



DISABILITY RIGHTS MISSISSIPPI

Protection and Advocacy for Individuals with Disabilities

April 9, 2020

Tate Reeves, Governor

550 High Street, Sillers Building, 19th Floor

Jackson, MS 39201

Governor Reeves,

Disability Rights Mississippi (DRMS) is the designated Protection and Advocacy organization for the state of Mississippi and is a part of the national network of Protection and Advocacy organizations as established in 42 USC 15041 *et seq.* DRMS provides legal assistance, advocacy services, and information and referrals to residents of Mississippi living with disabilities. DRMS also investigates allegations of abuse and neglect of persons with disabilities and is empowered by federal law to do so. Our primary areas of focus are the ADA, Medicaid services, treatment facilities, and educational services for children.

I write to you today to express our concern about the health and safety of Mississippians living with disabilities during the crisis created by the COVID-19 pandemic. While we are encouraged by your leadership in the effort to combat the virus, we urge you to 1) take action to ensure equal access to medical care for all Mississippi residents, especially if our hospitals are overwhelmed and are forced to ration medical treatment and equipment, and 2) take action to ensure the health and safety of state inmates during the COVID-19 crisis.

I. Medical Rationing

COVID-19 is a novel coronavirus that attacks the lungs and the need for ventilators and Intensive Care Unit (ICU) beds is paramount. Unfortunately, many models predict that at some point the demand for ICU beds and ventilators will exceed Mississippi's

capacity for seriously ill patients. We share your hope that the stay at home order, and other mitigation efforts taken so far, will flatten the curve to the extent that our existing resources will be sufficient to handle demand when the peak of the pandemic arrives in Mississippi. However, as news reports tell us, not all Mississippians are taking the pandemic as seriously as they should and our fellow residents - including those with disabilities - continue to contract COVID-19. DRMS is very concerned that people with disabilities will be discriminated against when medical resources begin to run short.

Some states have policies that address the allocation of medical resources in the event of a natural disaster or pandemic. Ideally, those policies set neutral decision-making rules based on the individual medical condition of the patient. Unfortunately, some of our neighbors, like Tennessee and Alabama, enacted policies that discriminate against individuals with disabilities. Alabama's policy has already been the subject of a complaint to the Office of Civil Rights at the US Department of Human Services (OCR).

Recently, on or about April 8, 2020, OCR announced an early resolution with Alabama after the state agreed to rescind its policy guidance and remove references to it from state websites. OCR found that the Alabama policy discriminated against both elderly people and people with disabilities with regard to the allocation of medical resources and treatment. As a recipient of HHS funds, OCR found that Alabama is required to follow applicable federal statutes prohibiting discrimination on the basis of disability. OCR complaints are currently pending against three other states.

As you know, Mississippi is also subject to the provisions of federal laws prohibiting discrimination against persons with disabilities. In the medical care setting, those laws include the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act. Title II of the ADA prohibits state and local governments from discriminating against people with disabilities. Title III prohibits discrimination in places of public accommodation, such as hospitals, clinics, and doctor's offices. Section 504 does the same for any recipient of federal funds and Section 1557 affects health care programs and activities that receive federal funds, which includes most private healthcare providers and private insurance companies.

Mississippi does not appear to provide any guidance for physicians and the healthcare professionals who make treatment decisions of their responsibilities under the federal laws outlined above. The Mississippi Department of Health does not have any regulations regarding medical treatment for people with disabilities. The Mississippi Division of Medicaid has policies that state that the Division does not discriminate, but that is only with regard to the services they provide and not directly applicable to

healthcare providers. Similarly, the Mississippi Code does not contain a statute that addresses potential discrimination in healthcare.

In the absence of a state policy, individual hospitals and hospital systems are left to establish their own policies and protocols. It is imperative that these individual policies and protocols set forth procedures for making non-discriminatory determinations regarding the receipt of medical care and require the formation of Ethics Committees to oversee the execution of these procedures. State guidance is necessary to ensure people with disabilities will not be automatically or prematurely deprioritized for medical care.

On March 28, 2020, OCR issued specific guidance which states that “[P]ersons with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgements about a person’s relative ‘worth’ based on the presence or absence of disabilities. Decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individual assessment of the patient based on the best available objective medical evidence.”

