

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

LARRY BERKE )  
2602 West Languid Lane )  
Phoenix, AZ 85086, )

Plaintiff, )

v. )

FEDERAL BUREAU OF PRISONS, )  
320 First St., NW )  
Washington, DC 20534 )

Case No.

Serve: )  
Ronald C. Machen, Jr. )  
United States Attorney's Office )  
555 4th Street, NW )  
Washington, DC 20530 )

COMPLAINT

Eric H. Holder, Jr. )  
U.S. Attorney General )  
Department of Justice )  
950 Pennsylvania Avenue, Room B-103 )  
Washington, DC 20530-0001 )

and )

CHARLES E. SAMUELS, JR., )  
in his official capacity as Director of the )  
United States Bureau of Prisons )  
320 First St., NW )  
Washington, DC 20534 )

Defendants. )

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1. Plaintiff Larry Berke ("Mr. Berke"), by his undersigned counsel, respectfully complains as follows against Defendants the Federal Bureau of Prisons ("BOP"), and Charles E. Samuels, Jr. ("Defendants").

### NATURE OF THE ACTION

2. This lawsuit concerns impending discrimination by Defendants against Mr. Berke – a deaf individual awaiting his BOP surrender date for his criminal conviction –that will violate federal law and the United States Constitution. It seeks to preempt the deprivation of qualified American Sign Language (“ASL”) interpreters and other auxiliary aids necessary to allow Mr. Berke to effectively communicate, that will inevitably occur upon his upcoming placement into the BOP’s custody. Defendants’ illegal and discriminatory conduct will preclude Mr. Berke’s ability to participate in institution proceedings, to effectively take part in any rehabilitative, educational, or religious programs, and to communicate effectively with others within and outside the institution.

3. As of this filing, Mr. Berke is not a prisoner. Pursuant to his Third Order Amending Judgment of Conviction, Mr. Berke was “committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months” on December 19, 2011, but does not have to “surrender himself for service” “at the institution designated by the Bureau of Prisons ... [until] August 23, 2012 at 12:00 p.m.” Third Order Amending Judgment of Conviction, attached as Exhibit 1.

4. Mr. Berke’s sentencing judge recommended that prior to his incarceration the BOP “be made aware of the defendant’s hearing impaired medical condition and where he can be accommodated, ... that the defendant be designated to a facility, which will abide by the American’s with Disability Act [sic],”<sup>1</sup> and “that the defendant be designated to a facility

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<sup>1</sup> Notwithstanding the sentencing judge’s recommendation, the BOP is subject to The Rehabilitation Act of 1973, 29 U.S.C. §§ 794 *et seq.*, not the Americans with Disabilities Act. The two laws have virtually identical requirements as to provision of auxiliary aids and services to deaf individuals, but the Americans with Disabilities Act does not apply to the federal government.

geographically near his family members.” Mr. Berke’s Judgment of December 19, 2011, attached as Exhibit 2.

5. The BOP will incarcerate Mr. Berke at United States Penitentiary (USP) Florence ADMAX Satellite Camp (“ADX Camp” or “Camp”) located in Florence, Colorado. The ADX Camp has virtually no auxiliary aids to allow effective communication with deaf prisoners. The ADX Camp has no telephone equipment (i.e. videophones) for deaf inmates, no visual safety alarms (beyond fire), or any means to facilitate communication for deaf prisoners such as visual pagers.

### **JURISDICTION AND VENUE**

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States.

7. Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1391(e) because the Defendant Samuels resides in this district, and a substantial part of the policy decisions giving rise to Mr. Berke’s claims occurred at BOP headquarters, which is located in this district.

### **THE PARTIES**

#### **A. Plaintiff**

8. Larry Berke must “surrender himself for service” of his criminal sentence on August 23, 2012. The BOP intends to incarcerate Mr. Berke at the ADX Camp on this date.

9. Mr. Berke has been deaf since birth. He is considered “Profoundly Deaf,” and while he can hear some sounds, he is unable to understand speech, and cannot hear or understand speech on a telephone.

