

CHAPTER SIX

PEOPLE WHO ARE DEAF AND HARD OF HEARING

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[6.0] I. CONTEXT FOR THE LEGAL ISSUES

The deaf and hard of hearing community is diverse. While an attorney can be accessible to people who are deaf or hard of hearing through accommodations such as sign language interpreters and CART (computer-aided real time transcription), it is also important for the advocate to have some understanding of the implications of deafness. In particular, a review of the extensive literature written by and about deaf people¹ is beyond the scope of this chapter. However, those practitioners wishing to delve into the complex issues concerning advocacy for deaf individuals are encouraged to consult the special Spring 2011 issue of the *Valparaiso University Law Review* which is devoted to issues of concern to the Deaf Community.² Major issues and information are briefly highlighted in this chapter.

Deaf people constitute a unique community, sharing a distinct history as well as social clubs, newspapers, sports leagues, poetry and theater. For those people who identify as culturally deaf, the greatest bond, of course, is American Sign Language (ASL). ASL is a beautiful, visual and spatial language using not only hand shapes and movements but also facial expressions and body language. Wholly distinct from English, ASL is the native language of many deaf people in this country, though differences exist in ASL use.³

Linguists have confirmed that ASL, once dismissed by hearing people as simple gesturing, is a complete language with its own grammar, syntax and idioms. ASL is the subject of important research on the origins of human language and the development of cognitive functioning.⁴ As the result of advocacy by deaf organizations and parents of deaf children, ASL was recognized by the New York State Board of Regents in 1992⁵ and is being taught as a “second language” in some of the state’s high schools.⁶

Proud of their language and angered by discrimination and poor educational services, a significant portion of the Deaf community has been involved in a political movement for over a generation. The 1988 protests at Gallaudet University, which led to the appointment of its first deaf president, symbolize the consciousness of the Deaf community. Many deaf people see themselves as members of a linguistic and cultural minority group rather than as handicapped individuals. Hearing people can find this “deaf pride” perspective difficult to understand. For example, controversy still surrounds cochlear implants—electronic devices surgically placed near the brain, which, with auditory training, can provide partial hearing to some deaf individuals. While cochlear implants have been heralded as a major medical breakthrough, many deaf people see such implants as unnecessary, demeaning and dangerous.⁷ As discussed in cover stories of the *Atlantic Monthly*⁸ and *The New York Times Sunday Magazine*,⁹ such views challenge widespread beliefs about deafness and some basic assumptions about disability.

Although deaf pride has grown considerably over the past generation, deaf people face genuine obstacles in education, employment and daily life. Transcending such barriers requires reasonable accommodations or benefits such as social security insurance payments, which can be obtained only through the use of disability law. Advocates for deaf people are likely to view this tension between deafness as a disability and deafness as a culture in a variety of ways.

For example, deaf people have different preferences as to terminology. Some want to be referred to as deaf or people who are deaf, others prefer hard-of-hearing and some feel hearing-impaired is accurate and appropriate. Deaf mute, which suggests an inability to communicate, is viewed as inaccurate and offensive.¹⁰

Deaf people also vary a great deal in how they function. The impact of a hearing impairment depends on many factors, such as the specific loss (i.e., in terms of decibels and frequencies) and the usefulness of any residual hearing. A very important factor is the age of onset, with the greatest impact being on children deafened before learning spoken language, the prelingually deaf. Many deaf people find that hearing aids,

although helpful, do not eliminate deafness (which hearing people often assume). As to speech, the ability and the desire to speak varies greatly among deaf people.

Another area of misunderstanding is lip reading, also called speech reading. Some deaf individuals, usually people who have significant residual hearing or who were postlingually deafened, find lip reading very helpful. However, even in the most ideal circumstances (e.g., close proximity to the speaker, good lighting, no background noise), only a third of all sounds in spoken English are produced by distinguishable mouth movements.¹¹ For many people who become deaf before learning English, lip reading is of little utility.

For purposes of legal advocacy, accessibility for deaf people primarily involves ensuring the availability of qualified interpreters or other auxiliary aids and services. In order for a deaf person and a hearing person to communicate, a qualified interpreter is often needed by both. Since deaf people vary in sign language proficiency and some use oral communication methods, the interpreter must be able to identify and utilize the communication mode most appropriate for the individual. The Registry of Interpreters for the Deaf (RID)¹² and the National Council on Interpreting (NCI) have established competence standards, ethical principles and testing procedures, for the certification of sign language interpreters. Assistance in locating certified interpreters can often be obtained from RID, Centers for Independence and deaf organizations.

In New York, the need for qualified interpreters often goes unmet. A comprehensive national needs assessment was completed by the National Consortium of Interpreter Education Center to identify current and future needs for interpreter education programs. Results indicated that the number of interpreters available for deaf individuals has declined.¹³ As discussed in section V.A.4., *infra*, deaf people are frequently provided unqualified interpreters or no interpreters at all.

Aside from interpreters, note takers, CART services and video-based telecommunication devices provide effective methods of making aurally delivered materials accessible to deaf individuals. Another means of accessibility is a TTY (also known as a Telecommunications Device for the Deaf or TDD), a keyboard device which, when used by both parties, allows conversation to be typed back and forth over the telephone.¹⁴ The relay system has been established to enable people with and without TTYs to communicate indirectly, through specially trained operators.¹⁵ The New York Relay Service is a statewide service that connects standard (voice) telephone users with deaf, hard of hearing, and deaf-blind people who use text telephones (TTYs) or voice carryover phones (VCO) through specially trained operators. Text telephones, however, have been largely superseded by other modes of communication, including IP relay (internet relay services) and VRS (video relay services).

[6.1] II. PUBLIC SERVICES AND PUBLIC ACCOMMODATIONS

Although since 1925 courts have recognized the need for interpreters for deaf people accused of crime,¹⁶ the civil right to an interpreter was, until recently, quite limited. The regulations promulgated under the Vocational Rehabilitation Act of 1973¹⁷ articulated the right but, because of the Act's limited scope and enforcement, interpreters were rarely provided. The right was also recognized by a number of states, but with similarly little impact.

Given the focus on accessibility and the broad coverage of the Americans with Disabilities Act (ADA), the provision of interpreters and auxiliary aids and services for deaf individuals greatly increased. Like many mandates under the ADA and its regulations, however, the duty to provide the deaf with such auxiliary aids is prescribed quite generally.¹⁸ Achieving genuine communication accessibility continues to require vigorous advocacy.

[6.2] A. Health Care

Among the areas in which interpreters are most important is the provision of health care. Effective communication is critical for the caregiver to accurately diagnose illness and for the deaf patient to give informed consent and understand what is happening during treatment.

While there is no rule requiring that interpreters be furnished in every medical situation, the regulations adopted by the Justice Department mandate that interpreters be provided “where necessary to ensure effective communication.”¹⁹

“The type of auxiliary and service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length or complexity involved and the context in which the communication is taking place.”²⁰

[6.3] 1. Hospitals

There should be little dispute that the ADA requires the provision of auxiliary aids and services to hospital patients.²¹ The accommodations required will likely depend upon the complexity of the communication. For example, an individual who is deaf or hard of hearing may need a qualified interpreter to discuss with hospital personnel a diagnosis, procedures, tests, treatment options, surgery or prescribed medications. In comparison, in situations that do not involve substantial conversation an exchange of written notes to achieve effective communication may be appropriate.²²

New York Department of Health regulations specify that hospitals must provide an interpreter within 20 minutes of a request (within 10 minutes in emergency situations) at no charge to the patient.²³ Despite these mandates, interpreters are frequently not provided. For example in one New York case, a general hospital refused a request for an interpreter by a pregnant deaf patient. As a result, the woman was unable to communicate with caregivers about the risks and benefits of a cesarean delivery or to express her wishes. She filed a complaint with the New York City Commission on Human Rights and a settlement was reached, which required the hospital to institute mechanisms ensuring the availability of interpreters and to pay her \$35,000.²⁴

[6.4] 2. Doctors’ Offices

Even more widespread is the failure to provide interpreters in doctors’ offices. Some physicians may be unaware of the legal duty to ensure accessibility. However, a 1993 study reported in the *Journal of the American Medical Association* demonstrated that a majority of physicians know an interpreter is necessary to provide effective treatment to a deaf patient, but only a small minority actually provide interpreters.²⁵

In June 1994, the state attorney general filed a federal suit against the Mid-Hudson Medical Group, a 19-physician group practice, which refused to provide interpreters to deaf patients. The action, brought under the ADA and the Rehabilitation Act as well as the state human rights and civil rights laws, challenged the defendants’ policy that “notepad communication” is sufficient, and sought injunctive relief as well as compensatory and punitive damages.²⁶ The defendants filed a motion to dismiss, asserting, among other arguments, that the People of New York lacked standing to assert the rights of the deaf. In denying the motion, the court observed that “New York has unmistakably declared its interest in the nondiscriminatory treatment of its citizens,” and noted that “defendants’ alleged discrimination against its seven to ten deaf patients threatens all hearing impaired citizens and perhaps disabled citizens throughout [the state].”²⁷ Mid-Hudson’s assertion that “the Attorney General is ‘nothing more than an interloper’ ‘who has no business’ asserting an ADA claim” was flatly rejected.²⁸

The case was resolved on the eve of trial by a consent judgment. Defendants agreed to make individualized decisions about providing auxiliary aids to deaf patients and to view a request for an interpreter as a “significant factor” in making that decision. They also agreed to train staff about the consent judgment and about hearing impairments, to notify all current and future deaf patients about the consent judgment, to document all communications with deaf patients concerning auxiliary aids (as well as the decisions made), to inform the attorney general’s office of each request and decision concerning auxiliary aids for a period of two years and to pay the state of New York \$25,000.²⁹

