

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WILLIAM PIERCE,

Plaintiff,

v.

DISTRICT OF COLUMBIA,

Defendant.

No. 13-CV-0134 (KBJ)

**BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF THE DEAF IN
SUPPORT OF PLAINTIFF WILLIAM PIERCE**

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Dated: October 22, 2015

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STATEMENT OF AMICUS

The National Association of the Deaf (“NAD”) through its Law and Advocacy Center, by and through its attorney Mary Vargas of Stein & Vargas, LLP, respectfully submits this statement of interest in support of the deaf plaintiff in the above-captioned class action.

Founded in 1880, the NAD is the nation’s premier civil rights organization of, by and for deaf and hard of hearing individuals in the United States of America. The NAD was shaped by deaf leaders who believed in the right of the American deaf community to use sign language, to congregate on issues important to them, and to have its interest represented at the national level. The NAD’s mission is to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing individuals in this country. The NAD represents individuals and organizations, and files *amicus* briefs in support of furthering its mission.

The NAD membership includes over 7,000 individuals and over 100 associations from all fifty states and Washington, D.C. The NAD is also the United States member of the World Federation of the Deaf, which has over 120 national associations of deaf people as members. The NAD’s Board of Directors consists exclusively of deaf and hard of hearing individuals. Of the many individuals who work for the NAD as regular contractors or permanent staff, nearly all are deaf or hard of hearing. During each of its biennial conferences, the NAD solicits and prioritizes the civil rights concerns of its members and affiliates, and of the deaf and hard of hearing community at large. The concerns raised during each conference guide the NAD’s work for the next two years. In addition, the NAD receives over 1,000 intakes per year from deaf and hard of hearing individuals reporting possible violations of their own civil rights.

The NAD's Law and Advocacy Center has engaged in civil rights litigation on behalf of deaf and hard of hearing Americans since 1977, the year the U.S. Department of Health Education and Welfare promulgated Section 504 regulations. The Law and Advocacy Center consists of seven civil rights attorneys, five of whom are deaf. Collectively, these attorneys have over eighty years of experience advocating for the civil rights of deaf and hard of hearing people. As one of its primary missions, the Law and Advocacy Center enforces the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, ("ADA") and the Rehabilitation Act, 29 U.S.C. § 701, *et seq.* ("RA") to protect the civil rights and independence of deaf and hard of hearing Americans. No other organization shares the NAD's unique position both as a bastion of grassroots advocacy within the deaf community and a leader in civil rights litigation to ensure effective communication for deaf and hard of hearing in all aspects of society.

Based on its decades of experience representing deaf and hard of hearing individuals and litigating pursuant to the ADA and the RA, *amicus* believe this Court was correct in ruling that the District of Columbia ("Defendant") had an affirmative obligation to assess Mr. Pierce's need for auxiliary aids and services without waiting for a specific request based on the legal mandate of both the ADA and the RA to "take appropriate steps" to ensure effective communication with Mr. Pierce. We believe that such routine assessments do not demean or patronize deaf and hard of hearing individuals, but rather grant autonomy and preserve their civil rights. *Amicus* hopes that its explanation in support of both conclusions will be helpful to this Court in denying Defendant's Motion for Reconsideration.

STATEMENT OF THE ISSUE

The National Association of the Deaf writes to refute the following argument from Defendant's Motion to Reconsider (ECF No. 95-1) on page 11:

[The Court's ruling] also presumes that a disabled individual wants the assistance of an accommodation. Such a presumption is counter to the very purpose of the ADA. See *Shedlock v. Dep't of Corr.*, 818 N.E.2d 1022, 1034 (Mass. 2004) (“[R]esort to assumptions and stereotypes concerning disabled persons is a harmful practice that Congress sought to deter by means of the ADA.”) (citing *Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110, 117 (1st Cir. 2004) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999))). Indeed, disability rights advocates urge independence, autonomy, and dignity of people with disabilities. See <http://www.ncil.org/about/> (“people with disabilities are the best experts on their own needs . . . and are deserving of equal opportunity to decide how to live, work, and take part in their communities”) (last visited Sept. 30, 2015). Requiring public entities to automatically undertake a disability assessment of any individual whom they assume may have (or has an obvious) disability, without the individual requesting accommodations, is contrary to these efforts.

