



To Whom It May Concern:

The National Association of the Deaf (“NAD”) seeks to ensure that all public and charter schools understand their legal obligations with respect to serving deaf and hard of hearing students and companions. The Americans with Disabilities Act (“ADA”) has clear mandates requiring such entities to provide effective communication to students and companions who are deaf and hard of hearing. Schools that violate such provisions are subject to legal action.

This letter contains the information necessary for public and charter schools to understand the ADA requirements regarding to deaf and hard of hearing students and deaf or hard of hearing parents or guardians. The relevant provisions are found in Title II of the ADA and its implementing regulations. *See American with Disabilities Act tit. 2, 42 U.S.C. §§ 12131-12165 (2020); 28 C.F.R. §§ 35.101-35.190 (2016).* These provisions show that:

- 1) Title II of the ADA applies to "public entities", or “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” 42 U.S.C. § 12131(1)(B) (emphasis added).
 - a. Public and charter schools are covered under this definition of public entity.
 - b. Public and charter schools may have additional obligations under federal and state law not covered in this letter.
- 2) Title II covers anything the public entity does. *See 28 C.F.R. § 35, App’x. B, Subpart A.*
 - a. This includes all programs, services and activities provided by public and charter schools to families and/or the public such as graduation ceremonies, PTA meetings, school plays, and school musical recitals. Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35696 (proposed July 26, 1991).
- 3) Title II applies to both deaf and hard of hearing students and deaf and hard of hearing companions.
 - a. “A ‘companion’ means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along



with such individual, is an appropriate person with whom the public entity should communicate.” 28 C.F.R. § 35.160(a)(2).

- 4) Covered entities must furnish (that is, obtain and pay for) any auxiliary aid or service that is necessary to achieve effective communication with a deaf or hard of hearing individual. *See* 28 C.F.R. § 35.160(b)(1).
 - a. Public and charter schools must give primary consideration to deaf and hard of hearing individuals’ requests for particular auxiliary aids and services, meaning they must provide an opportunity for deaf and hard of hearing individuals to request preferred auxiliary aids and services, and they must honor the choice unless they can provide another equally effective means of communication. *See* 28 C.F.R. § 35.160(b)(2); *see also* 28 C.F.R. § 35, App’x. B, Subpart E.
 - b. Whether a particular auxiliary aid or service, such as a sign language interpreter, is necessary depends on a variety of factors, including the length and complexity of the interaction, and the effectiveness of any alternative used.
 - c. To be effective, an auxiliary aid must ensure that the deaf or hard of hearing individual can both understand and participate in presentations and discussions.
 - d. Auxiliary aids and services must be furnished regardless of the number of individuals who have requested such services.
 - e. The deaf population varies greatly in its ability to use sign language and to communicate in spoken or written English. Do not assume that an auxiliary aid or service that is effective for one individual will be effective for another individual.
- 5) Auxiliary aids and services include qualified sign language interpreters, oral interpreters, cued speech transliterators, tactile interpreters, Certified Deaf Interpreters (“CDIs”), captioning of audio-visual materials, and text-based services such as Communication Access Realtime Transcription (“CART”). *See* 28 C.F.R. § 35.104.
 - a. Any interpreter provided must be qualified.



- i. To be “qualified”, an interpreter must be able to “interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.” 28 C.F.R. § 35.104.
 - ii. The following individuals are not “qualified” interpreters: (1) an employee or staff member who knows basic sign language; (2) family members, adult companions, and minor children of the deaf or hard of hearing individual, except in limited circumstances, including certain types of emergencies. See 28 C.F.R. § 35.160(c)(2), (3).
 - iii. It is important to ensure that the interpreter provided is properly licensed as many states require sign language interpreters to obtain state licenses.
- b. Realtime transcription services, such as CART, must be provided by trained professionals.
 - i. It is unlikely that an untrained individual can type quickly enough to ensure effective communication during a presentation or group discussion.
 - ii. Voice recognition software currently is not accurate enough to ensure effective communication, unless used by a trained professional “voice writer.”
- c. Computer-generated automatic captioning generally is inaccurate and unreliable, and, as a result, does not ensure effective communication. Best practice dictates that quality captioning for effective communication should be done by qualified captionists and must be:
 - i. Accurate, matching the spoken words or lyrics in their original language in the order spoken, providing nonverbal information that is not observable (e.g. identity of speakers, sound effects), and legible with appropriate font size and spacing between words for readability as well as providing appropriate capitalization and punctuation;
 - ii. Synchronous, coinciding with the corresponding spoken words and sounds to the greatest extent possible;



- iii. Complete, running from the beginning to the end of the program to the full extent possible; and
 - iv. Adequately positioned, viewable, and not blocking other visual content on the stage or screen (e.g. graphics and credits). *See* 47 C.F.R. § 79.1 (2003); *see also* Web Content Accessibility Guidelines 2.1 (2018).
- d. A PowerPoint presentation, presenter's notes, or frozen transcript does not satisfy ADA requirements for a live or taped event.
 - e. Seating arrangements and lighting must ensure that there is a clear line of sight to the interpreter or captioning, the interpreter or captioning is clearly visible by all deaf or hard of hearing participants, and the deaf or hard of hearing participants' view of the program is unobstructed (e.g. view of the stage is not blocked by objects such as columns or sound equipment or by the interpreter or captioning).
- 6) Covered entities may not charge the individual requesting the auxiliary aid or service for the provision of these services. 28 C.F.R. § 35.130(f).
- a. The cost of providing auxiliary aids and services should be viewed as part of overhead. Thus, the school may increase charges for all individuals to cover the cost of an interpreter or CART provider but may not bill the deaf or hard of hearing participant exclusively.
 - b. A public or charter school may not require the deaf or hard of hearing participant to bring an interpreter with them.
- 7) Public or charter schools may not refuse a deaf or hard of hearing individual admission or otherwise limit the individual's access to the event because of the need for auxiliary aids and services. *See* 28 C.F.R. § 35.130(b).
- 8) Although the ADA does not require covered entities to furnish auxiliary aids and services when doing so would create an undue burden, such a situation is unlikely to arise in the context of a single event or even a series of events, especially if such events are scheduled in advance. *See* 28 C.F.R. § 35.164.



