Center for Public Representation

From the Desk of
Senator Sara Gelser

June 2, 2021

Senator Sara Gelser
Majority Whip
Chair, Senate Human Services Committee
900 Court Street NE
Salem, OR 97301

Re: SB 567A

Dear Senator Gelser:

I am the Legal Director of the Center for Public Representation (CPR), a national public interest law firm that focuses on disability rights and justice. CPR provides training and technical assistance to disability rights attorneys and Protection and Advocacy organizations in all fifty states and ten Territories. It has assisted almost thirty disability rights organizations in filing complaints with the Department of Health and Human Services' (DHHS) Office of Civil Rights (OCR) concerning the discriminatory denial of life-saving treatment during COVID-19. CPR has negotiated and collaborated with OCR to ensure that States revise their Crisis Standards of Care to ensure the persons with disabilities, older adults, and persons from communities of color are not discriminated against during the pandemic.

I have reviewed the revised Senate Bill 567A, and believe it is entirely consistent with federal civil rights laws, including the very laws enforced by OCR. By ensuring that patients who need treatment, and thus qualify for that treatment, are not denied that treatment because of race, color, national origin, sex, sexual orientation, gender identify, age or disability is precisely what the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Age Discrimination Act, and Sec. 1557 of the Affordable Care Act all proscribe. As set forth in more detail below, SB 567A seeks to implement the non-discrimination provisions of federal law.

I. The Requirements of Federal Law

Title II of the ADA prohibits public entities (such as state and local governments) from excluding people with disabilities from their programs, services, or activities, denying them the benefits of those services, programs, or activities, or otherwise subjecting them to discrimination. 42 U.S.C. §§ 12131-12134. Implementing regulations promulgated by the United States Department of Justice (DOJ) define unlawful discrimination under Title II to include, *inter alia*: using eligibility criteria that screen out or tend to screen out individuals with disabilities, failing to make reasonable modifications to policies and practices necessary to avoid discrimination, and perpetuating or aiding discrimination by others. 28 C.F.R. §§ 35.130(b)(1)-(3), 35.130(b)(7)-(8). Moreover, DOJ has explicitly instructed that Title II of the ADA applies to emergency preparedness efforts of state and local governments, writing:

> One of the primary responsibilities of state and local governments is to protect residents and visitors from harm, including assistance in preparing for, responding to, and recovering from emergencies and disasters. State and local governments must comply with Title II of the ADA in the emergency- and disaster-related programs, services, and activities they provide.[1]

Section 504 of the Rehabilitation Act similarly bans disability discrimination by recipients of federal financial assistance, including Oregon agencies and most hospitals and health care providers. 29 U.S.C. § 794(a). The breadth of Section 504's prohibition on disability discrimination is co-extensive with that of the ADA. *See, e.g., Frame v. City of Arlington*, 657 F.3d. 215, 223 (5th Cir. 2011) ("The ADA and the Rehabilitation Act are generally interpreted *in pari materia.*").

Section 1557 of the ACA provides that no health program or activity that receives federal funds may exclude from participation, deny the benefits of their programs, services or activities, or otherwise discriminate against a person protected Section 504 of the Rehabilitation Act, 42 U.S.C. § 18116; 45 C.F.R. §§ 92.101(a), 92.101(b)(2)(i). This includes an obligation to make reasonable modifications in policies, practices, and procedures necessary to avoid discrimination. 45 C.F.R. § 92.205.

Section 1557 also forbids discrimination on the basis of race, color or national origin in the delivery of health care through its incorporation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, et seq. Pursuant to 28 C.F.R. § 42.104, Title VI makes illegal any criteria or methods of administration that screen out persons on the basis of race, color or national origin. And certainly the law prohibits intentional discrimination, which includes deliberate indifference to anticipated impacts.

The Age Discrimination Act, also incorporated by Section 1557, prohibits discrimination on the basis of age in programs or activities that receive federal financial assistance. 42 U.S.C. §§ 6101-6107. No person in the United States shall, on the basis of age, be excluded from participation, in be denied the benefits of, or be subjected to discrimination under, such a program. 34 C.F.R. § 110.10(a).

