U.S. Department of Justice
Civil Rights Division

Disability Rights Section
4 Constitution Square
150 M St., N.E.
Washington, DC 20002

May 14, 2024

By First Class Mail and Electronic Mail

Governor Jim Pillen
P.O. Box 94848
Lincoln, NE 68509-4848
jim.pillen@nebraska.gov

Re: The United States' Investigation of Nebraska's Behavioral Health Service System under Title II of the Americans with Disabilities Act

Dear Governor Pillen:

We write to report the findings of our investigation of Nebraska's administration of its behavioral health service system, including employment services, for adults with serious mental illness. In response to complaints, we assessed the State's compliance with Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131−12134, as interpreted by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999). Title II and *Olmstead* require public entities to administer services to individuals with disabilities in the most integrated setting appropriate to the individuals' needs. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d). Title II authorizes the United States to investigate, make findings of fact and conclusions of law, and attempt to secure voluntary compliance if violations are found. 28 C.F.R. § 35.172.

We have determined that Nebraska is violating Title II of the ADA by unnecessarily segregating people with serious mental illness in assisted living facilities and day program facilities. The State's administration of behavioral health services places others at serious risk of such unnecessary segregation in those facilities. This letter describes the United States' findings and the steps the State can take to remedy the ADA violations we identify below.

At the outset, we would like to thank the State for its cooperation and acknowledge the courtesy and professionalism of the State officials and counsel who participated in this investigation. We hope to continue our collaborative and productive relationship as we work toward an amicable resolution of the findings described below.

I. Summary of Findings

We found that Nebraskans with serious mental illness (SMI) want to live and work in their homes and communities. With the right services, people with SMI can live in their own homes, where they can be with their families and friends, spend their days as they choose, and

control their own lives. People with SMI can get jobs where they work alongside people without disabilities, doing the same work for the same pay.

Nebraska offers covered services that people with SMI need to live and work in the community, including permanent supportive housing, Assertive Community Treatment (ACT), case management, peer supports, and supported employment. The community-based services that Nebraska covers can help people live independently, manage their mental health symptoms, build relationships, and find and keep jobs. But Nebraska severely limits access to its community-based services. Instead, the State over-relies on segregated settings like assisted living facilities and day program facilities. In segregated settings, people with SMI are grouped together and supervised by paid staff and have little outside contact with people without disabilities.

There are many Nebraskans with SMI who used to live in their own homes and hold jobs in the community. But without community-based services—like case management or job coaching—they were forced to enter segregated settings to get the help they needed. Many of these people now live in segregated settings, like assisted living facilities (ALFs), surrounded only by other people with disabilities. Many also spend their days in segregated day programs. Once people enter ALFs and day programs, Nebraska offers them little help to get out. One person, who has been institutionalized in an ALF and day program for more than a decade, described what leaving would mean to her: "Freedom."

Nebraska fails to ensure that individuals with SMI know about and can access the State's covered services in the community even though these services are more therapeutic and cost-effective than institutionalization. For Nebraskans with SMI, a lack of access to community-based services, including crisis services, can trigger unnecessary admissions to hospitals or ALFs. When individuals experience mental health crises in Nebraska, law enforcement are often the first responders because the State has failed ensure access to necessary community-based crisis services.

Work is a critical part of mental health recovery. Even people with high behavioral health needs can get and keep jobs with the right services. Nebraskans living in the State's ALFs are overwhelmingly interested in working if they could get the help they need. But without community-based services, including supported employment services to connect them to and support them in workplaces, these individuals instead languish in day programs, with no path to employment. They want to—and can—do much more.

Nebraska is violating Title II of the ADA by failing to serve adults with SMI in the most integrated setting appropriate to their needs. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d). Nebraska's administration of its behavioral health system results in unnecessary segregation in several ways. First, the State uses restrictive service authorization criteria to limit the services an individual with SMI can receive in the community, including supported employment services and permanent supportive housing. Second, the State has underdeveloped its workforce necessary to provide access to community-based services. Thus, even when authorized, Nebraskans with SMI often cannot receive the services they need to avoid unnecessary segregation. Third, Nebraska fails to ensure that its agencies and State-licensed service providers and contractors provide covered services in integrated settings. Finally, the State

makes it difficult for licensed community-based service providers to serve individuals with SMI. Nebraska can reasonably modify the behavioral health services that it already offers so that people with SMI can live and work in their communities.

II. Investigation

The United States Department of Justice (the Department) opened this investigation in response to complaints that Nebraska over-relies on segregated service settings to serve people with SMI, in violation of Title II of the ADA. In June 2021, we notified the State that we had opened a statewide investigation into whether Nebraska serves people with SMI in the most integrated setting appropriate to their needs.

During our investigation, we interviewed Nebraskans with SMI and their families in rural and urban areas across the State. We met these individuals where they live and spend their days: in assisted living and other residential facilities, day programs, hospitals, and the community. We interviewed behavioral health service providers across the State, including in the Lincoln Regional Center, Nebraska's psychiatric hospital. We interviewed behavioral health staff in hospitals, crisis centers, secure and unlocked residential facilities, and day programs. We interviewed community-based providers, including supported employment providers. We also met with corrections staff and law enforcement in multiple counties.

The State facilitated our interviews of relevant state agency officials at every level. We spoke with the heads of the agencies that administer services for people with SMI, including Nebraska's Division of Behavioral Health,[1] Division of Medicaid and Long-Term Care,[2] and Vocational Rehabilitation.[3] We also interviewed staff from the behavioral health regions, Medicaid Managed Care Organizations, and the Offices of Public Guardian and Public Counsel. We interviewed the administrator of the State's new 988 suicide and crisis lifeline. Finally, we requested and reviewed information from the State about its administration of the behavioral health service system.

