

Sent by Electronic Mail OCRComplaint@hhs.gov

April 21, 2020

U.S. Department of Health and Human Services
Office for Civil Rights
200 Independence Avenue, SW Room 509F
Washington, DC 20201

Attn: Jocelyn Samuels, Director c/o Centralized Case Management Operations

Re: April 7, 2020 Complaint filed by Disability Rights New York -- Congregate Care Settings Serving New Yorkers with Intellectual and Developmental Disabilities Should be Priority Recipients of Personal Protection Equipment

Dear Director Samuels:

The Mental Hygiene Legal Service (“MHLS”) writes to you in support of the complaint submitted to your office on or about April 7, 2020 by Disability Rights New York (“DRNY”) challenging New York State’s failure to ensure that congregate care settings serving New Yorkers with intellectual and developmental disabilities (I/DD) have priority access to essential personal protective equipment (PPE) during the COVID-19 pandemic.¹ In writing, we also join and support comments by the New York Civil Liberties Union to highlight the significant danger COVID-19 poses to individuals living and working in congregate care settings without essential PPE.

In summary, DRNY has requested that the U.S. Department of Health and Human Services Office for Civil Rights (“OCR”) require New York State to ensure that Emergency Management offices prioritize the distribution of PPE to congregate care settings serving New Yorkers with intellectual and developmental disabilities (I/DD). The New York State Office for People with Developmental Disabilities (“OPWDD”) has designated the direct service professionals (DSPs) supporting people with I/DD as “essential and integral employees to OPWDD’s provision of services.”² Yet DSPs, and the people they support with I/DD, are unable to obtain necessary PPE under New York State’s current Emergency Management policies.

¹ The Mental Hygiene Legal Service is an agency of the Appellate Divisions of State Supreme Court operating pursuant to an enabling statute codified at article 47 of the New York State Mental Hygiene Law. Among other things, the Service has a mandate to provide legal services and assistance to people living in facilities licensed by the New York State Office of Mental Health and the Office for People with Developmental Disabilities. The positions taken in this correspondence are those of the MHLS directors and not those of the Appellate Divisions or the New York State Office of Court Administration.

² See Office for People With Developmental Disabilities, *Direct Support Professionals Defined as Essential Employees*, 18 March 2020, <https://opwdd.ny.gov/system/files/documents/2020/03/3.18.2020-direct-support-professionals-defined-as-essential-employees.pdf>. Last access April 20, 2020

In support of its complaint, DRNY invokes title II of the Americans with Disabilities Act (42 USC 12131 *et seq* and Section 504 of the Rehabilitation Act of 1973 (29 USC 794).

People with ID-DD are dying from COVID -19 at alarming rates. Our information is that 254 people receiving services from OPWDD in congregate care settings (intermediate care facilities and individualized residential alternatives) have perished from the virus. A Research Brief published by the Syracuse University Lerner Center for Public Health Promotion dated April 14, 2020 amplifies the allegations and urgency of the DRNY complaint. The Research Brief is included with this correspondence for ease of reference.

Among key findings stated in the Lerner Center report are as follows:

- COVID-19 deaths will likely be more prevalent among those with ID-DD;
- Death rates from pneumonia are between 2.2 times and 5.8 times higher among individuals with ID-DD than among those without ID-DD, providing a clear warning of the severity of COVID-19 among people with ID-DD;
- The COVID-19 case fatality rate for people with ID-DD (9.5%) is 2.2 times higher than the reported overall COVID-19 case fatality rate for the state (4.4%).

On March 11, 2020, OPWDD, citing then-CDC guidelines advised all state-owned and voluntary providers of congregate settings as follows:

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).³

Additional guidance was issued on April 20, 2020 requiring staff among other things to wear a facemask at all times while at work to prevent further transmission of the virus. Further 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 always wear a mask when in the same room as that individual.⁴

³ *OPWDD Guidelines for Implementation of Quarantine and/or Isolation Measures at State Owned and Voluntary Providers in Congregate Settings*, Office for People With Developmental Disabilities, 11 March 2020, https://opwdd.ny.gov/system/files/documents/2020/03/opwdd-guideline-for-containment_3-11-20.pdf. Last accessed April 20, 2020.

⁴ See Office for People With Developmental Disabilities, *Revised Staff Guidance for the Management of Coronavirus (COVID-19) in Facilities or Programs Operated and/or Certified by Office for People With*

Additionally, Governor Andrew Cuomo issued an Executive Order requiring that by April 17, 2020, “any individual who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance.” (EO 202.17). This most recent Executive Order amplifies the public policy imperative that PPE be available to people unable to maintain social distancing.

As alleged in the DRNY complaint, in congregate care settings, direct support personnel provide intimate care for residents throughout the day including physical assistance with washing, toileting, dressing and eating (complaint para 25). It is just not possible for these essential employees to maintain social distancing when engaging in such intimate personal care for people with disabilities (complaint para 26). Nonetheless, and again as alleged in the DRNY complaint, New York’s Emergency Management Offices categorically fail to prioritize PPE supplies for congregate care settings serving individuals with ID-DD. That is because these policies define priority recipients to include only hospitals, emergency medical services (EMS), nursing facilities and dialysis centers (complaint para 22,23 & 24).⁵

As alleged in the complaint filed by DRNY, the ADA implementing regulations make clear that illegal discrimination includes providing “an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement” as that provided to people without disabilities;⁶ and utilizing “eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity.”⁷ The ADA implementing regulations similarly make it clear that government actors cannot “deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.”⁸

Developmental Disabilities, April 20, 2020 https://opwdd.ny.gov/system/files/documents/2020/04/4.20.2020-opwdd_covid19_staffguidance_0.pdf. Last accessed April 21, 2020.

⁵ See e.g., 2020 Advisory #8 COVID-19 Update for New York City, New York City Department of Health and Mental Hygiene, dated 20 March 2020, <https://www1.nyc.gov/assets/doh/downloads/pdf/han/advisory/2020/covid-19-03202020.pdf>. Last April 20, 2020.

⁶ 28 C.F.R. § 35.130(b)(1)(iii).

⁷ *Id.* See also 28 C.F.R. § 35.130(b)(8).

⁸ 28 C.F.R. § 35.130(b)(2). The ADA implementing regulations make it clear that government actors cannot “directly or through contractual or other arrangements, utilize criteria or other methods of administration: (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or (iii) That perpetuate the discrimination of another public entity if

MHLS joins DRNY and the NYCLU in maintaining that there is no rational reason why congregate care settings for individuals with ID/DD should be distinguished from nursing homes and denied priority for PPE (complaint para 30). Individuals with I/DD are at least as vulnerable as those in nursing facilities and these individuals and the DSPs supporting them should have equal access to PPE. Because these issues are of critical importance to constituents of the Mental Hygiene Legal Service and the staff who support them during the COVID-19 pandemic, we urge OCR to act expeditiously with respect to DRNY's complaint and to ensure congregate care settings serving individuals with ID/DD are prioritized, statewide, for the receipt of PPE.

Thank you for your consideration of our support of DRNY's complaint.

Respectfully submitted
Mental Hygiene Legal Service

By: 

Sheila E. Shea, Director
Third Department
286 Washington Avenue Ext 205
Albany, New York 12203
518-451-8710
sshea@nycourts.gov

cc: MHLS Directors and Deputies
Disability Rights New York
New York Civil Liberties Union

both public entities are subject to common administrative control or are agencies of the same State.”
28 C.F.R. § 35.130(b)(3).