

# DISABILITY RIGHTS

at University Legal Services



Via Email: [eom@dc.gov](mailto:eom@dc.gov); [wayne.turnage@dc.gov](mailto:wayne.turnage@dc.gov)

April 3, 2020

Mayor Muriel Bowser  
Deputy Mayor Wayne Turnage  
District of Columbia Office of the Mayor  
1350 Pennsylvania Avenue NW  
Washington, DC 20004

Dear Mayor Bowser and Deputy Mayor Turnage:

Disability Rights DC at University Legal Services (DRDC) is the designated protection and advocacy agency that represents DC residents with disabilities and advocates to promote their rights.<sup>1</sup> Along with the 22 undersigned organizations, we write to convey our serious concern about the health and welfare of people with disabilities and seniors during the Covid-19 pandemic in the face of inevitable critical care and equipment shortages. If the pandemic results in governmental decisions to ration medical treatment, we urge the District to ensure that decisions are made about allocation of medical treatment without resorting to disability-based discrimination.<sup>2</sup>

The District must promulgate and enforce policies that include mandatory principles of nondiscrimination to ensure access to life-saving medical care for people with disabilities who contract Covid-19 and require access to life-saving

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<sup>1</sup> Disability Rights DC at University Legal Services (DRDC) is plaintiffs' counsel and plaintiff in *MJ v. District of Columbia*, a class action lawsuit under ADA Title II and the Medicaid statute on behalf of DC youth with significant mental and behavioral health challenges seeking intensive community-based services to prevent institutionalization. DRDC is also plaintiffs' counsel in *Brown v. District of Columbia*, a class action lawsuit under ADA Title II on behalf of DC Medicaid beneficiaries in nursing facilities seeking assistance from DC government to transition back to the community with the Medicaid long-term care services they need.

<sup>2</sup> Sheri Fink. *The Hardest Questions Doctors May Face: Who Will Be Saved? Who Won't?* New York Times, March 21, 2020, available at: <https://www.nytimes.com/2020/03/21/us/coronavirus-medical-rationing.html>.

220 I Street, NE, Suite 130  
Washington, D.C. 20002  
(202) 547-0198 ext.128 Fax: (202) 547-2662 TTY: (202) 547-2657  
[mrifkin@uls-dc.org](mailto:mrifkin@uls-dc.org)

intensive care and ventilators in hospitals and long-term care facilities such as nursing facilities and acute-care facilities. Moreover, the District must ensure that all health care providers have access to personal protective equipment (PPE) for all staff.

Outdated, discriminatory policies in other states regarding emergency resource allocations which illegally endorse the denial of access by people with disabilities and seniors to medically-necessary ventilators have prompted federal civil rights complaints in five states.<sup>3</sup> HHS' Office for Civil Rights issued guidance under Section 1557 of the Affordable Care Act and Section 504 of the Rehabilitation Act emphasizing the statutory prohibition against disability-based discrimination.<sup>4</sup> The guidance further prohibits rationing of scarce medical resources during an emergency based on medical professionals' devaluing of the lives of people with disabilities.<sup>5</sup> As such, neither the District nor medical providers (*i.e.*, hospitals, clinics, doctors) licensed or certified to operate in the District should deny medical care to persons with disabilities or seniors 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. Health care decisions must be based on an individualized assessment of the patient based on the best available objective medical evidence.

The District must issue a set of mandatory principles requiring all governmental and private medical providers to make treatment decisions consistent with the non-discrimination requirements of the ADA, Section 504 of the Rehabilitation Act and Section 1557 of the Affordable Care Act. Failure to issue

