

Sent via email

Secretary Alex M. Azar II  
United States Department of  
Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue, SW  
Room 120F  
Washington, DC 20201  
[alex.azar@hhs.gov](mailto:alex.azar@hhs.gov)

Administrator Seema Verma  
Centers for Medicare and Medicaid Services  
Hubert H. Humphrey Building  
200 Independence Avenue, SW  
Washington, D.C. 20201  
[seema.verma@cms.hhs.gov](mailto:seema.verma@cms.hhs.gov)

September 17, 2020

Re: Voting rights in nursing homes, ICFs, psychiatric hospitals, and group homes during the COVID-19 Pandemic

Dear Secretary Azar and Administrator Verma:

The undersigned organizations write to urge you to act quickly to protect the voting rights of the more than 2 million U.S. citizens living in nursing homes, intermediate care facilities (ICFs), psychiatric hospitals, and group homes (collectively, “congregate settings.”)<sup>1</sup> Since early in the pandemic, these facilities have been in ‘lock down,’ with residents cut off from family, friends, and loved ones. The isolation was an attempt to protect residents from COVID-19. However, with lockdowns still in place at many facilities, and with the November 3<sup>rd</sup> election quickly approaching, many residents are at risk of being denied the fundamental right to vote.

In previous years, many congregate settings, especially nursing homes, have served as polling places, making it easier for residents—including those who find it difficult or impossible to travel to an outside polling place due to a disability—to cast their ballot.<sup>2</sup> For residents who

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<sup>1</sup> See National Center for Health Statistics, HHS, *Long-Term Care Providers and Services Users in the United States, 2015-2016* [hereinafter *Long-Term Care Statistics*], at 76 (Feb. 2019) (identifying 1,347,600 nursing home residents in the United States in 2016).

<sup>2</sup> See Eleanor Laise, *Millions of COVID-hit nursing home residents risk losing their vote*, Market Watch (Aug. 21, 2020), <https://www.marketwatch.com/story/millions-of-covid-hit-nursing-home-residents-risk-losing-their-vote-2020-08-20>; *Participating Nursing Homes*, Cook County Clerk, <https://www.cookcountyclerk.com/sites/default/files/pdfs/Participating%20nursing%20home%20voting%20locations%207.pdf> (listing nursing home polling locations in Cook County, IL that participated in the March 17, 2020 presidential primary election); and Marie Szaniszlo, *Coronavirus prompts officials to relocate polling places from*

needed an accessible voting machine, the machine would be on-site. For residents who needed other forms of assistance to cast an independent and private ballot, a person would be available to provide assistance at various stages of the voting process. In addition, in nearly half of states, trained teams and volunteers would go to different congregate settings to provide residents with assistance completing absentee ballots.<sup>3</sup>

But during the pandemic, far too many residents are now left without a means to vote. Polling places have appropriately been moved to other locations to minimize the number of individuals (including those from outside the facility) gathering in one place on the premises, and many states have cancelled assistance programs.<sup>4</sup> Most residents are not able to travel outside their facility to a polling place, and exposure to large numbers of people at polling places would be unsafe (particularly as many residents have underlying health conditions putting them at increased risk of severe complications from COVID-19). Lockdowns have meant that congregate settings have refused to allow family, friends, and loved ones to visit to provide voting assistance.

Not only must residents of these facilities be able to receive and cast their ballots, they must be able to do so privately with assistance from a person they trust. All voters have the right to choose whomever they wish to help them in casting their ballot, including getting assistance from outside family or friends, other residents in the facility, or trusted facility staff. Permitting *only* facility staff to provide such assistance is not a solution, however. Because facility staff have enormous control over residents' lives, residents could feel coerced to cast their vote for candidates perceived to be favored by the facility or its staff (whether or not such coercion actually occurs).

Unfortunately, for the vast majority of residents in congregate settings, voting by mail is *the only way* to vote without incurring serious risk of infection. However, facilities have taken few steps to inform residents of their options, assist them in obtaining a mail-in ballot, or make technology available to residents who need to complete digital absentee ballots. And, in too many locations, residents who do have a mail-in ballot or digital ballot are denied the assistance they need to fill it out.<sup>5</sup>

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*nursing homes*, Boston Herald (Aug. 15, 2020), <https://www.bostonherald.com/2020/08/15/coronavirus-prompts-officials-to-relocate-polling-places-from-nursing-homes/>.