10. Mr. Berke is the son of deaf parents, has one deaf brother, many deaf cousins and extended family members, is married to a deaf woman, and has two grown children who are

deaf. His three youngest children (ages 10, 8, and 4) are hearing, but fluent in American Sign Language. Mr. Berke's two youngest children are not yet able to read or write fluently, and therefore their only effective form of communication with their father is sign language.

11. Mr. Berke's native language is American Sign Language, a complex language that employs signs made with hands, facial expressions, and body language. ASL is not a mere translation of ASL signs to English words; it is a distinct language with distinct vocabulary, syntax, and grammar. Mr. Berke requires a qualified ASL interpreter to communicate effectively with persons who do not know and use ASL.

12. Mr. Berke does not read lips. In general, lip reading is a very difficult and unreliable form of communication. It is extremely challenging to lip-read English because only a small fraction of the sounds used in speaking are clearly visible on the mouth and many sounds appear identical on the lips. In addition to the difficulties in lip-reading, the ability to accurately lip-read is greatly affected by the speaker's accent, facial bone structure, facial musculature, facial hair, lighting, distance from the lip reader, and other external factors.

13. Mr. Berke uses videophones to communicate with friends and family around the country, including his deaf adult children, brother, and several cousins. He uses video relay service with hearing friends and acquaintances.<sup>2</sup> None of his friends or family own older telecommunication equipment, such as the generally outmoded telecommunication devices for the deaf (TTY's); all use videophones.

## **B. Defendants**

14. The BOP is the federal executive agency responsible for the management and regulation of all federal penal and correctional institutions. 18 U.S.C. § 303(a)(1). The BOP is

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<sup>2</sup> The Video Relay Service ("VRS"), is a toll-free service for deaf users that uses a videophone between an ASL user and a hearing, non-ASL user through a relay operator who is a qualified ASL interpreter.

headquartered in Washington, D.C. The ADX Camp, where Mr. Berke will serve his sentence, is a correctional facility controlled and operated by the BOP.

15. Charles E. Samuels, Jr. ("Director Samuels") is the Director of the Federal Bureau of Prisons. Director Samuels is responsible for the oversight and management of the BOP's 115 institutions and for the safety and security of the more than 200,000 inmates and detainees under the agency's jurisdiction. He is responsible for the BOP's policies and practices regarding the treatment of and services provided to disabled inmates. Director Samuels is aware of the BOP's and the ADX Camp's policies and practices regarding disabled individuals and, more specifically, the BOP's inability or unwillingness to provide Mr. Berke with effective communication in the form of qualified interpreters and other auxiliary aids. He is sued in his official capacity.

16. At all times relevant to this action, Director Samuels acted pursuant to his authority as an official, agent, or employee of the United States.

#### **STATEMENT OF FACTS**

17. Upon information and belief, the BOP has not prepared for Mr. Berke's needs and the ADX Camp has virtually no auxiliary aids to allow effective communication for deaf prisoners, including telephones useable by deaf inmates, visual alarms, or regular ASL interpreters.

18. Defendants are on notice of the needs and entitlements of deaf individuals in their care. Defendants Samuels and the BOP have been sued on at least two recent occasions for failure to provide interpreter services, videophones, and visual notifications to other prisoners and federal

detainees.<sup>3</sup> Decisions on installing technology, such as a dedicated DSL line for videophones, would be made at the Director level.

19. 28 C.F.R. 551.90 establishes that Bureau staff shall not discriminate against inmates on the basis of . . . disability. . . . This includes the making of administrative decisions and providing access to work, housing and programs. This regulation was published in 63Fed. Reg. 200 (Oct. 16, 1998) with remarks that, “The revised regulations make more clear the Bureau’s intent that *all staff* are responsible for ensuring that their actions are in compliance.”(emphasis added)

20. Mr. Berke has made his needs known to the BOP through video relay telephone calls to the ADX Camp, where he spoke with a Ms. Grisenti and a Ms. Barker in Camp Records. In addition, the court referenced his disability in the Judgment requesting the BOP to address his needs in the housing designation.