III. Nebraska's Behavioral Health Service System

Nebraska's behavioral health service system includes facility-based and community-based services for adults with SMI. The primary state agency charged with overseeing this system is the Division of Behavioral Health (DBH) within the Department of Health and Human Services. DBH contracts with six regional behavioral health authorities (the Regions) and three

[1] The Division of Behavioral Health is a division within Nebraska's Department of Health and Human Services.

[2] The Division of Medicaid and Long-Term Care is a division within Nebraska's Department of Health and Human Services.

[3] Nebraska Vocational Rehabilitation is within Nebraska's Department of Education. 92 Neb. Admin. Code § 72-001.02.

Medicaid Managed Care Organizations (MCOs) to administer services to individuals receiving publicly-funded behavioral health services.

Nebraska state law requires DBH to make sure there are enough community-based behavioral health services statewide to help people with SMI find work and live independently.[4] But approximately 5,000 Nebraskans with SMI live in facilities, many in state-licensed ALFs. ALFs serve primarily or exclusively people with disabilities.[5] People with SMI live in ALFs throughout the State, but at least nineteen facilities primarily house individuals with SMI. Approximately 1,000 adults with SMI reside in those nineteen ALFs.

Nebraska also has twenty-two Medicaid and State-funded day program facilities for people with SMI across the State, often located near ALFs. Nebraska's largest day program facilities can serve over 100 people.[6] Many ALF residents attend day program facilities during the day, alongside other adults with SMI.[7] Day programs vary, with some offering only supervision of adults and activities like crafts.

Nebraska funds other facilities that provide more intensive behavioral health services. The State operates a 250-bed psychiatric hospital, the Lincoln Regional Center (LRC), which provides residential treatment for involuntarily-committed individuals. The State funds behavioral health services in private hospitals, mental health crisis centers, and hospital emergency rooms. In these intensive residential facilities, people can receive 24-hour behavioral health services, including symptom management, psychosocial rehabilitation, educational and vocational activities, skill acquisition and treatment, and programming on community living.[8] Thousands of Nebraskans with SMI enter these intensive facilities to receive behavioral health services each year. Although some people remain in these settings for years, many cycle through for shorter periods. On discharge, many enter ALFs, day programs, or both.

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[4] Neb. Rev. Stat. § 71-811 ("The division shall coordinate the integration and management of all funds appropriated by the Legislature or otherwise received by the department from any other public or private source for the provision of behavioral health services to ensure the statewide availability of an appropriate array of community-based behavioral health services and continuum of care and the allocation of such funds to support the consumer and his or her plan of treatment.")

[5] 175 Neb. Admin. Code § 4-006.07A ("To be eligible for admission to an assisted-living facility, a person must be in need of or wish to have available shelter, food, assistance with or provision of personal care, activities of daily living, or health maintenance activities or supervision due to age, illness, or physical disability.").

[6] Neb. Dep't of Health and Hum. Servs., *State of Nebraska Roster: Adult Day Services* (Apr. 15, 2024), https://dhhs.ne.gov/licensure/Documents/adultday.pdf.

[7] 471 Neb. Admin. Code § 35-004.08 (describing Day Rehabilitation); Neb. Dep't of Health and Hum. Servs., Div. of Behavioral Health, *Nebraska Continuum of Care Manual for Mental Health and Substance Use Disorders* 123–24 (Dec. 2023), https://dhhs.ne.gov/Behavioral%20Health%20Documents/Continuum%20of%20Care%20Manual.pdf

[8] 471 Neb. Admin. Code §§ 35-004.09 (describing Psychiatric Residential Rehabilitation as a facility-based program that "provides skill building in community living skills, daily living skills, medication management, and other related psychiatric rehabilitation services as needed to meet individual client needs.") and 35-014 (describing Secure Residential Rehabilitation as "a secure facility-based, non-hospital or non-nursing facility program…[that] provides skill building and other related recovery oriented psychiatric rehabilitation services as needed to meet individual client needs").

Although Nebraska covers the community-based behavioral health services that could allow individuals with SMI to live and work in their communities, these services are far more limited than facility-based options. For example, the State has only three Assertive Community Treatment (ACT) teams.[9] It also has few crisis response and stabilization services, such as peer-run crisis respite programs and mobile crisis teams, including teams that respond to mental health crises alongside law enforcement.[10] The State covers permanent supportive housing, which pairs rental assistance with community-based services, but its availability varies by geographic region.[11] Nebraska also has a Community Support service, which helps people with SMI to manage their mental health symptoms and daily life tasks while living at home, but the State makes it available only on a limited basis.[12]

Similarly, the State covers supported employment services that could help people with SMI get and keep jobs.[13] But the unavailability of these services to most people who need them means many people with SMI attend day programs in facilities instead. Nebraska has only six community-based supported employment providers statewide. In contrast, the State has twenty-two facility-based day program providers. Day programs do not typically include job training or help with finding work.[14]

IV. Findings

Nebraska's administration of its behavioral health service system violates the integration mandate of Title II of the ADA. Although Nebraska's covered services include the necessary services to support people with SMI in the community, the State has severely restricted the

[9] Neb. Response to Dep't of Justice Request for Information (Aug. 12, 2022) (on file).

[10] Univ. of Neb. Pub. Policy Ctr., *Nebraska's Regional Planning Discussion Summary* 1–2 (July 2021), https://dhhs.ne.gov/Behavioral%20Health%20Documents/Regional%20Planning.pdf.