<sup>3</sup> Ryan McCarthy and Jack Gillum, *Hundreds of Thousands of Nursing Home Residents May Not Be Able to Vote in November Because of the Pandemic*, ProPublica (Aug. 26, 2020), <https://www.propublica.org/article/hundreds-of-thousands-of-nursing-home-residents-may-not-be-able-to-vote-in-november-because-of-the-pandemic> [hereinafter McCarthy and Gillum, *Nursing Home Votes*, ProPublica].

<sup>4</sup> See e.g., *id.* (“Swing states such as Florida and Wisconsin have suspended efforts to send teams to nursing homes to assist with voting.”).

<sup>5</sup> See *Democracy North Carolina v. North Carolina State Board of Elections*, No. 1:2020cv00457, \_\_\_ F.Supp.3d; 2020 WL 448063 (M.D.N.C. 2020) (enjoining enforcement against *one individual* of a North Carolina statute that prohibits nursing home staff from assisting residents with ballots until Defendants “implement a law or rule that permits the disabled individual, Plaintiff Hutchins, to select his own person to assist him in marking, completing,

The isolation created by the lockdowns and visitor restrictions may also exacerbate a long-standing problem of staff at some facilities denying certain residents the opportunity to cast a ballot based on their perception that the residents do not have the capacity to vote. In the past, staff and other providers at residential facilities have made improper and often arbitrary judgements about who can vote, preventing individuals with mental disabilities, including dementia or Alzheimer’s from voting or receiving assistance to vote, even though these staff and providers have no authority to determine voter eligibility.<sup>6</sup> Mental impairments such as dementia or Alzheimer’s “do not mean residents automatically lose their right to vote.”<sup>7</sup>

## **Legal Background**

The Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, the Voting Rights Act (VRA), and CMS and HHS’s regulation on *Medicare and Medicaid Programs; Reform of Requirements for Long- Term Care Facilities* all require that facilities take steps to ensure that people with disabilities and seniors are not disenfranchised.

### *The ADA and the Rehabilitation Act*

The ADA prohibits discrimination based on disability by state and local government entities and places of public accommodation.<sup>8</sup> Section 504 of the Rehabilitation Act similarly prohibits discrimination against individuals with disabilities by entities that receive federal financial assistance.<sup>9</sup> Both laws protect individuals who have a disability, which is defined as “a physical or mental impairment that substantially limits one or more major life activities.”<sup>10</sup> One such

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and submitting his absentee ballot in accordance with Section 208 of the VRA”); *see generally* McCarthy and Gillum, *Nursing Home Votes*, ProPublica (“Despite a federal law that residents must be “supported by the facility in the exercise of” their rights, two states — North Carolina and Louisiana — prohibit staff from actively doing so.”).

<sup>6</sup> Bazelon Center for Mental Health Law, Autistic Self-Advocacy Network, National Disability Rights Network, and Schulte, Roth & Zabel LLP, *VOTE. It’s Your Right: A Guide to the Voting Rights of People with Mental Disabilities* (2018) at 14–15, <http://www.bazelon.org/wp-content/uploads/2018/10/2018-Voter-Guide-Updated.pdf> [hereinafter *Bazelon Voting Rights Guide*] (describing examples during the 2004 and 2008 elections where nursing home residents were unable to vote because staff made improper competency determinations); McCarthy and Gillum, *Nursing Home Votes*, ProPublica, (“From 2018 through 2019, Medicare documented complaints from at least 55 U.S. nursing homes in which residents said they weren’t given the opportunity to vote or were unable to get help casting a ballot.”).

<sup>7</sup> McCarthy and Gillum, *Nursing Home Votes*, ProPublica.

<sup>8</sup> Title II of the ADA applies to state and local government entities, while Title II applies to places of public accommodation; both contain provisions prohibiting discrimination. 42 U.S.C. § 12132 (Title II) (“[N]o 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. § 12182(a) (Title III) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”).

<sup>9</sup> 29 U.S.C. § 794(a) (an individual with disabilities cannot, “solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.”).

<sup>10</sup> 42 U.S.C. § 12102(1)(A); 29 U.S.C. § 705(20)(B).

major life activity is “caring for oneself.”<sup>11</sup> Virtually all people placed in congregate settings have real or perceived limitations in the ability to care for themselves, and most will also have other serious health conditions. Thus, nearly all individuals living in congregate settings will have one or more disabilities within the meaning of the ADA and Section 504.<sup>12</sup>

