JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

September 2, 2020

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

Re: The Age Bias in Utah's Crisis Standard of Care Tiebreaker Provision

Dear Mr. Severino

Justice in Aging, the Center for Medicare Advocacy, and the American Society on Aging have been closely monitoring the devastating impact the coronavirus has had on the lives of older adults. Older adults have died at astronomical rates – people aged 65-74 years die at 90 times the rate of people 18-29.[1] The Center for Disease Control and Prevention reports that people over the age of 65 make up 79.3% of the people who have died from the disease.[2] In light of the heavy burden this disease has placed on older adults, we want to acknowledge the immense work your office has done in a number of states to improve Crisis Standards of Care (CSC) during this challenging time. OCR's leadership in resolving complaints involving Crisis Standards of Care and ensuring that discriminatory standards are revised has provided assurance to older adults and persons with disabilities that their lives are valuable and worth saving.

We write today regarding the recently announced resolution with Utah's CSC.[3] During your roll out call with stakeholders, you mentioned the heightened protections the new Utah policy would provide to older adults in particular. While we celebrate these improvements with you, we were troubled to note that Utah's revised CSC includes the use of age as a tiebreaker. We would like to discuss our concern regarding this language and share with you how we view it as a violation of federal civil rights protections for older adults.

Utah's revised Crisis Standards of Care include the following tiebreaker language:

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[1] For older age ranges, the rate of death only increases – 75-84 die at 220 times the rate of young people, and ages 85 and over die at rates 630 times higher. Older adults bear the greatest burden of any population while younger adults tend to live through the disease. CDC Cases, Data & Surveillance, (updated August 18, 2020) https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html

[2] CDC COVID Data Tracker (visited August 31, 2020) https://covid.cdc.gov/covid-data-tracker/#demographics

[3] OCR Press Release (August 20, 2020) available at: https://www.hhs.gov/about/news/2020/08/20/ocr-resolves-complaint-with-utah-after-revised-crisis-standards-of-care-to-protect-against-age-disability-discrimination.html.

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> Tiebreakers: Because younger persons generally have better short-term mortality outcomes than older persons with the same clinical condition, when after individualized assessments of short-term mortality risk, not all patients with similar MSOFAs can be given ICU/ventilator care, relative youth may be used as a tiebreaker. [4]

This language allows "relative youth" to be used as a tiebreaker for scarce resources if multiple patients have similar Modified Sequential Organ Failures Assessment (MSOFA) scores and individualized assessments of short-term mortality risk. The stated reason is because "younger persons generally have better short-term mortality outcomes than older person with the same clinical condition." *Id*. While limited to a tiebreaker, the use of an age as the determinate will always cut against older adults, denying them care based solely on the fact that they are older.[5] The Age Discrimination Act of 1975 (Age Act) and Section 1557 of the Affordable Care Act prohibit such an outcome.[6]

One major goal of a CSC is to ensure decisions surrounding scarce resource allocation are made based on an individualized, clinical assessment of the patient and without discrimination. The revised CSC tiebreaker language relies on generalizations based on age rather than assessment, contradictory to prior OCR resolutions. For example, in resolving the complaint in Alabama brought by disability advocates, OCR found fault with Alabama's standards because it denied treatment through "blunt age categorizations, such that older persons might automatically be deemed ineligible for life-saving care without any individualized assessment or examination and based solely on missing a strict age cut off."[7] While Utah's CSC does not impose strict age cut offs, the tiebreaker provision will work to prevent an older patient from receiving care in favor of a younger patient with a similar MSOFA score and simlar individualized assessment. In that instance, the biased age-based tiebreaker would give preference to the younger person outside of any individualized factors. To avoid bias, tiebreaker provisions in crisis standards should not be based on generalized assumptions that an older individual must have worse mortality outcomes.

Arguments that age-based discrimination, such as the life-cycle or fair-innings theories assume that the preventable death of an older individual is less tragic or more desirable, and "systematically disfavor[s] older patients, disabled persons, and potentially other groups."[8]

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[4] Utah Crisis Standards of Care p. 7 https://coronavirus-download.utah.gov/Health/Utah-Crisis-Standards-of-Care-Guidelines-v7-08182020.pdf

[5] Coronavirus shows how ageism is harmful to health of older adults, June 15, 2020; https://theconversation.com/coronavirus-shows-how-ageism-is-harmful-to-health-of-older-adults-138249

[6] The Age Act establishes that "no person ... shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance."42 U.S.C. § 6102; Section 1557's incorporation of the Age Act expands those protections to all health programs and activities who receive federal financial assistance. 45 C.F.R. § 92.4.

