

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

THE ARC MARYLAND)	
8601 Robert Fulton Dr. Suite 140)	
Columbia, MD 21046)	
Howard County)	
)	
PLAINTIFF.)	Civil No. _____
)	
)	
v.)	
)	
)	
MAYOR AND CITY COUNCIL OF BALTIMORE CITY,)	
)	
CARROLL COUNTY,)	
)	
GARRETT COUNTY,)	
)	
QUEEN ANNE’S COUNTY,)	
)	
SOMERSET COUNTY,)	
)	
and)	
)	
TALBOT COUNTY)	
)	
)	
DEFENDANTS.)	
)	

MOTION FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

Plaintiff, the Arc Maryland, through its counsel and pursuant to Fed. R. Civ. P. 65,
hereby moves this Court for a temporary restraining order to enjoin Defendants’ discriminatory

actions excluding persons with intellectual and developmental disabilities from access to Defendants' COVID-19 programs and services. In support of this Motion, Plaintiff states:

1. Defendants' actions are causing immediate, irreparable harm to individuals with intellectual and developmental disabilities (I/DD) who are particularly vulnerable to serious health care consequences of COVID-19, including death, and who are being denied access to Defendants' vaccine services.
2. Plaintiff readily meets the test for issuing a temporary restraining order:
 - a. Plaintiff is certain to prevail on the merits of her claim. Defendants' exclusion of qualified individuals with intellectual and developmental disabilities (I/DD) from eligibility for their vaccine programs and services, despite the State of Maryland's designation of such individuals as eligible, is prohibited disability discrimination. The Americans with Disabilities Act provides, in relevant part, that "no 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. § 12132. Similarly, Section 504 of the Rehabilitation Act of 1973 requires that recipients of federal funding do not exclude a qualified individual with a disability on the basis of disability from participation in, the benefits of, or be subject to discrimination under any "program or activities receiving Federal financial assistance." 29 U.S.C. 794(a).
 - b. Individuals with I/DD will suffer irreparable harm in the absence of immediate relief.

c. The balance of equities tip in favor of the Plaintiff. Defendants are not harmed by providing the relief sought, which seeks compliance with the State's vaccination plan and with our nation's anti-discrimination laws. Providing vaccinations to our vulnerable health care populations will have a beneficial impact on our public health systems by preventing more hospitalizations and stress on health care resources.

d. The public interest is served by granting immediate relief. Providing urgently needed health care protection to those identified by the State of Maryland as especially vulnerable to the health consequences of the coronavirus supports the state's interest in providing for the welfare of its populace. Opportunities for vaccination among priority populations is important to those individuals deemed most likely to be adversely affected, but also to protect our health care systems from being further taxed and overwhelmed in responding to those who face complications or serious illness from the virus. Moreover, it is always in the public interest to enforce our nation's civil rights laws.

3. In support of this Motion, Plaintiff relies on the attached Memorandum of Law and accompanying Exhibits and Affidavit.
4. Counsel for Plaintiff has shared courtesy copies of all pleadings with Counsel for Defendants immediately prior to Plaintiff's filing and has, through e-mail, offered to to discuss the matter at Defendant Counsel's convenience.
5. Given that the lives and health of people with I/DD in Defendants' jurisdictions are at stake, Plaintiff presents for this extraordinary relief.

RELIEF REQUESTED

Plaintiff respectfully requests that this Honorable Court find that immediate, substantial, and irreparable harm will result to the Plaintiff before a full adversarial hearing can be held, and further seeks an Order of Court to:

1. Assume jurisdiction over this matter;
2. Grant a Temporary Restraining Order immediately enjoining Defendants, its officers, agents, employees, subordinates, successors in office, and all those acting in concert or participation with it, from excluding qualified individuals with disabilities from accessing their vaccine programs, and further Ordering Defendants to:
 - a. Correct their public information and websites to clearly indicate that people with Intellectual/ Developmental Disabilities (I/DD) are eligible for the COVID-19 vaccine in Phase 1B, as required by the Maryland State Vaccination Plan;
 - b. Designate a contact person and post the contact person's phone number and e-mail conspicuously on Defendants' websites and identify that the contact person is available so that persons with intellectual or developmental disabilities may receive assistance understanding their opportunities to access the vaccine;
 - c. Provide instruction to all of Defendants' staff and contractors that administer Defendants' vaccination programs and services or who convey information to the public about vaccine programs and services, that individuals with intellectual and developmental disabilities are currently eligible for the vaccine and are in Phase1B priority;
 - d. Issue notice(s) to the public, which may be accomplished through conspicuous notice on their website that people with I/DD are eligible for the vaccine under

Phase 1B; and that people with I/DD may contact Defendants' to indicate their availability for a vaccine appointment as eligible persons in Phase 1B.

