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March 3, 2022

By First Class Mail and Electronic Mail

Governor Jared Polis
State Capitol Building
200 E. Colfax Avenue, Rm. 136
Denver, CO 80203
Email: governorpolis@state.co.us

Re: United States' Investigation, Under Title II of the Americans with Disabilities Act, of Colorado's Use of Nursing Facilities to Serve Adults with Physical Disabilities

Dear Governor Polis:

We write to report the findings of our investigation of Colorado's long-term care system for adults with physical disabilities.¹ In response to several complaints, we assessed the State's compliance with Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131–12134, as interpreted by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which requires public entities to administer services to individuals with disabilities in the most integrated setting appropriate to their needs. The U.S. Department of Justice is authorized to seek a remedy for violations of Title II of the ADA. 42 U.S.C. § 12133; 28 C.F.R. §§ 35.170–174, 190(e). The COVID-19 crisis has highlighted that *Olmstead* compliance is not only a matter of ensuring the rights of individuals with disabilities to live independently and participate fully in society. It can also be a matter of life and death: nearly 150,000 nursing home residents nationwide have died of COVID-19, including more than 1,900 in Colorado.²

We have determined that Colorado is violating the ADA by administering its long-term care system in a way that unnecessarily segregates individuals with physical disabilities in nursing facilities and places others with physical disabilities at serious risk of unnecessary institutionalization. This letter describes the Department's findings and the steps the State should take to meet its legal obligations and remedy the violations the Department has identified.

¹ "Long-term care system" refers to State-administered long-term services and supports provided to adults with physical disabilities in nursing facilities and community-based settings.

² Centers for Medicare and Medicaid Services (CMS), COVID-19 Nursing Home Data, <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/> (last visited February 24, 2022); *see also* Dataset for 2022, https://download.cms.gov/covid_nhsn/faclevel_2022.zip (last visited February 23, 2022).

Before proceeding to the substance of the letter, we want to thank the State for its cooperation throughout our investigation and to acknowledge the professionalism and courtesy of all the State officials and counsel involved in this matter. We hope to continue our collaborative and productive relationship as we work toward an amicable resolution of the violations described below.

I. Summary of Findings

Each year, many Coloradans with physical disabilities enter nursing facilities after experiencing adverse medical events, or when the home- and community-based services on which they rely are insufficient to maintain their health and safety in the community. For some, what begins as a brief rehabilitative stay in a facility becomes indefinite when they are unable to access the supports they need to live independently. Others never connect with the services they need to live safe, healthy lives in the community, and enter nursing facilities after experiencing homelessness or adverse health events. Some individuals have remained in nursing facilities for many years with no movement toward discharge.

We have concluded that the State is failing to serve individuals with physical disabilities in the most integrated setting appropriate to their needs. Unnecessary institutionalization is common in Colorado despite several programs to help adults with physical disabilities remain in, or transition back to, their own homes and communities.

Colorado could remedy these deficiencies by reasonably modifying its service system for individuals with physical disabilities. These modifications can be grouped into four broad categories: (1) providing individuals with an informed choice about community-based alternatives to nursing facility care; (2) providing effective transition services; (3) expanding community-based service capacity; and (4) increasing access to integrated community-based housing opportunities. These changes would allow the State to transition many more nursing facility residents to the community and help others avoid unnecessary segregation altogether.

II. Investigation

The Department opened this investigation in response to several complaints, alleging that the State's administration of its long-term care system unnecessarily segregates individuals with physical disabilities and places individuals at serious risk of unnecessary segregation. On November 20, 2018, we notified the State that we were opening an investigation into whether Colorado was serving the individual complainants in the most integrated setting appropriate to their needs in accordance with Title II. The State responded with records for our review. We made a supplemental request on November 7, 2019 for records relating to the State's long-term care system and its programs, policies, and procedures for transitioning nursing facility residents to the community. The State provided responsive documents and responded to follow-up questions.

In addition to document review, we interviewed staff from options counseling agencies, transition coordination agencies, Single Entry Point case management agencies, county Departments of Social Services, community-based service providers, nursing facilities, and advocacy organizations. We also interviewed individual complainants, their family members, and others involved in their care and transition planning, and we reviewed their records. We also assessed Colorado nursing facility residents' interest in community living, and the appropriateness of community-based services for this population.

III. Colorado's Long-Term Care System

Coloradans with physical disabilities who qualify for Medicaid-funded nursing home care depend on the State to provide needed long-term services and supports. The State serves some of these individuals in nursing facilities, and others in home- and community-based settings. The agency responsible for providing these services is Colorado's Department of Health Care Policy and Financing (HCPF), which administers the State's Medicaid program.

