



U.S. Department of Justice

Civil Rights Division

*Disability Rights Section - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530*

February 14, 2024

BY EMAIL

Greg Perry, Attorney at Law
Haleigh Carlson, Attorney at Law
Perry, Guthery, Haase, & Gessford
233 South 13th Street, Suite 1400
Lincoln, Nebraska 68508

**Re: U.S. Department of Justice Investigation of Lincoln Public Schools'
Compliance with Title II of the Americans with Disabilities Act: Findings of
Fact and Conclusions of Law, DJ No. 204-45-100**

Dear Mr. Perry and Ms. Carlson:

The United States Department of Justice (the Department) has completed its investigation of Lincoln Public Schools (LPS) under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-34, and its implementing regulation, 28 C.F.R. Part 35. The Department's investigation included a review of documents from LPS, as well as interviews with individuals presently or formerly affiliated with LPS and other individuals with relevant knowledge of the events at issue.

The ADA prohibits discrimination by public entities such as LPS against qualified individuals with disabilities. After an investigation, we find that LPS violated Title II of the ADA by requiring deaf and hard of hearing students, who LPS believes need American Sign Language (ASL) interpretation, to attend cluster schools serving similar students. This blanket policy does not consider the individualized needs of deaf and hard of hearing students, denies students an equal opportunity to participate in LPS' neighborhood school and high school choice programs, is unnecessary to provide equally effective aids, benefits and services, and has denied effective communication to deaf students. LPS adheres to this policy for perceived administrative convenience, not for reasons related to specialized services offered at cluster schools or the content of a student's Individual Education Program under the Individuals with Disabilities Education Act. 20 U.S.C. § 1415. LPS' practice has also harmed the impacted students' parents who incur transportation and other costs because of the cluster school enrollment requirement. Set forth in greater detail below are the Department's findings of fact and conclusions of law, as well as the minimum steps LPS must take to remedy the identified violations.

I. STATUTORY AND REGULATORY BACKGROUND

Title II of the ADA mandates that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42

U.S.C. § 12132. A “qualified individual” with a disability is an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104. The term “disability” means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102(1)(A-C). The phrase “physical or mental impairment” includes “hearing impairments.” 28 C.F.R. § 35.108(b)(2).

Supplying more detail to Title II’s broad prohibitions on discriminatory actions, Title II’s implementing regulation provides that LPS must:

- Not deny qualified students with disabilities the opportunity to participate in or benefit from LPS’ aids, benefits, services, or programs, 28 C.F.R. § 35.130(a), (b)(1)(i);
- Not afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others, 28 C.F.R. § 35.130(b)(1)(ii);
- Not provide “different or separate aids, benefits, or services” to students with disabilities unless doing so is “necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others,” 28. C.F.R. § 35.130(b)(1)(iv);
- Take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others, 28 C.F.R. § 35.160(a)(1);
- Provide “appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, an equal opportunity to participate in, and enjoy the benefits of [its] services, programs, or activit[ies],” 28 C.F.R. § 35.160(b)(1);
- Not exclude or otherwise deny equal services, programs, or activities to an individual because of the known disability of an individual with whom the individual is known to have a relationship or association, 28 C.F.R. § 35.130(g).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

LPS maintains a blanket policy that requires all students who are believed to need ASL interpreting services to attend cluster schools, thereby denying such students the opportunity to attend their neighborhood elementary and middle schools and to choose their high school, as

students without disabilities can do. This blanket policy violates Title II of the ADA in several respects.

First, the blanket policy discriminates against qualified individuals with disabilities by denying them an equal opportunity to access a benefit of LPS' educational program—the opportunity to attend their neighborhood elementary and middle schools and choose their high school. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(1)(i)-(ii). While sometimes such students may attend electives at non-cluster schools, such limited access comes with costly transportation burdens and does not amount to the equal access enjoyed by students without disabilities.

LPS' policy denied Student A the educational opportunity provided to her nondisabled classmates to attend their neighborhood school close to home and with their siblings and neighborhood friends, and subjected her to new burdens, including 90 minutes per day of additional commute time. LPS' proposed placement of Student B in a cluster school would have denied her effective communication and the socio-emotional benefit of attending senior year of high school with her friends and peers she had gone to school with since ninth grade. Student B successfully appealed the proposed placement but missed the first three weeks of school while her parents contested LPS' proposed placement. And the policy denied Student C the opportunity to attend a high school that offered courses in his chosen career field, requiring him instead to spend time and money to commute to a non-cluster school program for his desired elective courses.

Further, LPS' school placement policy is unnecessary to ensure that LPS' services are as effective as those provided to others. *See* 28 C.F.R. § 35.130(b)(iv). There is no valid reason why students cannot have their ASL interpreter needs met at their neighborhood schools. Students who need ASL interpreters are low incident – approximately one student or so per grade at LPS. Thus, LPS generally provides ASL interpreters to students on a one-on-one basis because students in different grades generally attend different classes. Such one-on-one interpreting services could be offered in neighborhood schools as readily as in the cluster school. Therefore, other than cases in which students need the additional intensive, specialized deaf or hard of hearing services only provided by a cluster school, there is no educational justification to require attendance at a cluster school and LPS should provide the students ASL interpreting at their neighborhood school.

