



CONNECTICUT
LEGAL
RIGHTS
PROJECT, INC.



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

January 6, 2022

By Email: ocrmail@hhs.gov

Robinsue Frohboese (Robinsue.Frohboese@HHS.GOV)

Acting Director, Office for Civil Rights
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: URGENT: Civil Rights Complaint against Hon. Ned Lamont, Governor of Connecticut, the State of Connecticut, and the Connecticut Department of Public Health

Dear Ms. Robinsue:

Disability Rights Connecticut (DRCT) and the Connecticut Legal Rights Project (CLRP) bring this Complaint on behalf their respective constituents alleging discrimination by the State of Connecticut (the State) and the Connecticut Department of Public Health (DPH) against people with disabilities residing in Connecticut, in violation of Title II of the Americans with Disabilities Act of 1990 (“Title II” of the “ADA”),¹ which prohibits discrimination on the basis of disability by public entities, Section 504 of the Rehabilitation Act of 1973², and Section 1557 of the Affordable Care Act³. The Department of Public Health (DPH) is a public entity subject to Title II of the ADA. In particular, this Complaint alleges violations by the State and DPH of the rights of people with disabilities throughout Connecticut who have been denied reasonable modifications in the State’s policies, practices and procedures so that they may have equal access to the State’s COVID protection programs, including access to personal protective equipment (PPE) in the form of high-protection N-95 masks and at-home testing kits. These individuals are persons with disabilities that substantially limit one or more major life activities.

Please note that a parallel complaint is also being filed today with the U.S. Department of Justice’s Civil Rights Division concerning the same conduct and request for relief.

¹ 42 U.S.C. §§ 12131 *et seq.*, and 28 C.F.R. Part 35.

² 29 U.S.C. § 794a *et seq.* and 45 C.F.R. Part 84.

³ 42 U.S.C. § 18116 and 45 C.F.R. Part 92

I. INTRODUCTION

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. This includes during any short-term emergency actions designed to address a surge of a highly contagious virus, particularly at a time of temporary scarcity, as here. The State and its contractors or agents cannot simply suggest that municipalities *could* prioritize high risk, vulnerable individuals regarding access to this equipment or testing, at their discretion, and thus allow them to be distributed instead on a first come, first served basis and leave it at that. To do so, as happened here with the fully predictable result that many if not most municipalities utilized the first-come, first-served option, 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 test kits and N-95 masks for distribution within each town and city, and each municipality must comply with disability anti-discrimination laws, the State cannot abdicate its own responsibility to comply with such laws and must not distribute, or permit the distribution of, test kits and masks in a manner that is discriminatory. Because there is a scarcity of these items, particularly the test kits, 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 equal access to them and thereby be discriminated against because of their disabilities.

II. RELEVANT FACTS

On December 27, 2021, the Governor of Connecticut first announced the planned statewide distribution of both in-home test kits and N-95 masks through municipalities.⁴ It was reported on December 31, 2021, that, when the State received the N-95 masks and at home test kits, they would be distributed to the towns and that the towns could do as they pleased with respect to distribution of the N-95 and the at home test kits.

Although the Governor stated in a letter to us dated January 5, 2022 (attached) that “[g]uidance was provided to the municipalities which provided that distribution *should* prioritize access to self-test kits after traditional hours,” (emphasis added), that guidance was clearly insufficient to persuade anyone that it was a requirement, and in any event the Governor in subsequent public statements made it very clear that it was not. For example, the Governor’s December 28, 2021 press release said, with no reference to vulnerable populations, that “The at-home tests and N95 masks are being distributed by the state to municipalities and school districts. Each municipality and school district will then determine how best to provide them to people who live in their respective cities and towns.”⁵ It was also widely reported in the multiple Connecticut Hearst publications: “[Governor] Lamont urged cities and towns to give these first tests to those in need

⁴ <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2021/12-2021/Governor-Lamont-Announces-Plans-To-Distribute-Three-Million-COVID-19-At-Home-Rapid-Tests>.

