

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES

DISABILITY RIGHTS NEW YORK,

Complainant,

OCR CASE NO:

-against-

COMPLAINT

ANDREW CUOMO, in his official capacity
as Governor of New York State

Respondent.

PRELIMINARY STATEMENT

1. Disability Rights New York (DRNY) challenges New York State’s failure to ensure that congregate care settings serving New Yorkers with intellectual and developmental disabilities (ID/DD) have priority access to essential personal protective equipment (PPE) during the COVID-19 pandemic.
2. New York State, through the Office for People With Developmental Disabilities (OPWDD), licenses and certifies group homes and other congregate settings for over 40,000 people with ID/DD.
3. On March 11, 2020, OPWDD, citing Centers for Disease Control and Prevention (CDC) guidelines, advised all state-owned and voluntary providers of congregate settings that: “Surgical facemasks should be used by people who have had proximate or close exposure, or who show symptoms of COVID-19 to help prevent the spread of the disease to others. The use of surgical facemasks is also crucial for health workers and people who are taking care of someone in close settings (at home or in a health care facility).” *See*

https://opwdd.ny.gov/system/files/documents/2020/03/opwdd-guideline-for-containment_3-11-20.pdf (last visited March 27, 2020).

4. Throughout New York State, emergency management offices are prioritizing requests for PPE based on facility type and OPWDD licensed, operated or certified residential settings are not prioritized.
5. Authorities administering New York City's PPE stockpile prioritize PPE supplies only to "healthcare providers and facilities that are providing direct patient care in inpatient settings or in specific settings whose staff cannot maintain 6 feet of separation from a patient." *See* NYC Department of Health and Mental Hygiene, 2020 Advisory #8 COVID-19 Update for New York City (2020 Advisory #8), *available at* <https://www1.nyc.gov/assets/doh/downloads/pdf/han/advisory/2020/covid-19-03202020.pdf> (last visited March 27, 2020).
6. New York currently has ten times more confirmed COVID-19 cases than any other state.
7. New Yorkers with ID/DD living in New York State licensed or certified group homes and other congregate settings are at serious risk of contracting and succumbing to COVID-19.
8. Direct Support Professionals (DSPs) who provide essential care for individuals in congregate care settings do not have access to PPE to prevent the spread of COVID-19 to the individuals residing in these settings and many individuals residing in these settings are unable to protect themselves from contracting the disease.
9. On March 26, 2020, DRNY requested that Governor Andrew Cuomo designate congregate care settings serving New Yorkers with ID/DD as priority recipients of PPE.
10. The State failed to take immediate action to protect people residing in OPWDD congregate care settings by ensuring these settings are prioritized for receipt of PPE.

11. DRNY has received complaints that people with ID/DD in congregate settings have become sick with COVID-19 and already some of these individuals have died due to complications from the virus.
12. DRNY files this complaint on behalf of New Yorkers with ID/DD residing in congregate care settings.

JURISDICTION

13. The Office of Civil Rights of the United States Department of Health and Human Services has subject matter jurisdiction over claims of discrimination against State health care agencies as well as programs and activities to whom the Department provides federal assistance.

PARTIES

14. Disability Advocates, Inc. is an independent non-profit corporation organized under the laws of the State of New York. Disability Advocates, Inc. is authorized to conduct business as DRNY.
15. DRNY is a Protection and Advocacy system (“P&A”), as that term is defined under the Developmental Disabilities Assistance and Bill of Rights Act (“DD Act”), 42 U.S.C. § 15041, *et seq.*, the Protection and Advocacy for Individuals with Mental Illness Act of 1986 (“PAIMI Act”), 42 U.S.C. § 10801, *et seq.*, and the Protection and Advocacy of Individual Rights Act (“PAIR Act”), 29 U.S.C. § 794e, *et seq.* with offices in the State of New York located at: 25 Chapel Street, Suite 1005, Brooklyn, NY 11201; 725 Broadway, Suite 450, Albany, NY 12208; and 44 Exchange Blvd., Suite 110, Rochester, NY 14614.
16. As New York State’s P&A system, DRNY is specifically authorized to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of,

and advocacy for, the rights of individuals with disabilities. 42 U.S.C. § 15043(a) (2)(A) (i); N.Y. Exec. Law § 558(b).

17. Pursuant to the authority vested in it by Congress to file claims of abuse, neglect, and rights violations on behalf of individuals with disabilities, DRNY brings claims on behalf of individuals with disabilities who resided in the Office for People With Developmental Disabilities operated, certified or licensed facilities.
18. New York State is a public entity as defined by the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (ADA). *See* 42 U.S.C § 12131(1)(A).
19. Governor Cuomo is the Governor of New York State.
20. Governor Cuomo, in his official capacity as Governor of the State of New York, is covered as a public entity under the ADA.
21. Governor Cuomo, in his official capacity, is a recipient of federal financial assistance and therefore covered under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504).

