

EXHIBIT L

**UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA**

HANNAH SABATA, et al.,

Plaintiffs,

v.

**NEBRASKA DEPARTMENT OF
CORRECTIONAL SERVICES, et al.,**

Defendants.

Case No. 4:17-cv-03107-RFR-MDN

CLASS ACTION

**REPLY DECLARATION OF MARGO
SCHLANGER IN SUPPORT OF MOTION
FOR CLASS CERTIFICATION**

I, Margo Schlanger, declare as follows:

1. As stated in my previous declaration filed on February 19, 2019, I have been retained as an expert witness by the Plaintiffs in this case, to evaluate the disability-related policies, practices, and procedures in the Nebraska prison system. The purpose of this Reply Declaration is to provide the Court with additional support for my opinions based on my recently completed inspections of nine of the ten Nebraska state prisons.

2. During the week of June 3-7, 2019 I completed in-person inspections of the following Nebraska state prisons: the Work Ethic Camp (WEC), Nebraska Correctional Center for Women (NCCW), Community Corrections Center-Lincoln (CCC-L), Lincoln Correctional Center (LCC), Diagnostic and Evaluation Center (DEC), Tecumseh State Correctional Institution (TSCI), Nebraska State Prison (NSP), Nebraska Correctional Youth Facility (NCYF), and the Omaha Correctional Center (OCC). The only facility I did not visit was the Community Corrections Center-Omaha (CCC-O).

3. My methodology for the tours was to go through the facilities in an order that came as close as practicable (given staff availability and proximity of necessary locations) to the order an arriving prisoner would experience. My tours generally started with the intake and

screening functions, both custody and medical, and proceeded to housing and programming areas. At each stop, I engaged in discussions with the staff responsible for the services and activities being performed. For example, I interviewed custody officers and medical staff responsible for interviewing arriving prisoners, mental health staff responsible for interacting with prisoners during the course of treatment, and program staff such as teachers and librarians. At nearly all the facilities, I also interviewed a number of prisoners, including both named plaintiffs and other members of the putative class and sub-classes.

4. I was accompanied at all times on these tours by at least one, and often more, attorneys from the Nebraska Attorney General's Office. The Deputy Attorneys General were very active on the tour, staying close to me as I interviewed staff and incarcerated persons (other than the named plaintiffs), and participating in discussions with me and Plaintiffs' counsel regarding the minute-by-minute itinerary for each tour.

5. Touring concurrently with me was another expert retained by the Plaintiffs, Paul Bishop, an architect specializing in disability access. Mr. Bishop took measurements and photographs of the physical features of the facilities.

6. What I learned during the tours supports the conclusion that NDCS's policies, procedures and practices regarding prisoners with disabilities impact the members of the proposed disability sub-class—"all persons with disabilities who are now, or will in the future be, confined at any NDCS facility"—in a uniform and predictable way. While each prisoners' impairments and needs for auxiliary aids and/or reasonable modification may differ, all prisoners in the sub-class are harmed by NDCS's lack of necessary policies, procedures, and practices, and all prisoners in the sub-class are in urgent need of changes to bring NDCS in line with federal disability law.

A. Identification of Prisoners with Disabilities and Their Disability-Related Needs

7. In my first declaration I explained that Nebraska appeared to lack appropriate policies or formal practices in place to ensure people with disabilities are identified and their disability-related needs assessed. My tours confirmed this lack. I spoke to both custody and medical staff about the intake process at each institution I visited; their descriptions made clear that—with the exceptions described in ¶ 11—intake processes at NDCS do not systematically screen for disability. Just to cite one example, there is no hearing screening done at intake (or systematically thereafter), although a simple 10-question questionnaire is a standard hearing screening method, and several and perhaps all the NDCS prisons have the ability to do onsite audiograms.

8. In addition, even when disabilities *are* identified by medical staff, the disability is not recorded in a way that facilitates necessary follow-up or services. There may be a medical note placed in the prisoner's file, but there is no list, no responsive process, no tracking.

9. Similarly, even when a disability is identified, the prisoner's resulting functional needs are not assessed in any systemic way. Prison medical staff may sign off on a lower bunk pass, and occasionally a medical "porter" is assigned, but there is no process for considering and accommodating all the various ways disability may affect functional needs.