- e. Amend any vaccine interest lists, waiting lists, pre-registration forms, or registration forms permitting all eligible Phase 1B individuals to indicate an interest in receiving a vaccine, to include persons with I/DD.
3. Set this matter for an immediate hearing or schedule an immediate teleconference on The Arc Maryland's request for a Temporary Restraining Order and Preliminary Injunction prohibiting Defendants' discrimination against people with I/DD in their COVID-19 vaccine programs and services.

Dated: This 8th day of March, 2021.

Respectfully submitted,

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I. INTRODUCTION

Pursuant to F.R.C.P. 65, Plaintiff moves this Court to issue a temporary restraining order to immediately enjoin (1) the Mayor and City Council of Baltimore City, (2) Carroll County, (3) Garrett County, (4) Queen Anne's County, (5) Somerset County, and (6) Talbot County (collectively, the "Defendants") from omitting persons with Intellectual and/or Developmental Disabilities (hereinafter "I/DD") as a group eligible for the COVID-19 vaccine under Phase 1B of the state of Maryland's vaccine priority plan (the "Plan"). Such action illegally discriminates against persons with I/DD. The Defendants each have websites that inform the public which individuals are eligible for vaccines under various phases of the vaccine priority plan. It is undisputed that persons with I/DD are eligible for the vaccine under Phase 1B. Despite this, on their websites, where the Defendants describe priority categories for the vaccine, they have persistently excluded persons with I/DD from the Phase 1B eligibility list.

Furthermore, the Defendants' websites each offer pre-registration, registration, interest forms or telephone or email contact information through which *eligible* persons are to connect with the Defendants to indicate their interest and availability for vaccination appointments. The prerequisite to accessing the vaccine through these avenues, however, is eligibility. The resulting harm is evident: the constituents of Plaintiff The Arc Maryland, people with I/DD across the state residing in the Defendants' counties, are not informed by the Defendant Counties that they are eligible for the vaccine; are unable to schedule appointments, register, pre-register, or complete interest forms for the Defendants' vaccines; and are delayed or denied access to critical health care services in violation of federal law. It is critical that this discriminatory behavior be immediately reviewed and estopped by this Court, as a continuation of the Defendants'

discriminatory conduct will undoubtedly result in the hospitalization or death of individuals with I/DD, as the coronavirus continues to spread, and individuals with I/DD face a much higher risk for severe illness or death due to COVID-19.¹

II. FACTUAL BACKGROUND

a. The COVID-19 Pandemic & Persons with Intellectual and/or Developmental Disabilities

COVID-19 is a highly infectious respiratory disease and has created a global health pandemic. COVID-19 cases have been confirmed in all Maryland Counties. The scope of the health emergency has resulted in over 500,000 deaths nationally. In Maryland, as of March 6, 2021, the COVID-19 disease has killed 7,748 residents, and resulted in 35,378 hospitalizations.²

COVID-19 vaccines provide immunity against COVID-19, with over eighty-five percent efficacy. People with I/DD face a heightened risk of serious illness and death from COVID-19.³ Mortality rates amongst people with I/DD are 100 to 200 percent higher than people without I/DD.⁴ Accordingly, it is critical that individuals with I/DD be prioritized in access to the vaccine.

b. Maryland's Vaccination Plan

¹ Turk, et. al., *Intellectual and Developmental Disability and COVID-19 Case-Fatality Trends: TriNetX Analysis*, DISABILITY HEALTH J 2020 JUL; 13(3): 100942 (May 24, 2020) (last visited Mar. 5, 2021) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7245650/>.

² *COVID-19 and Vaccination Data*, MARYLAND MATTERS, <https://www.marylandmatters.org/covid-19-in-maryland-2/> (last visited Mar. 7, 2021).

³ *Are AAC Users at Greater Risk of Dying from COVID?*, COMMUNICATIONFIRST, <https://communicationfirst.org/are-aac-users-at-greater-risk-of-dying-from-covid/> (last visited Mar. 5, 2021)(reviewing nine studies published between May and December 2020 and finding that people with I/DD are between 1.7 and 16 times more likely to die from COVID-19 if they get the disease than those who do not have I/DD).

⁴ Turk, et. al., *Intellectual and Developmental Disability and COVID-19 Case-Fatality Trends: TriNetX Analysis*, DISABILITY HEALTH J 2020 JUL; 13(3): 100942 (May 24, 2020) (last visited Mar. 5, 2021) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7245650/>.

Prior to providing states with COVID-19 vaccines, the federal government requires submission of vaccine plans detailing how the state will serve and prioritize those most at risk. Under Maryland's Plan , implemented pursuant to an Executive Order and compulsory upon the Defendants, Phase 1 is the highest priority phase. Most of the vaccines distributed under Phase 1A of the Plan are prioritized for persons in nursing facilities or for essential health care workers. Vaccines for Phase 1B include distributions from the Maryland Department of Health ("MDH") to local governments and is especially important for Marylanders who turn to their county governments for protection against a virus that leaves them uniquely and particularly vulnerable to serious health consequences and fatality.