STATEMENT OF FACTS

22. Emergency management policies governing the distribution of PPE by local emergency management offices categorically fail to prioritize requests for PPE by congregate care facilities serving individuals with ID/DD
23. These policies define priority recipients to include only hospitals, emergency medical services (EMS), nursing facilities, and dialysis centers.
24. The Emergency Management Policy in NYC specifically states that, “if you do not fall into one of these facility types, your request will be denied.” *See* 2020 Advisory #8.

25. In congregate care settings, DSPs provide intimate care for residents throughout the day, including physical assistance with washing, toileting, dressing, and eating.
26. It is not possible for DSPs to maintain 6 feet of separation from individual service recipients.
27. Many individuals with ID/DD live in close proximity to one another in their residences and cannot adhere to prevention protocols, including wearing a mask, thoroughly and frequently washing hands, and avoiding touching their faces and others.
28. Many people with ID/DD have weakened immune systems that would require additional treatment time and medical resources should they become sick.
29. Excluding congregate settings for people with ID/DD from the groups in facilities being prioritized for PPE puts both DSPs and residents at high risk of contracting, spreading, and dying from COVID-19.
30. Since the individuals being served are equally vulnerable to those in nursing facilities, they need to have equal access to PPE.
31. On March 18, 2020, OPWDD issued a statement that DSPs are “essential and integral employees to OPWDD’s provision of services,” especially during the COVID-19 public health emergency. *See* OPWDD, Direct Support Professionals Defined as Essential Employees (March 18, 2020), *available at* <https://opwdd.ny.gov/system/files/documents/2020/03/3.18.2020-direct-support-professionals-defined-as-essential-employees.pdf> (last visited March 27, 2020).
32. OPWDD classified DSPs as “essential health care workers” pursuant to guidance from the New York State Education Department. *See* NYS Education Department, Additional Guidance on Statewide School Closures Due to Novel Coronavirus (COVID-19), Outbreak

in New York State (March 17, 2020) (“Essential health care workers may include . . . direct support professionals.”), *available at* <http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-third-guidance-3-17-20.pdf> (last visited March 27, 2020).

33. OPWDD has advised that when any individual residing in an OPWDD-certified facility is suspected of having COVID-19, either the sick individual should wear a facemask in the presence of others, or staff should wear a mask when in the same room as that individual. *See* OPWDD, Staff Guidance for the Management of Coronavirus (COVID-19) in Facilities or Programs Operated and/or Certified by OPWDD (March 25, 2020), *available at* https://opwdd.ny.gov/system/files/documents/2020/03/3.25.2020-staffing-guidance-document_final.pdf (last visited March 27, 2020).
34. Staff should also wear a disposable facemask and gloves when having any contact with that individual’s bodily fluids.
35. CDC guidance provides that people who will be within approximately 6 feet of an individual with COVID-19 for a prolonged period of time should wear a facemask when in the same room as a patient who cannot wear a mask themselves. *See* <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-prevent-spread.html>.
36. Since OPWDD, the lead agency in New York serving people with ID/DD, has recognized this critical need for PPE, New York cannot credibly assert that to prioritize congregate settings serving individuals with ID/DD for PPE would be a fundamental alteration of its rationing policies.
37. New York State agencies have classified DSPs as essential health care workers and recognized the need for facemasks for workers who must care for individuals in close

contact. Yet, New York State has not taken necessary steps to ensure that people with ID/DD and the people who care for them are prioritized for receipt of critical PPE.

38. In its March 26, 2020 letter, DRNY expressed urgent concern that OPWDD residential settings be included in New York State’s Emergency PPE prioritization.

39. DRNY continues to receive complaints that people living in OPWDD residential settings are contracting COVID-19.

40. Upon information and belief, people with OPWDD residential settings have died from complications of COVID-19.

41. There is no legitimate reason why congregate care settings for individuals with ID/DD should not be on equal footing with nursing facilities.

FIRST CLAIM FOR RELIEF
TITLE II OF THE AMERICANS WITH DISABILITIES ACT
42 U.S.C. § 12101, et seq.

42. DRNY incorporates by reference each and every allegation contained in the foregoing paragraphs as if specifically alleged herein.

43. Title II of the ADA states, in pertinent part:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or subjected to discrimination by any such entity. 42 U.S.C. § 12132.

44. A “public entity” includes state and local government, their agencies, and their instrumentalities. 42 U.S.C. § 12131(1).

45. Governor Cuomo, acting in his official capacity, was at all times relevant to this action, and currently is a “public entity” within the meaning of Title II of the ADA.