10. At each prison, intake processes include several types of orientation—related to medical care, sexual abuse response, institutional rules and schedules, and the like. But it was clear at each institution that prisoners—including prisoners with disabilities—are not generally informed about disability-related policies, practices, services, accommodations, or personnel. I learned this from prison personnel, from written orientation materials, and from prisoner interviews. Even prisoners who have obvious and significant disabilities reported that they were not informed of the presence of an ADA coordinator or of the services available to them.

11. There are a few exceptions to the lack of screening. The exceptions I learned about are: (a) At many (perhaps all) of the NDCS prisons, intake medical processes include a vision screening. That is, it seems that prisoners who need glasses are systematically identified as part of the intake physical. (b) At TSCI (and apparently only at TSCI), medical staff include an intake questionnaire to promote better access to chronic care processes, identifying prisoners with certain medical issues/disabilities (asthma, heart problems, diabetes, epilepsy, dental problems, STDs, hepatitis, HIV/AIDS, tuberculosis). The checklist is used to make sure that these prisoners are entered into the chronic care rolls. (c) At NCYF, part of the educational intake process includes identification of youthful prisoners with already-diagnosed special education needs. What these three exceptions share is that they involve systemic pro-active inquiry and record-keeping, both necessary for any effective disability identification system. In my view, these exceptions demonstrate that a more thorough solution to disability identification/tracking is entirely practicable.

12. Effective prisoner self-reporting is not substituting for practices/policies that ensure identification. As I stated in my original declaration, self-reporting depends on effective notice to prisoners that disability-related services are available and how to obtain them. As described above, this does not occur during orientation or intake. And the information has not made its way to prisoners otherwise: only a small fraction of the prisoners with disabilities I spoke with during my site visits knew anything about the existence of an ADA coordinator or disability-related services.

B. ADA Coordinator and Consultation among ADA Coordinator(s), Medical, Mental Health and Custody Staff

13. During the site visits, I learned that NDCS's former ADA Coordinator, Lisa Matthews, had resigned and left the Department. There had apparently not been a successor yet named. In addition, that day and on the other visits, I learned that NDCS had designated an ADA

coordinator at each prison, but that these individuals had not yet received any training or information about their role. No prisoner I spoke with had any information about a prison-specific ADA coordinator.

14. Obviously the exit of what may have been the only person at NDCS with disability-related training or experience is a blow. But even when Ms. Matthews was present, my interviews made it clear that ADA processes have not been effective at NDCS. Prisoners often did not know that such processes existed. I saw little evidence of appropriate consultation and ADA-informed decision-making. But the site visits confirmed my conclusion based on the ADA Coordinator files I had already reviewed that there is not an effective modification/auxiliary aid process in place, and that prisoners with disabilities are adversely affected.

C. Tracking and Notice to Staff

15. I was able to confirm that there are no systematized methods in place to inform staff of prisoners' disabilities. In fact, several prisoners told me that they would like to use a medical alert bracelet because of this gap. NDCS does not use disability-notification ID cards, or bed/cell cards. There may be evidence of a disability buried in the medical record somewhere, but there is no disability alert in medical or correctional files. I heard about resulting problems—for example, situations where a prisoner was unable to hear a correctional officer, but unable to prove up the hearing impairment that created the issue.

D. Provision of Reasonable Modifications and Auxiliary Aids

16. The site visits revealed that—without a process to conduct functional assessments and respond to them—few reasonable modifications and auxiliary aids are in place.

17. There are a few such auxiliary aids made available. For example, most though not all of the public televisions I saw had captioning enabled. (In fact, there was a posted memo at many prisons, dated March 2019, instructing that this occur.) All the pay-phones had a

volume adjustment button (though it did not increase volume very much). Some but not all of the libraries/education areas had magnification devices available for reading hard-copy materials.

18. More generally, however, in the absence of a process to consider and accommodate disability, there were entirely-to-be-expected gaps. Several examples follow—but my point here is not an exhaustive list but rather to set out the basis for my opinion that the absence of a functioning ADA process has had widespread adverse consequences.