Entities covered by these laws must provide reasonable modifications to their policies, practices and procedures that are necessary to provide people with disabilities an equal opportunity to participate in the entity’s services, programs, or activities, including registering to vote and casting a ballot.<sup>13</sup> Facilities “must also make reasonable modifications to their policies and practices to ensure that residents who need help with the voting process receive it.”<sup>14</sup> As Department of Justice guidance states: “The ADA’s provisions apply to all aspects of voting, including voter registration, the accessibility of poll sites and the casting of ballots.”<sup>15</sup> Finally, “...practices that categorically bar people from voting based on guardianship status, residence in a hospital, nursing home, group home or developmental disabilities center, or similar factors would violate the ADA because they bar voting by people with disabilities who have the capacity to vote and meet the essential requirements for voting.”<sup>16</sup>

### The Voting Rights Act

Under Section 208 of the Voting Rights Act, “Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by *a person of the voter’s choice*, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.” 52 U.S.C. § 10508. While this requirement has most often been discussed in the context of whom an individual may bring to the polling place, it applies equally to who a person wants to select for help filling out an absentee or mail-in ballot.

### Resident Rights in Long-Term Care Facilities, 42 CFR §483.10

Under a 2016 CMS and HHS rule, residents in long term care facilities have “the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights and to *be supported by the facility in the exercise of his or her rights.*”<sup>17</sup> Further, facilities

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<sup>11</sup> 42 U.S.C. § 12102(2)(A).

<sup>12</sup> See Lauren Harris-Kojetin et al., *Long-term care providers and services users in the United States, 2015–2016*, National Center for Health Statistics, Vital Health Stat 3(43) (Feb. 2019).

<sup>13</sup> 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(7) (public entities); 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a) (privately operated facilities); *Bazelon Voting Rights Guide* at 9 (“For example, a state hospital may have to modify its practices in order to assist residents in obtaining and submitting absentee ballots.”).

<sup>14</sup> *Bazelon Voting Rights Guide* at 24.

<sup>15</sup> U.S. Dep’t of Justice, Civil Rights Division, Disability Rights Section, *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities* (Sept. 2014) at 1,

[https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.pdf](https://www.ada.gov/ada_voting/ada_voting_ta.pdf); see also U.S. Dep’t of Justice, Civil Rights Division, *Frequently Asked Questions* (Feb. 2020), <https://www.justice.gov/crt/frequently-asked-questions-2>.

<sup>16</sup> *Bazelon Voting Rights Guide* at 8.

<sup>17</sup> Centers for Medicare & Medicaid Services, HHS, *Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68688 (Oct. 4, 2016), codified at 42 CFR §483.10(b)(2).

“must ensure” that residents can exercise their rights as residents of the facility, and as a citizen or resident of the U.S.<sup>18</sup>

### **We urge you to act.**

Both public and private facilities providing care in congregate settings that receive Medicare or Medicaid funding have legal responsibilities to protect the rights of their residents to vote, as described above. Many facilities may be unaware of these legal obligations, and fail to meet them, placing barriers in the way of residents who are eligible and able to vote. Even with lockdowns and restrictions on visitors during the pandemic, permitting a small number of individuals to enter facilities with appropriate precautions poses only minimal added risk—a risk that cannot be used to justify denying the fundamental right to vote. Facilities need guidance to remind them that their legal obligations to enable residents to vote continue even during the pandemic. Facilities would also benefit from information on best practices to promote access to the fundamental right to vote during the pandemic.<sup>19</sup> We urge CMS to provide such guidance, reiterating the applicable legal provisions and encouraging facilities to:

- Ensure residents are prepared to vote by:
  - Helping to verify that the resident’s voter registration is up to date, or supporting residents to register to vote with assistance filling out either paper-based or online registration forms;<sup>20</sup>
  - Assisting with any voter identification requirements, including help with securing any needed ID.<sup>21</sup>
  - Helping residents to request an absentee ballot

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<sup>18</sup> 42 CFR §483.10(b).

<sup>19</sup> For example, in Virginia, seniors “helped form a group to mobilize residents to apply early for their ballots. They started by placing application forms, pre-addressed envelopes, and signs with information in common areas. They hosted two events to help residents fill out the necessary forms – even providing large-print versions. In addition to in-person events, the self-declared voting aides are finding ways to help the skilled nursing residents that typically require outside assistance by working with the staff and social workers and providing them with training, forms, and envelopes.” Halley Freger, *Nursing home residents isolated by coronavirus now face looming challenge: Voting*, ABC News, (Aug. 31, 2020), <https://abcnews.go.com/Health/nursing-home-residents-isolated-coronavirus-now-face-looming/story?id=72700449>. In Wisconsin, “[Election] Commission staff have worked to bolster training for nursing home workers so they can help residents fill out their ballots . . . Staff has created a letter outlining voter registration and absentee ballot requests that clerks can send to facility managers. Staff also has emailed an information packet managers can share with residents that lays out how to vote absentee, witness requirements and other details in the process to about 15,000 nursing home and assisted living providers. . .” Todd Richmond, *Officials: Keep vote helpers out of Wisconsin nursing homes*, Associated Press (Sept. 10, 2020) <https://apnews.com/e2a5e0c5d4ff2275f6a24cd66854367e>.