⁵ <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2021/12-2021/Governor-Lamont-Calls-up-Connecticut-National-Guard-Soldiers-and-Airmen-to-Assist>

as a priority, along with teachers and first responders, *but he said they were free to ignore that guidance and hand out the tests as they saw fit.*⁶ The Governor and DPH also have failed to consistently make those same N-95 masks being provided for free to the general public (including people who mostly live in single-family housing) to dependent individuals required to live in crowded, very high-risk custodial situations like prisons; they only get KN-95 masks.

Exemplar of Affected Individuals

Doris Maldonado

Doris Maldonado lives in West Hartford with her 4-year-old. She has several medical conditions that leave her at high risk of COVID-19, including being immune-compromised. She is permanently disabled after surviving a coma from a head-on car collision in 1999 and inadequate medical treatment years later, leaving her reliant on Social Security Disability Insurance. This makes the costs of N-95 masks and home tests a severe financial burden, in addition to the possibility of death from acquiring COVID or losing more family members to COVID. (Last year, her mother died of COVID on April 17, 2020 in a nursing home, and every other month thereafter her sisters died at other facilities.)

Doris' partner tested positive for COVID on Sunday, December 26, 2021. She immediately called the on-call number at her primary care provider to find out if she could be tested there, and that office said they did not offer COVID testing and suggested the local pharmacies. On Monday, December 27, Doris waited 6.5 hours with her toddler in the car at a pediatric urgent care center to have her daughter tested. She went to the local pharmacy that evening to look for rapid tests for herself but they had run out of their entire shipment by noon. She tried to schedule a test online but could not schedule a test until January 9, 2022. She went to one drive-up testing location in Hartford, but the line was blocks long.

After 6.5 hours of waiting, her daughter's rapid test was positive. Doris finally was able to get a COVID test on December 29, 2021 at a doctor's office in New Britain. She received her positive test result the following day. "The failure to do anything to ensure [tests] are offered beyond a first-come, first-served basis is egregious," Maldonado said in an email. "Where is the accountability? We remain the marginalized of the marginalized."

On December 31, 2021, DRCT and CLRP wrote a joint letter to Governor Lamont (copy attached), explaining that his plan for distribution of N-95 masks and the test kits unlawfully discriminated against people with disabilities. We requested that the State immediately adopt and implement a plan to ensure that these obligations are promptly met:

- (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

⁶ [Lamont secures 426,000 COVID tests; hospitals restrict visitors \(ctinsider.com\)](#)(12/31/21)(emphasis added).

- 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 to the PPE and test kits.

We asked the Governor to get back to us by close of business Tuesday, January 4, 2022, with regard to these requests. Late on January 4th, a representative for the Governor, Commissioner Deidre Gifford, Senior Advisor to the Governor for Health and Human Services, sent an email message indicating a response was delayed. We responded that we “will refrain from our intended action until tomorrow early afternoon to allow you an opportunity to complete the letter to us, which we will look forward to receiving” (email exchange attached). At around 3:30 on January 5, 2022, we received a letter response from the Governor and his chief of staff, Paul Mounds (attached).

The Governor, in addition to asserting in his letter that this was only a temporary situation, purported to address the heart of our concerns that (1) high risk individuals with disabilities in the community were not being prioritized for distribution of the supplies and (2) individuals in high-risk state custodial housing and state-funded congregate facilities were not being provided with access to N-95 masks, as follows:

- “Guidance was provided to the municipalities which provided that distribution [of test kits] *should* prioritize access to self-test kits after traditional hours.”
- “With the vulnerable populations in mind, in addition to test kits supplied to municipalities, the State also delivered and continues to deliver today tens of thousands of kits and masks to organizations that had delivery models in place and the ability to quickly identify those in need, both of which often included disabled individuals.”
- “[T]housands more [test kits] were delivered to the Departments of Mental Health and Addiction Services, Children and Families, Veterans’ Affairs, Developmental Disabilities and Housing for distribution to persons with disabilities and other vulnerable citizens. Test kits distributed during this acquisition include kits for the Departments of Mental Health and Addiction Services and Developmental Services to provide to congregate non-institutional residential settings that serve their clients.”