Second, LPS' practices also violate their effective communication obligation to “take appropriate steps to ensure that communications with ... participants ... are as effective as communications with others,” 28 C.F.R. § 35.160(a)(1), and to provide “appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, an equal opportunity to participate in, and enjoy the benefits of [its] services, programs, or activit[ies],” 28 C.F.R. § 35.160(b)(1).

LPS failed to provide Student A effective communication during kindergarten while she attended her neighborhood school. Despite recognizing Student A's need for an ASL interpreter, LPS did not provide her with one when she attended her neighborhood school during homeroom

and electives classes. During this period, Student A experienced discomfort and fatigue and was unable to effectively learn and communicate with her peers. LPS eventually concluded that Student A needed more ASL interpretation, observing that she was not able to fully participate in class without it. There is no evidence that LPS considered whether it could provide ASL to Student A in all her classes at her neighborhood school and no evidence suggests that LPS determined it met an affirmative defense under the ADA to justify its refusal to hire an ASL interpreter for all of Student A's courses at her neighborhood school. Thus, Student A was denied effective communication under the ADA during the time she attended her neighborhood school.

Similarly, LPS failed to provide Student B effective communication by proposing an auxiliary aid or service, ASL, that Student B did not understand. LPS proposed placing Student B at a cluster school during her senior year with an ASL Interpreter, where Student B would have lacked access to her curriculum each day, because she did not understand or use ASL. Prior to LPS applying its policy to Student B, LPS had been providing effective communication through a combination of Communication Access Real-time Translation (CART)-like services. These services included closed-captioning, exchanging electronic notes, talk to text technology, and a modified Communication Access Real-time Translation (CART) system (a paraprofessional who typed what was being said on a projector). Thus, LPS' proposal to require Student B to learn and use ASL, denied her effective communication under the ADA because she could not understand ASL. Given that both ASL and CART-like services require a high degree of real-time visual focus, the proposed cluster school placement could not provide Student B with both the full extent of her CART-like services while also communicating with her in ASL through an interpreter. For the first three weeks of the school year, Student B's parents removed her from school while they challenged her new placement, rather than send her to a new school with an ASL interpreter, an inadequate and ineffective auxiliary aid and service that she could not use for communication.

LPS also harmed Student C, who is hard of hearing and needs an ASL interpreter. By requiring him to attend a cluster school, he could only participate in the high school choice program by driving another forty minutes a week for two years to attend a different high school that offered Student C's desired electives. Because LPS refused to provide ASL services for all courses at the school offering Student C's desired electives, he had to attend a cluster school and incurred the logistical and financial burden of driving to his elective course twice a week.

Third, an independent claim for association discrimination is recognized under the ADA in the regulation at 28 C.F.R § 35.130(g) which makes it discriminatory for a public entity to "exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." Student A's parents experienced discrimination because of their relationship with Student A. Because LPS refused to provide ASL services at Student A's neighborhood school, her parents incurred a separate violation of additional logistical, social, and financial burden of taking their child to a school that takes up to thirty minutes to drive to when

the neighborhood school is within walking distance. They also incurred the burden of taking their children to two schools and were denied the benefit of having their children attend the same school together and bond with their neighbors at school. Such harms, which other families with multiple children at Student A's neighborhood school did not face, are distinct enough from the harms to Student A. Similarly, Student B's parent missed work and lost income during meetings with the school and her attorneys to contest Student B's placement.

III. REMEDIATION

To remedy these violations and to protect the rights of present and future students with disabilities, LPS must implement, at minimum, the remedial measures set forth below:

1. Withdraw its blanket policy requiring all deaf or hard of hearing students believed to need ASL interpretation services to attend a cluster school. Instead, LPS will provide individualized assessments that only place students in cluster schools if the student requires the services provided by the cluster school and those services cannot be provided at a student's neighborhood school or if the student's parents request placement at the cluster school.
2. Adopt and implement a written non-discrimination policy (ADA/Non-Discrimination Policy) that documents the requirements of Title II and its implementing regulation including the obligation to provide an equal opportunity to students with disabilities as well as the obligation to provide effective communication to students who are deaf or hard of hearing.
3. Train and educate all employees, contractors, and others providing services to LPS' students on the ADA/Non-Discrimination Policy (ADA Training).
4. Designate an employee to coordinate all LPS' efforts to comply with and carry out LPS' responsibilities under the ADA. These duties will include involvement in regular reporting regarding ADA compliance to the Department.
5. Pay compensatory damages to aggrieved persons for injuries caused by LPS' failure to comply with Title II.

IV. CONCLUSION

We hope to work cooperatively with you to resolve the Department's findings. Should we fail to agree on an appropriate resolution, the Attorney General may initiate a lawsuit under Title II. *See* 42 U.S.C. §§ 2000d-1, 12133-34. Please contact Charlotte Lanvers, Trial Attorney, at (202) 305-5703 or at charlotte.lanvers@usdoj.gov on or before March 15, 2024, if you are willing to resolve this matter in a manner that will bring LPS into full compliance with Title II.¹

Sincerely,

A handwritten signature in black ink, appearing to read 'Rebecca B. Bond', enclosed in a thin black rectangular border.

Rebecca B. Bond
Chief
Disability Rights Section

¹ This Letter of Findings is a public document and will be posted on the Civil Rights Division's website.