46. Governor Cuomo provided and provides “services, programs [and] activities” through their office. 28 C.F.R. § 35.130.

47. The term “disability” includes physical and mental impairments that substantially limit one or more major life activities. 42 U.S.C. § 12102(2).
48. A “qualified individual with a disability” is a person “who, with or without reasonable modification to rules, policies or practices ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2).
49. People with ID/DD residing in OPWDD licensed, operated or certified settings are qualified individuals under the ADA.
50. Governor Cuomo’s refusal to ensure that congregate settings that serve people with ID/DD in New York State are prioritized for PPE violates Title II of the ADA and its implementing regulations by authorizing or failing to forbid actions that:
- a. “[L]imit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.” 28 C.F.R. § 35.130(b)(1)(vii).
 - b. Utilize criteria or methods of administration that tend to impair accomplishment of objectives of a program with respect to individuals with disabilities. 28 C.F.R. § 36.204.
 - c. Fail to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).

d. Apply criteria that tend to screen out individuals with disabilities from benefiting from a service, unless the criteria is necessary for the provision of the service. 28 C.F.R. § 35.130(b)(8).

51. By failing to prioritize the availability of PPE deemed necessary by OPWDD and the CDC, individuals with disabilities residing in OPWDD operated, certified or licensed residential settings have and will continue to be denied equal access to the benefits of the services, programs and activities and subjected to discrimination from the Emergency Management PPE policies.

SECOND CLAIM FOR RELIEF
SECTION 504 OF THE REHABILITATION ACT OF 1973
29 U.S.C. § 794

52. DRNY incorporates by reference each and every allegation contained in the foregoing paragraphs as if specifically alleged herein.

53. Section 504 provides, in pertinent part that “no otherwise qualified individual with a disability in the United States... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a).

54. Governor Cuomo was, at all times relevant to this action, and is currently a recipient of federal financial assistance within the meaning of Section 504.

55. Governor Cuomo provided and provides a “program or activity” where “program or activity” is described as “all operations of a department, agency, special purpose district or other instrumentality of a State or of a local government.” 29. U.S.C. § 794(b)(1)(A).

56. A disability is defined as “a physical or mental impairment that substantially limits one or more major life activities of such individual.” 29 U.S.C. § 705(9)(B) (citing 42 U.S.C. § 12102(1)(A)).
57. People with ID/DD residing in OPWDD licensed, operated or certified settings are qualified individuals under Section 504.
58. Governor Cuomo violates Section 504 by authorizing, or failing to forbid, actions that:
- a. Exclude from participation in, deny the benefits of, or otherwise subject individuals to discrimination on the basis of disability. 29 U.S.C. § 794(a); 45 C.F.R. §§ 84.4(a), 84.52(a)(1); 28 C.F.R. § 41.51(a).
 - b. Deny qualified persons with a disability the opportunity to participate in or benefit from the aid, benefit, or service. 45 C.F.R. § 84.4(b)(1)(i); 28 C.F.R. § 41.51(b)(1)(i).
 - c. Afford qualified persons with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others. 45 C.F.R. §§ 84.4(b)(1)(ii), 84.52(a)(2); 28 C.F.R. § 41.51(b)(1)(ii).
 - d. Limit individuals with a disability in the enjoyment of rights, privileges, advantages and opportunities enjoyed by others receiving an aid, benefit, or service. 45 C.F.R. §§ 84.4(b)(1)(vii), 84.52(a)(4); 28 C.F.R. § 41.51(b)(1)(vii).
 - e. Use criteria or methods of administration that have the effect of subjecting qualified persons to discrimination on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of a program or activity with respect to persons with disabilities. 45 C.F.R. §§ 84.4(b)(4) and 84.52(a)(4); 28 C.F.R. § 41.51(b)(3).

59. By failing to prioritize the availability of PPE deemed necessary by OPWDD, individuals with disabilities residing in OPWDD certified, operated, or licensed settings have and will continue to be excluded from participation in, denied the benefits of, and subjected to discrimination from the Emergency Management PPE policies.

PRAYER FOR RELIEF

WHEREFORE, DRNY requests relief as set forth below:

1. Declare that Governor Cuomo has violated the rights of New Yorkers with ID/DD by failing to ensure that PPE is prioritized in OPWDD congregate settings;
2. Require Governor Cuomo to take immediate steps to ensure congregate care settings serving individuals with ID/DD are prioritized for the receipt of PPE in accordance with the procedures established by OPWDD on March 25, 2020;
3. An award of reasonable attorneys' fees and costs; and
4. Such other further relief as deemed just and proper.

DATE: April 7, 2020
Albany, NY

DISABILITY RIGHTS NEW YORK
Complainant

Andrea Clisura, Esq.
Andrea.Clisura@drny.org

Sim Goldman, Esq.
Sim.Goldman@drny.org

Julie Keegan, Esq.
Julie.Keegan@drny.org

725 Broadway, Suite 450
Albany, NY 12207-5001
(518) 432-7861 (voice)