- “Currently, masks, including KN-95 and N-95 masks, are available on-line and in retail settings and are simply not in the same standing as test kits. Nevertheless, as part of the State’s effort to respond to the Omicron surge, the State is distributing millions of N-95 masks.”

We responded promptly to this letter by asking the Governor to provide us a copy of the “guidance” referenced in the letter. We received an email from Commissioner Gifford with a link to the guidance at 6:30 pm on January 5, 2022. The guidance provided to the municipalities dated 12/29/21 states, in *non-directive* terms:

“Here are *some guidelines* for the community-based distribution of COVID-19 self-tests:

- The majority of COVID-19 self-tests are being distributed through cities and towns:
 - o *Cities and towns have discretion to develop the distribution model that best fits their community*
 - o Distribution should prioritize vulnerable populations and provide access to self-test kits after traditional work hours
 - o Cities and towns may use a portion of the tests to ensure the availability of their essential workforce (e.g., emergency responders)”

<https://portal.ct.gov/coronavirus/self-test> (emphasis added).

We do appreciate that there has been a serious attempt to address testing needs in institutional settings and through some community organizations with delivery models in place, which inevitably include individuals with disabilities. We thank the Governor and his commissioners for responsiveness on that score. However, it is clear from the DPH “guidance” that “The majority of COVID-19 self-tests are being distributed through cities and towns.” The failure to require prioritization by municipalities of such tests for high-risk individuals in the community indicates the need for immediate relief from your agency. The reliance upon guidance which ambiguously provides that municipalities “should” prioritize vulnerable people in the community for test kits is completely belied by the Governor’s own press release which declares, without any reference to vulnerable populations, that “Each municipality and school district will then determine how best to provide them to people who live in their respective cities and towns,” and his subsequent statements to the press, cited above.

If there were any doubt about this, the real world response of the municipalities indicates that they got the message loud and clear that they were “free to ignore that guidance and hand out the tests as they saw fit.”⁷

Because the State, in distributing millions of federal dollars’ worth of life-saving supplies, has abdicated its responsibility to set uniform standards protecting people with disabilities in this distribution and has taken no action to **require** any city or town to reasonably accommodate

⁷ [Lamont secures 426,000 COVID tests; hospitals restrict visitors \(ctinsider.com\)\(12/31/21\).](#)

people with disabilities at a high risk of infection because of their residence in congregate living or at high risk of severe Covid disease if infected, Connecticut municipalities have adopted a broad range of policies -- from a total free-for-all on a first-come, first-served basis, to, in a few cases, recognition of the priority of high-risk individuals with, to varying degrees, some setting aside of test kits for these groups.

Based on research through media reports, we found **45 cities and towns** which are distributing the test kits entirely on a first come, first served basis, as authorized by the Governor, including:

Andover, Bethlehem, Bolton, Branford, Brookfield, Coventry, Cromwell, Danbury, Darien, Derby, East Haven, East Windsor, Ellington, Farmington, Glastonbury, Hamden, Manchester, Milford, Monroe, New Fairfield, Milford, New London, North Branford, North Haven, Norwalk, Orange, Redding, Rocky Hill, Southington, Stafford, Stamford, Stratford, Suffield, Tolland, Torrington, Vernon, Wallingford, Waterbury, West Hartford, West Haven, Weston, Westport, Wethersfield, Willington, and Windsor Locks.⁸

Going to individual town websites readily identifies additional “first-come, first-served” jurisdictions.⁹

A few municipalities, on the other hand, tried to do the right thing consistent with federal law. For example, the City of Middletown recognized that “it is simply neither efficient nor equitable to distribute 3,500 test kits to 48,000 residents at a mass distribution site on a first-come, first-served basis.” The city planned to work through their Medical Reserve Corps and Community Emergency Response Team to distribute their first shipment of kits to high-priority groups and individuals, including congregate living facilities providing specialized care and senior living facilities.¹⁰