The United States Department of Justice (DOJ) has also implemented and enforced regulations under titles II and III of the ADA to remedy the refusal of private health care providers to treat individuals with hearing impairments based upon that disability.³⁰ For example, in April 1996, the DOJ entered into a settlement agreement with a physician in Knoxville, Tennessee, following a claim that the physician had violated title III by refusing to accept an individual as a patient because she was deaf. The doctor agreed to (1) pay \$2,000 as compensation to the complaining party, (2) pay \$1,000 as a civil penalty to the DOJ, (3) “develop a written policy of nondiscrimination regarding treatment of patients with disabilities and specifically patients who are deaf,” and (4) train his employees to follow the nondiscrimination policy.³¹ Similarly, in April 1999, the DOJ entered into a settlement agreement with a doctor in Des Moines, Iowa, following a claim that the doctor had violated title III by refusing to accept a patient because she was deaf. The doctor agreed to adopt a nondiscrimination policy to ensure that his office would care for current or prospective hearing-impaired patients, train his employees with respect to that policy, and pay compensatory damages and a fine if he failed to abide by any of the agreed actions.³²

Under a federal consent decree approved by the Eastern District of Virginia on March 30, 2011, a Virginia hospital agreed to provide effective communication for patients and companions who are deaf or hard of hearing. The hospital also agreed to pay \$95,000 in compensatory damages to aggrieved individuals and a \$25,000 civil penalty to the United States.³³

The issue of who pays the cost of interpreter services is a major factor in determining whether the legal right to an interpreter has an impact upon actual practice. Although the state Department of Social Services (DSS) determined in 1985 that providers would be reimbursed for furnishing interpreters to Medicaid-eligible patients,³⁴ this policy was not well known. In addition, the responsibility of private health insurers for interpreter costs was not clearly mandated.

In 1996, the Public Health Law was amended to require health maintenance organizations (HMOs) to comply with the ADA and to “provide culturally and linguistically competent care” to meet the needs of the enrollee population.³⁵ When complaints were filed with the New York State Attorney General that Oxford Health Plan’s physicians and providers were not providing deaf patients with competent sign language interpreters, an investigation was initiated. On July 17, 1997, the Attorney General and Oxford executed a memorandum of understanding ensuring that interpreters would be provided and the costs covered.

Enforcement of the ADA by the DOJ and state Attorney General offices is having a significant impact on the development of ADA law and on the quality of health care deaf people receive. However, the timely provision of interpreters may also require the amendment of regulations (insurance, health, etc.) to include the interpreter fees as reimbursable costs. Commentators now advance another innovative proposal to cover interpreter costs is through a “pooled fund” or “communication access fund.” The theory behind the proposal is to place the responsibility of making doctors’ offices accessible on all members of the profession and to spread the costs among them so that no one member of the profession bears a larger proportion of the cost than others.³⁶

[6.5] 3. Mental Health Services

As important as communication is to medical care, it may be even more fundamental in mental health care, where diagnosis and treatment often rely exclusively on clinician-patient dialogue. Because psychiatric care is often provided by government agencies, the higher accommodation standards of title II of the ADA are frequently applicable.

In a 1994 federal case in Florida, deaf individuals receiving outpatient mental health care from a publicly funded clinic brought suit under the ADA to bar the layoffs of therapists who were fluent in sign language and knowledgeable about deaf culture. Facing budget problems, the clinic had planned to provide therapists without such skills, along with interpreters. In granting plaintiffs' request for a preliminary injunction, the court ruled that staff capable of direct communication with deaf clients were necessary to afford them "equal services," and that such staff must be provided when they are available.³⁷

Legislation was enacted in New York in 1994 requiring the Office of Mental Health and the Office of Mental Retardation and Developmental Disabilities (now The Office for People with Developmental Disabilities) to adopt regulations that address the communications needs of non-English-speaking individuals including those who are deaf or hard of hearing.³⁸ Under the uniform regulations promulgated by OMH and OPWDD, mental hygiene facilities must take reasonable steps to ensure that:

- (1) the overall quality and level of services are equal to that made available to all other persons or referrals;
- (2) necessary steps are taken to provide information in appropriate languages;
- (3) interpreters are provided in a timely manner when necessary for effective communication;
- and (4) parties serving as interpreters are sufficiently competent to ensure effective communication.³⁹

[6.6] B. Government Services

[6.7] 1. Local and State Agencies

By setting higher accessibility standards for government than for private business, the ADA acknowledges the importance of government participation and public benefits for people with disabilities.

The revised Justice Department regulations effective March 15, 2011 declare that government agencies must ensure that the deaf are afforded communication that is as effective as that which others enjoy.⁴⁰ While there is no rule specifying when an interpreter must be provided, the regulations state that "[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individuals with disabilities."⁴¹ If a deaf person's request for an interpreter is denied, the specific reason for the denial must be stated in writing by the agency director or designee.⁴²

The self-evaluation that state and local government agencies are required to conduct⁴³ should address the need for interpreters to serve the deaf citizens in their community, identify the qualified interpreters in the area and establish procedures to provide them when needed. The need for TTYs should be identified and met by every agency that provides substantial information over the telephone.

Although the regulations do not require that the interpreter be certified by RID, he or she must be *qualified*, which is defined as able to interpret "effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary."⁴⁴ The definition of a "qualified interpreter" now includes an interpreter who interprets via video remote interpreting (VRI) services or a on-site appearance. Qualified interpreters include, for example, sign language interpreters, oral transliterators and [cued] language transliterators.

As disputes are litigated, courts are likely to specify a wide range of circumstances in which government agencies must provide interpreters or take other actions. For example, deaf parents must be provided with an interpreter at school activities directly related to the education of their child, whether the child is hearing or deaf.⁴⁵ A deaf prison inmate is entitled to an interpreter at disciplinary hearings and counseling sessions.⁴⁶ When the city of New York was slow to make its 911 emergency response system accessible to TTY users, it was ordered by a federal court to stop delaying.⁴⁷

Efforts to reduce government budgets can also violate the ADA. When New York City sought to eliminate fire alarm boxes, a federal court granted an injunction barring their elimination because it would impede the ability of the deaf to obtain help in an emergency. The court found that the cost to the city of maintaining the boxes, although substantial, did not amount to an undue burden as defined in the ADA:

Congress intended the “undue burden” standard in title II to be significantly higher than the “readily achievable” standard in Title III. Thus, . . . the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs or activities of public entities in all but the most unusual cases.⁴⁸

[6.8] 2. Civil Courts and Agency Adjudications

New York law is clear that a certified interpreter must be provided without cost to deaf parties and witnesses in all New York civil court proceedings⁴⁹ and all adjudicatory proceedings before New York State agencies.⁵⁰ Despite the law’s clear mandate, serious problems exist.

For example, the competence of uncertified interpreters working in New York’s courts was challenged in a federal suit brought under the ADA.⁵¹ The Office of Court Administration entered into a stipulation of settlement in 1995, which provided for a variety of mechanisms intended to ensure that hired interpreters are able to meet the needs of deaf individuals. It included requirements that interpreters who lack RID certification be formally evaluated, and that those who are hired become certified within one year or be terminated.

As to serving on a jury in New York, a person cannot be excluded because he or she is deaf but must be provided with an interpreter.⁵² In federal proceedings, a deaf party or witness in a criminal or civil action initiated by the United States must be appointed a qualified interpreter.⁵³

[6.9] C. Stores, Businesses and Recreation

Everyday use of retail stores, professional offices, entertainment facilities and other businesses by deaf customers presents a broad range of communication issues. The ADA has begun to bring the need for accessibility to the attention of small business managers and corporate executives. Following are some examples of the law’s impact on the daily lives of deaf people.

In the settlement of an ADA suit brought by a single deaf customer, Burger King restaurants agreed to develop and install visual ordering systems and train staff to serve deaf individuals.⁵⁴ At the other end of the caloric spectrum, Weight Watchers settled the ADA claim of a deaf customer by agreeing to provide interpreters and install TTYs.⁵⁵ A federal lawsuit brought under the ADA against a movie chain was settled⁵⁶ with the defendants agreeing to install assistive listening devices⁵⁷ in each of their 17 theaters in the Washington, D.C., area. That said, one commentator recently observed that “for almost twenty years, due to an over-rigid regulatory interpretation of ambiguous legislative history, judicial skepticism toward the ADA, and undefined critical terms that essentially require extensive litigation against a well-funded industry, adversaries have combined to make accessible movies exceptional rather than routine.⁵⁸ Theaters offering live stage shows should offer interpreted performances, and many do.⁵⁹

If phone use is a significant factor in a public accommodation such as a hotel room, a TTY must be provided. Hotels and motels must also provide visual smoke alarms and television caption decoders (a device that displays the spoken portion of programs), and videos that have been closed-captioned.

All television sets 13 inches and larger sold in the United States after July 1, 1993, must include the inexpensive circuit that eliminates the need for a separate caption decoder.⁶⁰ In addition, and in 1996, Congress passed the Video Program Accessibility Act (VPAA) which is codified at 47 U.S.C. § 613. That Act required the Federal Communications Commission (FCC) to complete an inquiry to ascertain the level at which video programming is closed-captioned, and to prescribe regulations to ensure that video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of the regulations.⁶¹

On August 22, 1997, the FCC released its closed-captioning rules.⁶² The effective date of the rules was January 1, 1998. Captioning requirements for “new” programming (i.e., programming first published or exhibited after January 1, 1998) was phased in over eight years. At the end of the transition period and as of January 1, 2006, 100 percent of all new programming (that is not otherwise exempt) must be captioned. The rules provided for a 10-year transition period for “pre-rule” programming (programming first published or exhibited before January 1, 1998). As of January 1, 2008 and thereafter, 75 percent of “pre-rule” programming must be captioned at the end of 10 years.

