

DISABILITY CAMPAIGNERS CHALLENGE GOVERNMENT'S FAILURE TO EXPLAIN HOW LIFE-SAVING TREATMENT FOR CORONAVIRUS (COVID-19) WILL BE PRIORITISED

Lawyers acting on behalf of a group of disabled campaigners have written to Secretary of State for Health Matt Hancock and NHS England, challenging their failure to publish guidance on how Doctors will decide which patients receive life-saving treatment during the COVID-19 pandemic, in the event that the number of patients needing treatment outstrips supply.

The campaigners are concerned that, if they contract the virus, they may be deemed less likely to benefit from life-saving treatment than non-disabled people – meaning that they may not be offered life-sustaining treatment but will instead receive palliative care.

Lawyers Rook Irwin Sweeney have written to the government and NHS England, arguing that their failure to produce guidance on how decisions will be made is discriminatory and amounts to a breach of their clients' human rights. They also argue that the failure to produce clear national guidance is irrational, given the proliferation of guidance from other bodies which they fear will lead to discrimination against disabled people. Rook Irwin Sweeney have instructed barristers Steve Broach and Ruth Keating, of 39 Essex Chambers, and both solicitors and counsel are currently acting pro bono.

Recent guidance by the British Medical Association, referring to the "grave decisions" with which doctors will soon be faced, warns that "there is little or no surge capacity in the NHS although vigorous attempts are being made to reduce demand through social distancing and to increase the availability of intensive care beds. Nevertheless, it is possible that serious health needs may outstrip availability and

difficult decisions will be required about how to distribute scarce lifesaving resources. If demand outstrips the ability to deliver to existing standards, more strictly utilitarian considerations will have to be applied, and decisions about how to meet individual need will give way to decisions about how to maximise overall benefit."

The campaigners are concerned that there is no explanation about how patients will be prioritised and that value judgments will be made about disabled people's quality of life which will lead them to be placed at the back of the queue for treatment. They believe that it is the role of the Secretary of State and / or NHS England to publish guidance which will give a national framework for treatment prioritisation, which must take full account of disability rights concerns.

The 'letter before action' is sent shortly after the Financial Times published a 'decision support tool', featuring the NHS logo, which was apparently intended to help clinicians with treatment prioritisation decisions, although NICE subsequently published a tweet confirming that it had not developed or endorsed the COVID-19 decision support tool. The campaigners argue that, if used, this 'tool' would lead to direct age discrimination and indirect discrimination on grounds of disability. The publication of this seemingly official 'tool' and the confusion as to its status has thrown the need for national guidance into even sharper relief.

One of the campaigners is Doug Paulley, a 42 year old man with autonomic failure, a history of stroke, and mental health problems. Mr Paulley uses a wheel-chair full-time and lives in a residential home in Wetherby, West Yorkshire. He said,

"this is an extremely worrying time for me, as it is for all disabled people. I understand that difficult decisions will have to be made, but at the moment

we just don't know how doctors are going to prioritise life-saving treatment for coronavirus. I'm concerned that without proper guidance, doctors may decide not to treat me, simply because of my impairments. I feel strongly that I should be given the same chance as anyone else - all I'm asking for is some reassurance that my life will be valued as much as the next person."

Anne-Marie Irwin, Partner at Rook Irwin Sweeney solicitors, who acts for the campaigners, said,

"my clients are not asking for special treatment, and they know how hard NHS staff up and down the country are working to save lives. Having said that, they are entitled to know how they will be treated if they contract coronavirus and need life-saving treatment. Our clients consider it irrational that national guidance has not been put in place, and that the government is failing in its duty to protect their human rights. They also believe that clear guidance is crucial to assist the Doctors who will have to make these difficult decisions. We hope that the government will listen to our clients' concerns so that a solution can be reached without the need for litigation."

The other proposed claimants are:

AB, a 28 year old writer and policy advisor from London who has a genetic condition which means that he is paralysed from the waist down. He uses a ventilator throughout the night and part time during the day.

Francesca Adam-Smith, 17, also from North Yorkshire, who has chromosome 16 deletion, which means that she is non-verbal, has complex health needs and severe disabilities and needs constant care and support. She acts by her mother and litigation friend Rachel Adam-Smith.

William Runswick-Cole, 24, from Derbyshire, is acting by his mother and litigation friend Professor Katherine Runswick-Cole. William has diagnoses of learning disability and autism.

The Secretary of State for Health and Social Care and NHS England have been asked to respond to the letter before action on Thursday 16 April 2020. If there is no response by that date or if the issue cannot be resolved through correspondence, it is anticipated that judicial review proceedings will be issued in the week commencing 20 April 2020.

Bindmans LLP have also written to the Secretary of State and NHS England on behalf of their client, Mr D, who also seeks the publication of a national policy framework to enable him to understand the treatment that he would likely be afforded (if any) if he were hospitalised with coronavirus (COVID-19).

His firm wish would be not to attend hospital if there was a real risk that he would not receive life-sustaining treatment; as instead, he would wish to die peacefully at home in the embrace of his family.

Rook Irwin Sweeney is a law firm based in London and Bristol, specialising in public law and human rights. For more information contact Anne-Marie Irwin, Partner, at anne-marie.irwin@rislaw.co.uk or 0207 936 9886.