



Council of the District of Columbia Committee on Health Public Oversight Hearing on “The Public Health Element of the District’s COVID-19 Response”

Written Testimony of Disability Rights DC at University Legal Services

November 11, 2020

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Disability Rights DC appreciates the opportunity to submit written testimony regarding the District of Columbia’s response to the COVID-19 pandemic. Disability Rights DC (DRDC) is the designated protection and advocacy agency for the District of Columbia. We advocate on behalf of District residents with disabilities to promote their rights to live in the community under the integration mandate of the Americans with Disabilities Act (ADA) as interpreted by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999).<sup>1</sup>

COVID-19 poses a real and immediate threat to the lives of all DC residents; senior citizens and people with disabilities, particularly Black District residents with disabilities, are far more vulnerable to COVID-19 than the population at large.<sup>2</sup> As discussed below, the District’s response to COVID-19 in nursing facilities has placed senior citizens and people with disabilities at extreme risk of infection and death. To mitigate the serious risk of harm and death, the District must immediately transition individuals out of costly<sup>3</sup> nursing facilities and into the community through its existing EPD Waiver program, which provides a nursing facility level of care in the community. The transition of the vulnerable nursing facility residents to the community will save lives and is the sole effective remedy now that COVID-19 has entered these facilities.

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<sup>1</sup> DRDC, along with AARP Foundation Litigation and Terris, Pravlik, & Millian LLP, is plaintiffs’ class counsel in *Brown v. District of Columbia*. *Brown* is a class action under Title II of the ADA on behalf of DC residents in nursing facilities who seek transition assistance from the DC government to move back to the community with the Medicaid long-term care services they need. DRDC is also plaintiffs’ co-counsel and plaintiff in *MJ v. District of Columbia*, a class action lawsuit under Title II of the ADA and the Medicaid statute on behalf of DC youth with significant mental and behavioral health challenges seeking intensive community-based services to prevent institutionalization.

<sup>2</sup> *People with Disabilities*, Centers for Disease Control and Prevention, Last accessed on November 10, 2020 at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>; *If You Are at Higher Risk*, Centers for Disease Control and Prevention, <https://tinyurl.com/vtbebzc>; see also Report of the WHO-China Joint Mission on Coronavirus Disease (COVID-19), <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> at 12.

<sup>3</sup> In FY19 the average cost per recipient for nursing facility care is \$60,596. In FY19, the average cost per recipient for the Medicaid Waiver Program for People who are Elderly and/or have Physical Disabilities (EPD Waiver) is \$27,590. DC Department of Health Care Finance, *DHCF Proposed FY21 Budget, Including Medicaid and Alliance Spending Trends*, May 2020 Presentation to the Medicaid Care Advisory Committee (MCAC), at 70, available at [https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/page\\_content/attachments/DHCF%20FY21%20MCAC%20Budget%20Presentation%20Updated.pdf](https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/page_content/attachments/DHCF%20FY21%20MCAC%20Budget%20Presentation%20Updated.pdf)

## *The District's COVID-19 Response in Nursing Facilities*

The Supreme Court made clear in its landmark decision *Olmstead v. L.C.* that people with disabilities have the right under Title II of the ADA to live independently by receiving services in the most integrated setting appropriate to their needs. The District has an obligation under Title II of the ADA to provide transition assistance to help nursing facility residents who wish to move back to the community. The COVID-19 pandemic has exacerbated the need for an effective system of transition assistance and underscores the harms of ableism and institutionalization. Accordingly, *Olmstead* compliance is critical.

Since the District started tracking COVID-19 infections and deaths in nursing facilities in the District, about 30% (732) of District nursing facility residents have tested positive for COVID-19, based on the most recent District data.<sup>4</sup> This is almost 12 times higher than the 2.6% general community rate in the District.<sup>5</sup> According to DC Health, 163 nursing facility residents passed away due to COVID-19 as of November 5, 2020, meaning 22% of those who contract COVID-19 in a District nursing facility die, compared to 3.5% in the population at large.<sup>6</sup> Nursing facility residents represent a disproportionate share of the District's COVID-19 cases and deaths.

