January 19, 2022

The Honorable Dennis Schrader
Office of the Secretary
Maryland Department of Health
Herbert R. O'Conor State Office Building
201 West Preston St.
Baltimore, MD
21201

Dear Secretary Schrader,

Thank you for your steadfast leadership and ongoing commitment to address the crisis facing our state due to the COVID-19 pandemic. Despite it being nearly two years since this pandemic began, today we find ourselves in unprecedented times. Over the past week, many of our state's hospitals have been forced to implement various allocation of scarce resources (ASR) policies—meaning they are activating plans to determine which Marylanders receive critical treatment and resources, and which do not. That determination can be one of life and death. It also is one that without proper direction can lead to older adults and people with disabilities losing their lives as a result of bias and discrimination. Now, more than ever our state **must** adopt a uniform policy that clearly directs medical providers on how to allocate these scarce resources in an unbiased manner that protects the civil rights of older adults, people with disabilities and members of communities of color.[1] As health care professionals and disability and aging advocates, **we are writing to strongly recommend that you utilize your authority pursuant to Executive Order 22-01-04-01 to direct hospitals to implement the Maryland Healthcare Ethics Committee Network (MHCEN)'s ASR framework, which was developed to minimize the potential for discriminatory impact and bring it in line with federal civil rights laws.**

The pandemic has laid bare the structural inequities that people face in accessing and receiving health care. Without a clear and non-discriminatory policy, determinations of who will and will not receive a critical resource or treatment may be laden with inadvertent bias, privileging the lives of young people without disabilities, over those with disabilities and older adults. Today in Maryland, hospitals are using divergent crisis standards of care policies, meaning that prioritization for resources and treatment varies depending on what hospital a person goes to. Fairness in pandemic ASR requires that all hospitals in the state use the same framework—one that is clear about how to achieve greater equity when triaging scarce life-saving resources. We understand that many hospitals are using a framework developed by a group of the five largest hospitals in the state (Johns Hopkins Medicine, University of Maryland Medical System, MedStar Health, Lifebridge Health, and Luminis Health) (hereinafter "the 5H" group). The Maryland Health Care Ethics Committee Network (MHECN) modified 5H's ASR framework to better delineate how hospitals can perform ASR without discriminating against people with disabilities and older adults. Peoples' lives are at stake and people with disabilities and older adults are scared that they will be systematically discriminated against if they go to the hospital:

[1] "Crisis Standards of Care and COVID-19: What Did We Learn? How Do We Ensure Equity? What Should We Do?", J.L. Hick et al, National Academies of Medicine, August 30, 2021, https://doi.org/10.31478/202108e; *see also*, "Non-Discrimination in the Stewardship and Allocation of Resources During Health System Catastrophes Including COVID-19," American College of Physicians, March 26, 2020; https://www.acponline.org/acp_policy/policies/acp_policy_on_non-discrimination_in_the_stewardship_of_healthcare_resources_in_health_system_catastrophes_including_covid-19_2020.pdf; and "Covid Triage Standards May Worsen Racial Disparities in Treatment," Medical Xpress, September 21, 2021, https://medicalxpress.com/news/2021-09-covid-triage-standards-worsen-racial.html.

Ms. Burris is a 52 year-old woman with muscular dystrophy, who lives in Baltimore. She has a tracheostomy and uses a ventilator. She is worried about whether she, or her son who has an intellectual disability and seizures, would be denied care at a hospital due to their disabilities if they needed inpatient care at this time. When queried she said "just give me a chance to live" and went on to add "people will disabilities need a fair chance of survival."

Ms. Wright is a 70 year-old Black woman who lives in Baltimore County. She was hospitalized with COVID 19 a year ago and lost a kidney at the time. Since then she has returned home and relies on dialysis twice weekly to survive. While ASR frameworks are designed to identify people unlikely to benefit from scarce life-saving resources because they are too sick, it's important to be sure that judgments about likelihood of recovery are accurately made. The 5H framework disadvantages patients from accessing scarce life-saving treatments who have "severe comorbid conditions with death likely within 1 year". However, individual assessments of long-term prognosis (such as one year) are often inaccurate, disproportionally impact older adults and people with disabilities, and are inconsistent with OCR's best practices for ASR policies. MHECN's ASR framework avoids this pitfall by focusing only on short-term mortality (30 days) as a factor to be considered.

During the pandemic, the Department of Health and Human Services, Office of Civil Rights (OCR) responded to a series of complaints regarding states' ASR policies and clarified how federal civil rights protections apply to the rationing of scarce resources.[2] OCR indicated that "persons 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 or age. Decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individualized assessment of the patient based on the best available objective medical evidence."[3]

Fortunately, here in Maryland through a year-long collaboration between MHCEN[4] and disability and aging advocates, we have an ASR framework available and ready for adoption that simply refines the 5H ASR framework to better preserve the civil rights of people with disabilities and older adults. [5] During the pandemic, MHECN created a working group to cohere efforts across healthcare facilities to implement a plan for allocating scarce resources if needed. This group included participation from Justice in Aging and Disability Rights Maryland, two advocacy organizations that seek to promote the civil rights of people with disabilities and older adults, including older adults of color.

MHCEN's ASR framework reflects a long process of ethical and legal deliberation. It was informed by different disciplines, including input from the fields of law, ethics, nursing, and various medical specialties. The guidelines recognize, among other key points, that ASR must be kept separate from the

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[2] See, https://www.hhs.gov/about/news/2021/05/25/ocr-provides-technical-assistance-state-arizona-ensure-crisis-standards-care-protect-against-age-disability-discrimination.html
https://www.hhs.gov/about/news/2021/01/14/ocr-provides-technical-assistance-ensure-crisis-standards-of-care-protect-against-age-disability-discrimination.html
https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/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

[3] https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf

[4] MHECN is a membership organization for Maryland hospitals and other health care institutions that have an ethics committee

[5] MHCEN, Justice in Aging, and Disability Rights Maryland met with the five-hospital system group to provide feedback on their policy to ensure that it did not discriminate against people with disabilities and older adults. The five-hospital group was amenable to making many changes to the policy as a result of this feedback; however, shifts in priorities during the pandemic to vaccination, led the final revisions of the policy to be delayed. As a result, MHCEN finalized the policy in accordance with these recommendations and received no significant objections from the 5H group.

physician's direct patient care responsibilities; that core tenets of public health ethics apply; that both objective evaluations and individualized medical judgments are essential in the triage process to reduce the risk of bias; and that ASR must be keenly attentive to the history of discrimination in the healthcare arena and its impact on people of color, people with disabilities, and older adults.

Executive Order 22-01-04-01 affords the Secretary of Health the authority "to take actions, including without limitation, the issuance of directives and the establishment of appropriate policies and procedures, to control, restrict, or regulate the use, sale, dispensing, distribution, or transportation of anything needed to respond to the medical consequences of the catastrophic health emergency." We strongly recommend that you use this authority to direct the use of the attached MHCEN ASR framework as the state standard for triaging scarce life-saving treatments under ASRs in Maryland hospitals. We kindly ask that you respond to us by **January 25, 2022**.

For questions regarding this request please contact Megan Rusciano, Managing Attorney, Disability Rights Maryland at meganr@disabilityrightsmd.org or (443) 692 2487.

Cc: Kathleen Ellis, General Counsel, Maryland Department of Health

Most sincerely,

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