[11] Neb. Rev. Stat. § 71-812 (establishing the Behavioral Health Services Fund for the provision of behavioral health services, including housing-related assistance for very low-income adults with serious mental illness); Neb. Comm'n on Housing and Homelessness, *Opening Doors: 10 Year Plan to Prevent and End Homelessness in the State of Nebraska* 7 (Jan. 2015), https://opportunity.nebraska.gov/wp-content/uploads/2022/02/NCHH_OpeningDoors_StateofNE10YearPlantoPreventandEndHomelessness.pdf (noting that the State's Housing-Related Assistance Program "provides ongoing rental assistance to seriously mentally [ill] persons to be discharged from state psychiatric facilities but lacking safe and affordable housing"). *See also*, *e.g.*, Region V Systems, *Housing*, https://region5systems.net/how-we-help/housing/ (last visited Apr. 16, 2024) (describing housing and supportive services to individuals "with serious and persistent mental illness, who are indigent or have extremely low income, and who are discharging from an inpatient Mental Health Board commitment, or those that are at risk of an inpatient commitment"); Region 6 Behavioral Healthcare, *Housing*, https://www.regionsix.com/programs/housing/ (last visited Apr. 16, 2024) (describing its "rental assistance program that assists with access to decent, safe, and affordable housing to individuals who are recovering from a serious mental illness and have extremely low income").

[12] Neb. Medicaid State Plan, *Methods and Standards for Establishing Payment Rates*, Attachment 4.19-B, Item 13d (2021).

[13] 471 Neb. Admin. Code § 35-013 (describing Assertive Community Treatment services, including employment services); Neb. Dep't of Health and Hum. Servs., Div. of Behavioral Health, *Nebraska Continuum of Care Manual for Mental Health and Substance Use Disorders* 143–44 (Dec. 2023), https://dhhs.ne.gov/Behavioral%20Health%20Documents/Continuum%20of%20Care%20Manual.pdf.

[14] 471 Neb. Admin. Code § 35-004.08A (describing Day Rehabilitation program components).

supply of these services such that very few people with SMI can access the services they need outside of facilities. As a result, Nebraskans with SMI frequently enter ALFs and segregated day programs because they are unable to live and work in integrated settings without necessary services. People with SMI who are not currently living in ALFs or receiving segregated day services may face serious risk of such institutionalization. Indeed, the State's MCOs often funnel people with SMI to ALFs to get their basic needs met.

The State's overreliance on segregated settings extends to its day and employment services. ALFs often partner with, or operate, day programs for people with SMI, sometimes transporting residents in vans between the facilities at set times each day. As a result, many people with SMI spend their entire lives in segregated settings. And many Nebraskans with SMI who live in their own homes may nonetheless spend their days in segregated settings, because when they reach out to providers or case managers to get services during the day, they are more likely to be connected to day programs instead of to supported employment services. People with SMI leaving hospitals, jails, and other segregated settings are also at serious risk of unnecessary admission to day programs because the State does not make community-based alternatives available and readily accessible.

Title II of the ADA prohibits public entities from subjecting qualified individuals with disabilities to discrimination. Public entities may not, based on disability, exclude qualified individuals from participating in, or deny them the benefits of, the entity's services, programs, or activities. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a). When enacting Title II, 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 public entities to "administer [their] 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 711 (2020). Thus, a state violates the ADA when it administers and funds services for people with disabilities—including behavioral health services—in a manner that unnecessarily segregates them. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d).

The Supreme Court has held that unjustified isolation is a form of discrimination prohibited by the ADA. *Olmstead*, 527 U.S. at 597. Public entities must provide community-based services to individuals with disabilities when (a) these services are appropriate, (b) the individuals do not oppose community-based treatment, and (c) community-based services can be reasonably accommodated, considering the resources available to the entity and the needs of other people with disabilities it serves. *Id.* at 607. The ADA's integration mandate applies not only to people with disabilities who are currently segregated, but also to those at serious risk of segregation. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 460–61 (6th Cir. 2020); *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); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003); *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1026 (D. Minn. 2016) (finding that the *Olmstead* decision "supports a broad reading of the integration mandate," including recognition of at-risk claims); *Hiltibran v. Levy*, 793 F. Supp. 2d 1108, 1116 (W.D. Mo. 2011) ("Persons at risk of institutionalization may make an integration mandate challenge without having first been

placed in institutions."). *But see United States v. Mississippi*, 84 F.4th 387, 398 (5th Cir. 2023) (holding that the risk of institutionalization, without actual institutionalization, does not give rise to discrimination under Title II). A public entity must modify its policies, practices, or procedures when necessary to avoid disability discrimination, unless it can show that the modifications would fundamentally alter the nature of a service, program, or activity. 28 C.F.R. § 35.130(b)(7)(i).

Below, we detail our findings relating to Nebraska's violation of Title II's integration mandate. In short, Nebraska relies on segregated ALFs and day programs to serve adults with SMI who would prefer to receive community-based services to help them live and work in integrated settings. Nebraska's limitations on community-based services mean that Nebraskans with SMI who are in the community or leaving hospitals or homeless shelters have little choice but to enter ALFs and day programs to get services. Community-based services are appropriate for these individuals, and Nebraska can reasonably modify its system by expanding existing services so that Nebraskans with SMI can return to or stay in their own homes and work in the community.

A. Nebraska Is a Public Entity and Its Assisted Living Facilities and Day Programs Serving Adults with SMI Are Segregated Settings.

Title II of the ADA applies to the State of Nebraska because it is a "public entity" as defined by the statute. 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). The State, through DBH, retains responsibility for complying with Title II when it contracts with, licenses, and funds private entities to coordinate or provide services. *Id.* § 35.130(b)(1).