<sup>20</sup> Though some state laws may put limits on voter registration, federal disability rights laws are likely to pre-empt state restrictions where assistance is needed because of a disability.

<sup>21</sup> U.S. Dep’t of Justice, Civil Rights Division, Disability Rights Section, *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities* (Sept. 2014) at 1, [https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.pdf](https://www.ada.gov/ada_voting/ada_voting_ta.pdf); see also U.S. Dep’t of Justice, Civil Rights Division, *Frequently Asked Questions* (Feb. 2020), <https://www.justice.gov/crt/frequently-asked-questions-2>.

- Making election information on candidates and ballot initiatives available in accessible formats.
- Ensure residents can cast their ballots by:
  - Permitting residents to designate whomever they wish to help them vote, with only narrow restrictions as allowed by the Voting Rights Act. (i.e. the designated person cannot be the individual’s employer or an agent of their employer, or an officer or agent of the individual’s union.<sup>22</sup>) Residents may require assistance using technology to complete a digital ballot.
  - Facilitating an in-person meeting with the designated person to assist with voting. Permit such a designated person to enter the facility, even if visitors are not otherwise permitted, provided that reasonable safety precautions such as those described below are implemented.
  - Implementing appropriate safeguards for that meeting, such as:
    - Requiring, and when necessary, providing, personal protective equipment (PPE), for visitors.
    - Meeting outdoors, wherever and whenever feasible.
    - Refusing contact with anyone who is actively contagious with COVID during the period of contagion.
    - Providing free testing, if the facility makes testing a requirement for contact.
    - Ensuring that staff members are provided with training and guidance and are permitted to assist residents if designated.<sup>23</sup>
  - Providing stamps, envelopes or other materials as needed to mail in their ballots.
  - Reminding staff that they are not authorized to decide who is eligible to vote. We encourage CMS to follow the American Bar Association Standard (ABA): Anyone who expresses a desire to vote, with or without reasonable accommodations, should be allowed to vote.
  - Assisting residents with tracking their absentee ballot to ensure ballot application and absentee ballots are received.

For the few residents who may wish to vote in person, facilities should help residents identify their polling place and provide safe transportation to and from the polling place.

For many facilities, the process of assisting residents to vote will be made easier by arranging a meeting with their local election officials and working with them to prepare a plan specific to the

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<sup>22</sup> 52 U.S.C. § 10508.

<sup>23</sup> Obligations under federal law remain in force regardless of state and local laws. State laws that restrict staff in congregate settings cannot be enforced to the extent that they prevent the enjoyment of rights protected under federal law.

facility. Some election authorities may be able to provide Remote Access Vote By Mail (RAVBM) technology.

As the ABA explained in its August 2020 Resolution on election administration, “Any remedy to conduct elections in an alternative fashion should consider methods of voting that will not further disenfranchise our most vulnerable populations, such as the elderly, language minorities, individuals with disabilities, or low-income communities.”<sup>24</sup> We ask CMS to do its part to prevent the disenfranchisement of more than two million voters.

We urge you to direct all facilities receiving Medicaid and Medicare dollars to follow federal law to ensure their residents have access to the ballot. Failure to act will result in broad disenfranchisement.

For questions or follow-up, please feel free to contact Sonia Gill at [sgill@aclu.org](mailto:sgill@aclu.org), or Susan Mizner at [smizner@aclu.org](mailto:smizner@aclu.org).

Thank you.

American Civil Liberties Union

American Council of the Blind

Association of Programs for Rural Independent Living (APRIL)

Association of the University Centers on Disabilities (AUCD)

Autistic Self Advocacy Network (ASAN)

CommunicationFIRST

National Association of Councils on Developmental Disabilities (NACDD)

National Council on Independent Living (NCIL)

National Disability Rights Network

Paralyzed Veterans of America

Self Advocates Becoming Empowered (SABE)

The Consumer Voice

United Spinal Association

World Institute on Disability (WID)

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<sup>24</sup> American Bar Association, *Resolution 101, Election Administration Guidelines and Commentary* at 34 (Aug. 2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/08/2020-am-resolutions/101.pdf>.