Colorado's nursing facility-based long-term services and supports include care planning, 24-hour and overnight nursing care, medication management, dietary services, personal care services, and social services.³ These services are provided in more than 200 nursing facilities across the state, ranging from approximately 25 to 250 total beds.⁴ The services are defined in the federal Medicaid Act and Colorado's Medicaid State Plan. More than 15,000 Coloradans receive these Medicaid-funded facility-based services in a given year.⁵

Although these long-term services and supports also exist in community-based settings, the community-based services are far more limited. The State administers some of these home- and community-based services (HCBS) through its Medicaid State Plan, but most are administered through various Medicaid "waivers."⁶ The Medicaid Act allows states, with approval from the federal Centers for Medicare & Medicaid Services (CMS), to provide community-based services to people whose service needs qualify them for institutional care. Colorado provides HCBS waiver services to individuals with physical disabilities who are eligible for a "nursing home level of care."

³ 6 Colo. Code Regs. § 1011-1:5-5 to -11.

⁴ Colo. Dep't of Pub. Health and Env't, 3Q 2019 Quarterly Census Report, Col. G (Sept. 27, 2019), <https://www.colorado.gov/pacific/cdphe/nursing-home-consumer-resources>.

⁵ Colo. Dep't of Health Care Policy & Fin., *Nursing Facility Members* (on file with DOJ).

⁶ The term "waiver" refers to the Centers for Medicare & Medicaid Services (CMS) "waiving" certain program requirements to services a State offers through its Medicaid State Plan. CMS waives the requirements of statewideness, comparability, and income and resource restrictions to allow states to target services to groups of people at serious risk of institutionalization. MEDICAID.GOV, Home and Community Based Services, 1915(c), <https://www.medicaid.gov/medicaid/hcbs/authorities/1915-c/index.html>.

The primary waiver supporting Coloradans with physical disabilities is the “Elderly Blind and Disabled” (EBD) waiver, through which approximately 29,000 individuals receive a variety of services,⁷ like personal care services, homemaker services, and life skills training.⁸ Service provider agencies send caregivers to provide care at individuals’ homes, or individuals can “self-direct” services by choosing and managing the caregivers who provide their services. Waiver recipients can also access State Plan benefits like home health care, which includes skilled nursing, certified nurse aide services, and physical, occupational, and speech therapy.⁹

Colorado’s community transition system requires a nursing facility resident to pass through five steps. First, Colorado relies primarily on nursing facility staff to identify the residents who are interested in learning about the possibility of community transition.¹⁰ Second, the facility must refer interested residents to an “options counselor” who provides information about community living opportunities.¹¹ Third, options counselors are responsible for referring residents who wish to transition to a “Transition Coordination Agency.” A transition coordinator assesses the resident’s service needs, identifies potential service providers, and determines whether community living is “feasible.”¹² Fourth, if the transition coordinator determines that community living is “feasible,” then the coordinator determines the resident’s eligibility for HCBS waiver services.¹³ Fifth, the transition coordinator connects the resident with a case manager and, if necessary, to services to identify and secure appropriate housing, and works with both to help the resident choose service providers and housing.

⁷ Colo. Dep’t of Health Care Policy & Fin., Application for 1915(c) Waiver CO.0006.R08.12 (Persons who are Elderly, Blind, and Disabled) 303 (Jan. 1, 2021).

⁸ Personal care services help individuals bathe and maintain personal hygiene, dress, eat, toilet, and transfer between a bed and a wheelchair. Homemaker services help with meal preparation, shopping, laundry, and light housekeeping. Life skills training helps individuals learn or recover atrophied life skills after an adverse medical event or lengthy institutionalization.

⁹ Colo. Dep’t of Health Care Policy & Fin., Home Health Program, <https://hcpf.colorado.gov/home-health-program-0> (last visited February 24, 2022).

¹⁰ Specifically, Colorado relies on a survey of residents called the “Minimum Data Set,” which CMS requires nursing facilities to conduct. Nursing facility staff survey each resident on admission, quarterly, annually, and after changes in a resident’s condition. 42 C.F.R. §§ 483.1(b), 483.20(b)(1)-(2). One part of the survey, called “Section Q,” asks whether the resident wants “to talk to someone about the possibility of leaving this facility and returning to live and receive services in the community.” *Id.*

¹¹ Facilities must refer any resident with positive Section Q responses, but others may also refer a resident to options counseling, including self-referrals.