On January 18, 2021, Maryland entered Phase 1B of the Plan, prioritizing individuals who are: (1) 75 years and older; (2) in assisted living, independent living, developmental disabilities or behavioral health group homes, and other congregate living facilities; (3) *individuals with intellectual and developmental disabilities*; (4) high-risk incarcerated individuals; (5) continuity of government vaccinations; and (6) in education, or childcare providers (*emphasis added*).⁵ The Plan appropriately acknowledged just how vital the vaccine is for persons with I/DD by placing such individuals in Phase 1B.

On January 25, 2021, Maryland entered Phase 1C of the Plan. MDH made clear in its January 25, 2021 press release announcing that Maryland was moving into Phase 1C that "vaccine eligibility does not expire, and all Marylanders who were eligible under Phase 1A and

⁵ Maryland Department of Health, *Amended Directive & Order Regarding Vaccination Matters*, No. MDH 2021-02-04-01, available at [https://phpa.health.maryland.gov/Documents/2021.02.04.01%20-%20MDH%20Order-%20Amended%20Vaccination%20Matters%20\(Additional%20Covered%20Persons\).pdf](https://phpa.health.maryland.gov/Documents/2021.02.04.01%20-%20MDH%20Order-%20Amended%20Vaccination%20Matters%20(Additional%20Covered%20Persons).pdf) (last visited Mar. 5, 2021).

1B remain eligible....”⁶ Accordingly, and as expressly stated by the MDH, persons with I/DD remain eligible and have a priority for the vaccine.⁷

c. The Defendants’ Acts and Omissions

The Defendants developed website programs as part of their response to COVID-19. The Defendants’ websites are critical gateways for residents to obtain vaccines. As described in Plaintiff’s accompanying Complaint and summarized in further detail below, each Defendant excludes persons with I/DD from among those listed on its website as eligible for the vaccine under Phase 1B. The Defendants’ discriminatory conduct denies qualified individuals with I/DD the opportunity to access meaningful benefits of the Defendants’ vaccine programs and services based on disability.

The Defendants’ health department websites each provide informational graphic portraying the phases of eligibility in Phase 1B of the vaccine eligibility, but all of the graphics omit individuals with I/DD as eligible for Phase 1B, while listing other Phase 1B eligible groups. (Plaintiff’s Exhibits 1-6). Each of the Defendants’ graphic is attached as an exhibit, and a representative example is provided below:

⁶ Maryland COVID-19 Priority Groups, MARYLAND DEPARTMENT OF HEALTH, (updated February 10, 2021), available at https://covidlink.maryland.gov/content/wp-content/uploads/2021/03/covidLINK_VaxDistribution_PDF_web_508.pdf (last visited Mar. 7, 2021).

⁷ *Ibid.*

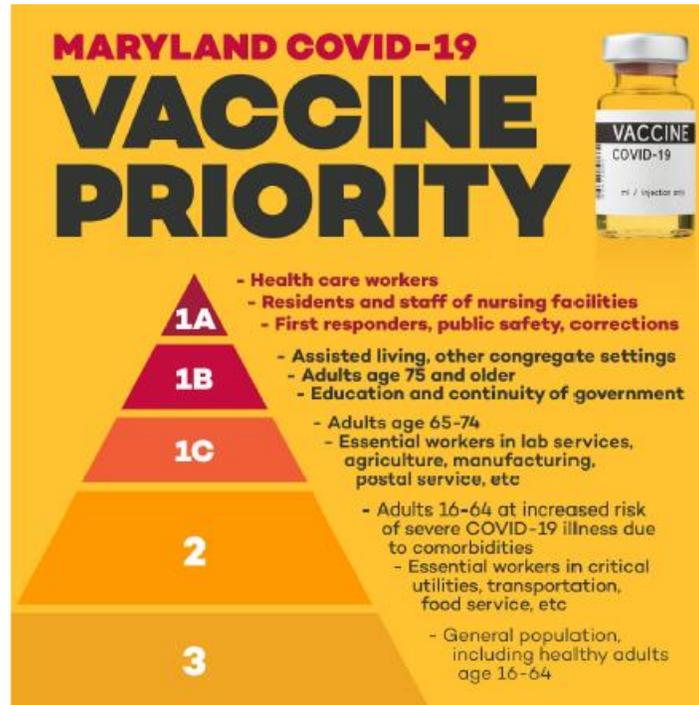


Figure 1. The above informational graphic, or some variation of it, is used by five of the six Defendant jurisdictions. Phase 1B includes no mention of individuals with I/DD. (Plaintiff's Exhibits 1-6).