- a. NDCS has implemented a system providing tablet-based phone services, without accommodation or auxiliary aids for deaf/hard-of-hearing or blind/low-vision prisoners. The J-pay kiosks similarly appear to lack screen reader functionality.
- b. While several prisons had a TTY device, in not one was there a staff member who actually knew how to attach the device to a phone line and make it work for a prisoner. In one prison, where instructions had been developed and were given to me, they did not work (among other issues, the outgoing relay line was incorrect). I heard repeatedly from prisoners that there was no way to use the TTYs to gain access to telecommunications services. Deaf prisoners and prisoners whose hearing impairment was sufficiently severe to foreclose use of regular phones were therefore entirely deprived of telecommunications access to their family and others.
- c. Educational programming was being offered using both computers and tablets. But there was no screen reader technology available.
- d. The wheelchairs provided to prisoners seem to be intended for low-intensity use, rather than long term use by healthy active individuals with mobility impairments.
- e. Outside of infirmary housing, various devices that might assist independence are not available—for example, transferring devices (often known as trapezes) that assist people with mobility impairments to get in and out of bed. Similarly, the prisoners I spoke with who needed special night-lights (because of low vision) or other unusual disability-related equipment uniformly reported that they were denied such equipment without individualized consideration.
- f. Many different questions to many different individuals at many prisons elicited no examples of prisoner job-related accommodations such as adaptive equipment.

19. Prisoner assistants are used in some circumstances to meet some prisoners' disability-related needs. But my conversations made it clear that this is not a system that is meeting the need. Even apart from the issues highlighted in my prior declaration that can make prisoner assistants a problematic accommodation, I confirmed that prisoner assistants are available only some of the time to some prisoners with some disabilities for some tasks.

E. Effective Communication

20. My visits confirmed systemic gaps in meeting the requirement of effective communication for prisoners with sensory impairments.

- a. For blind prisoners, there are many communications that are not made in an accessible format—whether that is braille or sound recording. For example, prison-specific rule books and orientation materials are not offered in any non-written version. Similarly, educational materials are provided on computers or tablets, without screen reader or auditory accommodations. As already mentioned, J-Pay kiosks and tablets are inaccessible to blind and low-vision prisoners. The list could go on and on. (Meanwhile, it is clear that NDCS could do better, because authorities have promulgated a recorded version of the system-wide rule book, on a network drive available to some staff—although it is not clear to me that this version is actually available to blind/low-vision prisoners.)
- b. For deaf prisoners who use sign language to communicate, access to an interpreter is evidently extremely limited. NDCS institutions occasionally use in-person interpretation—though it seems not nearly as often as they would be necessary for effective communication. Video remote interpretation (VRI) is not available, so interpretation occurs only when there is advance notice and arrangements are authorized and completed. I heard a few times that a device called UbiDuo might at some point be available. This device effectively functions as a way to allow typed instant-messenger-type conversation between individuals in the same location. It is not providing effective communication. First, despite numerous questions at different facilities, I was unable to find one where this device had yet been used, except as a demonstration. Second, this is a device that can work only for communication between individuals who are easily literate and type well. For many deaf/hard-of-hearing prisoners, neither is true.
- c. For hard-of-hearing prisoners, NDCS institutions have not surveyed communication problems or implemented systemic solutions. Prisons are noisy institutions, and NDCS facilities are no exception. Hard-of-hearing prisoners frequently need amplification and some need other types of

auxiliary aids—non-auditory alerts and the like. But with the exception of captioned televisions, mild volume-augmentation on (not-much-used) stationary phones, and the signal-to-earphone system used for institutional television, little has been done to satisfy these needs.

One prison—TSCI—had made a single desktop phone with volume and tone controls available to at least one or two hard-of-hearing prisoners in a unused mezzanine above Housing Unit 2. This is an excellent device and, again, demonstrates that use of such auxiliary aids would be easily accomplished. This phone, however, was unique to one housing unit in TSCI and staff appeared unaware of its actual purpose. I was told during the tour that it was the “TTY” phone. In addition, the mezzanine was up a flight of stairs from the upper tier of the housing unit and could not be reached by a person with significant mobility impairments as well as a hearing impairment.

F. ADA Request and Grievance Processes

21. My visits convinced me that the issues I highlighted previously are, in practice, undermining the ADA request/grievance processes. Prisoners are unaware of their rights and the appropriate way to seek their vindication. The process itself is inaccessible for prisoners who cannot see or write, or whose cognitive disabilities are significant. To work, the process needs notice to prisoners of its availability and scope; facility-specific ADA officials who can manage it; clarity about the appropriate path for resolution of disability issues; and accommodations within the process. None of these prerequisites to effectiveness obtain.

G. Restrictive Housing Issues

22. My visits demonstrated the existence of several restrictive-housing-related issues at NDCS facilities.

23. In some facilities—particularly TSCI--prisoners whose disabilities render them vulnerable to harm by other prisoners can obtain protection only by “checking in” to protective custody, which is a form of restrictive housing with very onerous and stark conditions of confinement.