¹² Colo. Dep’t of Health Care Policy & Fin., Transition Coordination Webinar Part 1 (on file with DOJ).

¹³ To do so, the coordinator consults two agencies in the resident’s locality. First, the coordinator asks the “department of human services,” an arm of county government, to assess the resident’s “functional eligibility,” or whether the resident’s disability qualifies the resident for the services offered under the relevant HCBS waiver. Second, the coordinator asks the local case management agency, or “Single Entry Point,” to assess the resident’s financial eligibility.

IV. Findings

Colorado is failing to provide services to individuals with physical disabilities in the most integrated setting appropriate to their needs, in violation of Title II of the ADA. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d). The State plans, administers, and funds its long-term care system in a manner that unnecessarily segregates many individuals with physical disabilities in nursing facilities. *See* 28 C.F.R. § 35.130(b)(3), (d). As a result, the State needlessly segregates many individuals with physical disabilities who do not oppose community-based services, and for whom such services are appropriate. The State's policies and practices place many others who live in the community at serious risk of unnecessary segregation.

Title II of the ADA prohibits public entities from subjecting qualified individuals with disabilities to discrimination. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a). Public entities may not, on the basis of disability, exclude qualified individuals with disabilities from participating in, or deny them the benefits of, the entity's services, programs, or activities. *Id.* 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). Title II includes an integration mandate, which requires that "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d); *Olmstead*, 527 U.S. at 597. 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 711 (2020). Thus, a state violates the ADA when it administers and funds services for people with disabilities—including the services in its long-term care system—in a manner that unnecessarily segregates service recipients. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d).

The Supreme Court has held that unnecessary segregation is a form of discrimination that the ADA prohibits. *Olmstead*, 527 U.S. at 597. State and local government entities that provide services to individuals with disabilities must provide those services in community-based settings when (1) community-based services are appropriate to the individuals' needs; (2) the individuals do not oppose community-based services; and (3) the state or local government entity can reasonably accommodate community-based services given available resources and the needs of other service recipients. *Id.* at 607. The ADA's integration mandate applies to individuals with disabilities in institutions, and to those at serious risk of unnecessary institutionalization. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003). A public entity must modify policies, practices, and procedures when necessary to avoid disability discrimination, unless it can show that the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7)(i).

Below, we detail our findings on Colorado's violation of Title II's integration mandate. In short, the State—a public entity—relies on segregated nursing facilities to serve many adults with physical disabilities who do not oppose community-based services. Community-based services are appropriate for this population, and can be reasonably accommodated.

A. Colorado Is a Public Entity Under Title II, and Nursing Facilities Are Segregated Settings.

The State of Colorado is a public entity as defined by the ADA. 42 U.S.C. § 12131(1). Title II requires public entities to ensure that their services, programs, and activities comply with Title II, even when operated by private entities through contracts or other arrangements. 28 C.F.R. § 35.130(b)(3). Thus, Colorado remains responsible for complying with the integration mandate, notwithstanding that it provides services to individuals with disabilities through private nursing facilities. *See, e.g., Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 276-77 (D. Conn. 2010) (denying state’s motion to dismiss Title II claim and rejecting state’s argument that it could not be held liable for private nursing facilities’ conduct); *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 317 (E.D.N.Y. 2009) (“It is immaterial [for purposes of Title II liability] that DAI’s constituents are receiving mental health services in privately operated facilities.”), *overruled on other grounds by Disability Advocates, Inc. v. Cuomo*, 675 F.3d 149 (2d Cir. 2012).

It is well established that nursing facilities are segregated institutions,¹⁴ and the nursing facilities we visited in Colorado are no exception. They are large settings that exclusively serve individuals with disabilities. The physical layouts of the facilities resemble hospital settings, with central nursing stations and long corridors for residents’ rooms and bathrooms, which are typically shared. Staff is uniformed, food is prepared and served at set times in dining halls, and activities tend to be on-site group activities.

B. Community-Based Service Settings Are Appropriate for Coloradans with Physical Disabilities.

With access to appropriate long-term services and supports in the community, nursing facility residents in Colorado could live in integrated, community-based settings. Community-based settings are also appropriate for virtually all non-institutionalized individuals with disabilities, as evidenced by their history of community living.¹⁵

Although different individuals with physical disabilities face a variety of challenges, their needs can ordinarily be accommodated through appropriate community-based services. Some

¹⁴ *See* 42 U.S.C. § 1395i-3(a) (defining skilled nursing facilities as institutions); *see also Fisher*, 335 F.3d at 1181-82, 1184-85 (considering nursing homes institutions); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 601-02, 610 (7th Cir. 2004) (listing nursing homes among institutional settings); *United States v. Mississippi*, 400 F. Supp. 3d 546, 556 (S.D. Miss. 2019) (characterizing nursing facilities as segregated settings).