The Defendants' graphics stand in sharp contrast to the description of Phase 1B eligibility provided by the State of Maryland and graphics used by other local jurisdictions that properly identify persons with I/DD as eligible in Phase 1B:

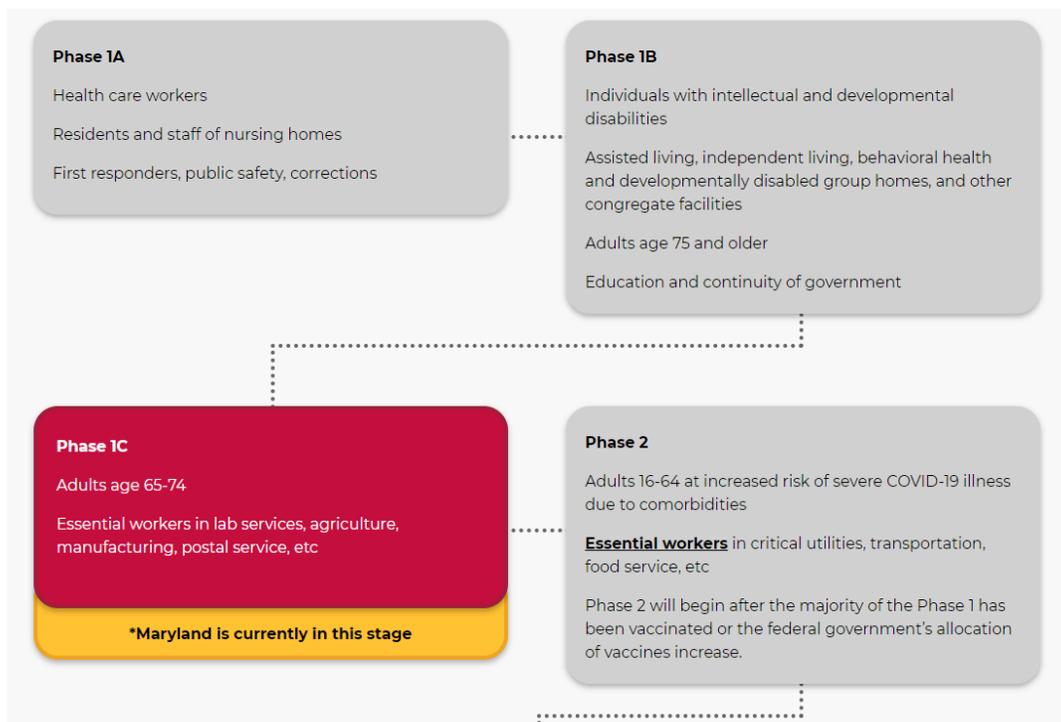


Figure 2. Informational Graphic Used on the Maryland Department of Health's Website, including those with I/DD. (Plaintiff's Exhibit 7).

Furthermore, the Defendants' discriminatory conduct persists via the manner in which individuals can indicate their ability to schedule an appointment for a vaccine. The Defendants' conduct is harmful to individuals with I/DD because vaccines are provided by appointment only. Each of the Defendants' websites provides steps to schedule a vaccination appointment, through submitting an interest or pre-registration form or by calling or emailing the Defendant counties. For example, Defendant Garrett County's website states that individuals who are unable to register online (with no appointments available) and are eligible under current guidelines may also call a hotline. (Plaintiff's Exhibit 3). Nonetheless, the Garrett County website shows that individuals with I/DD are not eligible under Phase 1B, which prevents individuals with I/DD from proceeding with registration.

Defendant Queen Anne's County's vaccine registration form has drop-down menus for a website user to demonstrate their eligibility for a vaccine. Though the drop-down list allows individuals to specify if they have a health condition, the options are limited to conditions such as obesity, sickle cell disease, and other health conditions; no option exists for people to indicate that they are eligible for Phase 1B because they have I/DD. (Plaintiff's Exhibit 9).

Defendant Somerset County's vaccine service provides that an individual seeking to schedule an appointment for a vaccine should send an e-mail to the County, but instructs that it is only vaccinating persons in Phases 1A-C, and explicitly excludes persons with I/DD from being eligible in Phase 1A-C. (Plaintiff's Exhibit 5.)

Other Defendants' websites prevents individuals with I/DD from submitting an interest form, including the Mayor and City Council of Baltimore City,⁸ Carroll County,⁹ and Talbot County.¹⁰ (Plaintiff's Exhibits 1, 2, and 6).

⁸ Defendant Mayor and City Council of Baltimore City's website excludes individuals with I/DD from Phase 1B eligibility, resulting in individuals with I/DD not being made aware that they are eligible and from making further contact to access the vaccine. The Baltimore City webpage provides vaccine registration links, but cautions that the links are solely available for persons in Phase 1A or 1B categories. Baltimore City emphasizes its instructions by noting that if individuals who are not among those it identifies in Phase 1A and 1B attempt to obtain a vaccine, they are taking away appointment slots from individuals that need to be prioritized. Defendant Mayor and City Council of Baltimore thus excludes persons with I/DD from its programs and services and prevents them from gaining access to the vaccine. (Plaintiff's Exhibit 1).