Def.'s Br. at 11, ECF No. 95-1. Defendant could not be more wrong. People with disabilities, including deaf and hard of hearing people, welcome a dialogue on auxiliary aids and services. Rights are not waived because requests are not made.

I. Conducting A Needs Assessment Does Not “Resort To Assumptions And Stereotypes Concerning Disabled Persons”

Conducting an assessment of the auxiliary aids and services that a person with a disability may need in no way “resort[s] to assumptions and stereotypes concerning disabled persons” as Defendant claims. Rather, failing to conduct a needs assessment has that effect.

Title II of the ADA (“Title II”) and Section 504 of the RA (“Section 504”) expressly contemplate that people with disabilities may need auxiliary aids and services of varying types in order to be granted meaningful access: Title II defines “qualified individual with a disability” as “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(b). Further, although not every individual with a disability requires

modifications, auxiliary aids and services, or barrier removal, the overriding purpose of both the ADA and the RA is to ensure that covered entities provide the modifications, aids, services, and barrier removal necessary to afford people with disabilities meaningful access to their programs, services, and activities.

These modifications, aids, services, and removals are so critical to the rights of people with disabilities that the disability community staged a 25-day protest to secure these rights in the first instance. The statutory language of Section 504 prohibits only “discrimination” against people with disabilities, without further elaborating as to what discrimination entails. *See* 29 U.S.C. § 794. Because of this ambiguity, the first court opinions interpreting Section 504 declined to read into the statute any obligation to make modifications, remove barriers, or provide aids and services to ensure access. *See, e.g., Snowden v. Birmingham-Jefferson County Transportation Authority*, 407 F. Supp. 394, 397 (N.D. Ala. 1975) (holding that, despite lack of bus lifts, a potential rider using a wheelchair was not excluded because a bus driver would have allowed her on if she could figure out how to get on the bus). Due to a four-year delay in promulgating implementing regulations that would create such an obligation within Section 504, the disability community staged “the longest occupation of a federal office by protectors in U.S. history.” Michael Ervin, Independent Living Institute, *The 25 Day Siege That Brought Us 504*, available at <http://www.independentliving.org/docs4/ervin1986.html> (last visited October 21, 2015). The lengths that the disability community underwent to secure the right to modifications, auxiliary aids and services, and barrier removal underscores how essential these provisions are to the antidiscrimination contemplated in Section 504 and Title II.

These regulations require recipients of federal financial assistance not only to make modifications, provide services, and remove barriers, but also to conduct a self-assessment to

determine *ex ante* the kind of modifications, services, and barrier removal necessary to achieve compliance with these regulations. *See* 42 Fed. Reg. 22677, May 4, 1977, implementing 45 C.F.R. § 84; 45 C.F.R. § 84.6 (self-evaluation requirement).

The ADA and its regulations that were implemented by the United States Department of Justice arose from years of advocacy efforts by the disability community, expanding the rights secured by Section 504 to all programs and activities of state and local governments, and to private entities that do not receive federal financial assistance. The regulations implementing Title II of the ADA outline at length public entities' obligations to modify policy, provide auxiliary aids and services, and remove barriers. In particular, the Department of Justice ("DOJ"), the agency responsible for implementing Title II of the ADA, explicitly stated in its explanation supplementing the Subpart E- Communications in its Title II regulations:

Because the appropriateness of particular auxiliary aids and services may vary as a situation changes, the Department *strongly encourages public entities to do a communication assessment* of the individual with a disability when the need for auxiliary aids and services is first identified, and to reassess communication effectiveness regularly throughout the communication . . . A public entity has a continuing obligation to assess the auxiliary aids and services it is providing, and should consult with individuals with disabilities on a continuing basis to assess what measures are required to ensure effective communication.