¹⁵ *See, e.g., Radaszewski*, 383 F.3d at 612 (observing that the plaintiff’s complaint and the evidence in the record “suggest that with appropriate care [plaintiff] can live at home (he has in fact done so for a number of years)”); *Long v. Benson*, No. 4:08-cv-26, 2008 WL 4571903 (N.D. Fla. Oct. 14, 2008), *aff’d*, 383 Fed. Appx. 930 (11th Cir. 2010) (“Mr. Griffin has in fact been receiving the care he needs in the community. The Secretary’s argument that it cannot be done thus falls flat.”).

individuals with physical disabilities have low care needs and require only a few hours of personal care services a day or each week to help with medication management, grooming, housekeeping, shopping, and meal preparation. For example, individuals with chronic health conditions, like diabetes, may need daily assistance only for managing medications. But community-based waiver services can also meet the needs of individuals who need more intensive services to help toilet, transfer, bathe, and eat, like individuals with mobility challenges stemming from disabilities like multiple sclerosis, severe arthritis, spina bifida, or paralysis. Even individuals who need nursing for suctioning tracheostomy tubes or managing other medical devices can be successfully served in the community. Some individuals may also need assistive devices, adaptive equipment or other support for visual or hearing impairments; modified living spaces (such as removal of a stove); or supervision, including periodic care and safety checks.

Publicly available and State-created data corroborates our finding that community-based services are appropriate for nearly all Colorado nursing facility residents with physical disabilities. Colorado serves more people with low care needs in nursing facilities than all but nine states;¹⁶ it could likely serve most of these individuals in the community.¹⁷ Community-based settings are also appropriate for individuals with significant care needs. For example, the State serves the majority of Coloradans with intellectual and developmental disabilities (IDD) in the community, including those with complex needs.¹⁸ This shows that Colorado could likely provide community-based services to many individuals with physical disabilities who have higher care needs.

C. Many Coloradans with Physical Disabilities Do Not Oppose Community-Based Services.

Our investigation revealed that a significant number of Colorado nursing facility residents with physical disabilities do not oppose receiving services in the community. The State's data supports this finding. A budget document for the 2018-19 fiscal year reports "high numbers of referrals" to options counseling, reflecting significant interest in community

¹⁶ AARP Found., Long-Term Services and Supports State Scorecard (September 24, 2020), longtermsscorecard.org/databydimension/table?ind=748&ch=4&tf=1089&bst=21&wst=27 (last visited February 24, 2022).

¹⁷ CAROL V. IRVIN ET AL., MATHEMATICA POLICY RES., THE NATIONAL EVALUATION OF THE MFP DEMONSTRATION: PATHWAYS TO INDEPENDENCE: TRANSITIONING ADULTS UNDER AGE 65 FROM NURSING HOMES TO COMMUNITY LIVING 20 (2016), <https://www.mathematica.org/our-publications-and-findings/publications/pathways-to-independence-transitioning-adults-under-age-65-from-nursing-homes-to-community-living> (noting that a designation of low care needs "suggest[s] that [individuals] can be served in the community and may not need nursing home care.").

¹⁸ Colo. Regional Center Task Force and Utilization Study 112 (2015) (on file with DOJ). This study found that among Coloradans with IDD who receive waiver services in community-based settings, one third are served at a level of intensity comparable to that of the services that Intermediate Care Facilities for Individuals with IDD provide to their residents. Intermediate Care Facilities are institutional settings for persons with IDD, analogous to nursing facilities, the institutional settings for persons with physical disabilities.

placement.¹⁹ Indeed, in the 24 months preceding the State’s release of documentation to the Department, only 14 of 664 nursing facility residents who had received options counseling declined to pursue community transition.²⁰ Those nursing facility residents who decide to pursue community transition often have to wait a year or more before they can actually move out;²¹ these individuals clearly do not oppose community-based services. And a 2017 HCPF survey revealed that 92 percent of former nursing facility residents living in the community for 24 months liked where they lived, compared with only 35 percent of individuals residing in facilities.²²

Many nursing facility residents with physical disabilities do not oppose community-based treatment; however, Colorado fails to identify them. To assess residents’ interest in community living, the State relies nearly exclusively on data generated by a portion of a standardized survey that CMS requires nursing facilities to administer to residents.²³ But our interviews revealed that nursing facility staff across the State often do not conduct the survey properly,²⁴ and do not discuss the services available to support individuals—especially those with high service needs—in the community. And the survey alone is an insufficient tool for allowing many long-term

¹⁹ Colo. Dep’t of Health Care Policy & Fin., *Schedule 13 Funding Request for the FYI 2018-19 Budget Cycle R-07*, at 1 (Nov. 1, 2017), <https://www.colorado.gov/pacific/sites/default/files/HCPF%2C%20FY19%2C%20R-07%20HCB%20Transition%20Services%20Continuation%20and%20Expansion.pdf> (last visited February 24, 2022).