All video-programming distributors—defined as all entities that provide video programming directly to a consumer’s home, regardless of the distribution technology—will be responsible for compliance with the closed-captioning rules. Exemptions from captioning obligations apply to several program categories, including programming other than English or Spanish, and late-night programming between the hours of 2 a.m. and 6 a.m., local time. There is no private right of action under the VPAA and the FCC regulations promulgated thereunder.⁶³ The FCC has exclusive jurisdiction with respect to any complaint under the act.⁶⁴ Emergency announcements must be open-captioned (no decoder needed).⁶⁵

[6.10] III. CRIMINAL PROSECUTION

The need for clear communication is nowhere more critical than when liberty is at stake, and few rights are more firmly established than those to the effective assistance of counsel and the opportunity to confront accusers. New York, like most other states,⁶⁶ has a statute that grants a deaf defendant the right to a qualified interpreter. However, a statutory right is often insufficient to protect the deaf defendant’s fundamental interests.

Under § 390 of the Judiciary Law, a criminal defendant who is deaf has a statutory right to a “qualified interpreter who is certified by a recognized national or New York state credentialing authority . . . to interpret the proceeding to, and the testimony of, such deaf person.”⁶⁷ However, § 390 also states that if providing a certified interpreter “would cause unreasonable delay in court proceedings, the court [can appoint someone who is] otherwise qualified.”

The determination as to whether an interpreter is necessary “lies within the sound discretion of the trial court, which is in the best position to make the fact sensitive inquires necessary to determine whether there exists a language barrier such that the failure to appoint an interpreter will deprive the defendant of his constitutional rights.”⁶⁸

As noted previously, there is no credentialing body for interpreters in New York and only a relatively small number of RID-certified interpreters in the state. Since Jud. Law § 390 authorizes the use of uncertified interpreters without defining what constitutes an “unreasonable delay” (or, more importantly, how a trial judge is to determine who is “otherwise qualified”), the rights of deaf defendants can be compromised.

The problem of unqualified interpreters in New York's courts was the subject of an ADA case settled in 1995, discussed at II.B.2., *supra*.⁶⁹ The breadth of the remedial steps required by the settlement⁷⁰ demonstrates the severity of the problem. Similarly, the problem in New York is illustrated by a case in which a criminal indictment was dismissed because an unqualified interpreter was provided to two grand jury witnesses who were deaf.⁷¹

Section 390 of the Jud. Law also fails to address the fact that the deaf vary enormously in terms of expressive abilities (i.e., sign language skills, speech clarity, writing skills and so on) and receptive skills (residual hearing, lip reading skills, reading ability and so on). Many people, including judges and attorneys, are unaware of these differences and make judgments about deaf persons' abilities without any basis. For example, in one case in Arizona an appellate court noted that a deaf defendant was "fairly adept at reading lips" in its decision upholding the trial court's acceptance of a deaf defendant's guilty plea.⁷² There was no indication as to how the court made this determination or whether it was aware of the research on the limited usefulness of lip reading.

For deaf defendants who lack sign language skills, computer programs that generate instantaneous transcription may provide accessibility. In *Adams v. State*,⁷³ a deaf man who had been convicted without receiving any communication assistance was exonerated in a retrial where he was provided with computer-assisted transcription (CAT). His attorney credited the acquittal to his client's ability to actively participate in the cross-examination of the victim.⁷⁴ However, the use of CAT requires good literacy skills, and the mean reading comprehension score of deaf 18-year-olds is the third-grade level.⁷⁵ In one case, a deaf defendant provided with simultaneous transcription was too embarrassed to admit his reading ability was very low.⁷⁶

There are also problems stemming from cultural issues, which the statutory right fails to address. For instance, a deaf person may nod her head to indicate that she is watching a speaker but not to indicate agreement with or understanding of what is being said. In one case, an appellate court noted that the arraignment judge "'looked the defendant in the face' as he spoke to him and wrote notes to him. The defendant 'nodded' when asked if he understood."⁷⁷

As to the scope of the right, Jud. Law § 390 provides that an interpreter be appointed to "interpret the proceeding to, and the testimony of" the deaf defendant, but it is silent as to attorney-client communication during trial preparation. No competent attorney can defend a client without discussing the facts, evidence, and trial strategy with the client.

Lastly, if the deaf defendant's entitlement to interpreting is simply a statutory right, the trial judge has broad discretion to balance the defendant's interests against the need for the economical administration of justice. For example, retired Supreme Court Justice Lewis Powell (sitting by designation on a federal court of appeals) upheld the conviction of a Spanish-speaking defendant who received summary translation from a noncertified interpreter. Though the federal Court Interpreters Act⁷⁸ requires simultaneous, verbatim translation, Justice Powell viewed such matters as within the broad discretion of the trial judge.⁷⁹

As one commentator has persuasively argued,⁸⁰ the deaf defendant's communication rights must be seen as constitutional rights if adequate protection is to be afforded—the guarantees to effective assistance of counsel, to confront witnesses, to understand the proceedings and to assist in the defense.

Recognizing the deaf defendant's communication right as constitutional ensures that he or she will be provided with whatever assistance is necessary. The assistance will be available for attorney-client communication during trial preparation as well as during the trial itself. It also ensures that a guilty plea or

waiver of any other constitutional right will be informed and voluntary. At the appellate level, the constitutional right ensures an appropriately strict standard of review and permits federal habeas corpus relief.

The constitutional right of a deaf defendant to sufficiently understand the proceedings to enable him to assist in his defense has been recognized by the U.S. Court of Appeals for the Fifth Circuit in *Ferrell v. Estelle*.⁸¹ There, the court directed a trial judge to explore every possible means to ensure that the defendant, who had recently lost his hearing and did not know ASL, could understand and participate in the proceedings.⁸²

Three New York trial courts have acknowledged a constitutional basis for a deaf defendant's communication right. In *People v. Rivera*,⁸³ the court found that inadequate interpreting had been provided to the defendant in each of two earlier prosecutions, one of which was out-of-state. The court then held that such interpreting had violated his rights to due process and assistance of counsel and, as a result, he could not be sentenced as a second felony offender in the case at bar.

In *People v. Doe*,⁸⁴ the court dismissed the charges "in the interests of justice" after a hearing-impaired defendant was convicted by a jury.⁸⁵ The defendant's hearing loss, unrecognized by her attorney but suspected by the probation officer responsible for the sentencing report, was determined in a formal audio-logical examination to be at least 8 percent. The court held that

[t]he fact that Josephine is able to hear a list of words given her in a controlled test setting does not mean she has the ability to hear testimony given in a narrative style at a trial. Even assuming that she was able to hear 92% of the trial, that percentage is not enough to satisfy due process. A defendant is entitled to hear 100% of the proceedings.⁸⁶

In *People v. Reets*,⁸⁷ the court dismissed charges "in the interests of justice" against a deaf defendant with very low communication skills and little prospect for improving those skills.⁸⁸ The court determined that the disability prevented the accused from assisting in his defense and his attorney from effectively representing him.

Communication issues also arise in the investigatory phase of the criminal process. Police must make every effort to provide interpreters to suspects, victims and witnesses.⁸⁹ In Wisconsin, an appellate court upheld a judgment for a deaf man who sued police under § 504 of the Rehabilitation Act. Although the officers knew the day before questioning and arresting the man that he was deaf, they refused his requests for an interpreter.⁹⁰ The jury awarded him \$68,000 in compensatory damages, \$90,000 in punitive damages and attorney fees.

Police must also scrupulously honor the Fifth and Sixth Amendment rights of deaf suspects. For example, one court held that when a defendant stated through an interpreter that he wanted a lawyer and would not answer any questions, the officer could not use momentary ambiguity in the interpreting interaction to justify further questioning.⁹¹

Although awareness about deafness is growing in the criminal justice system, fairness is not always demonstrated. In *State v. Rewolinski*,⁹² a deaf man convicted of murder challenged the admission into evidence of a TTY printout of a conversation he had with his girlfriend, who was later killed. The conversation occurred on a police station TTY he used to ask her for a ride home, after having been arrested for a motor vehicle violation. The TTY printout was seized by an officer as "sheriff's property" and introduced at trial on the premeditation element of the murder charge.

Upholding the conviction, the Wisconsin Supreme Court held that the defendant had no expectation of privacy when using police equipment and had options other than using the police TTY. As Judge Bablitch

noted in dissent, the defendant could not simply find a pay phone to use in private, as could a hearing person: “To say that Rewolinski ‘assumed the risk’ of having his conversations monitored when he had no reasonable alternatives, ignores reality.”⁹³ Judge Bablitch also challenged the majority’s analysis of the defendant’s expectation of privacy: “Unless the issue is framed to take into account the very different world that is the world without sound, the issue is erroneously framed.”⁹⁴

Commentators suggest that even though the right to an interpreter is widely recognized, courts are not adept at ascertaining whether any non-native English user—hearing or deaf—understands the proceedings or not.⁹⁵ In any case involving a deaf litigant or witness, some recommended guidelines include: (1) appointing a certified interpreter, (2) using a counsel-table interpreter to ensure adequate interpretation, and (3) video-taping the proceedings.⁹⁶

[6.11] IV. EMPLOYMENT DISCRIMINATION

The unemployment and underemployment that the deaf experience are due partly to deficiencies in educational services,⁹⁷ but also result from barriers that vigorous enforcement of the ADA can substantially eliminate.

Reasonable accommodations for a deaf person may mean that an employer needs to modify the communication methods used in testing and training, restructure job duties to eliminate telephone functions, permit telephone work to be done by TTY or relay, and/or provide interpreters for staff meetings and training programs. Refusal to take such actions can be motivated by bias, paternalism or indifference, and can be successfully challenged.