21. Defendants have not met their burden under 28 C.F.R. 39.160, to provide in writing why the request from Mr. Berke or his sentencing judge to “furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency,” would “fundamentally alter the program or activity or would result in undue financial and administrative burdens.” Under the CFR provision,

[t]he agency has the burden of proving that compliance with § 39.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and operation of the conducted 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 section would result in such an alteration or such burdens, the agency shall take any other action that would not

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<sup>3</sup> *Bryant v. U.S. Bureau of Prisons*, CV CAS 11-254 (C.D.Cal. Filed Jan.7, 2011); *Heyer et al v. U.S. Bureau of Prisons*, C.A. No. 5:11-cv-318(E.D.N.C. Filed June 20, 2011).

result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

28 C.F.R. § 39.160

**A. Medical Treatment and Rehabilitation**

22. Mr. Berke relies on sign language interpreters for effective communication for medical and health care services.

23. As a deaf individual reliant on American Sign Language for communication, Mr. Berke's arm and hand mobility is especially important to him. Mr. Berke has rotator cuff injuries in both shoulders, and has undergone rotator cuff surgery. He is currently undergoing physical therapy following surgery, which will need to continue into his incarceration. He also has Lateral Epicondylitis in both arms. He takes 800 milligrams of ibuprofen three times per day and uses a compression device on each forearm for the pain associated with the condition. Mr. Berke has been told by BOP employees that he will not be able to bring his compression devices or his own medications to the facility; rather, he will have to request to have these items issued or prescribed when he arrives.

24. In addition, Mr. Berke has other medical concerns, for which he will or may require medical attention during incarceration. Mr. Berke had surgery for prostate cancer in April 2012, and requires annual wellness check-ups. Mr. Berke also has a history of atypical seizures, for which he takes occasional medication. Mr. Berke wears glasses, which are exceptionally important to him as a deaf person so that he can rely upon visual cues and be observant of his surroundings.

25. Mr. Berke may need psychological counseling upon his arrival in the BOP. Mr. Berke's mother, his only remaining parent, passed away in May, 2012. In addition to the sense of loss he is feeling about her, Mr. Berke anticipates that the isolation of not being able to communicate or

interact with others during incarceration will require him to seek some psychological services in the BOP.

26. Defendants do not provide qualified ASL interpreters to effectively communicate with deaf prisoners in their custody during medical appointments, including the initial medical intake, psychiatric, ophthalmology, and other health related appointments. The ADX Camp has established no means to provide effective communication for Mr. Berke at these appointments.

### **B. Interpretive Services for Ordinary Prison Proceedings**

#### **Orientation**

27. Deaf prisoners are not provided interpreters for the registration and orientation programs upon their arrival to the BOP's custody, nor are they provided interpreters for periodic "Town Hall" or other meetings which cover rules and additional matters. As a result, Mr. Berke is at a significant disadvantage to understand and thus know how to follow the rules and regulations at the ADX Camp.

28. All prisoners entering a new facility of the BOP are provided with an "Admissions & Orientation" ("A&O") handbook outlining the rules of the facility. While Mr. Berke is able to read the handbook, because of his inability to communicate questions about the meaning of rules, many of them are rendered meaningless. For example, the disciplinary policy of the BOP lists a 307 level violation of refusing an order of any staff member carrying sanctions as severe as disciplinary segregation and loss of good time. Further clarification of these facility rules, like many others, requires the ability to communicate effectively with a facility authority.

29. Defendants are aware that the A&O handbook, on its own, is insufficient to orient incoming prisoners to the rules and procedures of ADX Camp. The handbook is just one part of



a larger Admissions and Orientation program that conveys complementary information. Without interpretive services for this orientation, Mr. Berke is at a significant disadvantage compared with hearing prisoners. Defendants' failure to provide interpretive services during orientation will set up Mr. Berke to unknowingly violate facility rules for the simple reason that there is no mechanism for him to learn them in the first place. Violation of facility rules often leads to disciplinary proceedings.

### **Disciplinary Proceedings**

30. Deaf prisoners are not provided with interpretive services at disciplinary proceedings in most facilities of the BOP. Without interpretive services, Mr. Berke will not be able to effectively respond to questioning from the disciplinary board or otherwise communicate his defense to charges. As a result of disciplinary proceedings, prisoners' privileges, including telephone, commissary, and recreation privileges may be taken away for periods of time. As a result of disciplinary proceedings, prisoners are often placed in disciplinary segregation.