II. The Provisions of SB 567A Are Consistent with these Federal Statutory Requirements

At its core, SB 567A precludes health care providers from denying or limiting medical treatment by reason of the patient's race, color, national origin, sex, sexual orientation, gender identify, age or disability. The proposed bill is consistent with, and seeks to ensure adherence to, federal statutory requirements. Individuals with disabilities are often denied treatment because of discriminatory assumptions about their conditions, or misperceptions about the value and utility of their lives.[2] Such conduct is wholly at odds with federal non-discrimination laws as they de-

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[1] *See*, DOJ, Emergency Management Under Title II of the Americans with Disabilities Act at 1 (July 26, 2007), available at https://www.ada.gov/pcatoolkit/chap7emergencymgmt.htm.

[2] *See generally*, NAT'L COUNCIL ON DISABILITY, MEDICAL FUTILITY AND DISABILITY BIAS 29 (Nov. 20, 2019) ("Several studies have demonstrated that health care providers' opinions about the

prioritize certain people based on their disability diagnosis. *See Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002, 1015 (3d Cir. 1995) (holding that nursing home could violate Section 504 of the RA and Title II of the ADA by excluding a person with Alzheimer's disease who would require a higher level of care); *Lovell v. Chandler*, 303 F.3d 1039, 1053 (9th Cir. 2002) (holding that state's exclusion of people who were blind or disabled from a new managed care program violated Section 504 and Title II of the ADA), *cert. denied*, 537 U.S. 1105 (2003). OCR's recent Bulletin also made clear that it is unlawful to make treatment decisions based on "judgments about a person's relative 'worth' based on the presence or absence of disabilities."[3]

The ADA and Rehabilitation Act bar the use of eligibility criteria that screen out or tend to screen out individuals with disabilities from access to services. *See*, *e.g.,* 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301 (ADA public accommodations); 28 C.F.R. § 35.130(b)(8) (ADA public entities). Patients with disabilities and persons of color are more than likely to be screened out because they have medical conditions that are perceived as more complicated, more resource intensive, and less likely to be fully remediated. This is true even if their underlying conditions are stable and have no impact on their ability to benefit from intensive care services or other medical treatment.

Another core tenet of the ADA and Rehabilitation Act is that decisions by covered entities must not be based on myths, stereotypes, and unfounded assumptions about people with disabilities; rather, they must be based on individualized determinations using objective evidence. *See School Bd. of Nassau County v. Arline,* 480 U.S. 273, 284-85, 287 (1987). The proposed bill makes it clear that individualized assessments based upon objective medical evidence must be used to make treatment decision, as required by the ADA, Section 504, and the Court's decision in *Arline.*

Finally, the SB 567A makes it clear that providers cannot treat disabled patients as unqualified for lifesaving care or other treatment when those disabilities do not affect their ability to benefit from the treatment sought. "Long standing and authoritative interpretations of the law bar the use of such circular techniques to insulate disability discrimination from legal challenge."[4]

At bottom, SB 567A seeks to enshrine in state law the non-discrimination goals of federal law. I sincerely hope the Oregon Legislature, in its wisdom, enacts this bill.

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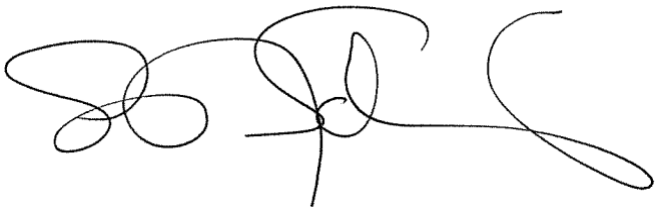
quality of life of a person with a disability significantly differ from the actual experiences of those people. For example, one study found that only 17 percent of providers anticipated an average or better quality of life after a spinal cord injury (SCI) compared with 86 percent of the actual SCI comparison group. The same study found that only 18 percent of emergency care providers imagined that they would be glad to be alive after experiencing a spinal cord injury, in contrast to the 92 percent of actual SCI survivors.") (footnotes omitted), available at https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf.

[3] *See*, n. 6, *supra.*

[4] Samuel R. Bagenstos, May Hospitals Withhold Ventilators from COVID-19 Patients with Pre-Existing Disabilities? Notes on the Law and Ethics of Disability-Based Medical Rationing, University of Michigan Law School, p.2, March 24, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559926.

Sincerely,



Steven Schwartz
Legal Director