In a 1994 case, a deaf man whose lip-reading skills were excellent but whose speech was difficult to understand until the listener became accustomed to it, brought suit under the Rehabilitation Act against the Federal Deposit Insurance Corporation (FDIC) for failing to promote him. The judge in *Meisser v. Hove*⁹⁸ noted that

[T]he FDIC [failed to show] that it would be difficult to adjust plaintiff’s duties so that oral communication would be less important. . . . [A]t key moments the dominant attitude [at FDIC] appears to have been one of indifference or inaction. . . . [T]he agency as a whole has utterly failed in its duty to pay attention to plaintiff’s needs and to give thoughtful consideration to how they might be addressed.⁹⁹

The court ruled that the FDIC had violated section 501 of the Rehabilitation Act,¹⁰⁰ which imposes on federal government agencies an affirmative duty to be a model employer in accommodating disabled employees. The FDIC was ordered to promote the plaintiff, pay him \$54,000 in back pay, provide him with various training and pay his attorneys’ fees.

Managers’ attitudes also were the focus in *Davis v. Frank*.¹⁰¹ The plaintiff, a deaf employee of the United States Postal Service, brought suit under the Rehabilitation Act, challenging the Postal Service’s failure to promote her to a position for which she was qualified and had seniority. The court ruled that she could perform the essential functions of the position and found the defendants’ explanations for not promoting her “biased, evasive, inconsistent, and not [trustworthy]. . . . The elimination of this type of entrenched resistance to employment of the handicapped, which often results from ‘archaic attitudes’ and ‘remote concerns,’ is one of the remedial purposes of this litigation.”¹⁰² The court ordered the Postal Service to appoint the plaintiff to the position, make the “minimal and inexpensive accommodations” that were needed and pay her back salary as well as attorneys’ fees.

Discrimination against deaf people is sometimes misrepresented as risk management. In *Strathie v. Department of Transportation*,¹⁰³ an individual whose school bus driver's license was suspended because he wore a hearing aid brought suit under the Rehabilitation Act. The U.S. Court of Appeals for the Third Circuit found that the plaintiff could drive a school bus without appreciable risk to passenger safety, without modification of the essential nature of the bus driver licensing program and without undue burden to the defendants.

In 2000, the EEOC and the Arizona Center for Disability Law announced the settlement of a discrimination lawsuit against Wal-Mart Stores, Inc. Under the terms of the agreement, Wal-Mart Stores, Inc. agreed to pay \$132,500 to two deaf job applicants and to offer the applicants positions with Wal-Mart. Wal-Mart also agreed to make corporate-wide changes in the hiring and training of new employees who are deaf or hard of hearing.¹⁰⁴

An issue regarding discrimination against the deaf—one which also has implications for the education of deaf children—concerns the tests used by many states for teacher certification. An action was brought in Texas under state law challenging the written teacher qualification tests as discriminating against prelingually deaf individuals. The case was settled with Texas adopting a statutory amendment exempting deaf candidates from the written portion of the certification tests while the problem was reviewed.¹⁰⁵

Some instances of discrimination are astounding. In Louisiana, in 1995, for example, a deaf college student entering her senior year asked to substitute another course for the required music class. In her three semesters as an elementary education major, the student had a 3.1 grade point average and had passed the general knowledge and communication skills components of the National Teacher's Examination. Not only was course substitution denied, but the university dismissed her from the elementary education program, citing concerns about her abilities to articulate words correctly, teach phonics and recognize noises denoting safety hazards to students. Neither these concerns nor a reasonable accommodation had ever been evaluated by the university in any meaningful way. The college student brought a federal action under the Rehabilitation Act and the ADA and was awarded, after a jury verdict, \$181,000 in damages, \$161,000 in attorney fees, and \$20,000 in costs.¹⁰⁶

[6.12] V. THE RIGHT TO AN EDUCATION

[6.13] A. Elementary and Secondary Public Education

[6.14] 1. Complexity of the Problems

Since its enactment in 1975, the Education of All Handicapped Children Act, now the Individuals with Disabilities Education Act (IDEA),¹⁰⁷ has ended the exclusion of disabled children from public schools and established their right to an appropriate education. The implementation of the IDEA, however, has not produced solutions to many of the serious educational problems faced by deaf students. Although no longer misdiagnosed as mentally disabled,¹⁰⁸ deaf children continue to experience academic difficulties and poor achievement.

In the Supreme Court's well-known *Rowley* decision, the Court held that a deaf kindergarten student receiving special services that provided "educational benefit" was not entitled to an interpreter, even though she could understand "less than half of what was said in the classroom."¹⁰⁹ Whatever can be said about the *Rowley* analysis of the IDEA and its application to the evidence, the reality is that historically the mean reading comprehension score of 18-year-old deaf students had been demonstrated to be at the third-grade level.¹¹⁰

Students who do not master basic reading skills are simply not receiving the appropriate education promised by the IDEA. Even the Rowley Court recognized that “not . . . every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a ‘free, appropriate public education.’”¹¹¹ Without the ability to read, a deaf person faces huge barriers to meaningful employment and, thus, economic security. What is perhaps the most important right created by the ADA, that of reasonable accommodation in employment, is largely useless to someone who cannot read and whose overall education has been limited by illiteracy.

The question of how to educate deaf children involves complex and controversial issues. More than 90 percent of deaf children are born to hearing parents who, overwhelmed by the implications of raising a deaf child, must immediately choose a communication strategy. Quick action is needed in order not to miss the critical period for language acquisition and cognitive development. With a multitude of fears as to how their child will function in a hearing world, parents are thrust into a century-old debate about sign language.

In the late 1800s, ASL was banned from the residential schools that virtually all deaf children attended. The decision was made by hearing educators who decided that, since signing was far easier than speaking for deaf children, use of sign language would impede their learning to speak. Listening and speaking skills were the primary if not the sole focus of the “oral” method, which became dominant. Students often found the continuous lip reading and articulation drills to be tedious and frustrating. ASL, repressed in the classroom, flourished in the schools’ residences, halls and throughout the deaf community.

In the 1970s, deaf students’ lack of success with both speech and academic subjects, combined with growing respect for sign language, spawned the total communication (TC) method. Total communication encourages simultaneous speaking and signing, generally using one of a number of sign systems based on English (e.g., signed exact English, cued speech¹¹²) rather than ASL. While some deaf schools and programs still use the oral method and a small number of deaf children succeed with it, the majority of deaf educational programs use TC. Despite the TC methodology, however, educational achievement has remained low.

A controversial research monograph, published in 1989, argued that deaf students’ low academic achievement can be addressed only by first teaching them ASL and then teaching English and other subjects in ASL.¹¹³ This approach would require, among other things, extensive retraining of teachers of the deaf (since very few know ASL), parents learning ASL as quickly as possible¹¹⁴ and greatly expanding the educational role of deaf adults.

A number of schools for the deaf around the country implemented this approach in some grades during the early 1990s. In 1998, the New York City Schools Board of Education decided to implement the “instruction in ASL” approach in a revised K-12 program at Public School 47, the city’s only public school for the deaf.¹¹⁵

Communications systems are not the only controversy in deaf education. Parents must also make decisions about mainstreaming, which appears to have become the paramount goal of special education law. While segregating people because they are different is clearly invidious, providing specialized services when necessary cannot accurately be characterized as segregation. Disabilities vary widely in how they affect children’s educational needs. As one commentator has noted, special education law “by not distinguishing between types of handicaps produces different effects on different groups of children.”¹¹⁶ A child who uses a wheelchair, for example, can learn within a regular classroom in the same fashion as a typical child, once architectural barriers are removed.

Deafness, on the other hand, has implications that go to the heart of learning and creates needs that cannot be met by physical plant changes. Although hearing loss does not diminish intelligence, it drastically affects the transmission of information and the opportunity for interaction. As noted above, the vast majority of deaf children are born to hearing parents, which can have significant implications for language acquisition. Similarly, general education presumes the ability to speak, read and write English, all of which are predicated on hearing English spoken since birth. Moreover, the limitations in interaction between deaf and hearing children impacts emotional development and the acquisition of socialization skills. For these and many other reasons, a deaf student requires careful evaluation and specialized services if an appropriate education is to be provided.

The failure to provide deaf students with an adequate education had, as one court noted in 1988, “risen to the level of a national epidemic.”¹¹⁷ To a very large degree, and even to this day, deaf students lag behind their hearing peers in academic achievement.

[6.15] 2. Commission on Education of the Deaf Report (1988)

Congress enacted the Education of the Deaf Act of 1986.¹¹⁸ A Commission on the Education of the Deaf (COED) was appointed to study the situation. Its 144-page report to the president and Congress, “Toward Equality: Education of the Deaf” (COED Report), begins:

The present status of education of persons who are deaf in the United States is unsatisfactory. Unacceptably so. This is the primary and inescapable conclusion of the Commission. . . . Do we have at hand the knowledge it would take to improve the situation significantly, even dramatically? The answer is a resounding Yes.¹¹⁹

Among other issues addressed, the COED Report focused on the impact of mainstreaming on many deaf children. The COED Report notes that the regular school environment

which may be the *least* restrictive in terms of the integration of other handicapped and non-handicapped students becomes the *most* restrictive in terms of basic communication between deaf children and their hearing peers, setting the stage for drastic retardation in development of identity, social skills, and maturity . . . [and] may also impede the child’s ability to acquire and develop language, a factor which will limit his or her education permanently.¹²⁰

Parents, deaf consumers, and professional personnel of all persuasions have, with almost total unanimity, cited [mainstreaming] as the issue that most thwarts their attempts to provide an appropriate education for children who are deaf.¹²¹

The possible conflict between mainstreaming and the purpose of the IDEA has been discussed by the Supreme Court,¹²² a number of lower federal courts¹²³ and congressional sponsors of the law.¹²⁴ Needless to say, the objective of inclusion is completely understandable, as is the moral passion with which people embrace it.¹²⁵ The paramount objective of education, however, is the mastery of necessary skills and the realization of a child’s full potential.