⁹ Defendant Carroll County directs individuals to complete a specific COVID-19 vaccination interest form if they fall into certain categories. The categories include: (1) Carroll County residents age 75 and over; (2) Carroll County residents between the ages of 65-74; (3) Carroll County residents under the age of 65 with health conditions that increase risk of serious illness from COVID-19; (4) essential workers in Carroll County; and (5) the General Population (not in priority groups 1A, 1B, 1C, or 2). Conspicuously, the website improperly omits directions for those with I/DD to complete the interest form. (Plaintiff's Exhibit 2).

¹⁰ Defendant Talbot County fails to present accurate information to the public about the Phase 1B eligibility for those with I/DD. Talbot County's COVID-19 vaccination website states that it is currently in vaccination Phase 1B, which includes "those aged 75 and older, those in education (K-12) and child care, those in congregate housing facilities, those in continuity of government. The website does not mention that those with I/DD are also eligible under Phase 1B. (Plaintiff's Exhibit 6). Defendant Talbot County provides interest lists and indicates that those interest lists are for Phase 1B eligible individuals only, but directs the completion of interest forms for individuals 75 and older, and child care providers. (*Id.*)

As individuals with I/DD turn to their local government to learn about their ability to receive a vaccine or to register for the vaccine, they are excluded from accessing the benefits of one of governments most sacred functions—protecting the health and safety of its populace. Defendants, meanwhile, offer their vaccination information, benefits and services to others identified as eligible for Phase 1B under the State’s Plan. It is this discriminatory conduct that Plaintiff seeks to immediately enjoin.

**III. A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
SHOULD BE ISSUED IN FAVOR OF PLAINTIFF**

The standards for issuance of a temporary and preliminary injunction are well-settled. A preliminary injunction is warranted if a plaintiff demonstrates that: the plaintiff is likely to succeed on the merits, likely to suffer irreparable harm if the order is not granted, the balance of equities tips in favor of the plaintiff, and an order is in the public interest. *See Sci. Sys. & Applications v. United States*, No. PWG-14-2212, 2014 U.S. Dist. LEXIS 99165, at *9-10 (D. Md. July 22, 2014) (same evaluation for temporary restraining order as for preliminary injunction)(citing *U.S. Dep’t of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 283 (4th Cir. 2006)); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013)(addressing and summarizing preliminary injunction factors)(citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Plaintiff readily satisfies each of these criteria.

a. Plaintiff The Arc Maryland is Likely to Succeed on the Merits

Rarely is a discrimination case as clear as in the instant matter. Qualified individuals with I/DD have been and continue to be excluded from the opportunity to benefit from Defendants vaccine program and services on the basis of their disability. The Americans with Disabilities

Act (“ADA”), as well as Section 504 of the Rehabilitation Act of 1973 (“Rehab Act”) were established to prohibit precisely the kind of discrimination carried out by the Defendants. In invoking the “sweep of congressional authority,” Congress intended the ADA to address discrimination faced day-to-day by people with disabilities and to provide a “comprehensive national mandate for elimination” of our historic discrimination. 42 U.S.C. § 12101(b)(4)(1).

In enacting the ADA, Congress acknowledged that disability-based discrimination is not limited to intentional discrimination based on prejudice or animus. *See* S. Rep. No. 101-116, at 6-7, 11 (1989); H.R. Rep. No. 101-485, pt. 2, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310-11. *See also Alexander v. Choate*, 469 U.S. 287, 295-97 (1985) (recognizing thoughtlessness, indifference, and benign neglect as key reasons for disability-based discrimination; holding that “discrimination by effect as well as by design” is actionable under the Rehab Act).

The ADA provides, in relevant part, that “no 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. § 12132. Similarly, Section 504 of the Rehab Act requires that recipients of federal funding do not exclude a qualified individual with a disability on the basis of disability from participation in, the benefits of, or be subject to discrimination under any “program or activities receiving Federal financial assistance.” 29 U.S.C. 794(a). As explained below, the Defendants’ violate our civil rights laws with reckless abandon.

i. The Defendants’ actions present an ongoing and continuous violation of Title II of the Americans with Disabilities Act

Title II of the ADA provides, in relevant part, that “no 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. § 12132. The Defendants, including their respective departments of health, are units of local government and are a “public entity” within the meaning of the ADA (42 U.S.C. § 12131(1) and 28 C.F.R. § 35.104).

To prove a violation of the ADA, plaintiffs must show: (1) they have a disability; (2) they are otherwise qualified to receive the benefits of a public service, program, or activity; and (3) they were denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of their disability. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). Plaintiff The Arc Maryland easily establishes a prima facia case of discrimination:

1. As a membership organization with 8,000 members in Maryland, including members in each of the Defendants’ counties, Plaintiff represents the interests of persons with I/DD, who are unequivocally individuals with disabilities under the ADA. Intellectual and developmental disabilities are characterized by limitations in intellectual and adaptive functioning that are needed for everyday life in areas such as communication, learning, self-care, social skills, or functional academics. Persons with disabilities that impair major life activities are “persons with disabilities” under the ADA. 42 U.S.C. § 12102 (1)-(2).