The District must do more to respond to COVID-19 for nursing facility residents. Initially, DC Health's pandemic response plan failed to provide adequate testing and personal protective gear in these facilities.<sup>7</sup> Occupancy rates over 90% make it difficult, if not impossible, to contain infectious outbreaks. DC Health has failed to fine any District nursing facility, despite failures to prevent the spread of COVID-19 among residents.<sup>8</sup> DC Health's ongoing efforts to restrict nursing facility residents from leaving for non-medical reasons have not prevented the spread of COVID-19, and further isolate these residents from their families and community.<sup>9</sup> As

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<sup>4</sup> This approximate percentage reflects the number of residents with confirmed COVID-19 cases in District nursing facilities divided by the approximate total number of nursing facility residents (total bed capacity (2,597) reported by DC Health multiplied by the 92% nursing facility occupancy rate for FY19). DC Health, COVID-19 Surveillance Data, Long-Term Care Facilities (Updated November 5, 2020). <https://coronavirus.dc.gov/data>  
<sup>5</sup> 18,379 confirmed COVID-19 cases reported by DC Health out of a total population of approximately 705,749 based on US Census Bureau data. DC Health, COVID-19 Surveillance Data (last updated November 10, 2020). <https://coronavirus.dc.gov/data>; U.S. Census Bureau, District of Columbia Population Estimates (July 1, 2019). <https://www.census.gov/quickfacts/DC>

<sup>6</sup> The nursing facility rate is based on 163 nursing facility COVID-19 deaths among the 732 reported COVID-19 cases. For the community rate, 657 COVID-19 deaths divided by 18,379 reported COVID-19 cases. DC Health, COVID-19 Surveillance Data (last updated November 10, 2020). <https://coronavirus.dc.gov/data>

<sup>7</sup> Ilana Xuman, director of LeadingAge DC stated in May 2020 most DC long-term care communities still need adequate testing, funding, and PPE. Margaret Barthel, "This D.C. Nursing Home Decided To Test Every Resident And Staff Member. Here's What Happened," DCist.org (May 28, 2020). <https://wamu.org/story/20/05/28/this-d-c-nursing-home-decided-to-test-every-resident-and-staff-member-heres-what-happened/>

<sup>8</sup> While Maryland has levied fines for nursing facilities violations, there have been no reported DC fines. DC Health, Civil Monetary Penalties, Nursing Homes. (last visited November 10, 2020). <https://dchealth.dc.gov/service/civil-monetary-penalties-nursing-homes> See Rebecca Tan and Rachel Chason, "These nursing homes failed to isolate covid-19 patients. Now they face six-figure fines," The Washington Post (August 26, 2020). [https://www.washingtonpost.com/local/maryland-nursing-home-fines/2020/08/26/8da892a4-e719-11ea-970a-64c73a1c2392\\_story.html](https://www.washingtonpost.com/local/maryland-nursing-home-fines/2020/08/26/8da892a4-e719-11ea-970a-64c73a1c2392_story.html)

<sup>9</sup> DC Health, Coronavirus 2019 (COVID-19) Reopening Guidance (Phase One & Phase Two) for Skilled Nursing Facilities & Assisted Living Residences, p. 3 (June 11, 2020). [https://coronavirus.dc.gov/sites/default/files/dc/sites/dcpcs/page\\_content/attachments/06122020\\_DCHealth-Long-Term-Care-Phased-Guidance.pdf](https://coronavirus.dc.gov/sites/default/files/dc/sites/dcpcs/page_content/attachments/06122020_DCHealth-Long-Term-Care-Phased-Guidance.pdf)

staff enter and leave facilities, they bring with them community-acquired infection into the facility.<sup>10</sup> According to DC Health, 439 nursing facility staff tested positive for COVID-19 and 7 staff passed away as of November 5, 2020.<sup>11</sup> Week-long lags in staff testing results render DC Health testing requirements ineffective.<sup>12</sup> Moreover, the District does not mandate testing of all nursing facility residents.<sup>13</sup> DC Health’s COVID-19 data and ongoing testing lags demonstrate it is too late to prevent the spread of the virus in nursing facilities through comprehensive testing and mitigation measures. This concern is only exacerbated by the recent rise in COVID-19 hospitalization rates across 38 states.<sup>14</sup>

To prevent further coronavirus infections or deaths, the District must act now to transition residents out of nursing facilities and into community settings, just as it did to transition families and individuals experiencing homelessness out of emergency shelters.<sup>15</sup> So far, the District’s pandemic response has not included a commitment to transition District residents out of nursing facilities into the community. The Aging and Disability Resource Center (ADRC) of the Department of Aging and Community Living (DACL) controls the gate for individuals who wish to exercise their rights to live in the community. ADRC is the District office responsible for providing transition assistance to people in nursing facilities.<sup>16</sup> Transition assistance includes information about residents’ rights to live in the community, information about community-based alternatives for nursing facility residents, assistance in linking nursing facility residents to home health agencies, assessment for Medicaid home and community-based services,<sup>17</sup> and assistance in securing needed adaptive equipment, household items, and applying for housing. The District only commits to a modest number of transitions each year that is not aligned with