The ALFs and day program facilities where Nebraska offers behavioral health services are segregated settings under Title II.[15] ALFs exclusively or primarily serve individuals with disabilities; the eligibility criteria for ALF admission require individuals to need help in various life domains, including personal care, activities of daily living, health maintenance activities, or supervision, "due to age, illness, or physical disability."[16] In nineteen of the State's ALFs, all or nearly all residents have SMI. These ALFs range in size from ten to nearly 250 residents.[17] Some ALFs have physical layouts that resemble hospitals, with long corridors connected by central staff stations. ALF residents typically must share bedrooms, sometimes with three or more adults in one room. Common areas, like dining halls and other public spaces, are much like those in nursing facilities. Like nursing facilities, ALFs may offer organized group activities at pre-determined times, but with limited opportunities for interaction with people other than ALF residents and paid staff. The facilities impose limits on what residents can do and when, limiting privacy and autonomy. ALFs restrict outside visitors with set visiting hours and, because living spaces are communal and bedrooms are often shared, private spaces for visiting

[15] *See* 28 C.F.R. § 35.130(d); 28 C.F.R. pt. 35, app. B, at 711 (2020).

[16] 175 Neb. Admin. Code § 4-006.07A.

[17] Neb. Dep't of Health and Hum. Servs., *State of Nebraska Roster: Assisted Living Facilities* (Apr. 15, 2024), https://dhhs.ne.gov/licensure/Documents/ALF%20Roster.pdf.

with non-resident guests are rarely available. In addition, residents generally do not have access to the kitchen and must eat at set times when meals are served in the dining halls.

Day programs for people with SMI in Nebraska also bear the hallmarks of segregation. These day programs exclusively serve people with SMI and offer few opportunities to interact with people without disabilities other than paid staff. Program participants' options for how to spend their days are restricted, with set schedules and activities each day. These facilities often post daily schedules of activities—some decorated with cartoon animals—that may list art projects, movies, basic pre-vocational activities like resume writing, and group discussions on topics like stress management.

Many ALFs partner with day programs or operate their own segregated day programming. ALFs offer ready access to day programs but rarely, if ever, refer their residents to supported employment services. Instead, ALFs and day programs incentivize a continual loop of segregation. For day program providers to be paid, state regulations require their participants to attend the program for a certain number of hours each weekday.[18] This financial incentive leads ALFs that operate or partner with day programs to limit the daytime hours residents are permitted to spend in the ALF while offering transportation to the day program facility. Some ALFs post notices advising residents that they must leave the ALF for set hours on weekdays. Many ALF residents fulfill this requirement by lining up on weekday mornings to ride in a van that transports them together to a day program and brings them back as a group at the end of the day. At least one ALF offers two of the day's three meals at the day program facility, incentivizing residents to attend the day program to eat. Unsurprisingly, some ALF residents believe that participation in day programs is required to live in the ALF.

B. Community-Based Services Are Appropriate for Nebraskans with SMI, and Most Prefer These Services.

Community-based services are appropriate for Nebraskans with SMI who currently live in ALFs, attend facility-based day programs, or who are at serious risk of entering an ALF or day program.[19] ALF and day program providers agree that the people they serve could live and work in the community with appropriate services to meet their needs.

Even people with the highest needs can find and keep jobs in typical workplaces. Providers have success stories of people with histories of mental health crises and hospitalizations who went on to have great careers with supported employment services. Many Nebraskans with SMI who currently live and work in the community are at serious risk of entering ALFs and day programs because the State limits the services they need to stay at home

[18] *See* 471 Neb. Admin. Code § 35-004.08A(6) (day rehabilitation "shall provide . . . [a] scheduled program of services to clients for a minimum of five hours per day, five days per week").

[19] *See, e.g.*, *Olmstead*, 527 U.S. at 602, 607; *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 994 (N.D. Cal. 2010) (appropriateness prong satisfied where plaintiffs' individual plans of care documented their need for specific community services, which were "critical to their ability to avoid institutionalization, and to remain in a community setting"); *see also* U.S. Dep't of Justice, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* Q. 4 (June 22, 2011), https://www.ada.gov/resources/olmstead-mandate-statement/ (listing types of evidence an individual can rely on to establish that an integrated setting is appropriate).

and at work long-term. By living and working in the community, these individuals show that community-based services are appropriate for them.[20]

Most Nebraskans with SMI would prefer to live and work in integrated, community-based settings. Indeed, Nebraskans with SMI across the State dream of living in their own homes and having jobs in their communities. Many of these people have work histories. They have pride in their work, and say they want to work again. People with and without previous work experience describe the jobs they would like to do in restaurants, construction, retail, or emergency medicine. Some people describe the businesses they would start, like selling their art online, if they had help with the process. Providers confirm that many people they serve prefer community-based services.

C. Nebraska Restricts Access to the Covered Community-Based Services that People with SMI Need to Live and Work in Their Communities.

We found that Nebraskans with SMI enter ALFs and day programs because they do not have access to the community-based services they need to live and work in integrated homes and workplaces. Covered services include the daily supports and crisis interventions that individuals need to avoid entering ALFs and day programs, as well as the case management necessary to connect individuals with community-based options to live and work in the community. The State's administration of its behavioral health system severely restricts access to covered services that individuals with SMI need to manage their disability, both at home and at work.

Nebraska has long been aware that people with SMI are "likely to remain in institutional environments longer than necessary,"[21] the State has left "gaps in the services, supports, and residential options available for individuals with behavioral health needs," [22] and the State needs to "[i]ncrease the number of persons receiving supported employment services."[23] The State's

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[20] *E.g. Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 612–13 (7th Cir. 2004); *Townsend v. Quasim*, 328 F.3d 511, 516 (9th Cir. 2003).