2. Persons with I/DD are qualified to receive the benefits of the Defendants’ vaccine programs because they are identified by the State of Maryland as eligible for vaccination under Phase 1B of the Plan, which was effective as of January 18 , 2021.

3. Persons with I/DD have been denied the benefits and services of the Defendants' vaccine programs and have been otherwise discriminated against on the basis of their disability. As set forth in Section II.c. above and demonstrated through Plaintiff's Exhibits, Affidavit and Complaint, the Defendants have excluded and continue to exclude qualified individuals with I/DD from receiving the benefits of their respective County vaccine programs, services, and activities on the basis of disability in violation of Title II of the ADA, 42 U.S.C. § 12132, and its implementing regulations 28 C.F.R. Part 35.

The implementing regulations amplify the statute's nondiscrimination mandate by giving more particularized descriptions of illegal activities intended by the Act. While the discriminatory impact of Defendants' actions as described by Plaintiff appears self-evident, the regulatory scheme further illuminates precisely how Defendants actions contribute to disability discrimination:

1. The Defendants violate 28 C.F.R. 35.130(b)(1)(ii), which prohibits local governments from providing qualified individuals with a disability an opportunity to participate in or benefit from a service that is not equal to that afforded others. The Defendants deny individuals with I/DD the opportunity to receive vaccine services and benefits that are equal to and as effective as services provided to other individuals in priority Phase 1B.

2. The Defendants violate 28 C.F.R. § 35.130(b)(3)(i)(ii), which prohibits local governments from utilizing criteria or methods of administration that have the effect of impairing accomplishment of the objectives of a public entity's program with respect to individuals with disabilities. As demonstrated, the Defendants prevent individuals with I/DD from not only finding out that they are eligible for the vaccination, but also from accessing

vaccine appointments, despite the State's Plan indicating that individuals with I/DD are eligible for vaccines in Phase 1B. The Defendants' websites omit the identification of people with I/DD in Phase 1B. As such, the Defendants employ methods of administration that discriminate on the basis of disability and defeat or substantially impair accomplishment of the objectives of the State vaccination plan, which Defendants are required to follow. In the very findings section of the ADA, Congress found that exclusionary qualification standards and criteria are a persistent form of discrimination justifying the broad remedial nature of the statute. 42 U.S.C. § 12101(a)(5). The Defendants actions demonstrate the tenacious presence of exclusionary criteria and the need for legal remedy.

3. The Defendants violate 28 C.F.R. § 35.130(b)(8), which prohibits a public entity from applying eligibility criterion that screens-out or tend to screen out individuals with disabilities from fully and equally enjoying any service, program or activity offered by the local entity. The Defendants exclude qualified individuals with I/DD from receiving benefits of the County's vaccine services by removing them altogether from Phase 1B of the vaccination priority plan as described on their websites.

4. The Defendants violate 28 C.F.R. § 35.130(b)(1)(v) and (vii), which prohibits a public entity from perpetuating discrimination and limiting individuals with disabilities from enjoying an opportunity, privilege or advantage enjoyed by others receiving the service. By excluding individuals with I/DD from accessing the vaccine, the Defendants have perpetuated discrimination and illegitimately limited the access of persons with I/DD to opportunities and advantages available to others in Phase 1B of their vaccine program.

The Defendants' actions present an ongoing and continuous violation of the ADA and its supporting regulations. The ADA authorizes injunctive relief as appropriate to remedy acts of discrimination against persons with disabilities. 42 U.S.C. § 12188(a)(1). Plaintiff has demonstrated that it will prevail on the merits of its Complaint and sees *no* defense to Defendants' discriminatory actions.

ii. The Defendants' actions present an ongoing and continuous violation of Section 504 of the Rehabilitation Act

The Rehab Act requires that recipients of federal funding not exclude, on the basis of disability, a qualified individual with a disability from participation in, the benefits of, or be subject to discrimination, in any program or activities receiving federal financial assistance. 29 U.S.C. § 794(a). The Defendants are recipients of federal funds.

The criteria for establishing a *prima facie* case under the Rehab Act incorporates the same elements needed to prove discrimination under the ADA: Plaintiffs must show: (1) they have a disability; (2) they are otherwise qualified to receive the benefits of a public service, program, or activity; and (3) they were denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of their disability. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). As described in section III.a.i., above, Plaintiff readily establishes its case. People with I/DD are qualified individuals with disabilities for purposes of the Rehab Act; individuals with I/DD are entitled to have access to the vaccine as part of a public program; the State of Maryland identified individuals with I/DD as eligible as part of Phase 1B under the Plan; nonetheless, the Defendants acts and omissions prevent individuals with I/DD within each respective county from accessing the vaccine.