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<sup>10</sup> Lenny Bernstein. “Covid-19 surges back into nursing homes in coronavirus hot spots,” The Washington Post (August 13, 2020). [https://www.washingtonpost.com/health/covid-19-surges-back-into-nursing-homes-in-coronavirus-hot-spots/2020/08/13/edbff5fe-dd75-11ea-b205-ff838e15a9a6\\_story.html](https://www.washingtonpost.com/health/covid-19-surges-back-into-nursing-homes-in-coronavirus-hot-spots/2020/08/13/edbff5fe-dd75-11ea-b205-ff838e15a9a6_story.html)

<sup>11</sup> DC Health, COVID-19 Surveillance Data, Long-Term Care Facilities (Updated November 5, 2020). <https://coronavirus.dc.gov/data>

<sup>12</sup> Margaret Barthel. “Nursing Homes Are Still ‘In The Middle Of The Pandemic’ As The D.C. Region Reopens,” DCist.com (July 29, 2020). <https://dcist.com/story/20/07/29/dc-assisted-living-open-coronavirus-pandemic/>

<sup>13</sup> DC Health, Coronavirus 2019 (COVID-19) Reopening Guidance (Phase One & Phase Two) for Skilled Nursing Facilities & Assisted Living Residences, p. 7 (June 11, 2020).

[https://coronavirus.dc.gov/sites/default/files/dc/sites/dcps/page\\_content/attachments/06122020\\_DCHealth-Long-Term-Care-Phased-Guidance.pdf](https://coronavirus.dc.gov/sites/default/files/dc/sites/dcps/page_content/attachments/06122020_DCHealth-Long-Term-Care-Phased-Guidance.pdf)

<sup>14</sup> Paulina Villegas and Jacqueline Dupree. “Covid-19 hospitalizations have risen in 38 states over the past week,” The Washington Post (October 23, 2020). <https://www.washingtonpost.com/nation/2020/10/23/coronavirus-covid-live-updates-us/#link-UPCRIBUEQFGDRGJYMLA2IPCGCQ>

<sup>15</sup> *Responding to COVID-19 in Emergency Shelters*, District of Columbia Government, available at <https://storymaps.arcgis.com/stories/b8c0374078644c5298ad2b6b8dfbf751>

<sup>16</sup> The nursing facilities are not providing transition assistance nor can they due to their extremely high caseloads, lack of incentives, and pandemic related responsibilities.

<sup>17</sup> DC Medicaid provides home and community-based long-term care services under two programs for seniors and people with physical disabilities: the Medicaid State Plan Personal Care Assistance (PCA) Program and the Medicaid Waiver Program for People who are Elderly and/or have Physical Disabilities (EPD Waiver). These services help people with disabilities perform their activities of daily living (ADLs) such as bathing, dressing, toileting, eating and transferring into and out of their wheelchairs. Among other services, the EPD waiver also provides accessibility home modifications and community transition services (covering moving and household startup costs for people moving out of nursing facilities to the community). The same ADL requirements apply to access services in nursing facilities as apply to access services in the community. Thus, DC residents in nursing facilities automatically qualify for these long-term care services; in order to participate, Liberty Healthcare assesses their ongoing needs using a standardized assessment tool.

the significant demand for transition, making transition assistance elusive for far too many nursing facility residents.

*The District has Failed to Maximize Federal Medicaid Dollars and Other Federal Funding to Transition Nursing Facility Residents into the Community*

The District has failed to maximize federal Medicaid funding to transition nursing facility residents into the community. The Department of Health Care Finance (DHCF) left millions of untapped federal dollars on the table under the Money Follows the Person (MFP) Program while incurring higher cost nursing facility services for those DC residents who would prefer to live in the community as is their right under the ADA. Since 2011, the District has administered the MFP Program and set a limited number of nursing facility residents allowed to transition to the community under MFP. Each year, DC set an MFP goal for only 30 or 40 transitions out of nursing facilities. According to a report commissioned by the U.S. Centers for Medicaid and Medicare (CMS), the District transitioned only 213 seniors and adults with disabilities from nursing facilities under the MFP Program from 2008 through 2019.<sup>18</sup>

