



CONNECTICUT
LEGAL
RIGHTS
PROJECT, INC.



**DISABILITY RIGHTS
CONNECTICUT**
Justice. Community. Inclusion.

By Electronic Mail

December 31, 2021

Hon. Ned Lamont
Governor
State Capitol
210 Capitol Avenue
Hartford, Connecticut 06106
Governor.Lamont@ct.gov

Re: Failure of State of Connecticut to Comply with State and Federal Anti-Discrimination Laws in Plan to Distribute Covid Testing and N-95 Masks-URGENT

Dear Governor Lamont:

We write on behalf of Disability Rights Connecticut (DRCT), Connecticut Legal Rights Project (CLRP), and their respective constituents regarding our serious concerns about the State's failure to ensure that individuals with disabilities throughout Connecticut, including those who are living in the community as well as those who are confined to State-operated or funded facilities or programs, are promptly provided with at-home testing kits as well as other access to COVID testing and personal protective equipment (PPE), including N-95 masks, as is now being offered to the general public on a limited basis. The failure to provide equitable access to testing and N-95 masks now being offered statewide is contrary to state and federal law, including Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, and their respective implementing regulations. The failure to provide testing and N-95 masks to institutionalized individuals with disabilities who are in the State's custody also violates the United States and Connecticut Constitutions and Conn. Gen. Stat. §17a-540, *et seq.*

Disability Rights Connecticut (DRCT) is the protection and advocacy ("P&A") system for the State of Connecticut. As such, DRCT is authorized under federal law to provide protection and advocacy services for those individuals in Connecticut who have mental, intellectual, developmental and/or physical disabilities pursuant to the Protection and Advocacy for Individuals with Mental Illness ("PAIMI") Act, 42 U.S.C. § 10801, *et seq., as amended*, 42 C.F.R. § 51; the Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. § 15041, *et seq., as amended*, 45 C.F.R. § 1326; the Protection and Advocacy for Individuals with Traumatic Brain Injury (PATBI) Act, 42 U.S.C. § 300d-52, the Protection and Advocacy for Individual Rights (PAIR) Act, 29 U.S.C. §794e (collectively referred to herein after as "the Acts"), and their respective implementing regulations.

Connecticut Legal Rights Project (CLRP) is a statewide legal services organization whose clients are low-income people with psychiatric disabilities. CLRP was created by a federal consent decree in 1990 to serve psychiatric inpatients in state facilities and provide them with their constitutional right to access the courts. CLRP also provides legal representation to low-income people with psychiatric disabilities who reside in the community.

DRCT has received complaints that individuals with disabilities have not received access to urgently needed COVID protections including home COVID tests and N-95 masks, as have now been widely promised statewide but are in short supply. The situation is particularly urgent given the recent surge in COVID cases throughout Connecticut primarily as a result of the highly transmissible Omicron variant's spread, and the concomitant increased risks to individuals with disabilities residing in institutional and other congregate settings in Connecticut.

It is our understanding, based on media reports, that the State has ordered, or intends to order, and will distribute 500,000 N-95 masks and approximately 426,000 test kits (with additional kits to arrive sometime later) in the near future, likely through the municipalities. It is further our understanding that these masks and test kits will be given to people on a "first-come, first served basis," as this is the way which municipalities are describing their availability in the absence of any statewide directives to the contrary. While the distribution of the 500,000 masks and the 426,000 test kits is necessary, it is insufficient to address the needs of not only of the overall population in Connecticut which is over 3.5 million. It is particularly insufficient to meet the needs of individuals with disabilities, including those living in institutions, many of whom are medically compromised and are wholly dependent upon staff at the institution to provide them with the needed PPE and COVID testing.

DPH has not offered any plan to address the needs of individuals with disabilities to have equal access to N-95 masks and COVID testing kits, especially in a time of scarcity when the most resourceful will more likely be able to access them. It is essential that people with disabilities have a means by which they can receive reasonable modifications in DPH's policies and practices and those of any of their contractors or agents, including the municipalities, so that they may have equal access to the testing and N-95 masks being offered. The State and its contractors or agents, such as the municipalities, cannot simply say that the access to this equipment or testing will be on a first come, first served basis and leave it at that. To do so is inherently inequitable given that many people with disabilities—many of whom are particularly vulnerable to becoming infected and seriously ill as a result of COVID—are not able to obtain N-95 masks or testing without reasonable modifications.

Further, although the State plans to give the municipalities the N-95 masks and test kits for distribution with each town and city and each municipality must comply with disability anti-discrimination laws, it cannot abdicate its responsibility to comply with such laws and must not distribute, or permit the distribution, of masks and test kits in a manner that is discriminatory. Because there is a scarcity of these items, without a clear directive to the municipalities with respect to the manner that they are to be distributed, there is a high risk that individuals with disabilities will not have equitable access to them and thereby be discriminated against because of their disabilities.

Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. § 12131, *et seq.* and its implementing regulations prohibits discrimination against qualified individuals with disabilities by public entities or their contractors. Specifically, Title II provides that “no 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 be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. The ADA requires that public entities make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability. *Henrietta D. v. Bloomberg*, 331 F.3d 261, (2d Cir. 2003). Title II also prohibits a public entity from engaging in methods of administration “[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination.” 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(3).

Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a), is a disability anti-discrimination statute that applies to recipients of federal funds. Courts, including the Second Circuit Court of Appeals, typically consider ADA and Section 504 claims together because the analysis for those claims is very similar. *Rodriguez v. City of New York*, 97 F.3d 611, 618-19 (2d Cir. 1999).

Further, Section 1557 of the Affordable Care Act 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 under the above law. *See* 42 U.S.C. § 18116. This includes an obligation to make reasonable modifications in policies, practices, and procedures necessary to avoid discrimination on the basis of a pre-existing condition and race. *See* 45 C.F.R. § 92.205.B.

The United States Health and Human Services (HHS), in its March 28, 2020 Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19), similarly prohibits disability discrimination in the provision of COVID care and services. And, in doing so, the Bulletin reiterates the responsibility of public entities such as Connecticut and its municipalities to provide reasonable modifications to ensure access of COVID-related care and services to people with disabilities and to refrain from engaging in methods of administration that have a discriminatory impact on people with disabilities. It also makes clear that, in a time of scarcity, individuals at heightened risk of Covid must be accommodated.

Additionally, individuals who are confined involuntarily by the state have a constitutional right to minimally adequate care and protection from harm. *Youngberg v. Romeo*, 457 U.S. 307(1982). Convicted prisoners also have constitutional rights to protections under the Eighth Amendment of the United States Constitution and the Connecticut Constitution. These include protection from communicable diseases. Finally, those individuals confined to the state’s psychiatric institutions and programs, such as Whiting Forensic Hospital and Connecticut Valley Hospital, not only have constitutional rights to treatment and protection from harm, but are also protected under state law—specifically the Connecticut’s statute ensuring patient’s rights codified at Conn. Gen. Stat. §17a-540, *et seq.*, for individuals with psychiatric disabilities who are confined to the State’s psychiatric facilities or in programs operated or funded by the state that provide psychiatric services.

The State and its contractors must make reasonable modifications in their policies and procedures so that people with disabilities are not excluded by reason of their disability from the services, activities, and benefits provided by the State or its contractors such as the provision of N-95 masks and COVID in-home testing kits, and any other COVID-related protections and services being offered to the public generally, including on a limited basis. The failure to do so constitutes unlawful discrimination under Title II and Section 504. The State must also not engage in methods of administration of its policies, procedures, and programs that tend to negatively affect or exclude people with disabilities. Such actions also constitute unlawful disability discrimination under Section 1557. The State must also provide treatment and protection from harm, including protection from COVID, to those individuals with disabilities residing in its custody, as required by the United States and Connecticut Constitutions as well as relevant state law.

We request that the State immediately adopt and implement a plan to ensure that these obligations are promptly met. Please provide us with a written plan that, at a minimum, includes:

- (1) A directive to all Connecticut municipalities to immediately adopt and implement a plan for distribution of N-95 masks and COVID test kits in a manner that will ensure that people with disabilities will have equal access to receive N-95 masks and at-home COVID-19 testing kits. The State must also order all municipalities to prioritize the distribution of masks and test kits to people with disabilities who are immune-compromised or otherwise at enhanced risk of severe disease due to the nature of their disabilities and/or who live in settings where infection from the highly contagious Omicron variant is likely. The State must also require that each municipality adopt and implement an ADA-compliant process for individuals with disabilities to seek and obtain reasonable modifications to the municipalities' policies, practices, and procedures to access the masks and test kits.
- (2) A directive to the Department of Public Health (DPH) and other relevant state agencies, including the Department of Mental Health and Addiction Services (DMHAS), the Department of Corrections (DOC), the Department of Children and Families (DCF), and the Department of Developmental Services (DDS), among others, to ensure that people with disabilities who live in state-operated or funded institutions or programs will immediately be provided access to appropriate PPE (including N-95 masks) and will receive ongoing COVID-19 testing as medically necessary to ensure that they are adequately protected from COVID.
- (3) An order that DPH, DMHAS, DOC, DCF and DDS adopt and implement a process for individuals with disabilities to seek and obtain reasonable modifications to their respective policies, practices and procedures to assure access the PPE and test kits.

We are available to meet with you at your convenience to work collaboratively with you to develop such a plan. If, however, we do not receive a written commitment and plan or agreement to work with us to promptly develop such a plan, from you by the close of business on **Tuesday, January 4, 2022**, we will take further action against the State to ensure that the rights of people with disabilities are protected.

Thank you for your prompt attention to this urgent matter. We can be reached *via* email at deborah.dorfman@disrightsct.org, sheldon.toubman@disrightsct.org, or KFlaherty@clrp.org

or, respectively, by phone at (860) 469-4463, (475)345-3169, or (860) 666-2200. We look forward to your response.

Sincerely,

/s/

Deborah A. Dorfman
Executive Director/Attorney
Disability Rights Connecticut

/s/

Sheldon Toubman
Litigation Attorney
Disability Rights Connecticut

/s/

Kathy Flaherty
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