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<sup>3</sup> [https://www.centerforpublicrep.org/wp-content/uploads/2020/03/OCR-Complaint\\_3-23-20-final.pdf](https://www.centerforpublicrep.org/wp-content/uploads/2020/03/OCR-Complaint_3-23-20-final.pdf) (WA complaint); [https://www.centerforpublicrep.org/wp-content/uploads/2020/03/AL-OCR-Complaint\\_3.24.20.docx.pdf](https://www.centerforpublicrep.org/wp-content/uploads/2020/03/AL-OCR-Complaint_3.24.20.docx.pdf) (AL complaint); <http://www.bazelon.org/wp-content/uploads/2020/03/3-27-20-TN-OCR-Press-Release-COVID-19-Treatment-Plan-Discrimination-Complaint.pdf> (TN complaint); <http://www.bazelon.org/wp-content/uploads/2020/03/3-27-20-Kansas-OCR-complaint.pdf> (KS complaint). Louisiana's complaint is not available on the internet.

<sup>4</sup> HHS, Office for Civil Rights in Action, *Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019* (March 28, 2020) available at: <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>; see also Consortium of Citizens with Disabilities letter to Secretaries of HHS, available at: <http://www.c-c-d.org/fichiers/Letter-re-COVID-19-and-Disability-Discrimination-final.pdf>

<sup>5</sup> *Id.*

directives that include these principles, or promulgate regulations, results in the risk that people with disabilities will be denied treatment based on misguided societal views about the quality or value of their lives. Specific non-discriminatory policies must govern crisis conditions marked by: shortages of critical care medical equipment (*e.g.*, ventilators) or emergency medical treatment provided by the DC Fire Department and contractor ambulance services, or shortages in ICU and other hospital bed space. Although District regulations require hospitals to create emergency preparedness plans,<sup>6</sup> the District has neither ensured that such plans exist, nor that they meet appropriate legal, human and civil rights standards.

The DC Emergency Healthcare Coalition of acute care hospitals, skilled nursing facilities, and community health centers, published an Emergency Operations Plan issued in 2014.<sup>7</sup> The plan outlines various coordination points among hospitals and other medical care facilities, but does not include principles for nondiscriminatory access to medical treatment, and scarce medical supplies and equipment such as ventilators in the face of a pandemic and surging treatment needs that outstrip healthcare provider capacity.<sup>8</sup>

The District must also ensure sufficient supplies of personal protective equipment (PPE) such as gloves and masks for all health care providers. PPE is essential to prevent the spread of Covid-19 and promote the continuity of services for people with disabilities in health care and long-term care facilities, group homes, and in their homes through the State Plan Personal Care Assistance (PCA) Program and the Medicaid Waiver Programs for People with Intellectual and Developmental Disabilities (I/DD Waiver) and for People who are Elderly and/or have Physical Disabilities (EPD Waiver). PCAs, home health aides, certified nurse aides, direct support professionals (DSPs), nurses and therapists are at high risk of contracting and spreading Covid-19 because, among other reasons, people with disabilities and seniors who receive these services have chronic health conditions including compromised immune systems, and are subject to heightened risk of the virus. Moreover, many of the people with disabilities and seniors served by health care workers cannot practice the recommended continuous handwashing without

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<sup>6</sup> D.C. Mun. Reg. tit. 22-B §§ 2724, 2824 (requiring a disaster plan for every adult and pediatric hospital).

<sup>7</sup> DC Emergency Healthcare Coalition Emergency Operations Plan (6-2014), *available at*: <https://files.asprtracie.hhs.gov/documents/01-dcehc-eop-baseplan-62014-508.pdf>

<sup>8</sup> *Id.* at 3.

help from their aides. Others live in congregate settings where the virus may spread more rapidly among residents. The use of PPE protects the health care workers as well as the beneficiaries who receive their services.

DC Health recently recommended that “[a]ll healthcare facilities should implement plans to conserve personal protective equipment (PPE) for DC’s most vulnerable patients, frontline healthcare workers, and first responders.”<sup>9</sup> But the recommendations focus exclusively on medical or health care facilities and do not cover care by nurses, PCAs, DSPs and others who provide care to people with disabilities and seniors in their homes, group homes, and other settings to prevent the caregivers and beneficiaries from contracting or spreading Covid-19 to each other. The District should issue a directive to all health care providers mandating they provide PPE to all staff, and including resources to assist them in accessing PPE.