### **Unit Team Meetings**

31. Deaf prisoners are not provided interpreters for Unit Team meetings at facilities of the BOP. Defendants' failure to provide interpreter services for unit team meetings at the ADX Camp will make meaningful participation in those meetings impossible for Mr. Berke. Team meetings are held within the first thirty days of incarceration in the facility, and thereafter every six months. Upon information and belief, the Unit Team meetings are used to discuss the prisoner's release preparation, inmate job, education, and similar issues.

### **Religious Programs**

32. Deaf prisoners are not provided interpreters for religious programs at facilities of the BOP. Mr. Berke is a practicing Catholic. He attends religious services, on average, once per month when interpreters are available at his community parish. Defendants' failure to provide interpreter services for religious services at the ADX Camp will make meaningful participation in those services impossible for Mr. Berke.

### **Employment**

33. Deaf prisoners are not provided interpreters for employment programs at facilities of the BOP. Defendants' failure to provide interpreter services for employment at the ADX Camp will negatively impact Mr. Berke's ability to successfully participate in his work by limiting his ability to communicate with his supervisors and co-workers. Upon information and belief, all prisoners at the Camp are assigned an inmate job.

### **Education**

34. Deaf prisoners are not provided interpreters for educational programs at facilities of the BOP. Defendants' failure to provide interpreter services for educational courses at the ADX Camp will make meaningful participation in those courses impossible for Mr. Berke. His participation will be limited because he will not be able to ask the course assistant any questions, to hear questions of the other students, to hear answers of the instructor, or to hear or participate in any classroom discussion.

### **C. Communication With Those Outside The ADX Camp**

35. Prisoners in BOP facilities are permitted access to telephones, per BOP Policy 5264.08.

36. Like other inmates, Mr. Berke wants to communicate by telephone with his attorneys, family, and friends while in the custody of the BOP. The BOP, however, either substantially

restricts or completely denies access to appropriate telecommunications devices for deaf prisoners in its facilities, including at the ADX Camp.

37. Mr. Berke cannot use a telephone in the same way as a hearing person. He requires a videophone to ensure effective communication.

38. A videophone is a telephone with a camera and screen for visual communication. It allows ASL speakers to sign with each other between camera screens and have real-time conversations. Communication can also be accomplished by videophone between an ASL user and a hearing, non-ASL user through a relay operator who is a qualified ASL interpreter. This process, called Video Relay Service (“VRS”), is toll free for deaf users.

39. A videophone is the most effective telecommunications auxiliary aid for deaf individuals like Mr. Berke who use ASL as a primary means of communication. It is far superior to communication through older technology such as TTYs<sup>4</sup>, both because it depends upon ASL skills instead of written skills for communication, and because without a videophone there is no way to contact most deaf individuals outside the institution who no longer own the older technology, including most of the members of Mr. Berke’s family. In particular, Mr. Berke would not be able to communicate with his younger children without a videophone as they are not able to write to him. Moreover, one cannot place a call to a videophone (his family’s exclusive telephone system) through a TTY.

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<sup>4</sup> A TTY is a sixty-year-old technology that allows people to send written messages back and forth to each other by telephone. When both users have this equipment, they can communicate directly over telephone lines. When a hearing person does not have a TTY, a Telecommunications Relay Service (“TRS”) operator reads aloud the written messages from the TTY user and transcribes the non-TTY user’s verbal response. The TTY ultimately is a much more time-intensive and less effective communication tool than the telephone. As a result, this old technology has been for the most part supplanted by the videophone. Most deaf individuals no longer have TTYs, and communicate on telephone solely by videophone. A TTY cannot be used to communicate with a deaf person who does not have a TTY. Most members of Mr. Berke’s family, many of whom are deaf, no longer own TTY’s.

40. Regular access to a videophone with relay capability would allow Mr. Berke to remain in contact with his deaf and hearing family, friends, and attorneys outside the institution.

**D. Other Necessary Auxiliary Aids to Allow Effective Communication**

41. Upon information and belief, the ADX Camp does not provide visual safety alarms (beyond fire), or any means to facilitate communication for deaf prisoners such as visual pagers, or other auxiliary aids such as vibrating alarm clocks, pagers, vibrating bed devices or message boards to accommodate the deaf. Mr. Berke would not hear a safety alarm or other announcement. He was informed by the BOP that he will not be permitted to bring his own vibrating alarm clock to the Camp.