The Rehab Act has been implemented by regulations that detail prohibited activities in federally funded programs and activities. 45 C.F.R. § 84.4 (a). Prohibited discrimination includes but is not limited to:

1. denying a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit, or service 45 C.F.R. § 84.4 (b)(1)(i).
2. affording a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit or services that is not equal to that afforded others. 45 C.F.R. § 84.4 (b)(1)(ii).
3. providing a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others. 45 C.F.R. § 84.4 (b)(1)(iii).
4. perpetuating discrimination or otherwise limiting a qualified disabled person in the enjoyment of any privilege, advantage or opportunity enjoyed by others receiving an aid, benefit or service. 45 C.F.R. § 84.4 (b)(1)(v)(vii).
5. utilizing criteria or methods of administration that: subject qualified persons with disabilities to discrimination on the basis of disability, or; have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of recipient's program or activity with respect to persons with I/DD. 45 C.F.R. Part 84; (b)(4).

The analysis presented in Section III.a.i. above, describing how the Defendants' actions violate the regulatory provisions of the ADA, is applicable to the corresponding regulations of the Rehab Act cited above. Claims under the "ADA's Title II and the Rehab Act can be combined for analytical purposes because the analysis is 'substantially the same.'" *Seremeth v.*

Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 336 n.1 (4th Cir. 2012) (quoting *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 n.9 (4th Cir. 1995)). Cf., e.g., *A Helping Hand, LLC v. Baltimore Cty.*, Md., 515 F.3d 356, 362 (4th Cir. 2008) (“Congress has directed courts to construe the ADA to grant at least as much protection as the Rehabilitation Act and its implementing regulations.”).

The Defendants’ actions constitute an ongoing and continuous violation of the Rehab Act and its supporting regulations. Like the ADA, the Rehab Act authorizes injunctive relief as appropriate to remedy acts of discrimination against persons with disabilities. 29 U.S.C. § 794(a)(2). Plaintiff’s claims fall squarely within the discriminatory activities that the Rehab Act was enacted to prevent. The merits of Plaintiff’s position are beyond credible dispute.

a. Individuals with I/DD are Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief

The harms at stake cannot be more serious. The long-term effects of the coronavirus on individuals with I/DD can be irreparable and the lethal nature of the pandemic can make the injury irrevocable. It is these severe harms and risks of harm that compel Plaintiff to bring this action. Waiting for a full merit hearing on Plaintiffs’ claims means that persons with I/DD will continue to be denied access to vaccines and will face the well-established adverse consequences to their health and well-being.

Studies have confirmed that people with I/DD face disproportionately higher risk of complications and death from COVID-19 than people without I/DD.¹¹ Developmental

¹¹ See *COVID-19 Support Guidelines for Individuals with IDD During the Pandemic*, AMERICAN ACADEMY OF DEVELOPMENTAL MEDICINE & DENTISTRY (July 2020), available at <https://static1.squarespace.com/static/5cf7d27396d7760001307a44/t/5f16512e8f88d259900766f5/1595298102002/>

disabilities, including intellectual disabilities, are “important risk factors for COVID-19 mortality” similar to “lung cancer and leukemia and lymphomas.”¹² Indeed, the Developmental Disabilities Administration (“DDA”), which provides services to Marylanders with I/DD, reports a mortality rate from COVID-19 among participants receiving DDA services of 5%, which is more than double the mortality for Marylanders who have contracted COVID-19.¹³

Furthermore, people with I/DD often rely on and cannot socially distance themselves from caregivers or staff who come into their homes and provide hands on assistance with basic activities of daily living, including bathing, toileting, and grooming. Reliance on this direct and hands on assistance by people outside of their household places individuals with I/DD at greater risk of exposure and contraction of COVID-19.

Acknowledging this increased risk that people with I/DD face from COVID-19, the State of Maryland prioritized people with I/DD in the Phase 1B of its vaccination plan.¹⁴ In doing so, the State saves this Court from having to determine whether there is a serious risk of irreparable

COVID-Support-Guidelines.pdf; see also Turk, et. al., *Intellectual and Developmental Disability and COVID-19 Case-Fatality Trends: TriNetX Analysis*, *DISABILITY HEALTH J* 2020 JUL; 13(3): 100942 (May 24, 2020) (last visited Mar. 5, 2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7245650/>; Landes, et. at., *COVID-19 outcomes among people with intellectual and developmental disability living in residential group homes in New York State*, *DISABILITY HEALTH J* (OCT. 4, 2020), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7311922/>.

¹² *White Paper: Risk Factors for COVID-19 Mortality among Privately Insured Patients: A Claims Data Analysis*, A FAIR Health White Paper in Collaboration with the West Health Institute and Marty Makary, MD, MPH, from Johns Hopkins University School of Medicine, (Nov. 11, 2020), available at <https://s3.amazonaws.com/media2.fairhealth.org/whitepaper/asset/Risk%20Factors%20for%20COVID-19%20Mortality%20among%20Privately%20Insured%20Patients%20-%20A%20Claims%20Data%20Analysis%20-%20A%20FAIR%20Health%20White%20Paper.pdf>.