[21] Neb. Dep't of Health and Hum. Servs., *A Vision for Community Integration: Nebraska's Olmstead Plan* 12 (Dec. 13, 2019), https://nebraskalegislature.gov/FloorDocs/106/PDF/Agencies/Health_and_Human_Services__Department_of/708_20191216-111512.pdf (stating that people with disabilities are "more likely to remain in institutional settings longer than necessary, live in substandard environments, have high rates of recidivism to jails and prisons, and enter or return to homelessness").

[22] Neb. Legis. LR 296, State-Licensed Care Facilities Oversight Committee, *Final Report* ii (Dec. 15, 2018), https://www.nebraskalegislature.gov/pdf/reports/committee/select_special/lr296/lr296_2018.pdf. The State Senate Committee investigated the living conditions, treatment quality, and State oversight of ALFs that predominantly serve people with SMI. The resulting report found that DBH had violated state law by "leaving gaps in the services, supports, and residential options available for individuals with behavioral health needs." *Id*. The committee concluded that these failures resulted in "a segment of the population with serious mental illness [that] has turned to assisted living facilities to fill their housing needs." *Id*.

[23] Univ. of Neb. Coll. of Pub. Health, *Nebraska Behavioral Health Needs Assessment* 100–01 (Sept. 2016), https://app1.unmc.edu/PublicAffairs/TodaySite/images/siteimages/BHStudy1011.pdf (listing challenges to supported employment services, including the "need to increase the number of providers to improve access" and goals such as "[i]ncreas[ing] the number of persons receiving supported employment services"); U.S. Dep't of Health and Hum. Servs., Ctr. For Mental Health Servs., Substance Abuse and Mental Health Servs. Admin.,

2019 *Olmstead* plan notes that Nebraska has failed to remedy barriers to integrated services, including barriers to supported employment.[24] For example, the State acknowledged that its supplemental income payment for low-income individuals was responsible for "ALFs becoming one of the primary residential options for individuals with serious mental illness (SMI)."[25] The State pays ALFs an extra $438 for each resident who receives federal Social Security Income (SSI) and Social Security Disability Income (SSDI), but contributes only $5 toward independent housing. Nebraska also acknowledges its long waitlists for community-based housing services[26] and the resulting lack of community-based housing opportunities for people with disabilities. Similarly, public comments summarized in the State's 2019 *Olmstead* plan conclude that "[t]he plan lacks focus on key areas including integrated employment."[27]

We found these problems—and others—still exist in Nebraska. Nebraska restricts access to its integrated services in several ways. First, the State fails to authorize community-based services for many individuals with SMI. Second, the State has underdeveloped its community-based workforce. So, even when authorized, Nebraskans with SMI often cannot receive the services they need to avoid unnecessary segregation. Third, the State fails to ensure that its contractors (MCOs and Regions) connect people with SMI to community-based services. Finally, the State makes it difficult for licensed community-based service providers to navigate the State's system and serve individuals with SMI.

1. The State Restricts Service Authorization and Fails to Maintain Community-Based Providers for Nebraskans with SMI.

Although Nebraska covers a variety of community-based services as part of its behavioral health system, including supported employment services, the State fails to make those services available to most Nebraskans with SMI who need and qualify for them.

Employment Development Initiative: Fiscal Year 2011 & 2012 Projects 17–19 (June 6, 2013), https://www.nasmhpd.org/sites/default/files/2013_EDI.pdf (Nebraska's self-report states: "[t]he goal has always been to increase employment opportunities for people with mental illness and/or substance use disorders in Nebraska" but after a review "it was clear SE [supported employment] needs to be updated").

[24] Neb. Dep't of Health and Hum. Servs., *A Vision for Community Integration: Nebraska's Olmstead Plan* 11–15 (Dec. 13, 2019), https://nebraskalegislature.gov/FloorDocs/106/PDF/Agencies/Health_and_Human_Services__Department_of/708_20191216-111512.pdf.

[25] *Id.* at 12.

[26] Nebraska's community-based housing services are funded through its Behavioral Health Services Fund. The Behavioral Health Services Fund is a cash fund "for the provision of behavioral health services," and certain funding is set aside "for housing-related assistance for very low-income adults with serious mental illness." Neb. Rev. Stat. § 71-812.

[27] Neb. Dep't of Health and Hum. Servs., *A Vision for Community Integration: Nebraska's Olmstead Plan* 51 (Dec. 13, 2019), https://nebraskalegislature.gov/FloorDocs/106/PDF/Agencies/Health_and_Human_Services__Department_of/708_20191216-111512.pdf.

Limits on Community Support Services

Nebraska routinely denies Community Support and instead authorizes people to attend facility-based day programs. For people who do receive Community Support, per State policy, the MCO or Region can only authorize a total of 36 hours over approximately 26 weeks, or an average of 1.5 hours per week.[28] These restrictions mean that community living is widely unavailable to individuals who need more regular support than the maximum rate allows.

Limits on Higher-Intensity Community-Based Services

Even when people with SMI are authorized for community-based services, they often do not receive those services. Although Nebraska covers higher-intensity community-based services like ACT, it has under-developed its provider network. As just one example, the State currently has only three ACT teams. ACT is therefore unavailable to most individuals who need it, with only 166 people throughout the state receiving the service in September 2022.[29] And although ACT is intended to be a long-term service,[30] Nebraska routinely revokes authorization for the few people who receive the service once they start to improve. Nebraska also offers another higher-intensity service called Emergency Community Support (ECS), but ECS is short-term[31] and only 145 individuals were enrolled in September 2022.[32] Similarly, Nebraskans with SMI report challenges obtaining permanent supportive housing. Without access to permanent supportive housing, people with SMI have few alternatives to ALFs.