Some towns, like Granby¹¹ and South Windsor¹², provided phone numbers that at-risk or medically fragile residents could call. The City of New Britain¹³ set up distribution sites at elderly/disabled housing complexes and specifically requested that residents of those complexes not attend the drive-through event at the local stadium. Mayor Erin Stewart stated “We are

⁸ https://www.journalinquirer.com/connecticut_and_region/towns-to-distribute-test-kits-see-your-towns-plan/article_70000046-68b1-11ec-a910-8300a9cfffac0.html
<https://www.nbcconnecticut.com/news/coronavirus/more-cities-towns-plan-to-distribute-covid-19-test-kits-on-monday/2682863/>
<https://bronx.news12.com/where-to-pick-up-at-home-tests-in-connecticut>
<https://www.fox61.com/article/news/health/coronavirus/connecticut-cities-and-towns-distribute-covid-19-test-kits/520-e4942aa2-38b0-4abb-b159-58346798f26c>
<https://www.fox61.com/article/news/health/coronavirus/at-home-covid-test-kit-distribution-in-your-town/520-7dad255e-6269-43a5-a997-139e78ab4e6e>

⁹ See, e.g., Meriden (<https://www.meridenct.gov/announcements/city-of-meriden-covid-19-home-self-test-kit-distribution/>)

¹⁰ <https://www.middletownct.gov/CivicSend/ViewMessage/Message/161003>

¹¹ https://www.granby-ct.gov/sites/g/files/vyhlf3171f/uploads/distribution_of_test_kits_and_masks.pdf

¹² <https://www.southwindsor-ct.gov/health-department/pages/covid-test-kit-distribution>

¹³ <https://twitter.com/conbct/status/1478083524838273026?s=21>

going to make sure that the test kits are going to get in the hands of our elderly New Britain Housing Authority residents, residents that are in densely populated buildings first.”¹⁴

East Hartford planned to distribute to housing authority sites, “congreg[ate] [sic] settings, and places identified as in the greatest need based on transmission.”¹⁵

While these policies vary widely, what they do show is that what complainants have requested of the state in the way of uniform direction is feasible, since several towns have on their own already done some version of just that. However, this does not benefit the vast majority of disabled Connecticut residents who do not live in those jurisdictions.

The Governor has continued to declare publicly that it is up to the towns and cities to decide **whether** to prioritize distribution to high risk, high need individuals with disabilities. For example, on January 3rd, according to the *Waterbury Republican-American*, the Governor stated: “I’m saying we have enough testing to take care of those folks most vulnerable, most in need, and give us a little time and we’ll have enough testing for everybody...” He again declined to give any instruction about the duty to accommodate such vulnerable individuals. Without enforcement from your agency stating that such a direction is required, his letter makes clear he will take no action in the next distribution round to include such clear direction, and it will continue to be mostly a free for all for the next allotment of test kits.

Similarly, the failure to make those same N-95 masks offered to the public available for individuals in state custody or state-funded facilities living in high-risk crowded quarters, including prisons under the control of the Department of Corrections, and relegating them to inferior KN-95 masks, requires immediate relief.

III. VIOLATIONS OF DISABILITY ANTI-DISCRIMINATION LAWS

Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. § 12131, *et seq.*, and its implementing regulations are directed at discrimination based on disability by state and local governments in their provision of public services. *Tennessee v. Lane*, 541 U.S. 509, 524 (2004) (“Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of [public] services and programs”). Congress stated that one of the purposes of the ADA was to assure equal opportunities for people with disabilities. 42 U.S.C. § 12101(a)(7). Title II 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

¹⁴ <http://www.newbritainherald.com/NBH-New+Britain+News/400258/many-new-britain-covid-testing-locations-reach-capacity-quickly-wednesday-city-will-receive-9000-covid-test-kits-from-state>

¹⁵ <https://www.easthartfordct.gov/home/news/update-on-at-home-covid-19-test-distribution>

qualified individuals with disabilities to discrimination.” 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(3). Public entities must also provide individuals with a disability opportunities equal to those available to those without a disability, 28 C.F.R. § 35.130(b)(1)(ii) & (iii).

