



April 10, 2020

Guidance Relating to Non-Discrimination in Medical Treatment for Novel Coronavirus 2019 (COVID-19)

During a pandemic such as COVID-19, healthcare providers are required to make difficult decisions concerning the allocation and rationing of limited healthcare resources, including staff, supplies, and space. As healthcare resources become scarce, hospitals and other healthcare institutions move through the continuum of care from conventional care, to contingency care, to crisis care. This guidance seeks to remind the healthcare community of their ongoing obligations to render healthcare in an ethical and non-discriminatory manner, obligations that are even more critical when providers are operating beyond their capacity. Healthcare institutions and providers must ensure effective protocols are in place in order to support the delivery of ethical, non-discriminatory decisions, especially those related to the allocation and rationing of limited healthcare resources.

It is essential that healthcare institutions operate within an ethical framework and consistent with civil rights laws that prohibit discrimination in the delivery of healthcare. Specifically, in allocating healthcare resources or services during public health emergencies, healthcare institutions are prohibited from using factors including, but not limited to race, ethnicity, sex, gender identity, national origin, sexual orientation, religious affiliation, age, and disability unrelated to near-term survival. Assumptions or stereotypes based on these characteristics serve no meaningful purpose in differentiating between people in the context of healthcare allocation decisions, and as further detailed below, are unacceptable both from an ethical standpoint, and as a matter of civil rights law.

Significant legal protections are in place to prohibit discrimination in the delivery of healthcare. Healthcare providers in the United States are subject to nondiscrimination mandates. Specifically, federal civil rights laws, including Section 1557 of the Affordable Care Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, prohibit discrimination in the context of allocation of medical care. In addition to protections under federal law, the Illinois Human Rights Act provides that every person is entitled access to the “full and equal enjoyment of services.” These laws provide a mandate to healthcare providers at all times, including during the current COVID-19 crisis.

Healthcare institutions should review their protocols regarding allocation and rationing of limited healthcare resources to ensure that they incorporate the fundamental principles of fairness, equity, and non-discrimination. This guidance provides recommendations for the delivery of appropriate care both during the immediate public health crisis caused by COVID-19 as well as to address the continued impact of the crisis on the healthcare system.

COVID-19 and Preventing Disability Discrimination

During times of crisis and scarcity of resources, persons with disabilities are particularly at risk of experiencing immediate life-threatening and inadequate medical treatment resulting from discrimination and biased decision-making in crisis standard of care settings.

On March 28, 2020, the U.S. Department of Health and Human Services issued a Bulletin entitled “Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19),” which provides guidance to address the goals of “providing care quickly and efficiently,” while recognizing the “fundamental principles of fairness, equality and compassion that animate our civil rights laws.” The guidance specifically directs, “Persons with disabilities . . . should not be put at the end of the line for health services during emergencies. Our civil rights laws protect the equal dignity of every human life from ruthless utilitarianism.”

To avoid discrimination against persons with disabilities in the allocation of healthcare resources to institutions and the rationing of medical treatment, healthcare providers are urged to consider the following principles:

- Healthcare providers should base decisions on individualized assessments, without assumptions about “quality of life” related to a person’s underlying disability. Judgments based on quality of life are inherently subjective, prone to bias, and rely on misguided assumptions about how persons with significant disabilities can have full, meaningful lives. Individualized assessments must not be based on assumptions about a person’s pre-existing condition or diagnosis, or the average life expectancy for people with such a pre-existing condition (i.e. HIV/AIDS, cancer, diabetes) or diagnosis.
- Persons with disabilities should be permitted to rely on reasonable accommodations that provide meaningful access to information and equal opportunity to benefit from the treatment. For example, these modifications might include interpreter services or the presence of an assistant, aide, or family member, provided that essential precautions can be taken to contain the spread of infection. Use of technology should also be considered in evaluating necessary reasonable accommodations.
- The use of effective communication is critical to a patient’s autonomy and ability to participate in their care. Otherwise, medical providers risk substituting misplaced assumptions and biases about the person with a disability for verifiable information and medical history. In addition, effective communication leads to better transparency in process and protocols, which helps to ensure that the medical provider and person with a disability understand each other and agree.
- Healthcare providers, like all other professionals, should be aware of the risk of making decisions and rendering medical treatment influenced by implicit bias, which operates below the surface of consciousness. Providers should review their treatment protocols to ensure that they safeguard against the biases of practitioners. And, moving forward, providers should ensure a diversity of stakeholders have an opportunity to review and provide feedback on protocols.

COVID-19 and Preventing Racial Disparities

The COVID-19 pandemic exacerbates racial disparities that already exist in the administration of healthcare. To reduce racial disparities in the allocation of healthcare resources to institutions and the rationing of medical treatment, healthcare providers are urged to consider the following principles:

- Members of racial and ethnic minority groups, and Black and Latinx individuals in particular, experience higher rates of undiagnosed and untreated chronic medical conditions and disabilities due to historic disparities in access to healthcare. Therefore, it is essential that members of these communities who present for COVID-19 treatment receive medical history inquiries and diagnostic testing to ensure such treatment is efficacious. For example, such screenings may address conditions such as HIV/AIDS, diabetes, heart disease, lung disease, and high blood pressure, all of which are chronic conditions that can lead to increased fatalities from COVID-19.
- Communication is critical to reverse the historic tendency of marginalized communities to forgo early and preventative disease diagnosis and management out of fear that the healthcare system will not respond to their healthcare needs. In order to mount an effective healthcare response in a pandemic environment, it is critical that the barrier of “reticent participation” be lifted and marginalized communities be encouraged to participate in COVID-19 pandemic initiatives. Thus, outreach to these communities is essential to encourage participation in telehealth screenings, testing, and access to medications to ensure effective management of chronic conditions that are potentially life-threatening when coupled with a COVID-19 infection.
- To ensure critical medical information related to COVID-19 is disseminated quickly, healthcare providers should use a range of communication methods to reach the broadest audience. This may involve partnering with formal and informal community leaders such as elected officials, religious leaders, and community service providers within a particular racial demographic. Communication should be repeated and sustained, which will assist the effectiveness of informal means of communication, such as word-of-mouth.
- To accommodate diverse communities, healthcare providers should evaluate the accessibility of services offered in terms of location, frequency, and hours of operation. If possible, services should accommodate persons who work second or third shifts.

COVID-19 and Access to Healthcare

- Persons experiencing financial insecurity should be informed that their receipt of care related to COVID-19 is not contingent upon insurance, financial status, or ability to pay.
- Undocumented persons should be informed that their receipt of care related to COVID-19 is not contingent upon immigrant status.
- Persons with limited English proficiency should be encouraged not to delay or avoid seeking medical treatment due to their limited English proficiency. Healthcare institutions are required to take reasonable steps to ensure services are accessible.

In Illinois, we must work collectively to do everything possible to safeguard against discrimination in medical treatment and affirm our civil rights laws, which protect the dignity and equal worth of all persons.