Limits on Supported Employment Services

The State similarly restricts supported employment services. Instead of making these services broadly available, the State funnels Nebraskans with SMI into facility-based day programs, sometimes for many years. Direct service providers reported that integrated, competitive work experiences are crucial for their clients' mental health recovery, but Nebraska's system makes it difficult to provide supported employment services. Day programs are more accessible, both in terms of the number of available providers and the State's willingness to authorize services, than supported employment. The State frequently denies supported employment services if the person is receiving any other services, like Community Support or Peer Supports, during the day. And across the board, providers have difficulty navigating the State's payment system for funding the services. In contrast, individuals

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[28] Neb. Medicaid State Plan, *Methods and Standards for Establishing Payment Rates*, Attachment 4.19-B, Item 13d, at 1a. Community Support services are billed in 15-minute units, up to a maximum of 144 units per 180 days, i.e. 36 hours over an approximately 25.7-week period (an average of 1.5 hours per week).

[29] Neb. Response to Dep't of Justice Request for Information (June 16, 2023) (on file).

[30] *See* U.S. Dep't of Health and Hum. Servs., Substance Abuse and Mental Health Servs. Admin, Ctr. for Mental Health Servs., *Maintaining Fidelity to ACT: Current Issues and Innovations in Implementation* 5 (2023), https://store.samhsa.gov/sites/default/files/pep23-06-05-003.pdf (describing ACT as "[t]ime-unlimited," where "[t]he ACT team provides services *for as long as needed*" (emphasis added)).

[31] Neb. Dep't of Health and Hum. Servs., Div. of Behavioral Health, *Nebraska Continuum of Care Manual for Mental Health and Substance Use Disorders* 25–26 (July 2022), https://dhhs.ne.gov/Behavioral%20Health%20Documents/Continuum%20of%20Care%20Manual.pdf.

[32] Neb. Response to Dep't of Justice Request for Information (June 16, 2023) (on file).

receiving facility-based day program services can receive the service for extended periods of time, sometimes years.

Nebraska fails to provide facility-based day program participants with the information and help they need to transition to community-based jobs. Some day program participants who have expressed interest in working believe they have no choice but to stay in the facility all day. In theory, Nebraska offers benefits counseling to help individuals understand how they can work without jeopardizing their public benefits. Nebraska has long been aware of the need to "[a]ddress the misconception that persons with behavioral health disorders cannot work" and to provide benefits counseling.[33] But many people are unaware that benefits counseling exists, and providers tell them that they cannot work because they would lose access to benefits.

Limits on Case Management

Nebraska limits case management that people with SMI need to avoid unnecessary segregation in ALFs and day programs. Although case management is a covered service, Nebraska relies primarily on Community Support providers to perform some case management tasks, along with the other services they provide. This results in restricted case management hours for individuals with SMI because Nebraska limits Community Support services to an average of 90 minutes per week. This is not enough time to provide both necessary Community Support services and case management.[34]

Nebraska's limits on case management create a significant barrier to transitioning people with SMI from ALFs and day programs to integrated settings. Behavioral health providers across the State find the process of transitioning Nebraskans with SMI from facilities to community settings difficult and sometimes impossible. The State does not reimburse community-based providers for time spent transition planning for people with SMI living in ALFs. This leaves people with SMI and their families to find community-based services and housing opportunities on their own. People with SMI routinely discharge from institutions with no community-based services in place, making them at serious risk of having to enter ALFs or day programs. And when individuals with SMI reenter the community, the lack of case management further compounds their inability to secure services needed to avoid placement in ALFs and day programs.

People with SMI need case management to coordinate the various services so they can find and maintain community-based housing and work. Effective case managers also help people with SMI transition from facilities to the community with appropriate services. But many Nebraskans with SMI receive no or limited case management. Some ALFs have never had a case manager visit a resident at the ALF. Some people with SMI are assigned a case manager

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[33] Univ. of Neb. Coll. of Pub. Health, *Nebraska Behavioral Health Needs Assessment* 100–01 (Sept. 2016), https://app1.unmc.edu/PublicAffairs/TodaySite/images/siteimages/BHStudy1011.pdf.

[34] Community Support providers are expected to perform case management functions—including benefits applications, arranging medical appointments, and getting people to those appointments—in addition to their core responsibilities of helping people with SMI live at home and work, and providing active rehabilitation and support interventions when an individual is in crisis. *See* 471 Neb. Admin. Code § 35-004.01A (describing Community Support service components).

through their MCO. But MCO case managers are typically minimally involved with their clients. Hospital staff try to alert MCO case managers when people with SMI are admitted during a mental health crisis. But the MCO case managers often respond after the person has already discharged, or do not respond at all. Other providers have similar challenges contacting MCO case managers. Without a case manager who is familiar with the individual's preferences, service history, and community-based options, hospital staff typically refer the individual for ALF or other group housing instead of referring the person to permanent supportive housing, ACT, or other community-based services. The State is in the process of adding several services, including care coordination for some individuals with SMI living in ALFs. This positive step, without more, does not ensure that individuals with SMI who wish to transition from ALFs and day programs will receive the services they need to live and work in integrated, community settings.

