



Coalition of Wisconsin Aging & Health Groups

Financial Empowerment – Personal Advocacy – Victim Rights

“Advocating for all Generations”

The Coalition of Wisconsin Aging Groups is a nonprofit, nonpartisan, statewide membership organization that was founded in 1977.

April 13, 2020

Via Email

State Disaster Medical Advisory Committee
Wisconsin Department of Health Services
PO Box 7850
Madison, WI 53707-7850

Re: Wisconsin Ventilator Allocation Advisory Work Group Recommendations

Dear Committee:

I chair the Coalition of Wisconsin Aging & Health Groups’ Board. We help Wisconsin seniors and people with health conditions achieve healthy aging and receive medications, care and supports. We also provide crime victim and elder abuse services. We have been serving Wisconsin seniors since 1977.

Health care organizations and the State may not discriminate on the basis of race, color, national origin, disability, age, sex, and exercise of conscience and religion by virtue of receiving federal health care funding (such as Medicare and Medicaid). Last week, you discussed the Wisconsin Ventilator Allocation Advisory Work Group’s recommended Guidelines. <https://publicmeetings.wi.gov/download-attachment/88be4c97-60e2-45fc-911f-69d12f7b148e> Those Guidelines are subject to federal civil rights laws.

The Ventilator Allocation Guidelines should specifically acknowledge federal civil rights laws prohibiting age and disability discrimination in the provision of health care – including the Age Discrimination Act of 1975, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act.

All references to age and disability in the Guidelines should be removed. Many people we serve fall into both categories; neither of which should be used to prohibit the allocation of a needed ventilator to a patient. In addition to age discrimination, using age raises issues of sex and racial discrimination because life expectancy varies by sex and race. www.cdc.gov/nchs/products/databriefs/db244.htm

We will limit our specific comments to age discrimination as disability organizations are providing feedback about disability. We will also comment on the organ donation recommendation.

AGE DISCRIMINATION

We agree with Justice in Aging that: “During a pandemic such as COVID-19 with limited resources, capacity, and time, healthcare providers may resort to internalized biases, including ageism. We have already seen examples in other countries that have prioritized younger patients receiving care over older adults.” <https://www.justiceinaging.org/wp-content/uploads/2020/04/Justice-in-Aging-Letter-to-Sec-Ghaly-Age-Discrimination-04032020.pdf>

The HHS Office of Civil Rights (OCR) in announcing its bulletin on discrimination during the COVID-19 emergency said:

Today, the Office for Civil Rights (OCR) at the U.S Department of Health and Human Services (HHS) is issuing a bulletin to ensure that entities covered by civil rights authorities keep in mind their obligations under laws and regulations that prohibit discrimination on the basis of race, color, national origin, disability, age, sex, and exercise of conscience and religion in HHS-funded programs, including in the provision of health care services during COVID-19.

<https://www.hhs.gov/about/news/2020/03/28/ocr-issues-bulletin-on-civil-rights-laws-and-hipaa-flexibilities-that-apply-during-the-covid-19-emergency.html>;

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

OCR recently settled a disability and age discrimination complaint against the State of Alabama about its Ventilator Allocation Guidelines. The complaint itself addressed disability discrimination, but OCR added age as an issue.

The Alabama document said regarding Hospital Tier 3 allocations: “Possibilities include: 1. Restriction of treatment based on disease-specific epidemiology and survival data for patient subgroups (may include age-based criteria).”

<https://www.documentcloud.org/documents/6824966-Alabama-Ventilator-Triage>

In announcing its settlement with the State of Alabama, OCR said:

OCR has reviewed the complaint and determined that, as a recipient of HHS funds, Alabama is required to comply with the civil rights statutes listed above. OCR is concerned that following the 2010 Criteria could result in discrimination against persons with disabilities by denying or stopping ventilator services simply because an individual has an intellectual disability. **Another concern is the potential for the 2010 Criteria to be used to impose 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 cutoff.** (bold supplied)

<https://www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html>

The recommended Wisconsin Guidelines would also run afoul of the federal laws prohibiting age discrimination in the provision of health care. They include the “blunt age categorizations” that OCR said violate federal law. Within Wisconsin’s Tiered Allocation strategy, patients are grouped into three tiers with age cutoffs for exclusion of ventilators. For example, all patients over age 70 with COVID-19 are in the Orange tier. Those younger than age 70 must have been on a ventilator for a specified time period or have specific scores on clinical mortality prediction tools before they are excluded from being on a ventilator. See Mortality Categories on page 3, attached. Once patients are allocated to the tiers (stages), older rather than younger patients within a tier are excluded from receiving a ventilator per page 6, attached.

If the Guidelines are adopted without removing the age references, OCR will require that they be removed in response to a complaint.