28 C.F.R. Pt. 35, App. A (emphasis added). In other publications, the DOJ has stated that public entities “must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice.” *See* DOJ, ADA Best Practices Tool Kit for State and Local Governments, Chapter 3: General Effective Communication Requirements Under Title II of the ADA, available at <http://www.ada.gov/pcatoolkit/chap3toolkit.htm> (last visited October 22, 2015). Thus, like the Court, the DOJ interprets Title II to create opportunities for people with disabilities to make their needs known; an *ex ante* needs assessment would satisfy this obligation.

In fact, when a public entity does not assess an individual's needs, the public entity falls back on "stereotypes and assumptions." Without an *ex ante* assessment, a public entity would rely on stereotypes and assumptions on the fly in deciding if it needs to provide a modification, auxiliary aid or service, or barrier removal. On the other hand, *ex ante* assessments allow a public entity to have impartial procedures in place for employees to make an informed determination of what auxiliary aids and services are necessary.

Indeed, the facts of this case illustrate the consequences of Defendant's failure to conduct a needs assessment. Defendant's personnel fell back on the erroneous assumption that Mr. Pierce could read lips and that he could read and write sufficiently to communicate solely through written English regardless of the nature, length, or complexity of the interaction. Defendant was wrong. A needs assessment would have revealed this information at the outset and prevented Mr. Pierce from being discriminated against for 51 days.

II. Conducting A Needs Assessment Supports the Independence, Autonomy, and Dignity of People With Disabilities

The NAD's Law and Advocacy Center receives over 1,000 intakes each year, chronicling a wide variety of ADA violations both great and small. Of the thousands of intakes we have received over the years, not one involved an individual who took offense at being offered an auxiliary aids or service or being assessed for such a need. By contrast, although the majority of these intakes reflect a denial of a request for auxiliary aids and services, some come from individuals who believed that showing that they are deaf and use sign language suffices as an implicit interpreter request.

To deaf and hard of hearing individuals, the question "Do you need an interpreter?" is as natural as the question "How can I help you?" or "Would you like fries with that?" Inquiring about auxiliary aids and service needs does not cause offense to deaf and hard of hearing

individuals. Deaf and hard of hearing individuals are well aware of their communication needs, and do not find such question to be an attack on their dignity. Rather, having hearing individuals with no experience or training in dealing with deaf or hard of hearing make decisions about their communication needs without consulting them is a direct insult to the dignity of deaf and hard of people. It is demeaning and patronizing to deaf and hard of hearing individuals when entities covered by the ADA or RA fail to provide effective communication, and more so when those entities refuse to consult these individuals on how to achieve effective communication. This is especially true when deaf and hard of hearing individuals are unaware of their rights to auxiliary aids and services and do not make a spontaneous request.

An *ex ante* needs assessment further protects the rights of deaf and hard of hearing inmates by anticipating the contexts in which the individual would need these various services. Even deaf and hard of hearing individuals with the legal knowledge and the confidence to request interpreters in a jail setting cannot possibly be expected to know enough about jails to anticipate every setting in which they may need auxiliary aids and services. Having the assistance of the needs assessment would allow the jail and the inmate to anticipate the inmate's communication needs in all the various communication settings that arise. Without this assessment, even in jails that provide auxiliary aids and services upon request, deaf and hard of hearing inmates constantly miss out on important interactions due to a failure to anticipate these needs and make requests in advance.¹ This assessment would support the independence, autonomy, and dignity of deaf and hard of hearing inmates by taking proactive steps to eliminate communication barriers before they arise.

¹ Although not within the scope of this brief, the NAD also disagrees with the District's implicit suggestion in its Motion to Reconsider that a deaf or hard of hearing individual has to make separate requests for every single interaction in jail. Such piecemeal approach defeats the purpose of the ADA by requiring the deaf or hard of hearing inmate to maintain constant vigilance through his incarceration and anticipate his every need *ex ante* to avoid waiving his rights.