- a. The nature of the burden is measured in the context of the entity's overall resources and not just the resources designated for a particular location or department.
- b. That the cost of providing auxiliary aids and services exceeds the fee that the deaf or hard of hearing individual pays to attend the activity or course does not mean that providing them results in an undue burden.
- c. A lack of advance notice does not excuse the entity from making best efforts to secure the aid or service.
- d. To ensure that certain auxiliary aids and services (e.g., sign language interpreters) can be secured, the aid or service must be procured as soon as the deaf or hard of hearing individual makes their request.

Another federal law, Section 504 of the Rehabilitation Act, is considered virtually identical to Title II. *See* Rehabilitation Act § 504, 29 U.S.C. § 794 (2020); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256 (D.C. Cir. 2008). Section 504 has specifically been recognized to require public schools to provide qualified sign language interpreters for the parents of public-school students. *See Rothschild v. Grottenthaler*, 907 F.2d 286 (2d Cir. 1990).

Further, the rights conferred and protected by Title II are distinct from the rights conferred and protected by the Individuals with Disabilities Education Act ("IDEA"). *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2020); *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1101 (9th Cir. 2013).

Moreover, Title II and Section 504 both provide for compensatory damages, allowing plaintiffs to recover damages for the emotional pain and suffering they have experienced as a result of defendant's discriminatory acts. *See Hunter v. District of Columbia*, F. Supp. 3d 158, 167 (D. D.C. 2014). This liability can extend to the emotional suffering of minor children who have been used as interpreters. *See, e.g., Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 277 (2d Cir. 2009); *id.* at 279 (Wesley, J., concurring). Thus, public entities and recipients of federal financial assistance who refuse to honor requests for interpreters expose themselves to liability for compensatory damages.

Please note that public and charter schools may have additional obligations under federal and state law not included in this letter.



National Association of the Deaf

www.nad.org

In most areas, local agencies provide the needed auxiliary aids and services on a fee basis. Your entity can locate such services by conducting a basic internet search for the particular aid or service needed. For example, searching for “American Sign Language interpreter Washington, DC” will bring up a list of interpreting agencies in Washington, DC.

Thank you for your attention on this important matter.

Sincerely,

The National Association of the Deaf
Law and Advocacy Center

Relevant Sections of Title II of the Americans with Disabilities Act

§ 12131. DEFINITIONS.

As used in this subchapter:

(1) Public entity

The term "public entity" means

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

§ 12132. DISCRIMINATION.

Subject to the provisions of this subchapter, 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.

Relevant Sections of the Implementing Regulations of the Americans with Disabilities Act

SUBPART A- GENERAL

28 C.F.R. § 35.104 DEFINITIONS.

Auxiliary aids and services includes—

- (1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;
- (2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;
- (3) Acquisition or modification of equipment or devices; and
- (4) Other similar services and actions.

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

SUBPART B- GENERAL REQUIREMENTS

28 C.F.R. § 35.130 GENERAL PROHIBITIONS AGAINST DISCRIMINATION.

- (a) No qualified individual with a disability shall, on the basis of 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 public entity.
- (b)
 - (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—
 - (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
 - (ii) 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;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(7) (i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

- (e) (1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.
- (f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.
- (g) A public entity shall not 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.
- (h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

SUBPART E- COMMUNICATIONS

28 C.F.R. § 35.160 GENERAL.

- (a) (1) A public entity shall 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.
- (2) For purposes of this section, “companion” means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.
- (b) (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.
- (2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.
- (c) (1) A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.
- (2) A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(3) A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) Video remote interpreting (VRI) services. A public entity that chooses to provide qualified interpreters via VRI services shall ensure that it provides—

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

§ 35.161 TELECOMMUNICATIONS.

(c) A public entity shall respond to telephone calls from a telecommunications relay service established under Title IV of the ADA in the same manner that it responds to other telephone calls.

§ 35.164 DUTIES.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

APPENDIX B TO PART 35, SUBPART A—GENERAL

The scope of Title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities “conducted by” Federal Executive agencies, in that Title II applies to anything a public entity does. Title II coverage, however, is not limited to “Executive” agencies, but includes activities of the legislative and judicial branches of State and local governments. All governmental activities of public entities are covered, even if they are carried out by contractors.

APPENDIX B TO PART 35, SUBPART E—COMMUNICATIONS

Section 35.160 requires the public entity to take such steps as may be necessary to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

Paragraph (b)(1) requires the public entity to furnish appropriate auxiliary aids and services when necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, the public entity's service, program, or activity. The public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This expressed choice shall be given primary consideration by the public entity (§ 35.160(b)(2)). The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164.

Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication. For instance, some courtrooms are now equipped for “computer-assisted transcripts,” which allow virtually instantaneous transcripts of courtroom argument and testimony to appear on displays. Such a system might be an effective auxiliary aid or service for a person who is deaf or has a hearing loss who uses speech to communicate, but may be useless for someone who uses sign language.

Although in some circumstances a notepad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.