[6.16] 3. Federal Policy on Deaf Education (1992)

In response to the COED Report and other criticisms, United States Secretary of Education Lamar Alexander issued “Deaf Students Education Services: Policy Guidance” in 1992.¹²⁶ Although the Supreme Court had assumed in *Rowley* that educators are able to choose the teaching method suited to a child’s needs, the Secretary of Education noted that “there is not widespread understanding of [the] educational

implications [of deafness], even among special educators. This lack of knowledge and skills in our education system contributes to the already substantial barriers to deaf students in receiving appropriate educational services.”¹²⁷

The Secretary of Education’s policy directly confronted the issue of inappropriate mainstreaming of deaf children:

The Secretary is concerned that the least restrictive environment provisions of the IDEA and Section 504 are being interpreted incorrectly . . . Any setting which does not meet the communication and related needs of a child who is deaf, and therefore does not allow for the provision of [a free, appropriate public education], cannot be considered the [least restrictive environment] for that child. . . . [A] center or special school may be the least restrictive environment in which the child’s unique needs can be met.¹²⁸

The policy specified the factors which must be assessed and addressed in a deaf student’s individualized education program (IEP):

1. Communication needs and the child’s and family’s preferred mode of communication
2. Severity of hearing loss and potential for using residual hearing
3. Academic level
4. Social, emotional and cultural needs, including opportunities for peer interaction and communication.

As noted in the policy, “curriculum content and method of curriculum delivery” may need to be considered (such as instruction in ASL, discussed in V.A.1., *supra*).

After the policy was published in 1992, meaningful changes occurred.¹²⁹ Several states have enacted a “bill of rights” for deaf and hard-of-hearing children. These laws recognize the student’s right to be educated by professionals fluent in his or her mode of communication, the right to placement in programs with peers with whom they can communicate and similar rights of great importance.¹³⁰

Significant changes also occurred under federal law. On June 4, 1997, President Clinton signed the bill re-authorizing the Individuals with Disabilities Education Act (IDEA).¹³¹ Under the IDEA, when preparing an IEP, the IEP team shall:

consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child’s language and communication needs, opportunities for direct communications with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child’s language and communication mode.¹³²

Thus, when re-authorizing the IDEA in 1997, Congress adopted the recommendations of the United States Department of Education in its 1992 Policy Guidance.¹³³

More generally, the focus of the IEPs for many deaf students began to shift from the student’s educational location to instructional services and skill mastery. Still, controversy continues to surround mainstreaming, with a host of competing perspectives. Some parents of disabled children insist on full inclusion, teachers’ unions are often resistant and administrators seek cost reductions. Among parents of deaf children, some demand revitalized deaf schools, while others want effective mainstreaming.

In response to these ongoing debates, the U.S. Department of Education issued a memorandum in 1994 discussing the least restrictive environment requirement.¹³⁴ While restating the strong legal and policy preference for mainstreaming, the document reiterates the requirement that school districts make a continuum of placements available and prohibits districts from adopting a “one size fits all” approach. The memorandum made clear that placement decisions may not be based on disability category, delivery system configuration, availability of educational services or administrative convenience.

Because deafness is a low-incidence disability and the provision of appropriate services can be relatively expensive, it is necessary to guard against IEP decisions based on the school district’s limited experience with deaf students or its need to minimize expenditures. When it comes to deaf children’s education, one size clearly does not fit all.

[6.17] 4. Qualified Interpreters and Other Issues in Mainstream Settings

For some students who are deaf, mainstreaming is clearly appropriate. For most such students, an interpreter is the virtual lifeline to all that occurs in the classroom, gym, cafeteria and school environs.¹³⁵ An interpreter must be provided not only during the school day but also for participation in sports and other extracurricular activities.¹³⁶

Given the student’s reliance on interpreting, it is critical that a person with adequate skills be provided. If either the material being explained by the teacher or the questions and answers of the other students are not interpreted with sufficient speed and accuracy, the deaf student learns only frustration. Sadly, this is often the case. The role is frequently assigned to a person with no interpreter training who may have taken only a single sign language course. The task of an interpreter, particularly in an educational setting, is extremely demanding, requiring specialized training and professional skills.

In 1985, the IDEA was amended to require that each state establish standards to ensure that personnel providing “related services” are “adequately prepared and trained.”¹³⁷ New York’s failure to adopt any interpreter standards was cited in 1989 by a hearing officer who denied a challenge to the interpreting provided by a teacher’s aide, who had taken two sign language courses five years earlier.¹³⁸

In large part as a result of parent advocacy, the New York State Education Department (NYSED) adopted interpreter guidelines in 1994.¹³⁹ In June 1997, the state Board of Regents followed by adopting a multistep plan to address the inadequate number of competent sign language interpreters in New York schools. The plan called for (NYSED) to establish a Coordination Center housed at the National Technical Institute for the Deaf (NTID). The Center was responsible for establishing four regional in-service training sites in 1997–98 to assess the skills of current interpreters and provide in-service training as needed.

The NYSED followed by awarding a five-year contract, 2003–2008, to NTID and Monroe #1 BOCES to enhance the work of the Coordination Center through the four in-service training sites and expanded post-secondary programs. The contract focused on ensuring programming for at least an AAS degree, with a concentration or a minor in Educational Interpreting. All of this work was intended to better support the professional development needs of interpreters employed in the education settings in New York State and to increase the number of qualified interpreters from post-secondary programs.

Deaf students are also entitled to consultant teachers note takers, tutors and speech therapists. Infringement of the right to such services occurs if one person is given incompatible roles—for example, interpreter and note taker. Regulations implementing IDEA also require that school districts must ensure that hearing aids worn to school by children with hearing impairments, are functioning properly as well as the external components of surgically implanted medical devices (cochlear implants).¹⁴⁰

In addition to such services, the student may need ASL instruction; such a right has been recognized in New York. In *Jennifer M.*,¹⁴¹ which focused on the adequacy of the interpreting provided, the hearing officer ruled that the school district must provide the student with an ASL instructor as part of her IEP. It is quite likely that the role of ASL in the education of deaf children will be argued in the future, both in policy debates and litigation. With the advent of cochlear implants however, the debate may also shift to an increased emphasis on oral education.

There are few definitive New York court decisions concerning deaf students. In one case, a federal court simply ordered a New York school district to fully implement a decision of the state commissioner of education, which required that a mainstreamed deaf student be provided with a full-time certified teacher of the deaf.¹⁴²

Court decisions and administrative rulings in other states have resulted in orders to provide a student with a teacher of the deaf to instruct that student in all academic subjects,¹⁴³ placement in a resource room program¹⁴⁴ and placement in a self-contained classroom.¹⁴⁵

In a 1994 decision, the U.S. Court of Appeals for the Eighth Circuit rejected a claim by the parents of three deaf students that the school's use of modified signed exact English was inappropriate because they used strict signed exact English at home.¹⁴⁶ In another federal case, a court entertained the plaintiff's ADA claim as well as the plaintiff's IDEA claim, but held that cued speech services need not be provided in a high school close to the plaintiff's home; rather, the school district could centralize the program in one location.¹⁴⁷

[6.18] 5. Deaf Schools and Related Issues

As the 1992 federal policy guidelines note: "Even the availability of interpreter services in the [mainstream] educational setting may not address deaf children's need for direct and meaningful communication with peers and teachers."¹⁴⁸

Language acquisition, learning and social/emotional development occurs for hearing children in a communication environment that is totally accessible. Immersion in the comparably hospitable environment provided by a deaf residential school is the appropriate placement for many deaf children who use sign language as their primary means of communication.

Deaf schools are an essential component of the continuum of services.¹⁴⁹ Given the distinct benefits of such an environment, neither official policy nor informal custom may legitimately require a child to "fail" in a mainstream program in order to be entitled to attend a deaf school. That said, the continued viability of deaf schools is questioned. In *Barron ex rel D.B. v. South Dakota Bd. of Regents*, the 8th Circuit Court of Appeals on September 9, 2011 held that the State Board of Regents did not violate the IDEA when it closed the state school for the deaf.¹⁵⁰

With the advent of mainstreaming, the quality of services at some deaf schools, it should be noted, has declined along with enrollment. The instructional personnel and programs at deaf schools must provide an educational environment that is just as challenging as that which the students attending regular schools are provided. There is a strong need to establish program standards for deaf schools to enable them to continue.¹⁵¹ In addition, as noted in the discussion at IV., supra, testing procedures that impede qualified deaf individuals from receiving teacher certification need to be changed.¹⁵²

School placement has been the subject of a fair amount of litigation. Court rulings have included placement in private deaf schools that use an ASL approach,¹⁵³ private deaf schools that use an oral approach¹⁵⁴ and placements in state schools for the deaf.¹⁵⁵ In cases decided by two federal courts of appeals,

school districts and state agency determinations that state schools for the deaf and the use of sign language were appropriate for the students were upheld, despite the parents' preferences for private schools using the oral method.¹⁵⁶

For some students, whether in mainstream or deaf school placements, a nine-month program is not sufficient to meet their educational objectives. Deaf students in New York who need a year-round structured learning environment to maintain developmental levels in language or other skills are entitled to summer programming.¹⁵⁷

[6.19] 6. Interplay of IDEA, ADA, and Section 504

In 2014, the U.S. Departments of Justice and Education issued a joint guidance document on meeting the communication needs of students with disabilities. The guidance observes that three federal statutes—IDEA, title II of the ADA, and Section 504 of the Rehabilitation Act—address the obligations of public schools to meet the communication needs of students with disabilities, including those who are deaf or hard of hearing, but do so in different ways. Public schools must comply with all three laws, and while compliance with one will often result in compliance with all, sometimes it will not.¹⁵⁸

Thus, a deaf student making sufficient educational progress under his or her IEP might still require word-for-word transcription (CART) as a title II accommodation in order to understand classroom discussion.¹⁵⁹

IDEA sets only a floor of access to education for deaf or hard of hearing students, but requires school districts to provide the individualized services necessary to get a child to that floor, regardless of costs, administrative burdens, or program alterations required. Title II and its implementing regulations, taken together, require public entities (including public schools) to take steps toward making existing services not just accessible but equally accessible to people with communication disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs.¹⁶⁰

[6.20] B. Post-Secondary Programs

In *Southwestern Community College v. Davis*,¹⁶¹ a well-known Supreme Court decision involving a deaf student who sought admission to a nurse's training program, the Court held that the Rehabilitation Act does not require post-secondary schools to accommodate people with disabilities if doing so would necessitate substantial program modifications or changing essential academic requirements. However, where such major modifications or changes are not required, a deaf student has the right to an interpreter and to such other auxiliary aids as are necessary to make the program accessible.¹⁶²

A number of courts have held that the academic institution must furnish interpreters to a deaf college or graduate student.¹⁶³ The U.S. Court of Appeals for the Eleventh Circuit ruled that a university's policy of providing sign language interpreters to deaf students on an "ability to pay" basis violated section 504 of the Rehabilitation Act.¹⁶⁴

Courts have also ruled that state vocational rehabilitation agencies must provide interpreters to deaf individuals eligible for services who enroll in educational or training programs.¹⁶⁵ In this line of cases, ironically, courts have held that adults receiving vocational services have greater educational rights under the Rehabilitation Act than the modest right to "educational benefit" that children have under the IDEA, as interpreted by the Supreme Court in *Rowley*.