Limits on Crisis Response Services

Nebraska's community-based crisis response services for people with SMI are, along with other community-based services, underdeveloped. In large areas of the State, police officers are often the first responders to mental health crises. When police officers respond to a mental health crisis, they may bring the person to a hospital or crisis center or arrest the person and charge them with a nuisance crime like loitering or disturbing the peace. Some jurisdictions in Nebraska have tried to make crisis response services more available, for example, by establishing mental health co-responder programs that pair behavioral health workers with law enforcement to respond to mental health crises. But these local efforts—concentrated in cities—are insufficient to plug the holes in the State's crisis response services.

Impact on Nebraskans with SMI

Nebraska's administration of behavioral health services keeps many individuals with SMI segregated in ALFs and day programs or in the community but at serious risk of segregation. For example, the capacity of ALF and day programs far exceeds the capacity of supported employment providers in the State. Indeed, State-commissioned reports have repeatedly cited the need to expand access to supported employment services.[35] Yet the number of adults with SMI receiving supported employment services in the state has remained static for many years, as has the number of supported employment providers.[36] The State routinely authorizes community-based services just long enough for individuals with SMI to achieve stability living

[35] Technical Assistance Collaborative, *Nebraska Olmstead Plan Evaluation* 9, 20–21 (Dec. 15, 2021), https://nebraskalegislature.gov/FloorDocs/107/PDF/Agencies/Health_and_Human_Services__Department_of/708_20211215-142757.pdf (noting the State's overarching goal of promoting employment for people with disabilities); Univ. of Neb. Coll. of Pub. Health, *Nebraska Behavioral Health Needs Assessment* 100–01 (Sept. 2016), https://app1.unmc.edu/PublicAffairs/TodaySite/images/siteimages/BHStudy1011.pdf; U.S. Dep't of Health and Hum. Servs., Ctr. For Mental Health Servs., Substance Abuse and Mental Health Servs. Admin., *Employment Development Initiative: Fiscal Year 2011 & 2012 Projects* 17–19 (June 6, 2013), https://www.nasmhpd.org/sites/default/files/2013_EDI.pdf.

[36] *Compare* Liu, Heng-Hsian N., *Policy and practice: an analysis of the implementation of supported employment in Nebraska* 70 (2011) (unpublished Ph.D. dissertation, Univ. of Nebraska), https://digitalcommons.unl.edu/psychdiss/30/, *with* Neb. Response to Dep't of Justice Request for Information (Oct. 3, 2022) (on file).

at home or in their new jobs before terminating the service. By suddenly cutting off community-based services, Nebraska places people with SMI at serious risk of mental health decompensation and institutionalization. While these services should be aimed at supporting recovery, many people with SMI need varying levels of support over time and services must be available to meet those ongoing needs.[37] Like ACT, the supported employment services that Nebraska covers should be available for as long as necessary to assist individuals with SMI who have long-term support needs.[38] Instead, the State generally only offers these individuals facility-based services.

2. Nebraska Fails to Ensure that its Behavioral Health Service System Provides Covered Services in Integrated Settings.

Nebraska fails to ensure that its State agencies, contractors (Managed Care Organizations and Regions), and service providers provide community-based services so that adults with SMI can live at home and work. Instead, Nebraska's system pushes individuals with SMI into ALFs and day programs. As discussed above, the State is responsible for administering its Medicaid and other services for people with SMI in a manner consistent with the ADA's integration mandate. Yet Nebraska administers behavioral health services, including supported employment services, through various funding streams and multiple departments and contractors, in ways that favor ALF and day program services over community-based options. The entities within the behavioral health service system operate in silos. There is limited information sharing and service coordination across the State agencies, Managed Care Organizations (MCOs), Regions, and service providers that Nebraska uses to authorize and provide behavioral health services.

Nebraska's failure to ensure that its covered services are available in integrated settings results in unnecessary segregation. The Regions and the MCOs routinely funnel people with SMI to ALFs and day programs because the State has underdeveloped community-based services. Thus, thousands of people with SMI spend their days cloistered in segregated ALFs

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[37] *See, e.g.*, U.S. Dep't of Health and Hum. Servs., Ctr. For Mental Health Servs., Substance Abuse and Mental Health Servs. Admin., *Executive Order: Saving Lives Through Increased Support for Mental and Behavioral Health Needs Report* 15 (Dec. 2020), https://www.samhsa.gov/sites/default/files/saving-lives-mental-behavioral-health-needs.pdf ("A primary principle [of mental health services] must be the recognition that mental illness and SUDs [substance use disorders] are chronic, relapsing illnesses and, for those with more severe conditions, will require ongoing care. For many, this will take the form of ongoing case management and long-term care.").

[38] U.S. Dep't of Health and Hum. Servs., Substance Abuse and Mental Health Servs. Admin, Ctr. for Mental Health Servs., *Maintaining Fidelity to ACT: Current Issues and Innovations in Implementation* 17–18 (2023) https://store.samhsa.gov/sites/default/files/pep23-06-05-003.pdf (supported employment services should be "continuous and time-unlimited" and "integrat[ed] with mental health services"). *See also* U.S. Dep't of Labor, Office of Disability Emp't Policy, *Competitive Integrated Employment (CIE), Mental Health*, https://www.dol.gov/agencies/odep/program-areas/cie (last visited April 17, 2024) (increasing competitive integrated employment for individuals with SMI includes combining supported employment services with mental health services to support life needs that must be addressed to pursue employment); IPS Employment Center, *IPS Practice and Principles*, https://ipsworks.org/index.php/documents/ips-practice-and-principles/ (last visited April 17, 2024) (one of the eight principles of Individualized Placement and Support (IPS), a supported employment model for people with SMI, is time-unlimited support: "Job supports . . . continue for as long as each worker wants and needs the support.").

and day programs instead of receiving the services they need to live and work in the community. Many more are at serious risk of unnecessary segregation.

