



Center for Public Representation



Disability Rights Education & Defense Fund



## **RESOLUTION OF FEDERAL CIVIL RIGHTS COMPLAINT RAISES THE BAR IN PROHIBITING MEDICAL DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES DURING COVID-19 PANDEMIC**

For Immediate Release

June 26, 2020

**WASHINGTON, D.C.** – Today, the U.S. Department of Health & Human Services Office for Civil Rights (OCR) [announced](#) the resolution of a federal complaint filed against Tennessee, one of nearly a dozen [complaints](#) filed by a coalition of national disability advocates – the Center for Public Representation, The Arc of the United States, Bazelon Center for Mental Health Law, Autistic Self Advocacy Network, Disability Rights Education and Defense Fund and Samuel Bagenstos -- challenging states' plans for rationing medical care during the COVID-19 pandemic as discriminating against people with disabilities. Medical rationing policies have disproportionately impacted Black people with disabilities, who have higher rates of COVID-19 infection and [hospitalization](#). Today's resolution sets a national precedent, with OCR building off earlier resolutions of complaints regarding Alabama's and Pennsylvania's plans and weighing in for the first time on the discriminatory impact of a number of provisions common in many states' rationing plans.

The [complaint](#) against Tennessee, brought by the coalition of national disability advocates together with Tennessee advocates led by Disability Rights Tennessee and the Civil Rights Enforcement and Education Center (CREEC), alleged that Tennessee's plan illegally excluded certain people with disabilities from accessing life-saving treatment like ventilators based on their disabilities and deprioritized others based on their disabilities. In response to the complaint and engagement with OCR, Tennessee has revised its "[Guidance for the Ethical Allocation of Scarce Resources During a Community-Wide Public Health Emergency](#)" to comply with federal disability rights laws and ensure that people with disabilities are not discriminated against even when public health emergencies, such as the COVID-19 pandemic, necessitate the rationing of scarce medical resources.

The following are key precedent-setting changes in Tennessee's policy to avoid discrimination against people with disabilities:

- **No Categorical Exclusions Based on Disability or Resource Intensity:** An individual can no longer be excluded from medical treatment based solely on a diagnosed disability or the fact that an individual might require more time or resources to recover because they have a disability. This is the first time OCR has addressed resource intensity as a factor. Rather than making assumptions about a patient's ability to respond to treatment based solely on stereotypes, medical personnel must perform an individualized assessment of each patient based on the best objective current medical evidence.

- **No Long-Term Survivability Considerations:** Due to this resolution, Tennessee is now the first state to explicitly eliminate longer-term survivability as a consideration in treatment decisions, changing its Guidance to allow medical personnel to consider only “imminence of mortality.” Survivability is a factor that can be fraught with speculation, mistaken stereotypes, and assumptions about the quality of life and lifespan of people with disabilities.
- **Reasonable Modifications Required:** Tennessee’s Guidance now requires hospitals to make reasonable modifications to the Sequential Organ Failure Assessment (SOFA)—the tool used to prioritize access to medical treatment—to avoid penalizing people with underlying conditions that are unrelated to their ability to benefit from treatment. This is the first time OCR has weighed in on modifications to assessment tools. It also requires hospitals and other long-term care facilities (such as nursing homes) to reasonably modify no-visitor policies when necessary to ensure equal access to care.
- **Reallocation of Personal Ventilators Prohibited:** Medical personnel may not reallocate the personal ventilator of a patient who uses a ventilator in their daily life to another patient whom the personnel deem more likely to benefit from the ventilator in receiving treatment. This is the first OCR resolution addressing this issue.

“Today’s OCR resolution makes clear that policies common in many states’ medical rationing plans – such as denying care based on the belief that disabled people take longer to recover or by using tools that penalize people for having disabilities that do not impact their ability to survive COVID19 – constitute illegal disability discrimination,” said Alison Barkoff, Director of Advocacy at the Center for Public Representation. “We hope that states will revisit their policies in light of today’s resolution.”

“This resolution makes major progress toward ensuring that people with disabilities have equal access to the care and tools necessary to fight COVID-19 infection,” said Shira Wakschlag, Director of Legal Advocacy and General Counsel at The Arc. “We are grateful to OCR for continuing to recognize the rights of people with disabilities during this pandemic and we will keep fighting for revisions to discriminatory policies that could mean the difference between life and death for people with disabilities.”

In addition to filing complaints with OCR, the national disability organizations have created resources to assist to assist stakeholders across the country in evaluating and advocating for non-discriminatory medical rationing plans at [Center for Public Representation](#) and [The Arc](#).

For more information about today’s resolution, contact:

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