42. Upon information and belief, ADX Camp has no mechanism to alert Mr. Berke to announcements made over the public address speaker system, such as meal announcements, count calls, or meetings. A vibrating pager and/or visual paging system would allow Mr. Berke to receive these messages.

43. Additionally, vibrating watches and vibrating bed devices would provide non-aural alarm notifications and permit Mr. Berke to timely attend scheduled activities at the ADX Camp. The Defendants do not provide these devices to those in their custody.

**CLAIMS FOR RELIEF**

**COUNT I: DISCRIMINATION ON THE BASIS OF A DISABILITY  
IN VIOLATION OF THE REHABILITATION ACT AGAINST MR.  
BERKE (29 U.S.C. §§ 794 ET SEQ. AND 5 U.S.C. § 703)**

44. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

45. The Rehabilitation Act of 1973, 29 U.S.C. §§ 794 *et seq.* (hereinafter “Rehabilitation Act”), provides that “[n]o otherwise qualified individual with a disability in the United States, as

defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”

46. Mr. Berke is deaf and, as such, is a qualified individual with a disability within the meaning of the Rehabilitation Act, 29 U.S.C. § 705(20).

47. Mr. Berke is otherwise qualified to receive informed medical treatment and communicate with medical providers on an equal basis with other prisoners in the BOP, and is eligible to participate in commensurate educational, religious, rehabilitation, vocational, telephone, and all other programs and services provided to others at that facility.

48. The BOP is an executive agency within the meaning of 29 U.S.C. § 794(a).

49. The operations of the BOP, including the departments, agencies, programs and instrumentalities at the ADX Camp such as Health Services, Psychology Services, the Education Department and its associated programs, Vocational and Occupational Training programs, Inmate Skills Development Initiative, and work programs such as Federal Prison Industries, are “program[s] or activit[ies] conducted by an Executive Agency” within the meaning of 29 U.S.C. §§ 794(a).

50. At all times relevant to this action, the Rehabilitation Act was and remains in full force and effect in the United States, and Mr. Berke has a right to not be subjected to discrimination on the basis of his disability by Defendants. 29 U.S.C. § 794(a).

51. The purpose of the Rehabilitation Act is to ensure that no “qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . . .” 29 U.S.C. § 794(a).

52. The Department of Justice’s regulations implementing the Rehabilitation Act recognize that activities of its agencies are programs or activities conducted by an Executive Agency of the United States government, and that “the agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.” 28 C.F.R. § 39.160(a)(1) (emphasis added).

53. Auxiliary aids include but are not limited to interpreters and telecommunication devices for deaf persons. 28 C.F.R. § 39.103.

54. The Department of Justice’s regulations implementing the Rehabilitation Act additionally mandate that “[i]n determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.” 28 C.F.R. § 39.160(a)(1)(i).

55. Defendants’ placement of Mr. Berke at the ADX Camp will discriminatorily impair his ability to communicate effectively with: medical staff and healthcare providers, including physicians; educational and vocational instructors and his fellow students; work program managers, coordinators, and his fellow employees; correctional officers; and other members of the institution staff. Furthermore, this placement will exclude Mr. Berke from religious, educational and vocational programs, telephone services, and institution-wide alarms and announcements. Defendants have done this by maintaining institutions without appropriate auxiliary aids, in violation of the Rehabilitation Act.

56. Defendants’ failure to maintain an institution with qualified interpreters and appropriate auxiliary aids – in effect to ensure the availability of an effective means of communication for

deaf prisoners so Mr. Berke can be placed there – will deny Mr. Berke, on the basis of his deafness, the same access to Defendants’ services, benefits, activities, programs, and privileges as is afforded to hearing individuals.

57. The failure to provide qualified interpreters and appropriate auxiliary aids and services to ensure an effective means of communication, and the failure to provide comparable access to services, benefits, activities, programs, and privileges, are policies, regular practices and/or customs of Defendants. These failures currently exist and will continue when Mr. Berke reports for his sentence without the relief requested herein.