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). Like Title II, Section 504 requires that people with disabilities are afforded benefits that are equal to those afforded others without disabilities. 28 C.F.R. § 41.51(b)(1)(ii). It also prohibits recipients of federal funds from engaging in methods of administration “[t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap.” 28 C.F.R. § 41.51(b)(3)(i), 45 C.F.R. § 84.4(b)(vii)(2).

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 Department of Health and Human Services (HHS), in its March 28, 2020 Bulletin: Civil Rights, HIPPA, 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. 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, also have constitutional rights to treatment and protection from harm.

The State and its contractors and/or agents have violated, and are continuing to violate, Title II and Section 504 by failing to make reasonable modifications to 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 in this case the provision of N-95 (not KN-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, including, and particularly, during a short-term period of scarcity.

The State is also engaging in unlawful 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.

Apart from these statutory obligations, 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 Eighth Amendment to the United States Constitution.

IV. REMEDIES

We respectfully request that the Office for Civil Rights immediately investigate this matter and mandate the following steps be taken, as applicable, by the Connecticut Governor and the Connecticut Department of Public Health:

- (1) Issue a directive to all Connecticut municipalities to immediately adopt and implement a plan for distribution of N-95 masks and COVID test kits (and any other COVID-related supplies offered to the general public) 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, including prioritizing high-risk individuals for scarce items. 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) Issue a directive to 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).
- (3) Issue an order that DPH, DMHAS, DOC, DCF and DDS adopt and implement a process for individuals with disabilities in state-operated or state-funded institutions or programs to seek and obtain reasonable modifications to their respective policies, practices and procedures to assure access to PPE (including N-95 masks) and test kits.

CONCLUSION

Relief is urgently needed even though the first round of test kits was already distributed without compliance with federal anti-discrimination laws, both because of the past harm and because the Governor has publicly announced, and stated in his January 5, 2022 letter, that **additional** limited rounds of masks and test kits will be distributed in the "next few days." His letter makes clear that, absent intervention, these also will not be distributed in a legally permissible manner, with the Governor again leaving it to the municipalities to decide about such compliance on their own; the suggestion that "[d]istribution should prioritize vulnerable populations" will be a mere serving suggestion that the majority of towns did, and will again, dispense with as they "see fit." Relief is also urgently needed on behalf of individuals in state custody or state-funded facilities who are forced to live in crowded housing and are not consistently being offered the same mask

protection (N-95s) as is being offered for free to the general public, the vast majority of whom live in far safer settings in terms of the risk of transmission.

Thank you for your attention to this complaint. We would be pleased to provide additional information. Please contact Deborah Dorfman, Sheldon Toubman, Kathy Flaherty, or Kirk Lowry with any questions or requests for additional information.

Sincerely,

/s/

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Attachments

cc: Rebecca Bond, United States Department of Justice, Civil Rights Division

Hon. Ned Lamont
DSS Commissioner Deidre Gifford
DPH Commissioner Manisha Juthani
Michelle Gilman, Deputy Chief Operating Officer



STATE OF CONNECTICUT
GOVERNOR NED LAMONT

Sent by Electronic Mail

January 5, 2022

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Dear Ms. Dorfman and Ms. Flaherty:

I received your letter dated December 31, 2021 regarding Covid testing and the distribution of N-95 masks. While I appreciate greatly the issues you raise, as a preliminary matter, I will note that there are more effective ways to communicate with me and the other executives in Connecticut. Rather than send a demand letter on New Year's Eve threatening "taking action against the State" if the State does not act as you have requested, you could instead reach out to my office to begin a discussion to get accurate information about our efforts and which may result in a resolution. It also would establish a better ongoing relationship in dealing with these complex and nuanced issues.

With that said, I wanted to briefly summarize the State's actions and its plan and invite you to meet with us to discuss any concerns you might have after reviewing this letter.

