



U.S. Department of Justice

Civil Rights Division

*Disability Rights Section
4 Constitution Square
150 M St., NE
Washington, DC 20530*

February 10, 2020

VIA EMAIL

Kevin Beal, Assistant Attorney General
Kelly Morrell, Assistant Attorney General
State of Maine, Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006
Kevin.Beal@maine.gov
Kelly.L.Morrell@maine.gov

Re: The United States' Findings and Conclusions Based on Its Investigation of the State of Maine under Title II of the Americans with Disabilities Act

Dear Mr. Beal and Ms. Morrell:

The United States Department of Justice (the Department) has completed its investigation of the State of Maine (Maine, or the State) under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131–12134, and its implementing regulation, 28 C.F.R. Part 35. The Department opened this investigation in response to a complaint from a Maine resident alleging that the home support service limits under the Maine Department of Health and Human Services (DHHS) MaineCare program's "Home and Community Services for Adults with Intellectual Disabilities or Autism Spectrum Disorder" waiver (Section 21 waiver) place the complainant's adult son (the Complainant) at risk of unnecessary segregation. This letter sets forth the Department's findings of fact and conclusions of law and the minimum steps the State must take to meet its legal obligations and remedy the violations the Department has identified.

Under Title II of the ADA, no qualified individual with a disability shall, on the basis of 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; 28 C.F.R. § 35.130(a). Congress explicitly identified unjustified "segregation" of persons with disabilities as a "for[m] of discrimination." 42 U.S.C. §§ 12101(a)(2), 12101(a)(5). Thus, Title II's implementing regulation requires, in what is known as the "integration mandate," that "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The "most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]" 28 C.F.R. pt. 35, app. B, at 709 (2019).

The Supreme Court has held that unjustified isolation is a form of discrimination prohibited by the ADA. *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999). Public entities must provide community-based services to individuals with disabilities when (a) such services are

appropriate, (b) the affected persons do not oppose community-based treatment, and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. *Id.* at 607.

The ADA's integration mandate applies not only to people with disabilities who are currently in institutions, but also to people with disabilities who are at serious risk of segregation. *E.g.*, *Steimel v. Wernert*, 823 F.3d 902, 912 (7th Cir. 2016) (quoting *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003)); *Davis v. Shah*, 821 F.3d 231, 263 (2d Cir. 2016); *Pashby v. Delia*, 709 F.3d 307, 321-22 (4th Cir. 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116-17 (9th Cir. 2011), *amended by* 697 F.3d 706 (9th Cir. 2012); *see also* *Kenneth R. v. Hassan*, 293 F.R.D. 254, 260 (D.N.H. 2013); *Suzman v. Comm'r, DHHS*, 876 A.2d 29, 38 (Me. 2005) (holding that because plaintiff required an institutional level of care to be eligible for the waiver, failure to provide him with services he needed rendered him at risk of institutionalization by definition).

A public entity must make modifications to policies, practices, or procedures when necessary to avoid disability discrimination, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7)(i).

Title II of the ADA applies to the State of Maine because it is a "public entity" as defined by the statute. 42 U.S.C. § 12131(1). Maine is prohibited from discriminating on the basis of disability, directly or through contractual, licensing, or other arrangements. 28 C.F.R. § 35.130(b)(1). Title II authorizes the United States to initiate investigations, make findings of fact and conclusions of law, and attempt to secure voluntary compliance when it finds violations. 28 C.F.R. § 35.172.

After carefully reviewing the evidence, we have determined that Maine is violating Title II of the ADA by failing to provide the Complainant with necessary services in the most integrated setting appropriate to his needs and thereby placing him at serious risk of unnecessary segregation, and failing to reasonably modify its relevant service program to avoid discrimination.

Our investigation began in May 2018 in response to a complaint filed by the Complainant's parent on the Complainant's behalf. The Complainant lives with his parents and has several disabilities and medical conditions that result in his need for assistance with all daily life activities. Since 2009, he has received Home Support Quarter Hour services under Maine's Section 21 waiver, which include personal assistance with activities of daily living and instrumental activities of daily living.