For example, an Indiana appeals court held that the Rehabilitation Act required the state vocational agency to provide a deaf man with the services necessary for him to realize his full "capacities and abili-

ties.”¹⁶⁶ Similarly, a New York court has interpreted the Rehabilitation Act to require the provision of those services that can enable the person to reach his or her “highest achievable vocational goal.”¹⁶⁷

Services for deaf people that may be necessary might include note takers and transcripts, either in addition to or instead of interpreters. One federal district court enjoined the holding of law school classes unless transcripts of the lectures and class discussions were made available to a deaf student by the next day.¹⁶⁸

As to the ADA, the first case brought by the United States Department of Justice under title III was filed against the Becker Certified Public Accountant Review Course. Becker had offered only one type of auxiliary aid, written transcripts, to a deaf student who enrolled in a licensing exam preparation program. The case was settled with the defendant agreeing to establish a comprehensive program of services, including interpreters when necessary, to make the course accessible.¹⁶⁹

Shortly after Becker was settled, the Justice Department announced a similar settlement in a case against BAR/BRI, which offers state bar examination review courses.¹⁷⁰ As a result of these two settlements, it seems clear that if an individual has used an interpreter in prior educational settings, a professional preparation course must also provide one.

[6.21] VI. FUTURE DEVELOPMENTS

The representation of deaf people, like deafness itself, involves unique issues. Given factors such as the vibrancy of the deaf community, the reach of the ADA and the continuing problems in deaf education and employment opportunities, advocacy for deaf individuals the law can be expected to continue to evolve. The attorneys at the National Association of the Deaf Law and Advocacy Center continue to be an excellent resource for the latest developments from around the country.¹⁷¹

Notes

- 1 See, e.g., Carol Padden & Tom Humphries, *Deaf in America: Voices from a Culture* (1990); Leah H. Cohen, *Train Go Sorry: Inside a Deaf World* (1995); Harian Lane, *When the Mind Hears: A History of the Deaf* (1989); Oliver Sacks, *Seeing Voices: A Journey to the World of the Deaf* (2000); Jerome Schein, *At Home Among Strangers* (2003); Arden Neisser, *The Other Side of Silence* (1983); Harian Lane, *The Mask of Benevolence: Disabling the Deaf Community* (1992).
- 2 The Special issue of the *Valparaiso Law Review* “gives voice to the overarching themes of communication access, allocation of costs, enforcement of rights and remedies, education, and respect for Deaf culture and American Sign Language.” Michael A. Schwartz, *America’s Transformation: The Arc of Justice Bends Toward the Deaf Community*, 45 Val. U. L. Rev. 845, 822 (2011).
- 3 Some deaf people do not learn ASL or acquire only minimal ASL skills, generally because of the methodology used in their education (see *infra* Part V.A.1.) or because they lose their hearing as adults. ASL can also vary by region and race and is not used in other countries, as separate and distinct sign languages exist.
- 4 Richard Wolkomir, *American Sign Language: It’s Not Mouth Stuff-It’s Brain Stuff*, *Smithsonian Magazine*, July 1992, at 30; L. Petitto & P. Marentette, *Babbling in the Manual Mode: Evidence for the Ontogeny of Language*, *Science Magazine*, Mar. 1991, at 1493.
- 5 N.Y. Comp. Codes R. & Regs. tit. 8, § 100.1(i) (N.Y.C.R.R.).
- 6 Nancy K. Mellon et. al, *Should All Deaf Children Learn Sign Language?*, *Pediatrics*, Vol. 136, Issue 1 (July 2015), <http://pediatrics.aappublications.org/content/136/1/170>.
- 7 See Pat Hagan, *Falling on Deaf Ears*, *New Scientist*, Aug. 2004 at 36, Amy Elizabeth Brusky, Comment, *Making Decisions for Deaf Children Regarding Cochlear Implants: The Legal Ramifications of Recognizing Deafness as a Culture Rather Than a Disability*, 1995 Wis. L. Rev. 235. The bioethical issues in this regard are also being analyzed. See Alicia Ouellette, *Hearing the Deaf: Cochlear Implants, The Deaf Community, and Bioethical Analysis*, 45 Val. U. L. Rev., 247 (2011), Robert A. Crouch, *Letting the Deaf be Deaf: Reconsidering the Use of Cochlear Implants in Prelingually Deaf Children*, 27 *Hastings Ctr. Rep.* 14 (1997). As of 2012 and according to the Food and Drug Administration, the United States is home to approximately 96,000 children and adult implantees. National Institute on Deafness and Other Communication Disorders, *Cochlear Implants*, <https://www.nidcd.nih.gov/health/cochlear-implants>.
- 8 Edward Dolnick, *Deafness as Culture*, *The Atlantic Monthly*, Sept. 1993 at 37.
- 9 Andrew Solomon, *Defiantly Deaf*, *N.Y. Times*, Aug. 28, 1994.

- 10 National Association of the Deaf, Community & Culture: Frequently Asked Questions, <https://www.nad.org/about-us/faq>.
- 11 Elizabeth Eckhardt & Jeane Anastas: *Research Methods with Disabled Populations*, G.J. Soc Work in Disability and Rehab., 233, 241 (2007); Michele-Lee Berko, *Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant*, 97 Dick. L. Rev. 101, 109 (1992).
- 12 Registry of Interpreters for the Deaf, 333 Commerce St., Alexandria, VA 22314, (www.rid.org). There were 256 RID- certified interpreters in New York State, according to a 2000 survey conducted by RID. RID and the National Association of the Deaf (NAD) formed the National Council on Interpreting (NCI) to, among other things, develop a National Interpreter Certification test which is now in use.
- 13 See www.interpretereducation.org/wp-content/uploads/2011/06/PracRept.pdf.
- 14 Telephone companies in New York must offer TDDs/TTYs at cost to certified hearing-impaired customers, for sale, lease or lease-purchase. N.Y. Public Service Law § 92-a. Purchase of a TDD/TTY by an eligible individual may be financed through the Department of Social Services Equipment Loan Fund.
- 15 TTY users: 1-800-662-1220. Others: 1-800-421-1220. In addition, effective June 1, 2000, New York State introduced 7-1-1 dialing for access to the relay system; www.nyrelay.com.
- 16 *Terry v. State*, 105 So. 386 (Ala. Ct. App. 1925).
- 17 29 U.S.C. §§ 701–797(b) (Rehabilitation Act).
- 18 On July 23, 2010, Attorney General Eric Holder signed final regulations revising the Department of Justice’s ADA regulations. The official text was published in the Federal register on September 15, 2010 and the final rules went into effect on March 15, 2011. The revised regulations amend the Department’s Title II regulations (28 C.F.R. Part 35) and the Title III regulation (28 C.F.R. Part 36). Appendix A to each regulation includes a section-by-section analysis of the rule and responses to public comments on the proposed rule.
- 19 28 C.F.R. § 36.303(c)(1).
- 20 28 C.F.R. § 36.303(c)(1)(ii).
- 21 Dept. of Justice, ADA Business Brief: *Communicating with People who are Deaf or Hard of Hearing in Hospital Settings* (2003), <https://www.ada.gov/hospcombr.htm>; see Bonnie Poitras Tucker, *Access to Health Care for Individuals with Hearing Impairments*, 37 Hous. L. Rev. 1101 (2000), (discussing of case law developments and settlements reached by the Department of Justice).
- 22 28 C.F.R. pt. 36, app. A.
- 23 10 N.Y.C.R.R. § 405.7. The Commissioner of Health may approve time limited alternatives to this section for rural hospitals which demonstrate that they have (1) taken and are continuing to take all reasonable steps to fulfill these regulatory requirements, but are not able to fulfill such requirements for reasons beyond the hospital’s control and (2) have implemented effective interim plans addressing the communication needs of hearing impaired individuals.
- 24 *Cruz v. North Cent. Bronx Hosp.*, New York City Commission on Human Rights Docket No. 93-126 (KE/si), Stipulation and Order of Settlement, dated June 16, 1993. Note that in order to obtain injunctive relief under the ADA requirement that interpreters be provided in a hospital emergency room, the plaintiff must show the likelihood of future use of that facility. *Schroedel v. New York Univ. Med. Ctr.*, 885 F. Supp. 594 (S.D.N.Y. 1995); *Bravin v. Mount Sinal Med. Ctr.*, 186 F.R.D. 293, (S.D.N.Y. 1999), *opinion vacated in part on rearg.*, 58 F. Supp. 2d 269 (S.D.N.Y. 1999).
- 25 David A. Ebert & Paul S. Heckerling, *Communication With Deaf Patients—Knowledge, Beliefs, and Practices of Physicians*, 273 Am. Med. Assoc. 227 (1995).
- 26 *People by Vacco v. MidHudson Med. Group, P.C.*, 877 F. Supp. 143 (S.D.N.Y. 1995).
- 27 *Id.* 147-48.
- 28 *Id.* at 149.
- 29 Consent Judgment, Mar. 13, 1995.
- 30 See Tucker, *Access to Health Care for Individuals with Hearing Impairments*, 37 Hous. L. Rev. 1104 (2000).
- 31 Settlement Agreement Between the United States of America and Dr. Haresh K. Mirani Under the Americans with Disabilities Act (Apr. 1, 1996), <https://www.justice.gov/crt/file/887861/download>.
- 32 Settlement Agreement Between the United States of America and Dr. Thomas A. Brown under the Americans with Disabilities Act (Apr. 1999), <https://www.justice.gov/crt/settlement-agreement-between-united-states-america-and-dr-thomas-brown>.
- 33 *Heisley v. Inova Health System*, No. 1:10-cv-714-LMB/IDD (E.D. Va. Mar. 30, 2011); <https://www.ada.gov/inova.htm>.
- 34 New York State Department of Social Services Informational Letter 85 INF-4 from Robert C. Osborne, Deputy Commissioner, Division of Medical Assistance, dated Feb. 20, 1985. Effective Oct. 1, 1996, the Legislature transferred responsibility for administration of the state’s Medicaid program from DSS to the Department of Health (1996 N.Y. Laws ch. 474, §§ 233-248). Section 242 of that law provides that