58. Defendants failure to provide qualified ASL interpreters and other reasonable auxiliary aids for the deaf, will result in Mr. Berke being:

- unable to communicate effectively with healthcare providers, raise medical issues, understand the treatments and medications they prescribe, or discuss mental health problems;
- excluded from participating in the same religious, educational, vocational, and rehabilitation classes and work programs as hearing detainees;
- deprived of knowledge of institution-wide safety or emergency announcements;
- deprived of knowledge of institution counts, meals and other important daily activities;
- unable to communicate effectively with correctional officers and staff members;
- subject to disciplinary action stemming from Defendants’ refusal to provide auxiliary aids to allow effective communication;
- deprived of meaningful participation in disciplinary proceedings;
- prevented from obtaining consistent access to new hearing aid batteries;
- prevented from obtaining consistent access to closed-captioned televisions; and
- prevented from communicating equally and effectively with family, friends, and their counsel by telephone.

59. As a proximate result of Defendants' violations of the Rehabilitation Act, Mr. Berke will suffer discrimination, unequal treatment, exclusion (including exclusion from Defendants' services, benefits, activities, programs, and privileges), financial loss, loss of dignity, frustration, humiliation, emotional pain and suffering, anxiety, trauma, embarrassment, unnecessary loss of rights and privileges, including unnecessary disciplinary measures, and serious injury to his health and mental health, including the injuries specified herein.

60. Defendants' failure to comply with the Rehabilitation Act has created an atmosphere that will result in harm to Mr. Berke, as he will be in the custody or supervision of the BOP and will seek to use the services, benefits, activities, programs and privileges provided by Defendants and to which he is entitled. This harm will occur unless and until Defendants are ordered by this Court to modify their policies, practices and procedures as demanded by the Rehabilitation Act.

**COUNT II: VIOLATION OF THE CONSTITUTION OF THE  
UNITED STATES – DUE PROCESS AGAINST MR. BERKE  
(FIFTH AMENDMENT – RIGHT TO QUALIFIED INTERPRETER  
AT DISCIPLINARY HEARINGS)**

61. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

62. Under the Fifth Amendment of the Constitution of the United States, “[n]o person ... shall ... be deprived of life, liberty, or property, without due process of law.”

63. The Fifth Amendment guarantees Mr. Berke notice and a meaningful opportunity to be heard in connection with institution disciplinary proceedings.

64. In addition to failing to adequately inform deaf prisoners of the applicable rules when first entering the BOP's custody, in effect setting deaf prisoners up to break them, Defendants maintain an institution that does not provide deaf prisoners qualified sign language interpreters for disciplinary hearings stemming from their alleged violation of those rules. Defendants then



impose various punishments based on determinations that such rules were violated. Defendants' refusal to provide qualified interpreters at these hearings will deprive Mr. Berke notice and a meaningful opportunity to be heard in connection with his disciplinary proceedings, a particularly unfortunate deprivation considering the likelihood that violations of the rules are inadvertent and directly linked to Defendants' own failure to explain them.

65. Defendants' failure to comply with the Fifth Amendment will result in harm to Mr. Berke unless and until Defendants are ordered by this Court to modify their policies, practices and procedures pursuant to the Fifth Amendment.

**COUNT III: VIOLATION OF THE CONSTITUTION OF THE  
UNITED STATES – CRUEL AND UNUSUAL PUNISHMENT  
AGAINST MR. BERKE (EIGHTH AMENDMENT – RIGHT TO  
ADEQUATE MEDICAL TREATMENT)**

66. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

67. Under the Eighth Amendment to the Constitution of the United States, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

68. The Eighth Amendment guarantees Mr. Berke a right to reasonably adequate medical care and treatment, including the right to be seen by a person competent to examine the patient, and make diagnoses, treatments, and referrals.

69. Competent medical diagnoses require that the practitioner amass information about the patient. Competent information gathering includes questioning, discussion, and communication between the patient or patient's representative and practitioner in a language comfortable to the parties. There are no adequate means to ensure effective communication for Mr. Berke with medical personnel at the ADX Camp.

70. Treatment under certain mental health services – including group therapy and other talk therapies – are largely or entirely based on conversations between the patient and practitioner.