III. Requiring Public Entities To Automatically Undertake A Needs Assessment Of A Deaf Individual Is Necessary To Give Effect To The ADA

Especially in a jail setting, a number of barriers stand between a deaf or hard of hearing individual and an effective request for interpreting services. Barriers include not only the expected communication difficulties, but a lack of understanding of laws and the legal system, or a fear that a request will be met with hostility, retribution or even violence. Allowing such barriers to operate as a waiver of ADA rights frustrates the central purposes of the ADA: it lets the defendant blame the victim for its own misconduct. By contrast, a needs assessment gives effect to the purposes of the ADA.

A. Language of Title II as well as Implementing DOJ Regulations Support the Requirement of Ex Ante Needs Assessment

Title II requires public entities to “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). Although the regulations do not give examples of “appropriate steps,” they make clear that such steps include furnishing auxiliary aids and services to ensure that the communication needs of the individual with a disability are met. The regulations require public entities to “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity”; to consider “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”; and, to “give primary consideration to the requests of individuals with disabilities.” 28 C.F.R. § 35.160(b).

These provisions are clear about needing to assess the deaf or hard of hearing person’s communication needs. The converse is not true; these provisions cannot be read to permit public

entities to stick their heads in the sand and invent facts about what a deaf or hard of hearing individual can and cannot do unless and until that individual successfully communicates otherwise.

B. A Needs Assessment Prevents Disability or Ignorance of the Law from Becoming Waiver of Rights

Under Defendant's view, failing to request auxiliary aids and services constitutes a tacit waiver of an individual's right to these aids and services. Such "raise it or waive it" requirement in Title II would frustrate the purpose of the ADA. First, communication barriers impose significant obstacles for deaf and hard of hearing individuals to request auxiliary aids and services. Therefore, placing the duty on the deaf or hard of hearing individual to make the initial request would create the potential for the disability to interfere with the exercise of ADA rights. Second, deaf and hard of hearing individuals may not be aware of their rights, creating the potential for ignorance of the law to constitute a waiver of rights.

Communication barriers may prevent a deaf individual from requesting an interpreter. Although most deaf and hard of hearing individuals can write a simple request for an interpreter, a pen and paper is not always available. Prevented from writing out an interpreter request, the deaf individual would have to speak or sign the request. However, it is likely that a person receiving the request may not understand the deaf individual's speech or may not recognize the sign for "interpreter." Therefore, the existence of a communication barrier itself prevents the deaf person from requesting an auxiliary aid or service.

By requiring an ex ante needs assessment, the Court prevents the disability itself from interfering with the exercise of disability rights. Rather than conditioning ADA rights on a deaf person's ability to sufficiently overcome communication barriers to properly articulate his/her

needs, it places the burden on the defendant to identify communication barriers and to address them.

In addition to communication barriers preventing the making of needs-based requests, the intimidation of a correctional setting can effectively act as a gag order on a deaf or hard of hearing person. As this Court accurately stated, “uneven power dynamic between prison officials and inmates [] inherently and appropriately exist[], and also . . . departments of corrections have complete control over whether prison inmates (disabled or not) receive any programs or services at all.” *Pierce v. District of Columbia*, --- F. Supp. 3d ---, Civ. No. 13–cv–0134, at *13 (2015) (citations omitted). Often, inmates, especially those who are deaf and hard of hearing, dread disturbing the very fragile status quo in fear of retaliation, losing certain privileges, or even bodily harm. Deaf and hard of hearing inmates may worry that prison officials ignorant of ADA requirements may treat them worse for making any request. Under such circumstances, deaf and hard of hearing inmates may find it safer to not make requests for auxiliary aids and services.

An *ex ante* needs assessment is necessary to ensure that ignorance of rights does not constitute a waiver of these rights. Like the general United States population, many deaf and hard of hearing individuals are not civil rights lawyers and are not fully versed in their own rights. Many people are not familiar with the ADA.² Even well educated Americans may erroneously believe that the ADA does not apply to jails and prisons, and decide not to request an interpreter for that reason. Still others may have been denied interpreters so many times in the past by “friendlier” entities, such as doctors and hospitals, that they may believe requesting an interpreter is futile. Under each of these circumstances, a deaf or hard of hearing individual’s

² The average deaf person's understanding of his legal rights may in fact be lower than his hearing counterpart. Study after study shows that language deprivation, which is common among pre-lingual deaf people, limits access to general knowledge and information. See, e.g. Michele LaVigne and McCay Vernon, *An Interpreter isn't Enough: Deafness, Language, and Due Process*. 2003 WIS. LAW REV. 844 (2003).

ignorance of their own rights, or lack of faith in the enforcement of these rights, would amount to a waiver of these rights unless consequences existed for a public entities failure to take the affirmative steps the Court prescribes.

By requiring a needs assessment in its Order, this Court ensures that deaf and hard of hearing inmates are aware of the opportunity to request an interpreter. Any individual who does not want an interpreter can decline one, knowingly and voluntarily waiving these rights. Rather than conditioning ADA rights on the deaf or hard of hearing individual's knowledge of the ADA, it conditions ADA rights on the defendant's compliance with the ADA.

IV. The DOJ's Enforcement Activity Reflects Support Of Ex Ante Needs Assessments.

The Court's ruling finds considerable support in the enforcement activity of the United States Department of Justice (DOJ). The DOJ's settlements with jails routinely require these entities to conduct an "initial communication assessment . . . at the time the need for auxiliary aids and services is first identified." *See* Settlement Agreement Between the United States of America and the City of Henderson Nevada, DOJ No. 204-46-167, available at <http://www.ada.gov/henderson-nv-sa/henderson-nv-sa.htm> (Aug. 5, 2013); *see, e.g.*, Settlement Agreement Between the United States of America, the City of Englewood Colorado, and Plaintiffs, DOJ Compl. No. 204-13-311, available at <http://www.ada.gov/englewood.htm> (Mar. 7, 2013); Settlement Agreement Between the United States of America, the County of Arapahoe Colorado, et al., DOJ Compl. No. 204-13-310, available at <http://www.ada.gov/lawrence-arapahoe.htm> (Mar. 21, 2013); Settlement Agreement Between the United States of America and the County of Alameda Sheriff's Office, DOJ Compl. No. 204-11-290, available at <http://www.ada.gov/bonner.htm> (Feb. 4, 2010).

Even outside the jail context, the DOJ often requires covered entities to conduct ex ante needs assessments. *See e.g., Heisley v. Inova* (No. 1:10-714, E.D. Va., Mar. 30, 2011) (Consent

Decree) (hospital required to provide a Communication Request Form to all of its incoming deaf and hard of hearing patients and companions); Settlement Agreement between the United States and the City of Henderson, Nevada, DOJ Compl. No. 204-46-167, available at <http://www.ada.gov/henderson-nv-sa/henderson-nv-sa.htm> (Aug. 5, 2013) (requires initial and ongoing communication assessment for police interactions with deaf and hard of hearing individuals); Settlement Agreement between the United States and the City of New Haven, Connecticut, DOJ Compl. Nos. 204-14-143/204-14-144, available at <http://www.ada.gov/new-haven/new-haven-sa.htm> (May 20, 2013) (requires police department to determine appropriate auxiliary aids and services once on notice that a member of the public is deaf or hard of hearing); Settlement Agreement between the United States and the Wallingford Police Department in Wallingford, Connecticut, DOJ Compl. No. 204-14-164, available at http://www.ada.gov/wallingford_sa.html (Aug. 18, 2015) (requires police department to determine appropriate auxiliary aids and services once on notice that a member of the public is deaf or hard of hearing); Settlement Agreement between the United States and the Rochester Police Department, Rochester, Michigan, available at http://www.ada.gov/rochester_pd_sa.html (Aug. 24, 2015) (requires initial and ongoing communication assessment for police interactions with deaf and hard of hearing individuals).

CONCLUSION

For the forgoing reasons, this Court should DENY Defendant's Motion to Reconsider. In its original opinion, the Court properly recognized that the only way for a jail or prison to appropriately meet the communication needs of deaf and hard of hearing inmates is to require the jail or prison authorities to perform an *ex ante* needs assessment. Such assessments are vital to

the communication needs and dignity of all deaf and hard of hearing individuals. Anything less would be a perversion of the intent and spirit of the ADA and the RA.

Respectfully submitted,

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