24. In some facilities—particularly NSP—the restrictive housing units are not themselves accessible, risking serious injury to prisoners with disabilities housed there, and rendering the programs, services, and activities unequal for those prisoners who are nonetheless confined to them. I heard reports of months-long stays in restrictive housing from prisoners who were unable to shower or access the exercise yard while there.

H. Special Housing and the Integration Mandate

25. At several prisons—particularly TSCI, NSP and OCC—prisoners with disabilities who need certain types of accommodations are consolidated into particular units, where accessible cells or “medical porters” (that is, prisoner assistants) are made available. The result is that the prisoners are either denied equal access to the programs, services, or activities available only at other units, or are denied the disability-related services they need.

26. LCC and NSP pose particular problems. They are the only facility where certain programs are offered—but they are largely inaccessible to prisoners who cannot manage stairs. At LCC, NDCS has made an accommodation available—prisoners with minor mobility impairments are given a “spine pass,” which authorizes them to traverse the prison by way of a route that has fewer stair steps. But they need special access to that area (the “spine”), which can be delayed. And some parts of the prison are simply inaccessible to them. For example, LCC is the only place where a residential sex offender program known as “iHELP” is offered. For some prisoners, iHELP is a pre-condition for release at the prisoner’s parole date. LCC is also the location of the men’s Secure Mental Health Unit (SMHU).

27. NSP has the only male residential drug treatment (Residential Treatment Center, or “RTC”) program, located in Housing Unit 6 which I was told is completely inaccessible. RTC is often required as a pre-condition for parole. NSP also has what I understand to be NDCS’s only specialized Veteran’s Housing unit, but it can only be accessed via stairs. I spoke with at

least one wheelchair using veteran who tried to be assigned to the veteran's unit, but could not be due to his need for the wheelchair.

28. The point for current purposes is, again, not to identify every discriminatory practice, but rather to illustrate how the absence of a disability planning process affects prisoners with disabilities. An appropriate process would identify each type of programming and ensure that there are ways for prisoners with disabilities to access them.

I. Re-Entry and Parole

29. NDCS has two community corrections facilities, CCC-L and CCC-O, geared towards work details and work release, to serve a reentry function. My visits suggested that prisoners with disabilities do not have equal access to community corrections institutions. For example, prison staff explained to me that anyone who needs assistance with an "activity of daily living" (abbreviated ADL, in my conversation) is not admitted to CCC-L. (The Warden did say that if a prisoner can work without assistance, but needed assistance getting dressed, perhaps that could be worked out.) Prison staff told me there had been just one wheelchair user at the facility in 7 years, no blind prisoners, and one partially-deaf prisoner (who could read lips). As already explained, I did not tour CCC-O.

30. As noted above, several programs commonly required as a pre-condition for parole are offered only in inaccessible locations.

31. My interviews with prisoners confirmed my initial opinion that the Board of Parole lacks an adequate process for identifying communication needs in advance of parole hearings, as my prisoner interviews uncovered delays before the necessary accommodations could be secured, or going through hearings with no accommodations at all.

32. In my declaration of February 19, 2019, I stated my opinion that the Board of Parole's decision-making process was discriminatory in part because the Board's rules include

language requiring the board to weigh disability as a factor against granting parole. (Feb. 19, 2019 Declaration at ¶ 121(a). The regulation I referred to was Section 4-401(A)(9), which at the time of my February 19, 2019 declaration provided that the Board shall consider “The offender’s mental or physical makeup, including any disability or handicap which may affect his or her conformity to law.” From the Deposition of NDCS’s ADA Expert Barry Marano, I learned that in response to Mr. Marano’s review, NDCS amended the regulation to add the following clause to the above quoted Section 4-401(A)(9): “however, in making its parole decisions the Board does not discriminate on the basis of any disability or handicap that will not affect an individual’s conformity to law.” Marano Deposition, Exhibit 6, Amended Parole Regulation, NDCS 352938-939 (Amended May 21, 2019). This additional language does nothing to remove the regulation’s discriminatory impact, as it allows the Board to continue discriminating as long as they can point to a subjective basis to believe that the prisoner’s disability “may affect his or her conformity to law. As defense expert Mr. Marano stated in his deposition: “To me, it looks on the surface that your disability is an issue.” Marano Deposition at 145:10-12.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration is executed at Ann Arbor, Michigan this 11th day of July, 2019.



Margo Schlanger