Because the State's system operates in silos, Nebraska does not effectively gather and share information or coordinate entities to keep people with SMI from falling through the cracks and into institutions. For example, Nebraska does not consistently and accurately gather and analyze data about Nebraskans with SMI. Since Nebraska lacks information about its citizens with SMI, the State cannot determine which services these individuals need to leave or avoid entering ALFs and day programs. Nor does the State gather, analyze, or act on data about its community-based provider network's capacity to meet the needs of adults with SMI. There is a high demand for community-based services. But the State fails to identify individuals for whom community-based services are appropriate and preferred and ensure sufficient community-based provider capacity. Instead, the system defaults to segregated settings.

Impact on Nebraskans with SMI

By failing to ensure the provision of behavioral health services in the community with effective oversight, the State has fostered a routine, system-wide practice of referring individuals who could receive services in the community to segregated ALFs and day programs instead. Indeed, behavioral health service providers across the system, including institutional and community-based providers, cite ALFs and day programs as the main service options for Nebraskans with SMI. Almost any need for community-based services triggers referral to an ALF—from challenges taking medications at home to discharging from LRC after years of hospitalization. Once admitted, ALF residents often enter day programs, too. *See* Section IV.A, above.

V. Nebraska Could Remedy These Violations

Nebraska could remedy these violations without fundamentally altering its behavioral health service system.[39] Nebraska already has a statutory goal of providing greater access to community-based services and improved outcomes for people with SMI.[40] Changes like those below, built on Nebraska's existing behavioral health service system, would reasonably modify the system by expanding community-based alternatives to treatment in segregated settings, allowing more Nebraskans with SMI to live and work in the community.[41]

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[39] Public entities are required to make reasonable modifications to their services, programs, and activities to avoid discriminating against people with disabilities, 28 C.F.R. § 35.130(b)(7)(i), as long as the modifications are not a fundamental alteration, *Olmstead*, 527 U.S. at 603, 607.

[40] Neb. Rev. Stat. § 71-810(1)(a) ("[DBH] shall encourage and facilitate the statewide development and provision of an appropriate array of community-based behavioral health services and continuum of care for the purpose[] of providing greater access to such services and improved outcomes for consumers of such services.").

[41] *Radaszewski v. Maram*, 383 F.3d 599, 611–12 (7th Cir. 2004) (providing existing services in the community is a reasonable modification); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280–81 (2d Cir. 2003) (changes and increased access to existing services are reasonable modifications); *Guggenberger v. Minn.*, 198 F. Supp. 3d 973, 1030 (D. Minn. 2016) (providing existing Medicaid waiver services to eligible people is a reasonable modification); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1304–05 (M.D. Fla. 2010); *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 344–45 (D. Conn. 2008).

First, Nebraska could expand access to its existing community-based services like Community Support, ACT, case management, and permanent supportive housing, and ensure sufficient provider capacity so that Nebraskans with SMI can receive the services they need to transition to, or remain in, the community. The State should authorize services to fill the day-to-day needs of individuals with SMI. Case managers should follow their clients throughout the State's behavioral health service system, so that clients receive consistent, continuous, and timely information and service coordination.

Second, Nebraska could offer supported employment services, including benefits planning, to every person with SMI receiving State-administered behavioral health services who expresses an interest in working. Nebraska could streamline its approval and funding processes for supported employment services so that people with SMI experience continuous and seamless service delivery. Supported employment service authorization and funding should continue for as long as the person needs supported employment services to pursue their employment goals.

Third, Nebraska could ensure that services it covers for individuals with SMI, regardless of whether Nebraska uses contracted or licensed entities to authorize or connect individuals to the service, are available and accessible in the community. This could involve enforcing existing contracts requiring that necessary services be provided in the community.

Fourth, Nebraska could administer its behavioral health service system to communicate and coordinate across State agencies and contracted entities. DBH could serve as the State's hub for information and technical support relating to behavioral health services, including employment services, for people with SMI. The State should develop a process for collecting and analyzing accurate, up-to-date information about Nebraskans with SMI and their service needs and preferences, and the State's provider network capacity.

Fifth, Nebraska could identify people with SMI in ALFs and day programs who may be open to living and working in the community. Nebraska could educate these individuals about community-based options and provide transition planning to people who want to move. Transition planning should start with the presumption that people with SMI can live and work in the community with the right services in place. Transition planning should be person-centered, and identify and arrange the services the person needs to move to, live, and work in the community.

VI. Conclusion

We would like to work cooperatively with you to resolve the Department's findings. We hope to enter settlement negotiations with Nebraska and agree on changes the State will make to remedy the violations. If Nebraska will not negotiate, or if our negotiations fail, the United States may take appropriate action—including filing a lawsuit —to remedy the State's ADA violations.[42]

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

Please contact Nicole Kovite Zeitler, Trial Attorney at the Disability Rights Section of the Civil Rights Division, at (202) 598-7166 by May 28, 2024 if the State of Nebraska is interested in working with the United States to reach a resolution along the lines described above. If you have any questions as you review this letter, please feel free to contact us.

Sincerely,

/s/ Kristen Clarke
Kristen Clarke
Assistant Attorney General
Civil Rights Division

cc: Joe Kelly
Lieutenant Governor

Bo Botelho
General Counsel, Nebraska Department of Health and Human Services

Tony Green
Interim Director, Division of Behavioral Health

Matt Ahern
Interim Director, Division of Medicaid & Long-Term Care

Juan Román
General Counsel, Commissioner's Office, Nebraska Department of Education

Lindy Foley
Director, Nebraska Vocational Rehabilitation