ORGAN DONATION

The recommended Guidelines say:

Patients who meet brain death criteria or who have severe neurological injury and are potential organ donors should NOT be included in the GRAY group [excluded from use of a ventilator] unless the demand for ventilators greatly exceeds supply. This is because the organ-sustaining treatments that these potential donors require may provide life-saving benefit for more than one patient who is awaiting organ transplantation (assuming transplantation of vital organs continues despite the pandemic).

The reasoning here is faulty. If a COVID-19 patient needs a ventilator, the denial of a ventilator will almost immediately cause the patient’s death. The patient waiting for a transplant will not immediately die without an organ, but, instead may have to wait longer for one to become available. This section of the Guidelines should be removed.

Sincerely,

/s/

Sara Buscher, Chair
Coalition of Wisconsin Aging & Health Groups
sarabus@milwpc.com

CC: Rob Gundermann, President & CEO

A hospital's incident command system team should determine when to move from one stage to the next of this tiered allocation strategy

Clinical Overview of Mortality Categories:

	ADULTS		PEDIATRIC
<p>GRAY Category Patients</p> <p><i>EXTREMELY UNLIKELY TO SURVIVE THIS ADMISSION DESPITE INTERVENTION</i></p>	<ul style="list-style-type: none"> Moribund Trauma (confirmed by 2 trauma attendings) Severe burns in patients with any two (2) of the following <ul style="list-style-type: none"> Age >60 >40% TBSA Inhalation Injury Cardiac Arrest <ul style="list-style-type: none"> Unwitnessed OR Witnessed and recurrent / refractory Metastatic malignant disease New severe and irreversible neurological event or condition with high expected mortality* 		<ul style="list-style-type: none"> Moribund Trauma (confirmed by 2 trauma attendings) Severe burns with expected mortality >90% Cardiac Arrest <ul style="list-style-type: none"> Unwitnessed OR Witnessed and recurrent / refractory Metastatic malignant disease New severe and irreversible neurological event or condition with high expected mortality**
	ADULTS with COVID-19	ADULTS with Other Conditions	PEDIATRIC
<p>RED Category Patients</p> <p><i>HIGHLY UNLIKELY TO SURVIVE THIS ADMISSION DESPITE INTERVENTION</i></p>	<ul style="list-style-type: none"> Patients age >80 <ul style="list-style-type: none"> (Due to disease specific mortality of COVID-19) All Ages <ul style="list-style-type: none"> Severe ARDS + Severe AKI <ul style="list-style-type: none"> (Cr >2, need for renal replacement therapy) SOFA >11 	<ul style="list-style-type: none"> SOFA >11 After 120 hours of ICU care: <ul style="list-style-type: none"> SOFA 8-11 without improvement Transplant ineligible end-stage organ failure (needing critical care) <ul style="list-style-type: none"> Class III/IV CHF Severe chronic lung disease: FEV <25%, pHTN with HF III/IV, Mean PA pressure >50 MELD >20 	<ul style="list-style-type: none"> PELOD >33 After 168 hours of ICU care: <ul style="list-style-type: none"> PELOD 25-33 without improvement OR Worsening PELOD score since admission
<p>ORANGE Category Patients</p> <p><i>UNLIKELY TO SURVIVE THIS ADMISSION DESPITE INTERVENTION</i></p>	<ul style="list-style-type: none"> Patients age >70 <ul style="list-style-type: none"> (Due to disease specific mortality of COVID-19) All Ages <ul style="list-style-type: none"> After 48 hours of ICU care: <ul style="list-style-type: none"> SOFA score increased by 2 After 120 hours of ICU care: <ul style="list-style-type: none"> SOFA 8-11 without improvement 	<ul style="list-style-type: none"> After 48 hours of ICU care: <ul style="list-style-type: none"> SOFA 8-11, without improvement Transplant eligible end-stage organ failure (needing critical care) <ul style="list-style-type: none"> Class III/IV CHF Severe chronic lung disease MELD >20 	<ul style="list-style-type: none"> After 120 hours of ICU care: <ul style="list-style-type: none"> PELOD 25-33, without improvement Transplant ineligible end-stage organ failure (needing critical care)

*Severe and irreversible neurological event or condition with high-expected mortality in adults:

- 1) Global cerebral injury due to metabolic/ infectious / anoxic insult on CT/CTA/MRI
- 2) High grade aneurysmal subarachnoid hemorrhage with poor GCS
- 3) Intraparenchymal hemorrhage with high ICH score
- 4) Penetrating brain injury with significant parenchymal damage
- 5) Moderate to Severe traumatic brain injury with high IMPACT score

**Severe and irreversible neurological event or condition with high-expected mortality in pediatric patients:

- 1) Global cerebral injury due to metabolic/ infectious / anoxic insult on CT/CTA/MRI
- 2) Intraparenchymal hemorrhage
- 3) Moderate to Severe traumatic brain injury

Tiered Allocation Strategy Flowchart:

