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June 11, 2024

U.S. Department of Education
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U.S. Department of Education
Office for Civil Rights
400 Maryland Avenue, SW
Washington, DC 20202-1100
Ocr@ed.gov

Via email

Re: Discrimination Against Deaf and Hard of Hearing Students in Delaware (Case No. 03-24-4011)¹

Dear Department of Education, Office for Civil Rights,

ACLU-DE files this amended complaint on behalf of Deaf and Hard of Hearing (“D/HH”) students and youth in Delaware, urging OCR to investigate the Delaware Department of Education (“DDOE”), the Delaware Department of Health and Social Services (“DHSS”), and Local Education Agencies (LEAs) for engaging in systemic patterns and practices that deny deaf and hard of hearing students in Delaware access to equal educational opportunities and meaningful accommodations as required by federal law. Specifically:

1. DDOE and DHSS fail to maintain appropriate, adequate, and accessible educational aids, services, and programming throughout Delaware, particularly for deaf and hard of hearing youth in Sussex and Kent counties, South of the C&D Canal (“Lower

¹ This amended complaint is intended to replace and clarify our complaint filed on 12/22/23.

Delaware”). Therefore, ACLU-DE alleges that DDOE, DHSS, and LEAs, as recipients of federal education funds and state and local government entities, enable and perpetuate systemic discrimination in state educational programs against deaf and hard of hearing youth in Delaware in violation of Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and Title II of the Americans with Disabilities Act (“ADA”). DDOE deprives deaf and hard of hearing students in Lower Delaware access to the full range of accommodations and support services that are available only through placement at the Delaware School for the Deaf (“DSD”) with limited or nonexistent equivalent local alternatives available.

2. DDOE, DHSS, and Delaware LEAs fail to provide meaningful opportunities for time-sensitive, therapeutic interventions for birth-to-three students to build language access, including auditory, oral, and signed skills where appropriate (i.e., access to a variety of appropriate, accessible accommodations for deaf and hard of hearing children birth to three). DDOE, DHSS, and LEAs fail to maintain adequate resources and staff to provide deaf and hard of hearing children from birth to three early intervention therapy based on the individualized needs of children. In doing so, these entities therefore discriminate on the basis of disability, create undue delay in connecting children with appropriate early intervention services, and deprive students of therapy time that can often not later be compensated.

Federal law recognizes that all students, regardless of disability, deserve an appropriate education based on a student’s individualized needs, and that discrimination on the basis of disability is prohibited. The ACLU of Delaware urges the Department of Education Office for Civil Rights to investigate the Delaware Department of Education for system-wide violations of Section 504 and the ADA.

1. Jurisdiction

DDOE and its LEAs receive federal financial assistance from this Department and, therefore, are required to comply with Section 504. DDOE and its LEAs, as public entities, are also required to comply with Title II of the ADA. Both early intervention for deaf and hard of hearing youth and statewide services in Delaware for school-aged children with disabilities receive federal funding from the federal Department of Education. OCR enforces Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, with respect to federal funds provided by the Department of Education. The regulation that implements Section 504, at 34 C.F.R. Part 104, prohibits discrimination on the basis of disability in programs and activities that receive federal financial assistance.²

Further, 34 C.F.R. § 104.34(a) provides in relevant part that a recipient shall educate each student with a disability with students who are not disabled to the maximum extent appropriate to the needs of the disabled student. A recipient shall place a student with a disability in the regular educational environment operated by the recipient unless it is demonstrated by the

² See Section 105, Case Processing Manual, *U.S. Department of Education Office for Civil Rights*, <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>; 29 U.S.C. § 794, 34 C.F.R. Part 104.

recipient that the education of the disabled student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.³

OCR also enforces Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq, with respect to, among other things, public elementary and secondary education programs. The regulation that implements Title II, at 28 C.F.R. Part 35, prohibits discrimination on the basis of disability by any state or local government entity.⁴

2. DDOE fails to provide related aids and services for deaf and hard of hearing children in Lower Delaware.

Families with deaf and hard of hearing children in Lower Delaware are left with a dearth of options and support, and are thereby deprived of their civil rights.⁵ Most related aids and services for deaf and hard of hearing students in Delaware are currently provided by Delaware School for the Deaf (“DSD”), located in the state’s northernmost New Castle County in Newark, Delaware. ACLU-DE has received complaints from families in the southernmost Sussex County seeking local accommodations and services for their deaf or hard of hearing children, wherein the State and LEAs have only proposed sending the student to DSD, with no alternative options, even when travel times may exceed two hours each way. While this option may indeed be best for some children, it is not a one size fits all solution, and the State cannot treat it as such.

Many Local Educational Agencies (“LEAs”) fail to offer aids and services and/or specially designed instruction within traditional classroom settings within their districts to address the individual needs of students, resulting in predetermined 34 C.F.R. 104.35(a) evaluations and subsequent referrals to DSD and Statewide Services, without consideration of whether a particular student’s individualized needs are best met in the mainstream classroom. ACLU-DE’s allegation that students are referred to DSD without consideration of individualized student needs is based on multiple complaints reflecting personal experiences of families who experienced such referral without individual consideration of their child’s circumstances, and where the referral has occurred because the LEA was unable to provide *any* services to accommodate the student. Unfortunately, a lack of transparency from DDOE and numbers too small to be captured in collection data through the CRDC or FOIA requests results in few

³ It is important to recognize too that where a mainstream classroom does not meet the individualized needs of a particular student, it is not the Least Restrictive Environment. *See Deaf Students Education Services Policy Guidance*, 57 Fed. Reg. 49274 (“Any setting that does not meet the communication and related needs of a child who is deaf does not allow for the provision of FAPE and cannot be the LRE for that child”... “Just as the IDEA requires placement in the regular education setting when it is appropriate for the unique needs of a child who is deaf, it also requires placement outside the regular education setting when the child’s needs cannot be met in that setting.”)

⁴ 42 U.S.C. §§ 12131 et seq., 28 C.F.R. Part 35; *See also* OCR and DOJ FAQ on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools (explaining that under Title II of the ADA, public schools must provide “auxiliary aids and services” that are determined by giving “primary consideration” to the aid requested by the student with the disability, and that such services must make communication with students with hearing disabilities as effective as communication with students without disabilities.”) (<https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>)

⁵ *See* Legislator Listening Session, Parents & Caregivers of Children who are Deaf, Hard of Hearing, & Deaf-Blind in Delaware, *Zoom Webinar and In-Person at Legislative Hall, Dover, DE*, “Notes on Common Themes,” dated Oct. 24, 2023. (Meeting minutes distributed by Rep. Cyndie Romer highlight the following common themes: “Limited access to specialized services and resources for children, specifically in Southern Delaware. Long travel times to access specialized services. Challenges in finding suitable educational placements in specific school districts. Lack of clear guidance on educational placements.”)

publicly available data sources from which to pull statistics about these anecdotal patterns.⁶ We therefore ask the Department of Education to ensure that IEP placements are occurring as required under federal law based on individualized assessments of students' needs.

Beyond ACLU-DE's client work and independent investigation into the systemic harms against deaf and hard of hearing children in Delaware, Delaware Statewide Programs for the Deaf, Hard of Hearing, and Deaf-Blind has confirmed many of the facts at the core of our allegations.⁷ In a presentation provided by the Programs' Statewide Director and the Statewide Family Educator at the Nemours Annual Audiology Conference on February 6, 2024, the State demonstrated that they lack fundamental staffing and programming to support D/HH children in Delaware.⁸ Specifically, the presentation explicitly stated that Delaware currently lacks: 1) a Statewide Coordinator for Deaf and Hard of Hearing programs, 2) direct instruction support to LEAs for students 3-21 years, 3) an early learning program for children 18 months to 5 years in Kent and Sussex counties, and 4) bilingual and auditory-oral services statewide.⁹ The Statewide Presentation makes no mention of concrete plans to address these harmful gaps at the core of this complaint.¹⁰ While some staffing may have since changed in the four months that followed, anecdotal evidence reveals that the severe shortage of service providers and resources to meet the needs of D/HH students statewide persists.

While outsourcing students who are hard of hearing to DSD may pool resources for this lower incidence population, blanket referral of these students to DSD and Statewide Services without individualized assessment and consideration of available and reasonable local interventions is a violation of their civil rights.¹¹ Indeed, LEAs must understand the programming needs of deaf and hard of hearing children and consider solutions available through Section 504 aids and services that can make educational opportunities accessible,

⁶ In addition to the anecdotal evidence we've received, we have relentlessly attempted to obtain relevant public records from Delaware state and local agencies that would shed light on these systemic concerns. The State's lack of transparency not only impedes our investigation, but raises additional concerns about families' ability to access and understand the landscape of services and resources for D/HH students in Delaware. The records requests we have pursued are as follows: In July, 2023, we requested data from every Delaware school district about referral and placement rates of D/HH students; On September 11, 2023, we requested records from Alex Corbin and Dale Matusevich at DDOE regarding the oral and aural therapy services available in Delaware; on March 29, 2024, we requested records from DDOE, DHSS, and Christina School District regarding services and providers available for D/HH students; On May 8, 2024, we requested information from DDOE, DHSS, and Christina School district again regarding our previous FOIA request. Finally, we communicated directly with administrators at DSD who encouraged that we request data directly from them, but upon such request and multiple follow ups, provided no such data. All of these efforts garnered responses where agencies claimed that other agencies are instead responsible, demonstrating that no agency believes the responsibility of ensuring smooth provision of services is their own. Very few of these efforts have produced responsive and substantive information to date.

⁷ See *Statewide Programs for the Deaf, Hard of Hearing, and Deaf-Blind Presentation*, Nemours Annual Audiology Conference, Melinda Failing and Kristin Johnson, Slide 5 (Feb. 6, 2024), attached as Exhibit 3.

⁸ *Current and Proposed Programs and Services*, Exhibit 3, Slide 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *T.R. v. Sch. Dist. of Philadelphia*, 4 F.4th 179, 191 (3d Cir. 2021) ("Addressing the educational needs of children with disabilities requires individualized assessments and considerations of countless concerns.")

whether in a mainstream classroom or specialized school.¹² “Administrative convenience” does not alleviate an LEA’s obligation to place students based on an individualized assessment.¹³

For deaf and hard of hearing children in Lower Delaware, the options should not be hours of daily travel, weeks of endless fighting for appropriate accommodations in the students’ home school district, virtual lessons that may be inappropriate for many children, or nothing.¹⁴ These options are unacceptable and fail to meet federal obligations; OCR must take immediate steps to expand access to accommodations and services for the individualized needs of deaf and hard of hearing students in Lower Delaware.

3. DDOE’s Failure to Provide Early Intervention Oral and Aural Therapy as Promised

As a birth mandate state, children who are deaf or hard of hearing are eligible for DOE-funded services once identified, from birth onwards. These early interventions are overseen by DHSS and DDOE, Office of Early Learning.¹⁵ Delaware’s state-run Birth to Three program relies on IDEA Part C funding.¹⁶ Because Delaware opted into IDEA Part C Early Intervention funding, Delaware must provide a statewide system for early intervention that meets federally mandated requirements including, but not limited to, a timely evaluation system and a state policy that “ensures appropriate early intervention services based on scientifically based research.”¹⁷

There are a range of auditory/oral therapies that can help some deaf and hard of hearing children access sound, in some cases through hearing aids or cochlear implants, and develop oral and aural skills. For students for whom it is appropriate, auditory/oral therapy is most effective when administered before the age of five, but ideally, before the age of three. The time-sensitive nature of auditory/oral therapy underscores Delaware’s critical obligation to make it accessible

¹² 34 C.F.R. § 104.34; *see also* *K.K. ex rel. L.K. v. Pittsburgh Pub. Sch.*, 590 F. App’x 148, 152 (3d Cir. 2014); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).

¹³ *See F.C. v. N.Y.C. Dept. of Ed.*, 15 Civ. 6045 (PAE), 2016 WL 8716232 at *14 (S.D.N.Y. Aug. 5, 2016).

¹⁴ While not an exhaustive list, some solutions may include aggressive recruitment of providers, increased training and technical assistance for existing staff, incentives for staff to get additional certifications, the pooling of resources with other area school districts to create and share communication practice opportunities, countywide teachers of the deaf (TODs), ASL conversation groups, trainings and technical support for Speech and Language Pathologists (SLPs) and aides, Augmentative and Alternative Communication (AAC) experts, and D/HH classrooms as appropriate.

¹⁵ 20 U.S.C. § 1431 et seq.; Del. Code Ann. tit. 16, § 803A; *see also* Educators (Birth-8 Years of Age): Early Childhood Special Education (ECSE), *Delaware Department of Education*, <https://www.doe.k12.de.us/Page/3624>.

¹⁶ Birth to Three Early Intervention Program Policies and Procedures Manual, *DHSS*, available at <https://dhss.delaware.gov/dhss/dph/birthtothree/files/2023BirthtoThreeEIPProgramPoliciesProceduresManual.pdf> (“The manual is based on the participation of Delaware in Part C of the Individuals with Disabilities Education Act (IDEA).”); Although SB136 established in 2021 that early intervention IDEA Part C programs should be housed within DDOE, rather than DHSS, there has been inexplicable delay in this transition, necessitating investigation of both recipients of federal IDEA funds.; *See also* Legislator Listening Session, Parents & Caregivers of Children who are Deaf, Hard of Hearing, & Deaf-Blind in Delaware, *Zoom Webinar and In-Person at Legislative Hall, Dover, DE*, “Notes on Common Themes,” dated Oct. 24, 2023. (Meeting minutes distributed by Rep. Cyndie Romer highlight the following common themes: “Lack of coordination among various entities including healthcare providers, educational institutions, and support agencies. Challenges navigating communication with various agencies, schools, and healthcare providers.”)

¹⁷ 20 U.S.C.A. § 1435.

for children in the Birth to Three program, which covers the period when auditory/oral therapy is most effective.

While Delaware claims to provide auditory/oral therapy services, such programming has been largely inoperative since at least 2020. Some auditory/oral therapy was available to some Delaware families in New Castle County between 2013 and 2020 but was inaccessible to families living in Lower Delaware, due to its distance and the resulting commuting burden on young children, and has not been facilitated by the Christina School District at all since 2020. This is true despite Christina's continued receipt of IDEA Part B funds and subgrant to fund the teaching position, and despite the Christina Early Education Center's advertisement of auditory/oral therapy as an available early intervention offering for families.¹⁸ This lack of programming has thereby deprived children from birth to three the provision of individualized services where such auditory/oral therapy is determined to be necessary based on the child's individualized assessment. The often-irreversible lack of timely intervention denies these children access to equal opportunities in plain violation of their civil rights under the ADA and Section 504.

After receiving several complaints from families with deaf and hard of hearing children who are between ages 0 and 3 regarding the lack of operational auditory/oral therapy programs in Delaware,¹⁹ ACLU-DE submitted a FOIA request to DDOE seeking more information about its auditory/oral programming.²⁰ Although we repeatedly asked for any information confirming the current existence of oral and aural therapy, as advertised on DDOE and DSD webpages, DDOE continuously evaded responding directly and failed to provide any assurance that it is operating a functional program or similar alternative therapies.²¹ While the Department confirmed that there is one certified auditory/oral therapy instructor statewide, until very recently that instructor had been on extended leave without any replacement instructor in place since 2020. The Department failed to offer continued receipt of these services for eligible students, despite the instructor's absence. Further, in an email exchange with Dale Matusевич, Director of DDOE's Exceptional Child Resources, DDOE *admitted* to maintaining an understaffed auditory/oral therapy program, and to lacking an active and effective plan for the provision of

¹⁸ See attached Email from Dale Matusевич dated Oct. 3, 2023 [Exhibit 1]; See also https://www.dsdeaf.org/apps/pages/index.jsp?uREC_ID=256396&type=d&termREC_ID=&pREC_ID=569421. In Delaware, the primary, and perhaps only, type of auditory therapy offered to students from birth to three statewide has been Listening and Spoken Language ("LSL"), illustrating a potential critical shortcoming of Delaware's limited therapeutic offerings. Delaware School for the Deaf advertises "LSL" on their website as the only available auditory/oral therapeutic option for children birth to three.

¹⁹ See Legislator Listening Session, Parents & Caregivers of Children who are Deaf, Hard of Hearing, & Deaf-Blind in Delaware, *Zoom Webinar and In-Person at Legislative Hall, Dover, DE, "Notes on Common Themes,"* dated Oct. 24, 2023. (Meeting minutes distributed by Rep. Cyndie Romer highlight the following common themes: "Delays in diagnosis and intervention, especially for newborns...Challenges in receiving timely and effective early intervention services.")

²⁰ See attached Email thread with Alex Corbin, Deputy Attorney General [Exhibit 2]: In an email exchange dated 12/13/2023, ACLU-DE wrote "We are seeking information demonstrating that the program really is up and running in this moment, not just generally (i.e., that there are a certain number of students currently and regularly receiving a certain number of hours of LSL instruction provided by Delaware schools.)" In response, Corbin only provided general information about what the LSL program *would* look like if it were hypothetically being administered, and confirmed that the information provided is not specific to this year. His response did not answer our question.

²¹ *Id.*

auditory/oral therapy services in the absence of their single instructor.²² Finally, the Statewide Presentation mentioned above confirmed that there are no bilingual and auditory-oral services offered statewide, and that there is no early learning program for D/HH students from 18 months to 5 years in Kent and Sussex counties.²³ Administrators from DSD confirmed in a Zoom conversation on February 29, 2024, that Delaware currently offers no auditory-oral services whatsoever or any other kind of direct services for birth to three D/HH students in Delaware. Delaware's failure to provide necessary and appropriate early intervention oral and aural therapy to children from birth to three in a timely and widely available manner results in a failure to provide a FAPE in Delaware and thereby deprives these students of equal educational opportunities.

Further, access to American Sign Language is also limited for D/HH children from 0 to 3 years old across the state in Delaware. The only ASL course for parents is offered in person at the DSD campus in New Castle County, which is untenable for many working parents throughout the state. While DSD hosts an ASL playgroup on the DSD campus, this playgroup is again inaccessible for many birth to three children statewide, and there are no equivalent alternatives offered elsewhere in the state. While the birth to three state-run program often refers students and their families to Statewide Programs at DSD because LEAs lack internal resources to meet students' needs, Statewide Programs does not offer any direct services to birth to three youth in Delaware. Therefore, this referral pattern systemically deprives D/HH birth to three-year-olds in Delaware of services they are legally owed under the birth mandate. During a period where language acquisition is so critical, the complete deprivation of resources to D/HH children birth to three in Delaware is unacceptable.

Delaware's lack of meaningful accommodations and services for deaf and hard of hearing children statewide and the systemic denial of early intervention therapy to children with hearing loss birth to three are plainly discriminatory on the basis of disability and deny students access to equal educational opportunities. The ACLU-DE therefore requests that the Department of Education Office for Civil Rights urgently investigate these Delaware agencies for violations of the Rehabilitation Act of 1973 and the ADA, for the deprivation of a meaningful educational opportunities to students with disabilities.

Sincerely,

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**Under the direct
supervision of Bensing and
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²² See Exhibit 1: Dale Matusевич wrote in an October 3, 2023, email, "Currently, the teacher, [redacted], is on maternity leave so referrals for LSL services should go through Becky Ryan, Christina's Special Education Director... Another issue we face is that there are only approximately 800 LSL certified teachers in the world. We are fortunate to have one in Delaware but when she is out it does present some concerns in the delivery of services. We did discuss...one option for providing LSL services would be contracting with a tele-remote provider until [teacher] returns."

²³ See Exhibit 3, Slide 5.