DRMS urges the Office of the Governor of the State of Mississippi to issue guidance to hospitals and other healthcare providers regarding their obligations under the ADA and other federal disability non-discrimination laws to individuals with disabilities during all phases of treatment. This guidance should be made public and should address both the allocation and continuation of medical treatment during this or any similar crisis. It should include the following criteria:

1. Treatment allocations must be based on individualized determinations, using current objective medical evidence. Treatment decisions should not be based on generalized assumptions about a person’s disability.
2. Treatment allocation decisions cannot be based on misguided assumptions that people with disabilities experience a lower quality of life or that their lives are not worth living.
3. Treatment allocation decisions cannot be based on the perception that a person with disability has a lower prospect of survival. While the possibility of a person’s survival may receive some consideration in an allocation decision, that consideration must be based on the prospect of surviving the condition for which the treatment is designed - in this case, COVID-19 - and not other disabilities.
4. Treatment allocation decisions cannot be based on the perception that a person’s disability will require the use of greater treatment resources.

Modifications must be made where needed to ensure persons with disabilities have equal opportunity to benefit from treatment.

DRMS does not know when COVID-19 cases or hospitalizations will peak in Mississippi. However, we believe that such guidance, coming from the governor's office, is critical to protecting people with disabilities who are unfortunate enough to contract COVID-19. State guidance should be issued as soon as possible so that it is in place well before physicians and healthcare professionals are forced to make heart-wrenching decisions regarding medical rationing. We understand that you may wish to consult with various stakeholders in drafting a healthcare rationing policy. DRMS stands ready to represent the community of people living with disabilities in Mississippi, whose very lives are in peril if we do not act in time.

II. Prisons and Facilities

DRMS is very concerned about Mississippians living with disabilities in both long term care facilities and those confined in the state's jails and prisons. COVID-19 is highly contagious and these populations are particularly vulnerable to infection due to the conditions of their confinement and the relatively close quarters to other people such facilities naturally entail. According to the Bureau of Justice Statistics office of the US Department of Justice, an estimated 32% of prison inmates have at least one disability and roughly 20% of inmates have an intellectual or developmental disability.

DRMS has authority under federal regulations to enter facilities where people with disabilities live or receive treatment to investigate allegations of abuse and neglect (45 CFR 1326.217(b) and 42 CFR 51.42(b)) as well as general monitoring of facilities in an effort to prevent abuse or neglect from happening in the first place (42 CFR 51.42(c)(3)). This authority includes both long term care facilities, such as Intermediate Care Facilities (ICF) and state hospitals, as well as jails and prisons in Mississippi (45 CFR 1386.19, 45 CFR 1326.27, and 42 CFR 51.2).

As you are well aware, Mississippi's prisons were already in crisis before COVID-19 had arrived in the United States. The poor physical condition of the state's prisons and low staff levels have led state inmates to be confined unsanitary and unhealthy circumstances that have already jeopardized the health and safety of the people in the state's custody. The introduction of COVID-19 to Mississippi poses a particular risk to our state's inmates, who cannot practice the social distancing measures recommended by the Center for Disease Control and other national healthcare authorities.

DRMS must continue its work, even during the current pandemic. Recently, DRMS has made efforts to ensure the health and safety of people living with disabilities without risking infection of vulnerable people and in a manner that respects social distancing guidelines. We have made contact with the facilities run by the Mississippi Department of Mental Health (MDMH) via telephone to inquire about the measures the facilities have put in place in an effort to protect the residents in their charge from COVID-19 exposure and treat and isolate those who have been exposed. MDMH leadership has been cooperative in this regard and we appreciate the efforts the Department has made in these difficult times.

Unfortunately, DRMS has not received the same level of cooperation from the Mississippi Department of Corrections (MDOC). Despite several attempts, and communication with various administrative and legal personnel, we have not received any substantive response to our inquiries regarding the measures taken, if any, to protect state inmates from COVID-19 exposure and the efforts to treat inmates who have contracted the disease.

The information requested is no more than DRMS would be able to access under federal regulations if our personnel were at a MDOC in person. We believe our requests to be both reasonable and necessary to protect inmates with disabilities in our state.

We urge you to require Interim MDOC Commissioner Tommy Taylor to order his staff to comply with federal regulations and respond to our request for information regarding what measures are being taken to protect the state's inmates from COVID-19.

Due to the urgency of these matters, please let us hear from your office by April 15, 2020.

Sincerely,

s/ Polly Tribble

Polly Tribble

Executive Director

CC: Diana Mikula, Mississippi Department of Mental Health
Tommy Taylor, Mississippi Department of Corrections
Dr. Thomas Dobbs, Mississippi Department of Health