We urge you to exercise your leadership to ensure equitable, non-discriminatory access to medical treatment and equipment for all District residents, regardless of age and disabilities. Please respond by Friday, April 10, 2020, with the steps you are taking to address these concerns.

Thank you for your cooperation and attention to these pressing issues.

Sincerely,

/s/

Marjorie Rifkin  
Managing Attorney  
Disability Rights DC at  
University Legal Services

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<sup>9</sup> DC Health Guidance, *COVID-19: Recommendations for Conserving the Supply of Personal Protective Equipment in DC* (March 26, 2020), available at: <https://dchealth.dc.gov/node/1469386>; see also DC Health, *Recommendations On Limitations Of Elective and Non-Urgent Medical and Dental Procedures* (March 17, 2020), available at: [https://dchealth.dc.gov/sites/default/files/dc/sites/doh/page\\_content/attachments/Letter%20-%20Elective%20Procedures.FINAL\\_.pdf](https://dchealth.dc.gov/sites/default/files/dc/sites/doh/page_content/attachments/Letter%20-%20Elective%20Procedures.FINAL_.pdf) (urging medical providers to limit elective, non-urgent medical and dental care to conserve resources including PPE as part of “community mitigation strategies” in the wake of the pandemic).

Alice Abrokwa  
Senior Attorney  
National Center for Youth Law

Maria E. Blaeuer, Esq.  
Director of Programs and Outreach  
Advocates for Justice and Education,  
Inc.

Lewis Bossing  
Senior Staff Attorney  
Bazon Center for Mental Health  
Law

Lydia X. Z. Brown  
Founder and Volunteer Director  
Fund for Community Reparations for  
Autistic People of Color's  
Interdependence, Survival, and  
Empowerment

Tina M. Campanella  
Chief Executive Officer  
Quality Trust for Individuals with  
Disabilities

Karen A. Newton Cole  
Executive Director  
Neighborhood Legal Services  
Program

Sam Crane  
Legal Director, Director of Public  
Policy  
Autistic Self Advocacy Network

Sharon daVanport  
Executive Director  
Autistic Women & Nonbinary  
Network (AWN)

Robert D. Dinerstein  
Professor of Law and Director  
Disability Rights Law Clinic,  
American University\*

\*Institutional affiliation for  
identification only

Yaida Ford  
Managing Principal  
Ford Law Pros PC

Tawara D. Goode  
Assistant Professor & Director  
Georgetown University Center for  
Excellence in Developmental  
Disabilities

Llamilet Gutierrez  
Executive Director  
Amara Legal Center

Jean Harris  
President  
NAMI DC

Thomas L. Mangrum, Jr.  
Ricardo T. Thornton, Sr.  
Co-Presidents  
Project ACTION!

Damian Miller,  
Executive Director  
Arc of D.C.

Ian M. Paregol  
Executive Director  
DC Coalition of Disability Service  
Providers

Scott Schenkelberg  
Chief Executive Officer  
Miriam's Kitchen

Kate Scott  
Interim Executive Director  
Equal Rights Center

Grace M. Lopes  
Executive Director  
Rising for Justice

Jonathan Smith, Executive Director  
The Washington Lawyers' Committee  
for Civil Rights

Ariel Levinson-Waldman  
Founding President and Director-  
Counsel  
Tzedek DC

Alison Whyte  
Executive Director  
DC Developmental Disabilities  
Council

Cc:

Councilmember Vincent Gray [vgray@dccouncil.us](mailto:vgray@dccouncil.us)

Councilmember Anita Bonds [abonds@dccouncil.us](mailto:abonds@dccouncil.us)

Councilmember Brianne Nadeau [bnadeau@dccouncil.us](mailto:bnadeau@dccouncil.us)

Toni Jackson, Esq. [toni.jackson@dc.gov](mailto:toni.jackson@dc.gov)