The decision to purchase and distribute testing kits ("kits") and N-95 masks ("masks") came shortly before the Christmas holiday.¹ The purpose of the acquisition of test kits was to relieve some of the pressure on the testing sites in Connecticut which were being overwhelmed with demand driven by the Omicron surge, workplace requirements, travel, and testing sought by individuals seeking to determine their status to participate in holiday gatherings. This purchase and allocation are short-term responses to surge in demand. The purchase and allocation are not being established as an ongoing program of supply. It is anticipated that the federal government is going to act this month to make hundreds of millions of kits available nationally including home delivery.

¹ Some kits which have been received this week were secured using federal funds that could only be used for K-12 students. The decision for this acquisition pre-dated the holiday weekend.

The initial bulk of the kits were received and immediately delivered over the New Year's holiday weekend to the municipalities as it is the municipalities that are most capable to develop the distribution model that best meets the needs of their community. Guidance was provided to the municipalities which provided that distribution should prioritize vulnerable populations and provide access to self-test kits after traditional work hours. Certainly, people with disabilities fall into the category of vulnerable populations, as do other populations in Connecticut. Masks have been and continue to be readily available and your comments that the State's direction was to distribute the masks on a first come, first serve basis are simply incorrect.

With the vulnerable populations in mind, in addition to test kits supplied to municipalities, the State also delivered and continues to deliver today tens of thousands of kits and masks to organizations that had delivery models in place and the ability to quickly identify those in need, both of which often included disabled individuals. For example, approximately 20,000 kits were delivered to faith-based organizations which in the vaccination efforts were identified as effective in providing support to disabled individuals in the community. At the time of this delivery, the faith based organizations were provided the opportunity to take masks as needed. More than 30,000 kits and as many masks as needed have been delivered to Foodshare for distribution. In addition, thousands more were delivered to the Departments of Mental Health and Addiction Services, Children and Families, Veterans' Affairs, Developmental Disabilities and Housing for distribution to persons with disabilities and other vulnerable citizens. Test kits distributed during this acquisition include kits for the Departments of Mental Health and Addiction Services and Developmental Services to provide to congregate non-institutional residential settings that serve their clients.

We are working diligently to identify vulnerable populations and increase supply to such populations to alleviate the current shortage of testing opportunities. It is important to note our efforts are contingent upon the availability of kits for acquisition. We expect hundreds of thousands more kits in the next few days. The State is also planning on increasing distribution to the state agencies and non-profit providers that work regularly serving vulnerable populations. Commissioners and senior leadership from the state agencies that serve our most vulnerable populations have met and are continuing to gather information which will help the State direct resources to further efforts to temporarily boost testing opportunities.

In regard to those disabled individuals in state custody or residing in state institutions, we have not identified problems with access to testing in those settings that would necessitate the provision of additional test kits.

Currently, masks, including KN-95 and N-95 masks, are available on-line and in retail settings and are simply not in the same standing as test kits. Nevertheless, as part of the State's effort to respond to the Omicron surge, the State is distributing millions of N-95 masks.

My staff and I welcome the input of Disability Rights Connecticut and Connecticut Legal Rights Project. We are receptive to suggestions that will ensure that Connecticut's most vulnerable populations have equal access to resources during a time when there are significant shortages statewide. Please contact Commissioner Deidre Gifford, to arrange a meeting to discuss these issues.

Sincerely,



Ned Lamont
Governor

cc: Speaker Matt Ritter
House Majority Leader Jason Rojas
House Minority Leader Vincent Candelora
Senate President Tempore Martin Looney
Senate Majority Leader Bob Duff
Senate Minority Leader Kevin Kelly
Senator Catherine Osten
Representative Toni Walker
Senator Mary Daugherty Abrams
Representative Jonathan Steinberg
Senator Gary Winfield
Representative Steven Stafstrom
Senator Marilyn Moore
Representative Catherine Abercrombie
Joe Delong, ED and CEO, CT Conference of Municipalities
Molly Cole, Coordinator, CT Cross Disability Lifespan Alliance
Walter Glomb, CT Developmental Disabilities Council
Win Evert, ARC of CT
Sarah Egan, Director, Office of the Child Advocate
Marybeth Rutter, Director, UCEDD
Alison Barkoff, Principal Deputy Administrator, United States Administration for Community Living
Jennifer Mathis, Deputy Assistant Attorney General, United States Department of Justice