²⁰ Letter from Kim Bimestefer, Exec. Dir., Colo. Dep’t of Health Care Policy & Fin., to Julia Graff, Trial Attorney, Dep’t of Justice 6 (Jan. 23, 2020) (on file with DOJ). Six hundred and sixty-four individuals received referrals to options counseling in this period. HCPF, Q600 2017-2019 Trends (showing that 462 individuals received referrals to options counseling in 2018, and 202 individuals received options counseling referrals in the first nine months of 2019) (on file with DOJ).

²¹ Colo. Dep’t of Health Care Policy & Fin., Money Follows the Person (MFP) Semi-Annual Progress Report 29 (2019, Period 2) (reporting an 11.97-month average); MFP Semi-Annual Progress Report 29 (2019, Period 1) (reporting an 11.7-month average); MFP Semi-Annual Progress Report 29 (2018, Period 2) (14-month average); MFP Semi-Annual Progress Report 29 (2018, Period 1) (16-month average); MFP Semi-Annual Progress Report 29 (2017, Period 2) (12.84-month average); MFP Semi-Annual Progress Report 29 (2017, Period 1) (10.7-month average) (on file with DOJ).

²² Colo. Dep’t of Health Care Policy & Fin., *Funding Request for the FY2018-19 Budget Cycle, R-07 Transition Services Continuation and Expansion 3* (Nov. 1, 2017), <https://www.colorado.gov/pacific/sites/default/files/HCPF%2C%20FY19%2C%20R-07%20HCB%20Transition%20Services%20Continuation%20and%20Expansion.pdf>.

²³ As discussed above, this survey is called the “MDS” and includes questions known as “Section Q” questions, which ask whether residents want “to talk to someone about the possibility of leaving this facility and returning to live and receive services in the community.” See notes 10-11.

²⁴ Significant challenges in Section Q administration nationwide led the federal Department of Health and Human Services’ Office for Civil Rights to issue guidance to long-term care facilities in 2016. The guidance emphasizes that facility staff must ask all residents whether they want to receive information about community living unless the question is unnecessary because the individual has an active discharge plan, and that residents “should be encouraged to learn about [community living] possibilities.” U.S. Dep’t of Health and Human Servs. Office for Civil Rights, *Guidance and Resources for Long Term Care Facilities: Using the Minimum Data Set to Facilitate Opportunities to Live in the Most Integrated Setting 4* (May 20, 2016).

residents to make an informed choice about where they can live and what services are available to support them. As a result, many residents who would like to receive information about community living are incorrectly recorded as lacking interest.

D. Colorado Can Make Reasonable Modifications to its Long-Term Care System that Would Enable More Individuals with Physical Disabilities to Live and Receive Services in the Community.

Colorado can implement reasonable modifications that would enable many of its current nursing facility residents to transition to, and live successfully in, the community, and prevent the serious risk of institutionalization for numerous other Coloradans with physical disabilities. These modifications can be grouped into four broad categories. First, the State should provide information about community-based alternatives to current nursing facility residents and at-risk individuals. Second, Colorado should expand transition coordination services and streamline the transition process for nursing facility residents who do not oppose receiving services in an integrated community-based setting appropriate to their needs. Third, Colorado should increase access to the community-based services that allow people with physical disabilities to live independently. Fourth, the State should increase access to integrated community-based housing opportunities for individuals with disabilities.