Because the District has transitioned so few people from nursing facilities, it failed to take advantage of millions of unspent federal Medicaid reimbursement dollars. Federal MFP funds are only available to the District for each person transitioned from nursing facilities to the community following a minimum 90-day nursing facility stay. For one year of Medicaid services following transition to the community, the District receives an increased Federal reimbursement rate of 85% (as compared to the standard 70% Federal Medicaid match for the District). MFP provided the District with enhanced federal funding that covered the first year of EPD Waiver services as well as transition coordination and household startup assistance for each nursing facility resident who transitioned through MFP. The District planned for the federally funded MFP program's termination in 2018 with a Sustainability Plan to CMS regarding how it would build on the years of the program. In 2018, the District cut its MFP targets by half when it believed the MFP program was ending. In 2019 and 2020, the District used mostly non-MFP funding to transition nursing facility residents consistent with its Sustainability Plan. However, the MFP Program has continued to receive federal support on a year-to-year basis contingent upon Congressional approval.<sup>19</sup> Had the District maximized the funds from the MFP Program effectively, there may have been fewer people infected with the coronavirus.

The District recently decided in its EPD Waiver Amendment and emergency and proposed regulations to arbitrarily reduce community transition services (CTS) from 120 days to 60 days prior to discharge from a nursing facility. D.C. Mun. Reg. tit. 29 § 4221.1 and § 4252.6. This reduction reflects the District's lack of commitment to expand integrated opportunities. CTS are meant to provide for the planning and expenses required for transitioning out of these facilities into the community. A cut in the time prior to discharge for these services means the approximately 4,000 DC Medicaid beneficiaries in nursing facilities<sup>20</sup> will have an even harder

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<sup>18</sup> Liao, B. and Peebles, V. "Money Follows the Person: State Transitions as of December 31, 2019," Table 2 (Cumulative transitions by target population and total, as of December 31, 2019), at 6. Available at <https://www.medicaid.gov/medicaid/long-term-services-supports/downloads/mfp-2019-transitions-brief.pdf>

<sup>19</sup> *Id.* at 1.

<sup>20</sup> DHCF, *DHCF Proposed FY21 Budget, Including Medicaid and Alliance Spending Trends*, May 2020 Presentation to the Medicaid Care Advisory Committee (MCAC), at 70 (4,072 was the total number of recipients of Medicaid LTSS in nursing facilities in FY19), available at

time engaging in meaningful planning and transitioning back to the community. Often plans change, resulting in slippage of discharge dates and the need for community transition services for longer than 60 days.<sup>21</sup> Neither the EPD Waiver amendment nor these emergency regulations include any rationale for the sharp reduction in CTS. The District maintains a 92% nursing facility occupancy rate,<sup>22</sup> the highest nursing facility occupancy rate in the country, which supports a longer period prior to discharge for CTS, not shorter.

The District has capacity to provide all the services nursing facility residents need to live in the community as it already does for thousands of individuals who need a nursing facility level of care under the EPD Waiver. Indeed, the EPD Waiver has over 1,500 unused program slots. To address any immediate housing needs, the District should use “special purpose” federally-subsidized housing vouchers<sup>23</sup> and local dollars, or provide temporary emergency housing in vacant hotel rooms throughout the District.<sup>24</sup> The District does not have an effectively working system to provide that needed transition assistance to mitigate the serious risk of harm and death from the coronavirus. The District must immediately make meaningful progress towards community integration for individuals residing in nursing facilities. There is too much at stake in terms of the lives and well-being of senior citizens and people with disabilities.

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<sup>21</sup> Martha Bebinger. “Moving People Home After Nursing Home Stay Is Complicated,” Kaiser Health News (August 12, 2013) (highlighting difficulties of transitioning out of nursing facilities). <https://khn.org/news/nursing-home-money-follows-the-person-massachusetts/>

<sup>22</sup> Kaiser Family Foundation, *State Health Facts, Certified Nursing Facility Occupancy Rate* (2019). <https://www.kff.org/other/state-indicator/nursing-facility-occupancy-rates/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>

<sup>23</sup> Prioritizing housing resources for this population is feasible, the District has simply chosen not to do so. Specifically, the District could exercise its discretion to allocate more “special purpose” federally-subsidized housing vouchers (administered by Mayoral agencies) and earmark them for nursing facility residents to enable them to transition from nursing facilities to the community.

<sup>24</sup> Julie Zauzmer. “D.C. pays millions to place the homeless in hotels to avoid covid-19. But many rooms are empty. And others need them,” The Washington Post (August 7, 2020). <https://www.washingtonpost.com/dc-md-va/2020/08/07/dc-pays-millions-place-homeless-hotels-avoid-covid-19-many-rooms-are-empty-others-need-them/>