[a]ll rules, regulations, acts, decisions, determinations and orders of the department of social services with respect to those

provisions of the medical assistance program transferred pursuant to this act . . . shall continue in force and effect as rules, regulations, acts, decisions, determinations and orders of the Department of Health until duly modified or abrogated by the Commissioner of Health.

- 35 N.Y. Pub. Health Law § 4403(5)(b).
- 36 Howard Rosenblum, *Communication Access Funds: Achieving the Unrealized Aims of the Americans With Disabilities Act*, 45 Val. U. L. Rev. 1061 (2011).
- 37 *Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994).
- 38 1994 N.Y. Laws ch. 301 (amending N.Y. Mental Hygiene Law §§ 7.09, 13.09); *see also* 14 N.Y.C.R.R. §§ 527.4, 633.4(a)(15).
- 39 14 N.Y.C.R.R. § 633.4(a)(15).
- 40 28 C.F.R. § 35.160(a).
- 41 28 C.F.R. § 35.160(b)(2).
- 42 28 C.F.R. § 35.164.
- 43 28 C.F.R. § 35.105.
- 44 28 C.F.R. § 35.104.
- 45 *Rothschild v. Grotenthaler*, 725 F. Supp. 776 (S.D.N.Y. 1989), *aff'd in part*, 907 F.2d 286 (2d Cir. 1990).
- 46 *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988).
- 47 *Chatoff v. City of New York*, No. 92 Civ. 0604 (RWS), 1992 WL 202441 (S.D.N.Y., June 30, 1992). *See also* 45 C.F.R. pts. 35, 63.
- 48 *Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622, 636 (S.D.N.Y. 1996) (citation omitted).
- 49 N.Y. Judiciary Law § 390 (Jud. Law).
- 50 State Administrative Procedure Act §§ 202, 301(6); N.Y. Labor Law § 620(4); N.Y. Executive Law § 259-i(7); N.Y. Workers' Compensation Law § 150(b).
- 51 *Rodriguez, Minto & Rich v. State of New York & New York Soc'y for the Deaf*, 93 CIV 7517 (HB) (S.D.N.Y. 1995), Stipulation of Settlement, Feb. 20, 1995.
- 52 *People v. Guzman*, 125 Misc. 2d 457, 478 N.Y.S.2d 455 (Sup. Ct., N.Y. Co. 1984), *aff'd*, 148 A.D.2d 350, 538 N.Y.S.2d 986 (1st Dep't 1989), *aff'd*, 76 N.Y.2d 1, 556 N.Y.S.2d 7 (1990). As to serving on a jury in the federal courts, *see United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987); *see also* Randy Lee, *Equal Protection and a Deaf Person's Right to Serve as a Juror*, N.Y.U. Rev. L. & Soc. Change 81 (1989).
- 53 Court Interpreters Act, 28 U.S.C. § 1827. For an exhaustive treatment of this topic, the reader is encouraged to examine Douglas M. Pravda, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, 45 Val. U. L. Rev. 927 (2011).
- 54 *Sacchetti v. Burger King*, filed Dec. 1993, settled Mar. 1994. *See* 4 Disability Compliance Bulletin 1 (Apr. 27, 1994).
- 55 *Yunasko v. Weight Watchers S. Cal.*, filed Apr. 1994, settled Oct. 1994 (C.D. Cal.). *See* 5 Disability Compliance Bulletin 6 (Jan. 19, 1995).
- 56 *Isbell v. Cineplex Corp.*, CA No. 94-0679-SS (D.D.C.), Order of July 29, 1994.
- 57 A number of electronic devices are available that help overcome distance and environmental noise for some people who wear hearing aids.
- 58 John F. Waldo, *The ADA and Movie Captioning: A Long and Winding Road to an Obvious Destination*, 45 Val. U. L. Rev. 1033 (2011).
- 59 Donald McNeil, *Signing on Broadway: It's a Tough Act*, N.Y. Times, Feb. 13, 1995, www.nytimes.com/1995/02/13/theater/signing-on-broadway-it-s-a-tough-act.html. For assistance and information regarding sign language interpreted performances on Broadway the Theater Development Fund (TDF) is an excellent resource. www.tdf.org.
- 60 Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960.
- 61 47 U.S.C. § 613(a), (b).
- 62 47 C.F.R. pt. 79.
- 63 47 U.S.C. § 613(j); 47 C.F.R. § 79.1(h).
- 64 *See Zulauf v. Kentucky Educ. Television*, 28 F. Supp. 2d 1022 (E.D. Ky. 1998).
- 65 47 C.F.R. § 73.1250(h).
- 66 Michele-Lee Berko, *Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant*, 97 Dick. L. Rev. 101, 103 (1992).

- 67 Jud. Law § 390 also provides that a deaf witness, victim or spouse/parent of a victim must be provided with a certified interpreter.
- 68 See *People v. Rios*, 57 A.D.3d 501, 502 (2d Dep't 2008) (citation omitted); see also *People v. Catron*, 143 A.D.2d 468, 532 N.Y.S.2d 589 (3d Dep't 1988) (holding that the determination that a particular interpreter is qualified lies within the sound discretion of the trial court, and that a hearing for the purpose of assessing the interpreter's fitness, as requested by the defendant, was unnecessary).
- 69 *Rodriguez, Minto & Rich v. State of New York & New York Soc'y for the Deaf*, 93 CIV 7517 (HB) (S.D.N.Y. 1995), Stipulation of Settlement, Feb. 20, 1995.
- 70 It includes requirements that noncertified interpreters be formally evaluated and spot-checked, and that interpreters hired by the Office of Court Administration without RID certification become certified within one year or be terminated.
- 71 *People v. Rodriguez*, 145 Misc. 2d 105, 546 N.Y.S.2d 769 (Sup. Ct., Queens Co. 1989).
- 72 *State v. Hansen*, 105 Ariz. 368, 369, 464 P.2d 960 (1970).
- 73 749 S.W.2d 635 (Tex. Ct. App. 1988).
- 74 Taylor, *Computer Helps Acquit Deaf Defendant, Preserving Sixth Amendment Right*, Nat'l L.J., Jan. 29, 1980, p. 21.
- 75 Allen, *Patterns of Academic Achievement Among Hearing Impaired Students: 1974 and 1983*, in *Deaf Children in America* (Schildroth & Karchmer eds., College Hills Press 1986).
- 76 *Brazell v. State*, 828 S.W.2d 580 (Tex. Ct. App. 1992).
- 77 *Turner v. State*, 429 So. 2d 645, 646 (Ala. Crim. App. 1982) (citation omitted).
- 78 28 U.S.C. § 1827.
- 79 *Valladares v. United States*, 871 F.2d 1564 (11th Cir. 1989).
- 80 Deirdre M. Smith, Comment, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial*, 46 Me. L. Rev. 87 (1994).
- 81 568 F.2d 1128 (5th Cir. 1978), *vacated on other grounds*, 573 F.2d 867 (5th Cir. 1978).
- 82 See also *Mothershead v. King*, 112 F.2d 1004 (8th Cir. 1940).
- 83 125 Misc. 2d 516, 480 N.Y.S.2d 426 (Sup. Ct., N.Y. Co. 1984).
- 84 158 Misc. 2d 863, 602 N.Y.S.2d 507 (N.Y.C. Crim. Ct., N.Y. Co. 1993).
- 85 *Id.* at 871.
- 86 *Id.* at 867.
- 87 157 Misc. 2d 515, 597 N.Y.S.2d 577 (Sup. Ct., Kings Co. 1993).
- 88 *Id.* at 520.
- 89 *Kiddy v. Oklahoma City*, 576 P.2d 298 (Okla. 1978); *State v. Woody*, 449 S.E.2d 615 (Ga. Ct. App. 1994). For a discussion of ADA settlements reached by the Department of Justice on behalf of deaf suspects, victims and witnesses with the Wisconsin State Patrol, the Rochester, N.Y., Police Department, and other municipalities, see *Americans with Disabilities Practice and Compliance Manual*, § 2:115 (Aug. 2001 Supplement).
- 90 *Serio v. Milwaukee*, 186 Wis. 2d 575 (Wis. Ct. App., 1994).
- 91 *People v. Smith*, 31 Cal. App. 4th 1185 (1995).
- 92 159 Wis. 2d 1 (1990).
- 93 *Id.* at 40.
- 94 *Id.* at 38.
- 95 See Michele LaVigne & Vernon McCay, *An Interpreter Isn't Enough: Deafness, Language, & Due Process*, 2003 Wis. L. Rev. 843 (2003).
- 96 For more exhaustive treatment of the issues presented within this section pertaining to deaf individuals and criminal prosecution the reader is referred to two informative articles; Kelly McAnnany and Aditi Kothekar Shah, *With Their Own Hands: A Community Lawyering Approach to Improving Law Enforcement Practices in the Deaf Community*, 45 Val. U. L. Rev. 875 (2011) and Douglas M. Pravada, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, 45 Val. U. L. Rev. 927 (2011).
- 97 See *infra*, Part V.
- 98 872 F. Supp. 507 (N.D. Ill., 1994).
- 99 *Id.* at 521-522.

