



U.S. Department of Justice

Civil Rights Division

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

December 13, 2016

BY E-MAIL

Marshall Ney, Esq.
Friday, Eldridge & Clark LLC
3350 S. Pinnacle Hills Pkwy, Suite 301
Rogers, Arkansas 72758
mney@fridayfirm.com

Re: U.S. Department of Justice Investigation of the Pea Ridge School District's Compliance with Title II of the Americans with Disabilities Act: Findings of Fact and Conclusions of Law, DJ No. 204-10-38

Dear Mr. Ney:

The United States Department of Justice (the "Department") has completed its investigation of the Pea Ridge School District ("PRSD"). The Department's investigation included a review of documents from PRSD and other sources, as well as interviews with individuals presently or formerly affiliated with PRSD and other individuals with knowledge of the events at issue. We initiated this review under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. pt. 35.

The ADA prohibits discrimination by public entities such as PRSD against qualified individuals with disabilities. After investigation and consideration, we find that PRSD violated Title II of the ADA by excluding three students from PRSD after reviewing a document in its possession that referenced the human immunodeficiency virus ("HIV") status of a family member of these students. The ADA expressly rejects such treatment. A student's HIV status, actual or perceived, is not a permissible basis for the exclusion of a student from a public school setting. Set forth in greater detail below are the Department's findings of fact and conclusions of law, as well as the minimum steps PRSD must take to remedy the violations identified herein.

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. 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 “HIV disease,” whether symptomatic or asymptomatic. 28 C.F.R. § 35.104. An individual meets the requirement of “being regarded as having such an impairment” if he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment. 42 U.S.C. § 12102(3)(A). *See also* 28 C.F.R. § 35.104 (“regarded as having an impairment” includes individuals who do not have an impairment “but [are] treated by a public entity as having such impairment”).

Supplying more detail to Title II’s broad prohibitions on discriminatory actions, its implementing regulation (promulgated pursuant to 42 U.S.C. § 12134) provides that PRSD must:

- Not deny students with disabilities the opportunity to participate in or benefit from PRSD’s aids, benefits, services, or programs, 28 C.F.R. § 35.130(b)(1);
- Not utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of PRSD’s program with respect to individuals with disabilities. 28 C.F.R. § 35.130(b)(3)(i-ii);
- Not impose or apply eligibility criteria that screen out or tend to screen out students with disabilities from fully and equally enjoying PRSD’s services, programs, or activities, unless PRSD can show that such criteria are necessary for its provision of those services, programs, or activities. 28 C.F.R. § 35.130(b)(8).
- 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

PRSD removed three students from its schools based on documents in its possession that referenced the HIV status of a family member of these students. PRSD concluded that these students were not to be allowed back into the school district until HIV testing was completed on each of the students and the results returned to PRSD. Following widespread media coverage of this matter, PRSD issued a press release acknowledging that it “has recently required some students to provide test results regarding their HIV status. . . .” PRSD excluded the students for multiple days from school and extracurricular activities without conducting an individualized assessment as to each of the students. Ultimately, PRSD readmitted the students prior to receipt of their HIV test results.

The exclusion of these students from PRSD is a clear violation of Title II. PRSD's actions were rooted in information regarding HIV and a person with whom the students had a known relationship or association. *See* 28 C.F.R. § 35.130(g). The exclusion of these students denied them the opportunity to participate in or benefit from PRSD's aids, benefits, services, and programs. *See* 28 C.F.R. § 35.130(b)(1). In addition, PRSD's demand that HIV test results be provided to PRSD violates the prohibition on utilizing criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of PRSD's program with respect to individuals with disabilities. 28 C.F.R. § 35.130(b)(3)(i-ii). The demand for the provision of test results also violates the prohibition on imposing or applying eligibility criteria that screen out or tend to screen out students with disabilities from fully and equally enjoying PRSD's services, programs, or activities, unless PRSD can show that such criteria are necessary for its provision of those services, programs, or activities. 28 C.F.R. § 35.130(b)(8).

III. REMEDIATION

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

1. Revise Policy 4.34 ("Communicable Diseases and Parasites") to make clear that HIV is not considered to be a condition requiring a student's exclusion from school under that policy.
2. Adopt and implement a written non-discrimination policy ("ADA/Non-Discrimination Policy") that documents the requirements of Title II and its implementing regulation. This ADA/Non-Discrimination Policy shall:
 - a. state that PRSD does not discriminate on the basis of disability, including HIV;
 - b. state that individuals who are either "regarded as disabled" or are associated with a person with a disability, including HIV, are covered by the ADA's protections;
 - c. expressly prohibit inquiries as to the HIV status of any prospective student or student as a precondition to the provision of PRSD's services, programs, or activities;
 - d. expressly prohibit requests for the HIV test results of any prospective student or student as a precondition to the provision of PRSD's services, programs, or activities.
3. Train and educate all employees, contractors and others providing services to PRSD students on the ADA/Non-Discrimination Policy ("ADA Training").

4. Designate an employee to coordinate all of PRSD's efforts to comply with and carry out PRSD's responsibilities under the ADA. These duties shall include involvement in regular reporting regarding ADA compliance to the Department.
5. Pay compensatory damages to aggrieved persons for injuries caused by PRSD's failure to comply with Title II.

IV. CONCLUSION

We hope to work cooperatively with you to resolve the Department's findings in this matter. Should we fail to agree on an appropriate resolution, the Attorney General may initiate a lawsuit pursuant to Title II. *See* 42 U.S.C. §§ 2000d-1, 12133-34. Please contact Anne Langford, Trial Attorney, at (202) 616-2727 or at anne.langford@usdoj.gov on or before December 19, 2016, if you are willing to resolve this matter in a manner that will bring PRSD into full compliance with Title II.

Sincerely,



Rebecca B. Bond
Chief
Disability Rights Section