1. Provide Information to Prevent Unnecessary Institutionalization.

Colorado can facilitate and expand community-based placement of nursing facility residents, and help avert the unnecessary institutionalization of at-risk individuals, by improving its processes for informing these individuals about community living options, through a person-centered planning process.²⁵ Although Colorado currently has a regulation requiring information about community-based alternatives to be provided to all individuals considering entering a nursing facility,²⁶ this frequently does not occur. When nursing facility residents are recorded as “not interested” in community living in response to the survey questions discussed in Section IV(C) above, then those individuals will commonly receive no information about community-based alternatives, which is a problem for at least two reasons. First, for some residents, a lack of information about community-based services and an understanding of how these services would work is itself the barrier discouraging them from wanting to transition to the community. Second, as discussed above, the nursing facilities themselves conduct the surveys, resulting in many interested individuals being incorrectly recorded as “not interested.” Thus,

²⁵ Person-centered planning is a formal service planning process in which the person with a disability directs the services and supports they receive. With the help of people they choose, service recipients identify their goals and preferences for community living, and the steps and services needed to achieve those goals. *See generally* CMS, System-Wide Person-Centered Planning (May 2016), <https://www.medicaid.gov/sites/default/files/2019-12/system-wide-person-centered-planning.pdf>.

²⁶ *See* 10 COLO. CODE REGS. § 2505-10:8.402.11 (“[A] client ... [should not be certified] for nursing facility admission unless the client has been advised of long term care options including . . . [HCBS] as an alternative to nursing facility care.”).

Colorado overlooks many interested individuals because of its overreliance on this single data source.

Moreover, even when individuals *are* properly recorded as being interested, that still does not mean that they will receive any information about community living. Indeed, from January 2020 through October 2021, only 6.7 percent of individuals who responded with interest in learning more about community living received referrals to options counselors, the professionals whom Colorado tasks with providing such information.²⁷ Finally, even when the information on community living is provided, our investigation determined that it is too often conveyed in a way that prevents it from being fully understood.

The State can reasonably modify its long-term care system to remedy these deficiencies by:

- Providing Medicaid-eligible individuals entering or at serious risk of entering nursing facilities with early, accurate information about community-based services and prompt help to arrange those services.
- Providing individuals currently receiving Medicaid nursing facility services with information about community-based services on a regular basis, and prompt help to arrange those services.
- Providing information to individuals through an engagement and person-centered planning process sufficient to ensure that individuals can make an informed choice between community-based services and nursing facility services.
- Providing publicly accessible information, regular outreach, and training about all available community-based services to relevant State and county workers and contractors, nursing facility residents and staff, advocates, hospital staff, and community providers.

2. Provide Effective Transition Services.

From 2013, when Colorado began its community transition program, through the end of 2019, only 269 Coloradans with physical disabilities transitioned from nursing facilities to the community.²⁸ Among the 44 states receiving federal grants to transition individuals from

²⁷ CMS, MDS Data 2020-21 (on file with DOJ). This represents a decrease from the previously low referral rate of 21 percent. Colo. Dep't of Health Care Policy & Fin., Q0600 Trends 2017-2019 (on file with DOJ).

²⁸ KRISTIE LIAO ET AL., MATHEMATICA, MONEY FOLLOWS THE PERSON: STATE TRANSITIONS AS OF DEC. 31, 2019, at 6, Table 2, <https://www.medicaid.gov/medicaid/long-term-services-supports/downloads/mfp-2019-transitions-brief.pdf> (last visited February 24, 2022). “Money Follows the Person” is a federal grant program to help states transition institutional residents to community-based settings. Colorado transitioned a total of 581 individuals, across disability sub-populations, between 2013 and the end of 2019. As stated above, 269 of these 581 individuals

institutions to the community, only 14 states transitioned fewer people across all population groups.²⁹

The low transition numbers stem, in part, from insufficient numbers of transition coordinators to help nursing facility residents move to community-based long-term care services. Hundreds of Medicaid-funded nursing facility residents live in counties lacking transition coordination agencies altogether.³⁰ Even where these agencies operate, they sometimes cannot meet the demand. All our complainants who received transition coordination lived in counties with transition coordinators, and waited an average of seven months for their first meeting. Delays associated with waiting for transition coordinator availability have improved recently, but capacity challenges remain in some parts of the State.

Community transitions falter due to significant delays throughout the transition process, with transitions frequently taking more than a year.³¹ Individuals experience long delays while awaiting unnecessary financial eligibility determinations for Medicaid-funded waiver services.³² Another bottleneck is the processing time for Prior Authorization Requests for skilled home health services and durable medical equipment, and for skilled or unskilled services that exceed the State's cost containment expenditure cap. These delays jeopardize individuals' housing opportunities, create additional obstacles and complications, and lead some individuals to give up and withdraw from the process. Each passing week risks the erosion of individuals' natural supports, independent living skills, and self-confidence.