71. At the ADX Camp, Defendants maintain a facility that denies deaf prisoners an effective means of communication. Defendants have not established means to acquire the services of qualified ASL interpreters, which are necessary to allow Mr. Berke to understand and communicate with medical staff and healthcare providers. Without these auxiliary aids, Mr. Berke will be unable to participate in questioning regarding medical diagnoses or derive any benefit from certain mental health services to which he will be subjected by Defendants and their employees.

72. Defendants are aware of Mr. Berke’s disability and need for interpretive services to converse with medical practitioners.

73. By maintaining the facility where Mr. Berke will be placed in such a way that will deprive him of a qualified interpreter during medical and mental health treatment, Defendants have acted with deliberate indifference to Mr. Berke’s needs.

74. Defendants’ failure to comply with the Eighth Amendment will result in harm to Mr. Berke unless and until Defendants are ordered by this Court to modify their policies, practices, and procedures pursuant to the Eighth Amendment.

**COUNT IV: VIOLATION OF THE CONSTITUTION OF THE  
UNITED STATES – CRUEL AND UNUSUAL PUNISHMENT  
AGAINST MR. BERKE (EIGHTH AMENDMENT – INFORMED  
CONSENT TO MEDICAL TREATMENT)**

75. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

76. Under the Eighth Amendment to the Constitution of the United States, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

77. Defendants are required to provide reasonably adequate medical treatment to those under their custody. Adequate medical treatment includes the Eighth Amendment guarantee of the right to be free from unwanted medical treatment, including the right to be treated only with one's informed consent.

78. At the ADX Camp, Defendants maintain a facility that denies deaf prisoners an effective means of communication. Defendants have not established means to acquire services of qualified ASL interpreters, which are necessary to allow Mr. Berke to understand and communicate with medical staff and healthcare providers. Without these auxiliary aids, Mr. Berke will be unable to understand, and thus give his informed consent to, any and all medical treatment to which he will be subjected by Defendants and their employees.

79. Defendants are aware of plaintiffs' disability and need for a qualified interpreter at medical treatments.

80. By maintaining the facility where Mr. Berke will be placed in such a way that will deprive him of a qualified interpreter during medical treatment, Defendants have acted with deliberate indifference to Mr. Berke's needs.

81. Defendants' failure to comply with the Eighth Amendment will result in harm to Mr. Berke unless and until Defendants are ordered by this Court to modify their policies, practices and procedures pursuant to the Eighth Amendment.

**COUNT V: VIOLATION OF THE CONSTITUTION OF THE  
UNITED STATES – CRUEL AND UNUSUAL PUNISHMENT  
AGAINST MR. BERKE (EIGHTH AMENDMENT – RIGHT TO  
PRIVACY IN MEDICAL TREATMENT)**

82. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

83. Under the Eighth Amendment to the Constitution of the United States, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

84. The Eighth Amendment guarantees Mr. Berke a constitutional right to privacy in medical treatment. Defendants’ practice of using other prisoners or detainees as interpreters for deaf individuals under BOP custody during medical and mental health appointments violates the constitutional right to privacy in medical treatment. Such prisoner or detainee interpreters have no obligation to keep confidential any information communicated during medical or mental health appointments. Moreover, this breach of privacy rights is especially problematic in the institutional setting where a prisoner’s or detainee’s possession of confidential information about another prisoner or detainee can be used in threatening and dangerous ways.

85. Defendants are aware of Mr. Berke’s disability and need for a qualified interpreter at medical treatments who will be obligated to keep this medical information confidential.

86. By maintaining the facility where Mr. Berke will be placed in such a way that will deprive him of a qualified interpreter during medical treatment, Defendants have acted with deliberate indifference to Mr. Berke’s needs.

87. Defendants’ failure to comply with the Eighth Amendment will result in harm to Mr. Berke unless and until Defendants are ordered by this Court to modify their policies, practices, and procedures pursuant to the Eighth Amendment.