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
Executive Director
Connecticut Legal Rights Project

/s/

Kir Lowery
Legal Director
Connecticut Legal Rights Project

Cc:

Chief of Staff Paul Mounds
DAS Commissioner Josh Geballe
Attorney General William Tong
DOC Commissioner Angel Quiros
DPH Commissioner Manisha Juthani
DMHAS Commissioner Nancy Navarretta
DCF Commissioner Vannessa Dorantes
DDS Commissioner Jordan Scheff
OPM Secretary Melissa McCaw
Speaker Matt Ritter
House Majority Leader Jason Rojas
House Minority Leader Vincent Candelora
Senate President Martin Looney
Senate Majority Leader Bob Duff
Senate Minority Leader Kevin Kelly
Senator Catherine Osten
Rep. Toni Walker
Senator Mary Daugherty Abrams
Rep. Jonathan Steinberg

Sen. Gary Winfield
Rep. Steven Stafstrom
Senator Marilyn Moore
Rep. Catherine Abercrombie
Joe DeLong, ED and CEO, CT Conference of Municipalities
Molly Cole, Coordinator, CT Cross Disability Lifespan Alliance
Walter Glomb, CT Developmental Disabilities Council
Win Evert, ARC of CT
Sarah Egan, Director, Office of the Child Advocate
Marybeth Rutter, Director, UCEDD
Alison Barkoff, Principal Deputy Administrator, United States Administration for Community
Living
Jennifer Mathis, Deputy Assistant Attorney General, United States Department of Justice

Sheldon Toubman

From: Deborah Dorfman
Sent: Tuesday, January 4, 2022 6:12 PM
To: Gifford, Deidre; Sheldon Toubman; KFlaherty@clrp.org
Cc: Juthani, Manisha; Gilman, Michelle; Kirk Lowry
Subject: RE: Response to your letter of Dec. 31

Dear Commissioner Gifford:

Thank you very much for your message, Commissioner. We appreciate your advising us of the intention to respond, although we had asked for a response from the Governor by the close of business today.

The situation is urgent--it cannot wait one day longer. DRCT's and CLRP's clients and constituents with disabilities, including individuals in state institutions, must be immediately provided with equal access to N-95 (not KN-95) masks and test kits as are being offered to the general public, and an opportunity to receive reasonable modifications. Each day that goes by without these protections needlessly exacerbates the risk that they will become seriously ill from COVID-19 and serves only to perpetuate disability discrimination.

That having been said, we do understand the intense pressures on all state officials right now and will refrain from our intended action until tomorrow early afternoon to allow you an opportunity to complete the letter to us, which we will look forward to receiving.

Thank you and Happy New Year.

Sincerely,

Deborah Dorfman
Executive Director/Attorney
Disability Rights Connecticut

From: Gifford, Deidre <Deidre.Gifford@ct.gov>
Sent: Tuesday, January 4, 2022 5:25 PM
To: Deborah Dorfman <deborah.dorfman@disrightsct.org>; Sheldon Toubman <sheldon.toubman@disrightsct.org>; KFlaherty@clrp.org
Cc: Juthani, Manisha <Manisha.Juthani@ct.gov>; Gilman, Michelle <Michelle.Gilman@ct.gov>
Subject: Response to your letter of Dec. 31

CAUTION: EXTERNAL SENDER.

Good afternoon:

Happy New Year to you all. We are in receipt of your letter of December 31 regarding test and mask distribution. We have a response draft that is currently being reviewed, and which we should have to you shortly but likely not by the end of the day today.

We look forward to further conversations on the topic and appreciate your advocacy on this important issue.

Best, Deidre

Deidre S. Gifford, MD, MPH
Senior Advisor to the Governor for Health and Human Services
Commissioner, CT Department of Social Services
Deidre.Gifford@ct.gov