¹³ Compare Bernard Simons, *Developmental Disabilities Administration (DDA) Updates*, [https://dda.health.maryland.gov/Documents/COVID%2019%20Documents/Dep%20Sec%20Webinars/Webinar%20DDA%20Deputy%20Secretary%20FINAL%202.19.21%20\(1\).pdf](https://dda.health.maryland.gov/Documents/COVID%2019%20Documents/Dep%20Sec%20Webinars/Webinar%20DDA%20Deputy%20Secretary%20FINAL%202.19.21%20(1).pdf) (Feb. 19, 2021) with *Coronavirus Disease 2019*, MARYLAND DEPARTMENT OF HEALTH, <https://coronavirus.maryland.gov/>.

¹⁴ Other states also prioritize people with I/DD in the first phase of vaccination plans. See policies in: NC, MN, OH, LA, OR, and NE. North Carolina available at: <https://files.nc.gov/covid/documents/NC-COVID-19-Vaccine-Plan-with-Executive-Summary.pdf>; Ohio available at: <https://coronavirus.ohio.gov/wps/portal/gov/COVID-19/resources/news-releases-news-you-can-use/COVID-19-update-12-04-20>, and Minnesota, available at: <https://www.health.state.mn.us/diseases/coronavirus/vaccine/phaseIguide.pdf>.

harm to persons with I/DD if they are not provided access to the COVID-19 vaccines. Without immediate action to provide individuals with I/DD with the protections in the State's Plan, individuals with I/DD face continued exposure to and possibly death from COVID-19.

b. The Balance of Equities Tips in Plaintiff's Favor

Plaintiff is only seeking what the state Plan already requires—that Defendants recognize individuals with I/DD as eligible for the vaccine and provide them proper access. While this rationale would seem to move the balance of equities in clear favor of Plaintiff, there are other factors compelling justice to land in Plaintiff's corner. As described above, the consequences of the Defendant's actions on individuals with I/DD are extremely severe, and include illness, unnecessary hospitalization, and death. The anxiety of individuals with I/DD seeking vaccines is apparent as Plaintiff responds to cries for assistance.

For all of these reasons, equities lie definitively with Plaintiff. The relief requested requires only that the Defendants do no harm.

c. Preliminary Relief is in the Public Interest

The public interest is best served by granting Plaintiff The Arc Maryland immediate preliminary relief. The state of Maryland has already determined that there is a robust public interest in safeguarding the health of those with I/DD who are more likely to suffer serious health care complications from COVID-19. It is also in the public's interest to further prevent the risk of spreading the virus between people with I/DD and their caregivers, and into the community. In addition, the failure of the Defendants to provide vaccine eligibility and to vaccinate individuals with I/DD may reasonably be expected to result in a scarcity of health care resources, as people with I/DD are at risk of serious complications if infected with the virus. It is

undoubtedly in the public interest to vaccinate at-risk, eligible individuals now to prevent additional strain on an already over-taxed health care system.

Furthermore, the public interest is well served where government agencies are required to follow governmental procedures. The Defendants continue to disregard the State of Maryland's Plan for vaccination. Society functions best when local government is required to abide by state government mandates, and this is particularly important when vulnerable individuals are more likely to be hospitalized or die as a result of local government's disregard of state directions.

People with I/DD have experienced structural health inequities and the Defendants' exclusion of individuals with I/DD from obtaining the vaccine is one example. In passing the ADA over thirty years ago, Congress noted that disability discrimination persists in critical health services. 42 U.S.C. § 12101(a)(2)(3). In invoking the "sweep of congressional authority", Congress intended the ADA to provide a "comprehensive national mandate for elimination" of our historic discrimination. 42 U.S.C. § 12101(b)(4)(1).

Given our history of discrimination and the exclusion of people with disabilities from local government programs and services, it is most certainly in the public interest to enjoin continued discrimination. In the instant case, Plaintiff seeks that very promise of equality in public service that "animates the ADA." In granting Plaintiff relief, the Court helps to fulfill that promise and acts to implement our nation's civil rights laws, which action serves the public interest.

IV. Conclusion

Plaintiff has a right to relief and remedy. The urgency of this action cannot be understated. Lives are at stake. Individuals with I/DD have suffered and will continue to suffer

immediate, substantial, and irreparable harm before a full adversarial hearing can be had. Despite State Executive Orders providing vaccine eligibility to persons with I/DD, the Defendants persist in their harmful and discriminatory activity.

Plaintiff the Arc Maryland requests that this Court issue a temporary restraining order to enjoin the Defendants from excluding eligible persons with I/DD from Defendants' vaccine programs and services; and to take necessary corrective action to provide notice and access for persons with I/DD to such services. It is critical that this discriminatory behavior be immediately estopped by this Court.

Dated: This 8th day of March, 2021

Respectfully submitted,

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