The State can reasonably modify its long-term care system to remedy these deficiencies by:

have physical disabilities, including “older Coloradans.” Another 203 of the 581 individuals have unspecified dual diagnoses. It is possible that some of these 203 individuals have physical disabilities, but even if that is so, such individuals would not necessarily have transitioned to the community from nursing facilities, as opposed to other institutions geared toward people with disabilities other than physical disabilities.

²⁹ *Id.*

³⁰ Colo. Dep't of Health Care Policy & Fin., Transition Coordination Agency List (Jan. 2021), <https://hcpf.colorado.gov/sites/hcpf/files/Transition%20Coordination%20Agency%20List-January%202021.pdf>; Colo. Dep't of Pub. Health and Env't, 3Q 2019 Quarterly Census Report, Col. G (Sept. 27, 2019), <https://www.colorado.gov/pacific/cdphe/nursing-home-consumer-resources>.

³¹ See Colo. Dep't of Health Care Policy & Fin., MFP Semi-Annual Progress Reports, note 21, above.

³² Colo. Dep't of Health Care Policy & Fin., Colorado's Three-Year No Wrong Door Implementation Plan 22 (Oct. 2016) (on file with DOJ) (noting that “many individuals that are already enrolled in Medicaid and . . . transitioning from long-term care facilities to community-based services are required to go through a new financial eligibility determination even though it is not necessary. In many cases, when an individual is already enrolled in Medicaid and meets the functional eligibility and targeting criteria for an LTSS program, a simple administrative change in the financial eligibility system is all that is necessary to reflect the current program status.”).

- Promptly transitioning to community-based long-term care services all individuals in nursing facilities who do not oppose community placement, and for whom such placement is appropriate.
- Ensuring that those individuals have individualized, person-centered, written transition plans that identify necessary services and reasonable deadlines to set them up.
- Streamlining the processes for financial eligibility determinations for waiver services and Prior Authorization Requests.

3. Expand Access to Colorado’s Community-Based Service System.

Colorado has failed to remove unnecessary barriers that frustrate the desires and efforts of individuals with physical disabilities to receive services in integrated, community-based settings. We learned of challenges across the State in accessing skilled home health services, as well as unskilled services like personal care and homemaker services. The State has acknowledged, and our provider interviews confirmed, that insufficient community-based provider capacity is a “significant challenge[] to accessing home and community based services.”³³

The insufficiency of community services is especially acute in rural and frontier areas, and for individuals who need overnight assistance or 24-hour supervision. Individuals with physical disabilities, most of whom are on the EBD waiver, cannot access 24-hour, seven-days-a-week supervision, although the State could likely provide this service cost-effectively. For example, the State already offers these same services to individuals on the Developmental Disabilities waiver.³⁴ Colorado’s consumer direction programs offer a possible avenue for increasing access to community living for individuals with significant service needs and for those living in rural or frontier areas. But very few Coloradans with physical disabilities who have transitioned out of institutions take advantage of these programs.³⁵

³³ Colo. Dep’t of Health Care Policy & Fin., MFP Semi-Annual Progress Report 71-74 (2017, Period 2).

³⁴ Colorado offers 24 hours of Individual Residential Services and Supports (IRSS) to individuals with developmental disabilities who are living in small congregate settings (three or fewer beds), host homes, and “single residential setting[s].” Application for 1915(c) Waiver for Home and Community-Based Services CO.0007.R08.11 5 (July 1, 2021) (explaining that “[t]he purpose of the HCBS-DD waiver is to provide services and/or supports to individuals with intellectual and developmental disabilities who are in need of services and supports 24 hours a day that will allow them to live safely and participate in the community.”). In 2018-19, the State provided IRSS to 2,372 individuals with developmental disabilities at an average cost of \$41,158 per person. CMS, Colorado 372 Annual Report on Home- and Community-Based Waivers, Developmental Disabilities Waiver, 2018-19 Year 5 Lag Report 10-11 (2019).

³⁵ Colo. Dep’t of Health Care Policy & Fin., MFP Semi-Annual Report 76 (2019, Period 1) (on file with DOJ) (reporting five individuals with physical disabilities who transitioned participating in self-direction); MFP Semi-Annual Report 76 (2018, Period 2) (reporting three individuals with physical disabilities who transitioned participating in self-direction).

Colorado can increase its community-based provider capacity. Even though the State has taken steps to rebalance its long-term care expenditures from institutional to community-based services, it continues to fund nursing home care disproportionately to community-based care. Colorado spent more than \$1.25 billion in 2019 to serve approximately 15,000 nursing facility residents, while spending \$457,186,592 to serve approximately 29,000 EBD waiver recipients in the community.³⁶ The State has consistently acknowledged that community-based care is more cost effective than nursing facility care while yielding better health outcomes.³⁷

The State can reasonably modify its long-term care system to remedy these deficiencies by improving access to community-based services in the following ways:

- Increase the number of people using consumer direction programs, especially for individuals in rural and frontier areas, and those with significant service needs.
- Remedying shortages in community provider capacity to meet demand.