[8] "Universal Do-Not-Resuscitate Orders, Social Worth, and Life-Years: Opposing Discriminatory Approaches to the Allocation of Resources During the COVID-19 Pandemic and Other Health System Catastrophes Free",

Instead, the fair allocation of resources should rely on "the ability to survive the acute event, not long-term survival."[9] This life-cycle theory is in conflict with OCR's guidance that medical care cannot be denied "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."[10] Some CSC use a lottery as a tie breaker, which effectively eliminates bias in the determination of who receives potentially lifesaving treatment. When tiebreaker considerations are required, they should be based on unbiased considerations and not be based on unjust and discriminatory factors of age (e.g., prioritizing "youth"), disability, and race.

The tiebreaker language in the Utah CSC is not limited to situations where there are large age differences between the two people needing care. By its terms, it would be applied in situations where there may be just a few years difference, such as a 70 year old man and a 73 year old man. When they are so clinically similar as to require a tiebreaker, this would lead to absurd and age-biased result of denying care to the 73 year old man simply because he is three years older.[11]

Older adults are at serious risk of discrimination resulting in death should the Utah tiebreaker standards actually be applied. This illness has targeted older adults, and older adults need the treatment necessary to fight back. In Salt Lake County, people over the age of 60 make up 195 of the 230 deaths due to COVID-19.[12] It is because the older population already faces a high risk of death and complications from COVID-19 that self-isolation and social distancing measures have been undertaken across the country.[13] People everywhere are doing what they can to save older adults from exposure to this disease. The tiebreaker language in the Utah CSC inexplicably denies critical care to the very people these efforts were meant to protect - those most at risk of dying from COVID-19 complications. Death rates are lower in Utah, in part, because the population is young and younger people are less likely to die of COVID-19.[14] For

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Annals of Internal Medicine, Ideas and Opinions, Thomas A. Bledsoe, MD; Janet A. Jokela, MD, MPH; Noel N. Deep, MD; Lois Snyder Sulmasy, JD, April 24, 2020.); *see also* AGS Position Statement on Allocating Scarce Resources in the COVID-19 Era (explaining use of "life-years saved" and "long-term predicted life expectancy" shows bias against older adults).

[9] *Id.*

[10] OCR Bulletin, Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19) (March 28, 2020) available at: https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf.

[11] Similarly problematic results would arise where the age gap is wider, but both people are considered relatively young. An age-based policy that provided care to a 19 year old male military member and denied it to 30 year old mother of three young children be a tiebreaker that makes sense to their families and the community?

[12] *See* https://slco.org/health/COVID-19/data/

[13] *See* Executive Order No. 591: Declaration of a State of Emergency to Respond to COVID-19 (Mar. 10, 2020).

[14] See Kem Gardner Policy Institute, The University of Utah, "Research Brief: Is Utah's Relatively Low COVID-19 Death Rate Due to its Younger Population?" July 2020, https://gardner.utah.edu/wp-content/uploads/C19-Age-Brief-July2020.pdf

older adults, we should build triage standards that support the most impacted population. "The explicit use of age in triage protocols—either as a categorical exclusion, or as a secondary tie-breaker under a "life-years saved," "survivability" or "fair innings" rationale—further frustrates the ability to assess the extent to which the physiology of advanced age impacts COVID-19 survival, rather than the triage protocols themselves that deprioritize the elderly." [15]

We applaud OCR's efforts to resolve problematic crisis standards for countless older adults and persons with disabilities and hope that by raising these issues you will work to remove age-based bias in tiebreaker provisions from CSCs. We would greatly appreciate an opportunity to discuss this matter with you and a few other aging advocates as soon as you are available. Please contact Regan Bailey at rbailey@justiceinaging.org to schedule.

Sincerely,

REGAN BAILEY
GELILA SELASSIE
DENNY CHAN
Justice in Aging

___/s/__ *Alice Bers*
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[15] Teneille R. Brown , Leslie P. Francis & James Tabery (2020) Embedding the Problems Doesn't Make Them Go Away, The American Journal of Bioethics, 20:7, 109-111, DOI: 10.1080/15265161.2020.1779864; *see* https://www.tandfonline.com/doi/full/10.1080/15265161.2020.1779864