**COUNT VI: VIOLATION OF THE CONSTITUTION OF THE  
UNITED STATES CRUEL AND UNUSUAL PUNISHMENT  
AGAINST MR. BERKE (EIGHTH AMENDMENT – RIGHT TO A  
REASONABLY SAFE ENVIRONMENT)**

88. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

89. Under the Eighth Amendment to the Constitution of the United States, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

90. The Eighth Amendment guarantees Mr. Berke the right to a reasonably safe living environment.

91. Defendants have failed to equip BOP facilities, including the ADX Camp, with adequate visual alarms, pagers, or message boards that would alert Mr. Berke to an emergency, such as a fire or lockdown. This failure violates Mr. Berke’s right to a reasonably safe living environment.

92. Defendants are aware of Mr. Berke’s disability and need for a these emergency alerts.

93. By maintaining the facility where Mr. Berke will be placed in such a way that will deprive Mr. Berke of these emergency alerts, Defendants acted with deliberate indifference to his rights.

94. Defendants’ failure to comply with the Eighth Amendment poses an unreasonable risk of future harm to Mr. Berke and will continue to do so throughout his term of imprisonment unless and until Defendants are ordered by this Court to modify their policies, practices, and procedures pursuant to the Eighth Amendment.

**COUNT VII: VIOLATION OF THE CONSTITUTION OF THE  
UNITED STATES FREEDOM OF SPEECH AGAINST MR. BERKE  
(FIRST AMENDMENT)**

95. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

96. At the ADX Camp, Defendants maintain an institution that will impermissibly deprive Mr. Berke of his First Amendment rights of freedom of speech by failing to provide him with telecommunication equipment necessary for him to communicate with family and friends outside of the ADX Camp.

97. Hearing inmates at the ADX Camp have telecommunication equipment that allows communication with people outside of the ADX Camp.

98. Defendants' refusal to provide the necessary telecommunication equipment to ensure that Mr. Berke has the same level of telephone access as hearing prisoners serves no legitimate or compelling need and is not rationally related or narrowly tailored to any identified penological or rehabilitative need.

99. Because Mr. Berke will be housed in an area far from his family and friends, telecommunication equipment is critical to his exercise of his First Amendment right to communicate with friends and family.

100. Provision of appropriate telecommunication equipment to Mr. Berke will have negligible effects, if any, on other inmates, detainees, and prison employees at FCI Butner.

101. Defendants' failure to comply with the First Amendment of the United States Constitution will result in harm to Mr. Berke, unless and until they are ordered by this Court to modify their policies, practices and procedures.

**PRAYER FOR RELIEF**

WHEREFORE, Mr. Berke respectfully request:

A. The Court adjudge and decree that Defendants, by the organizations, systems, policies, practices, and conditions described above, have violated and continue to violate Section 794 of the Rehabilitation Act and the Constitution of the United States;

B. The Court enter such injunctive and/or declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure against Defendants and in favor of Mr. Berke as it deems appropriate to remedy violations of the laws of the United

States and to prevent future violations of the same, including by ordering Defendants to make available at the ADX Camp in preparation for Mr. Berke's incarceration:

- qualified ASL interpreters to enable Mr. Berke to communicate effectively with medical and mental healthcare professionals, institution staff, educational and vocational instructors, religious clergy, work program managers and coordinators, and disciplinary officers;
- non-aural notification of emergencies or other important events and announcements, *e.g.*, a vibrating pager, visual alarms, vibrating watch, vibrating bed device, and/or message boards;
- equal and full access to appropriate and effective telecommunication devices for the deaf, including full and equal access to a videophone; and

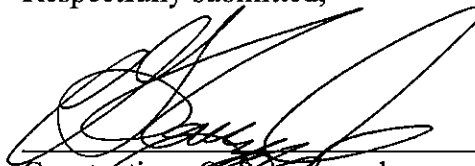
C. Judgment be entered against Defendants in favor of Mr. Berke for the costs of litigation, including reasonable attorneys' fees and costs under 28 U.S.C. § 2412(d)(1)(A).

D. The Court retain jurisdiction of this matter until Defendants demonstrate that they have fully complied with the orders of this Court, and that there is a reasonable assurance that Defendants will continue to comply in the future absent continuing jurisdiction; and

E. The Court award Mr. Berke any further relief that the Court deems appropriate, including additional attorneys' fees and costs.

Dated: August 14, 2012

Respectfully submitted,



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