4. Increase Access to Integrated Community-Based Housing Opportunities.

Barriers to accessing affordable, accessible housing opportunities frequently prevent nursing facility transitions. They can also lead to unnecessary institutionalization for individuals living in the community with unstable housing, or whose housing becomes unsuitable when they develop accessibility needs.

Colorado attempts to link individuals with disabilities to affordable, accessible housing opportunities through several housing services, including help finding and securing housing (called housing navigation services), housing development, rental vouchers, and home modifications. By modifying these services that it already provides, the State can increase opportunities for community integration. For example, Colorado offers a home modification service through its waiver programs, but very few nursing facility residents use the service to

³⁶ HCPF, FY20, R-1, Medical Services Premiums, Ex. H, Long Term Care and Insurance Summary; CMS, Colorado 372 Annual Report on Home- and Community-Based Waivers, 2018-19 Year 1 Lag Report (2019).

³⁷ Colo. Dep't of Health Care Policy and Fin., Schedule 13 Funding Request for the FY 2018-19 Budget Cycle 6 (2017) ("In addition to increasing the quality of life for the clients who transitioned, the [MFP] grant program also demonstrates significant cost savings for the Department compared to serving these clients in a nursing facility."), <https://hcpf.colorado.gov/sites/hcpf/files/HCPF%2C%20FY19%2C%20R-07%20HCBS%20Transition%20Services%20Continuation%20and%20Expansion.pdf>; from Bonnie Silva, Deputy Dir., Office of Cmty. Living, to Caitlin Adams, Cmty. Living Coordinator, Office of Legal Counsel 7 (June 29, 2018) ("As of December 2017, [Colorado's transition program] produced a savings of more than \$2.8 million to the State of Colorado.") (on file with DOJ); Colo. Dep't of Health Care Policy & Fin., FY 2019-20 Joint Budget Committee Hearing Agenda, at 51 (Dec. 17, 2018) (estimating an average savings of roughly \$33,000 per person who has transitioned to the community), https://leg.colorado.gov/sites/default/files/fy2019-20_hcphrgl.pdf.

help them move to the community.³⁸ Interviews revealed that people have transitioned to inaccessible homes and simply “made do”—for example, by using a portable commode until a bathroom door was widened, or by living temporarily with family or friends for as long as several months until the work was complete. If the State leveraged its home modification service, it could prevent many at-risk individuals from losing their community-based housing and convert inaccessible housing stock.

The State can reasonably modify its long-term care system to remedy these deficiencies by:

- Increasing the accessibility of existing housing stock by authorizing home modifications to be completed before individuals are discharged from nursing facilities; encouraging contractor participation by streamlining the approval process; and increasing the lifetime cost cap.
- Ensuring that the recently expanded housing navigation service is fully operable statewide and effectively connecting individuals to housing opportunities.
- Incentivizing housing developers to increase the number and percentage of fully accessible units in new developments; ensuring that individuals requiring accessibility features receive priority for accessible units; and supporting access to integrated permanent supported housing options.
- Taking steps to expand the availability of affordable housing units for individuals with physical disabilities transitioning from or diverted from nursing facilities.

V. Conclusion

We look forward to working with you to resolve the Department’s findings in this matter. If the State declines to enter into voluntary compliance negotiations or if our negotiations are unsuccessful, the United States may take action, including initiating a lawsuit, to obtain redress for outstanding concerns associated with the State’s ADA compliance. This letter is a public document and will be posted on the Civil Rights Division’s website.

Please contact Julia Graff, Trial Attorney at the Disability Rights Section of the Civil Rights Division, within two weeks of receiving this letter if Colorado is interested in working with the United States to reach an appropriate resolution along the lines described above.

³⁸ Since the State began its community transition program in 2013, only 39 program participants have used the service, and only after transition. Letter from Kim Bimestefer, Exec. Dir., Colo. Dep’t of Health Care Policy & Fin., to Julia Graff, Trial Attorney, Dep’t of Justice 38-39 (Jan. 6, 2020) (on file with DOJ).

Sincerely,

/s/

Kristen Clarke
Assistant Attorney General
Civil Rights Division

cc: Kim Bimestefer, Executive Director
Colorado Department of Health Care Policy & Financing