deals-coronavirus-hot-spot-other-rural-idaho-communities-prepare-worst#stream/0>

<sup>2</sup> <https://www.idahostatesman.com/news/coronavirus/article241988226.html>