The complaint alleged, and our investigation concluded, that the State has for years failed to provide the Complainant with the services the State acknowledges he needs. In 2014, Maine ceased authorizing the Complainant's planning team's requests for services in excess of 84 hours per week, citing the State's cap on services Section 21 waiver recipients can receive while living in their own (or family) homes. The State's continued failure to provide necessary in-home services to the Complainant also resulted from the State's service planning process, which determined Complainant's placement/services based on provider preference, rather than based on

what would be the most integrated setting appropriate for the Complainant. The family instituted an administrative challenge to the 2014 denial, which the State contested while also acknowledging that the Complainant needs 168 hours of services per week. In February 2017, at the conclusion of the administrative challenge, the State cut the Complainant's services in half, to 84 hours per week. During the Department's investigation, in March 2019, the State reversed course and made an exception to the cap, authorizing the Complainant to receive 168 hours per week of Home Support services in his home. The 84-hour cap otherwise remains in force. In addition, the State has failed to ensure that its licensed service provider fulfills the hours or identify additional providers that could fulfill the authorized hours; thus, the Complainant continues to receive approximately 84 hours per week of in-home services.

As a result of Maine's failure to provide him with necessary services in the most integrated setting appropriate, the Complainant is at serious risk of unnecessary segregation. *See* 28 C.F.R. § 35.130(d). The Complainant's continued receipt of fewer services than he needs is not sustainable. Although his parents assist as much as they can, both are aging and have physical limitations that render them unable to consistently or effectively assist their son. To receive the services he needs, the Complainant would have to move, but his only options are segregated settings. The only alternative placements he has ever been offered were a bed in an Intermediate Care Facility (ICF) or a bed in a multi-person group home. ICFs are by definition institutional placements. And whether living in an ICF or a group home, the Complainant would not have access to the community as he did when he lived at home with adequate services. He could not freely choose to go into the community and interact with individuals with and without disabilities if he lived in these settings but instead would be restricted by the congregate, shared-staff nature of those facilities. The State has failed to make reasonable modifications to its policies, practices, and procedures that would bring it into compliance with the ADA here. *See* 28 C.F.R. § 35.130(b)(7)(i).

In addition to placing the Complainant at serious risk of unnecessary segregation, Maine's failure to reasonably modify its 84-hour cap on Quarter Hour services has caused him to experience emotional harm.

Maine should promptly implement measures to remedy this violation and protect the civil rights of individuals with disabilities who receive Section 21 waiver services in the State. These should include:

1. Reasonably modifying the Section 21 waiver's 84-hour cap on Quarter Hour services by establishing and implementing a process for individuals to obtain an exception to the cap, such that individuals can receive Section 21 waiver services in the most integrated setting appropriate to their needs unless the provision of such services would constitute a fundamental alteration.
2. Reasonably modifying the Section 21 waiver's service planning process to ensure that the services a member receives, and the setting(s) in which they receive such services, are determined by the member's individual needs and preferences, rather than by provider preference.

3. Informing individuals currently receiving, or who may be eligible to receive, Section 21 waiver services, including individuals currently receiving services in agency placements, those receiving Quarter Hour services, and those receiving Medicaid services in ICFs who may be eligible for Section 21 waiver services, about the exceptions process and providing personal planning that is sufficiently focused on the member's individual needs and preferences, as described above.
4. Informing State employees, agents, and contractors, including case managers, as well as others, including providers, who serve on personal planning teams, and employees implementing the exceptions process, about the modifications implemented, including the exceptions process, how to apply for an exception under the process, and how the exceptions and personal planning processes should operate to ensure that individuals can receive services in the most integrated setting appropriate to their needs.
5. Ensuring that the State has sufficient provider capacity to fulfill the Complainant's authorized Section 21 waiver service hours.
6. Paying compensatory damages to the Complainant for injuries caused by the State's actions.
7. Providing the United States with written status reports delineating all steps taken to comply with these requirements, including the date(s) on which each step was taken, and, where applicable, information sufficient to demonstrate compliance.

We hope to work cooperatively with you to resolve the Department's findings in this matter. We are obligated to inform you, however, that if the State declines to enter into voluntary compliance negotiations or if our negotiations are unsuccessful, the United States may then need to take appropriate action, including initiating a lawsuit, to obtain redress for outstanding concerns associated with the State's compliance with the ADA.

Please contact Lindsey Weinstock, Trial Attorney at the Disability Rights Section of the Civil Rights Division, at (202) 616-2221 within five days of receipt of this letter if Maine is interested in working with the United States to reach an appropriate resolution along the lines described above. If you have any questions as you review this letter, please feel free to contact us.¹

Sincerely,

/s/

Rebecca B. Bond
Chief
Disability Rights Section

¹ We will share a copy of this letter with the complaining party. Under 28 C.F.R. § 35.172(d), a complainant may file a private suit at any time pursuant to Title II of the ADA, 42 U.S.C. § 12133.