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July 1, 2020

Governor Greg Abbott
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

*Via U.S. Mail and Email sarah.hicks@gov.texas.gov
CCOMRequests@gov.texas.gov*

Phil Wilson
Acting Executive Commissioner
Texas Health and Human Services
P.O. Box 13247
Austin, Texas 78711

Via U.S. Mail and Email Phil.Wilson@hhsc.state.tx.us

Dr. John Hellerstedt
Commissioner
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714

Via U.S. Mail and Email John.Hellerstedt@hhsc.state.tx.us

Dear Governor Abbott, Executive Commissioner Wilson, and Commissioner Hellerstedt:

Almost three months ago, on April 6, 2020, Disability Rights Texas and more than a dozen other advocacy groups wrote the three of you to urge the issuance of statewide guidance on the rationing of healthcare resources that prohibits discrimination against persons with disabilities.¹ Despite our request, the state never issued any guidance on this critical issue.

Perhaps, due to the relatively low numbers of COVID-19 cases and hospitalizations in Texas at the time of our April letter, you did not see the need to issue statewide guidance protecting the rights of Texans with disabilities from discriminatory healthcare rationing. Now, however, as the Governor acknowledged in his June 26, 2020 Executive Order, there have been “substantial increases in COVID-19 positive cases, and increases in the COVID-19 positivity rate and hospitalizations resulting from COVID 19....” Accordingly, the June 26 Executive Order contained “targeted and temporary adjustments to the reopening plan” as a means “for reducing the growing spread of COVID-19 and the resulting imminent threat to public health....”

In short, what might have seemed unnecessary in April is, we believe, clearly urgent today. We know that hospitals and their ICUs in Dallas, Houston, Austin, and San Antonio are at or near capacity. We know that San Antonio hospitals have for the past few weeks been considering the rationing of Remdesivir, which is being used to treat COVID-19. Therefore, we repeat our request that you issue statewide guidance

¹ Our April 6, 2020 letter, with proposed guidance, attached.

to all hospitals that expressly prohibits the rationing of healthcare resources in a manner that discriminates against individuals with disabilities and violates federal non-discrimination laws.

Finally, the U.S. Department of Health & Human Services, Office for Civil Rights (“OCR”), just issued an early case resolution after Tennessee updated its crisis standards of care (“CSC”) plan to ensure that the criteria does not discriminate against persons based on disability or age.

Following technical assistance from OCR, Tennessee updated its CSC plan and:

- “Clarified that resource-intensity and duration of need on the basis of age or disability should not be used as criteria for the allocation or re-allocation of scarce medical resources. This protects patients who require additional treatment resources due to their age or disability from automatically being given a lower priority to receive life-saving care;
- Removed language permitting the use of a patient’s long-term life expectancy as a factor in the allocation and re-allocation of scarce medical resources, instead indicating that providers should consider only risk of imminent mortality;
- Added language stating that reasonable modifications to the use of the state’s primary instrument for assessing likelihood of short-term survival should be made when necessary for accurate use with patients with underlying disabilities. Such reasonable modifications ensure that people with disabilities are evaluated based on their actual mortality risk, not disability-related characteristics unrelated to their likelihood of survival;
- Removed categorical exclusion criteria that prohibited people with disabilities from receiving care on the basis of their diagnosis, and required individualized assessments of patients based on the best available objective medical evidence; and
- Incorporated language stating that hospitals should not re-allocate personal ventilators brought by a patient to an acute care facility to continue pre-existing personal use with respect to a disability. Under this language, long term ventilator users will be protected from having a ventilator they take with them into a hospital setting taken from them to be given to someone else.”²

Tennessee was not alone in having to revise its crisis standards of care or triage guidance: both Pennsylvania and Alabama also quickly resolved cases with OCR following complaints.³

In April, we asked that your offices issue clear guidance prohibiting the devaluing of the lives of persons with disabilities before the need for rationing arose in Texas. With the prospect of healthcare rationing now substantially more likely, we must ask again that your offices quickly issue such lifesaving guidance. We stand ready to assist you in developing appropriate guidance.

²<https://www.hhs.gov/about/news/2020/06/26/ocr-resolves-complaint-tennessee-after-it-revises-its-triage-plans-protect-against-disability.html>

³ <https://www.hhs.gov/about/news/2020/04/16/ocr-resolves-civil-rights-complaint-against-pennsylvania-after-it-revises-its-pandemic-health-care.html>; and <https://www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html>.

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If you have any questions or would like to discuss this critical issue further, you may reach me at 512.454.4816.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Faithfull", with a long horizontal flourish extending to the right.

Mary Faithfull
Executive Director
Disability Rights Texas