



April 30, 2020

The Honorable Andrew M. Cuomo
Governor of New York State
New York State Capitol Building
Albany, NY 12224

Re: COVID-19 New York Public Health Emergency and Disaster Conditions: Call for Equitable Allocation of Scarce Resources to Older Adults and Non-Discriminatory Crisis Standards

Dear Governor Cuomo:

We write to you today on behalf of the State Society on Aging of New York (SSA) and all older New Yorkers. We would like to bring to your attention serious concerns regarding the human rights of older adults in the COVID-19 crisis, especially as they have been developing in the state's nursing homes and assisted or independent living facilities because of the scarcity of personal protective equipment and other critical resources.

The State Society on Aging of New York (SSA) is an interdisciplinary membership society focused on improving the quality of life of older New Yorkers. SSA's membership comprises gerontologists, university professors, public policy experts, medical professionals, direct service providers, and others who work to improve the welfare of older adults.

First, we thank you for the leadership you have shown in handling this crisis. Your executive orders and well-informed public addresses have blunted the effect of the crisis here in New York, the epicenter of the public health emergency. In our recommendations below, we seek additional protections for older New Yorkers, who are at greatest risk of severe illness, heightened suffering, and death as a result of COVID-19.

Crisis conditions are compounded for older adults residing in nursing facilities that are intended to keep the state's most vulnerable older New Yorkers safe. Policies implemented largely by executive orders have not adequately addressed the problems that nursing homes and adult care facilities continue to face. The plight of vulnerable older adults and others in diverse facility settings demands immediate attention as the COVID-19 pandemic continues to ravage these communities. This is not only a legal obligation, but a moral imperative.

The 2012 Institute of Medicine Crisis Standards of Care make clear that there is both a duty of care and a duty of non-abandonment to all persons under disaster and emergency conditions.¹ While swift action from the state and also the federal government has expanded the state's surge capacity, COVID-19 positive older adults and nursing home residents in particular have been forgotten.

We at SSA urge you to take immediate action to ensure:

- Equitable allocation of scarce resources from the Public Health and Social Services Emergency Fund—established by the CARES Act—to older adults and their health care providers, prioritizing under-resourced long-term care providers;
- Adequate provision of personal protective equipment (PPE);
- Adequate levels of staffing;
- Consistent and timely tracking and reporting of case and death data;
- Adoption of non-discriminatory crisis standards² and ethics guidelines; and
- Recognition and honoring of Older New Yorkers’ right to health and human rights, as protected under international conventions.

Critical to addressing the inequities detrimentally affecting older adults is acknowledging that New York’s long-term care facilities continue to grapple with scarcity in human resources, PPE, and critical equipment such as ventilators and dialysis machines.

PPE shortages are especially dangerous to both residents and workers in long-term care facilities. Many frail residents need assistance with activities of daily living and require staff to be in close contact with the residents they serve. This places health care workers in nursing homes—who already count among the bravest in the battle against COVID-19—at high risk of infection if they lack appropriate protection.

Shortages in critical medical equipment have created a human rights crisis. Continuing scarcity will leave providers in the distressing position of having to make difficult triage decisions, in the form of both explicit and implicit rationing of care.

Mandating re-admission of COVID-19 positive older adults who have been hospitalized to their sending nursing home puts all residents of the nursing home, as well as the health care workers serving them, at significant risk. This is a form of implicit rationing given the under-resourcing and under-funding of the nursing homes through historically low reimbursement rates. In no uncertain terms, it is consigning these very sick older adults to death. Planning across the system should include inter-institutional agreements and arrangements for seriously ill hospitalized older adults to be discharged to a provider such as Calvary Hospital, which as a specialty hospital has the resources and trained staff to care for them.

Certain triage guidelines place older adults and people with multiple co-morbidities at the bottom of the priority list. The guidelines are not color-blind: people of color in low-income communities have been disproportionately affected by COVID-19 due to adverse social and economic determinants of health, and are more likely to be among the last to be served under certain triage guidelines. For these reasons, we recommend that the following considerations be barred under any set of triage or ethics guidelines developed and adopted by the state:

- Categorical exclusions on the basis of diagnosis or functional impairment that may violate federal law;
- Implicit or explicit quality of life assessments as an allocation criteria;
- Long-term survival beyond the acute care episode as an allocation criteria;
- Short-term survival probabilities, unless based upon individualized assessment of the patient consistent with available standards of evidence; and
- Reallocation of ventilators of older persons with disabilities who use ventilators in their daily lives and are COVID-19 positive or symptomatic.³

SSA has identified the need for essential uniform crisis standards that are consistent across institutions and prohibit discrimination against older adults based upon age, disability, race or ethnicity, or pre-existing conditions. Such action is critical for guiding providers' ethical decisions as PPE and equipment shortages affect their ability to deliver care. We support the following actions called for by the New York State Bar Association (NYSBA) Health Law Section:

The New York State Department of Health should:

- Adopt a uniform structure by issuing emergency regulations and ethics guidelines that health care institutions can follow—including nursing home and assisted and independent living facilities, institutional triage committees, and providers—to make ethics decisions under scarce resource conditions;
- Ensure that the needs of vulnerable older adult populations, including older adult communities of color, are met on a non-discriminatory basis; and
- Ensure provision of palliative care as an ethical minimum to mitigate suffering among older adults who are institutionalized or are hospitalized during the COVID-19 crisis.

The Governor should:

- Direct all state agencies to interpret and apply the law and regulations in a manner that supports compliance with triage and ethics guidelines.

As you have recognized, there is a need to move swiftly to protect the rights of older New Yorkers during the COVID-19 pandemic. We urge you to take the steps we have outlined above to ensure an orderly and ethical process in equitable allocation of scarce resources to older adults and long-term care providers, full recognition and honoring of older adults' right to health and human rights, protection of vulnerable older adult populations from discrimination and abuse, and equitable access to palliative care as an ethical minimum in the context of the public health emergencies and disasters.

Thank you for your timely attention to these issues of grave and collective concern among our members.

Sincerely,

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cc: Howard Zucker, MD, JD, Commissioner, New York State Department of Health (DOH)
Mark Kissinger, Director, NYS DOH Bureau of Long Term Care
Greg Olsen, Acting Director, New York State Office for the Aging (NYSOFA)

¹ INSTITUTE OF MEDICINE, CRISIS STANDARDS OF CARE: A SYSTEMS FRAMEWORK FOR CATASTROPHIC DISASTER RESPONSE: VOLUME 1, 1-3, (Dan Hanfling, et al., eds., The National Academies Press 2012), <https://doi.org/10.17226/13351>, https://commed.vcu.edu/IntroPH/2012/crisisManagement_IOM.pdf.

² INST. OF MEDICINE, Crisis Standards of Care: A Systems Framework for Catastrophic Disaster Response, 1 (Dan Hanfling, et. al. eds) (The National Academies Press) (2012) (hereinafter "IOM 2012").

³ Ari Ne'eman et al., Evaluation Framework for Crisis Standard of Care Plans (April 8, 2020).