- 100 29 U.S.C. § 791.
- 101 711 F. Supp. 447 (N.D. Ill. 1989).
- 102 *Id.* at 452, 455.
- 103 716 F.2d 227 (3d Cir. 1983).
- 104 *See EEOC v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 980 (D. Ariz. 2001).
- 105 *Texas Ass'n of the Deaf v. Texas Cent. Educ. Agency*, Travis Co. Dist. Ct., Cause No. 489,304, complaint filed Aug. 15, 1990, nonsuit filed Feb. 3, 1992. *See also* Texas Educ. Code Ann. § 21.048(c).
- 106 *Grantham v. Moffett*, 996 WL 3750 (E.D. La. Jan. 3, 1996).
- 107 20 U.S.C. §§1400-1490.
- 108 Some cases of misdiagnosis and misplacement have resulted in multimillion-dollar awards in New York. *See Snow v. State*, 98 A.D.2d 442, 469 N.Y.S.2d 959 (2d Dep't 1983), *aff'd*, 64 N.Y.2d 745, 485 N.Y.S.2d 987 (1984); *McNulty v. State*, 1988 WL 372547 (Sup. Ct., Onondaga Co. 1988).
- 109 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).
- 110 T.E. Allen, *Patterns of Academic Achievement Among Hearing-Impaired Students: 1974 and 1983*, in *Deaf Children in America* (Schildroth & Karchmer eds., College Hills Press 1986).
- 111 *Rowley*, 458 U.S. at 203 n. 25.
- 112 Cued speech is a technique used in conjunction with lip reading which seeks to aid the student in understanding spoken English. It involves the use of eight hand shapes held in four positions close to the speaker's mouth.
- 113 Robert E. Johnson, Scott K. Liddell & Carl J. Erting, *Unlocking the Curriculum: Principles for Achieving Access in Deaf Education*, (1989). *See also* Shawn Neal Mahshie, *Educating Deaf Children Bilingually* (1995).
- 114 It has long been noted that deaf children of deaf parents generally do better in school than those of hearing parents.
- 115 *See* Felicia R. Lee, *New York to Teach Deaf in Sign Language, Then English*, N.Y. Times, Mar. 5, 1998.
- 116 Donald W. Large, *Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975*, 58 Wash. U.L.Q. 213 (1980).
- 117 *Visco v. Sch. Dist. of Pittsburgh*, 684 F. Supp. 1310, 1314 (W.D. Pa. 1988).
- 118 Pub. L. No. 99-371, 100 Stat. 781 (1986), codified at 20 U.S.C. §§ 4301-4305.
- 119 The Commission on Educ. of the Deaf, U.S. Gov't Accountability Office, *Toward Equality; Education of the Deaf*, p. viii, <http://archive.gao.gov/t2pbat17/135760.pdf>.
- 120 *Id.* at p. 32-33.
- 121 *Id.* at p. 25.
- 122 “*Despite this preference for ‘mainstreaming’ handicapped children . . . Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that the ‘nature or severity of the handicap may be such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.’ The [IDEA] thus provides for the education of some handicapped children in separate classes or institutional settings.*” *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 n.4 (1982) (quoting 20 U.S.C. § 1412(5)) (emphasis added).
- 123 *Geis v. Bd. of Educ. of Parsippany-Troy Hills, Morris Co.*, 774 F.2d 575, 583 (3d Cir. 1985) (“[mainstreaming] does not trump all other considerations”); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 296 (7th Cir. 1988) (“[T]he mainstreaming goal . . . cannot be evaluated in the abstract . . . [but] must be weighed in tandem with the Act’s principal goal of ensuring . . . a free appropriate education.”).
- 124 For example, Sen. Robert Stafford, one of the original sponsors of the law, stated: “We recognized . . . that there are many instances when it would be harmful to a handicapped child to force him or her into a regular classroom situation.” Robert T. Stafford, *Education for the Handicapped: A Senator’s Perspective*, 3 Vt. L. Rev. 71, 76 (1978). *See also* H.R. 94-332, 94th Cong. (1st Sess. 1975).
- 125 Judith E. Heumann, Assistant Secretary, Office of Special Education and Rehabilitation Service, United States Department of Education, speaking at a California Department of Education Conference, described segregated special education as immoral. 9 *The Special Educator* 85 (Nov. 2, 1993).
- 126 57 Fed. Reg. 49274 (Oct. 30, 1992).
- 127 *Id.*
- 128 157 Fed. Reg. 49275.

- 129 See generally Kathryn Ivers, *Towards a Bilingual Education Policy in the Mainstreaming of Deaf Children*, 26 Colum. Hum. Rts. L. Rev. 439 (1994).
- 130 For a complete list of states with a Deaf Children’s Bill of Rights, see <https://www.nad.org/resources/education/bill-of-rights-for-deaf-and-hard-of-hearing-children>.
- 131 Pub. L. No. 105-17, 111 Stat. 37. The IDEA was reauthorized as the Individuals with Disabilities Education Improvement Act of 2004. Pub. L. No. 108-446; 118 Stat. 2647.
- 132 20 U.S.C. § 1414(a)(3)(B)(iv). New York State implementing regulations are found at 8 N.Y.C.R.R. § 200.4(d)(3)(iv).
- 133 Under the 2004 reauthorization, the statute remains unchanged with respect to the consideration of special factors for children who are deaf or hard of hearing.
- 134 Memorandum from Judith E. Heumann, Assistant Secretary for Special Education, and Thomas Hehir, Director, Office of Special Education Programs, U.S. Department of Education, to Chief State School Officer, Subject: Questions and Answers on the Least Restrictive Environment Requirements of the Individuals with Disabilities Education Act, Nov. 23, 1994.
- 135 In a decision focusing on the establishment of religion issue, the U.S. Supreme Court held that a sign language interpreter is a conduit and, thus, provision of an interpreter to a deaf student mainstreamed in a parochial school did not violate the First Amendment. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).
- 136 *State ex rel. Lambert v. West Virginia State Bd. of Educ.*, 191 W. Va. 700 (1994).
- 137 20 U.S.C. § 1412(a)(14). “Related services” is defined to mean, among other things, interpreting services. 20 U.S.C. § 1401(26).
- 138 *In re Jennifer M.*, Elmira Sch. Dist., Report of Hearing Officer G. Susan Gray, Ph.D., June 19, 1989.
- 139 New York State Guidelines for Educational Interpreters, State Education Department, 1994.
- 140 34 C.F.R. § 300.113.
- 141 Elmira Sch. Dist., Report of Hearing Officer G. Susan Gray, Ph.D., June 19, 1989.
- 142 *Kantak v. Liverpool Cent. Sch. Dist.*, 1990 WL 36803 (N.D.N.Y. Mar. 30, 1990).
- 143 *Springdale Sch. Dist. v. Grace*, 693 F.2d 41 (8th Cir. 1982).
- 144 *In re Frederick Cnty. Public Schs.*, No. 023-82 (Md., Sept. 15, 1981), EHLR 503:191.
- 145 *Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290 (7th Cir. 1988).
- 146 *Petersen v. Hastings Public Schs.*, 31 F.3d 705 (8th Cir. 1994).
- 147 *Barnett v. Fairfax Co. Sch. Bd.*, 721 F. Supp. 757 (E.D. Va. 1989).
- 148 57 Fed. Reg. 49274 (Oct. 30, 1992).
- 149 COED Report, pp. 29B36. See also Robert Silverstein, *The Legal Necessity for Residential Schools Serving Deaf, Blind and Multi-Handicapped Sensory-Impaired Children*, 131, No. 2 American Annals of the Deaf 78 (Apr. 1986).
- 150 655 F.3d 787 (8th Cir. 2011).
- 151 COED Report, Recommendation 9.
- 152 See Judith L. Mounty, *Testing Deaf Individuals: Equity in Test Conditions and Test Format*, in *In Tune With the Future*, Selected Proceedings of the 1990 Association on Handicapped Students Service Programs in Postsecondary Education; Hugh T. Prickett & Davis S. Martin, “Equity in Testing Deaf Teachers: Issues and Progress,” a paper prepared for the 1991 Convention of the American Instructors of the Deaf Biennial Conference.
- 153 *Jessica M. v. Worcester Pub. Schs.*, Mass. Bureau of Special Educ. Appeals No. 87-1223, Hearing Officer Reece Erlchman, Dec. 1987.
- 154 *Grkman v. Scanlon*, 528 F. Supp. 1032 (W.D. Pa. 1981); *Visco v. Sch. Dist. of Pittsburgh*, 684 F. Supp. 1310 (W.D. Pa. 1988).
- 155 *DeWalt v. Burkholder*, C.A. No. 80-0014-A (E.D. Va. 1980), EHLR 5551:550; *Board of Educ. of Franklin Lakes Sch. Dist. v. Mr. & Mrs. R.B.*, Case No. 83-1178 (N.J. Feb. 22, 1984), EHLR 505:266.
- 156 *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228 (9th Cir. 1994), *overruled on other grounds*, *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011); *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. Me. 1993).
- 157 N.Y. Education Law § 4402(2)(a).
- 158 https://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.htm.
- 159 *K.M. ex rel. Bright v. Tustin Unified School Dist.*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493 (2014).
- 160 *Id.* at 1097.

- 161 442 U.S. 397 (1979).
- 162 34 C.F.R. 104.44(d).
- 163 *U.S. v. Bd. of Trs. of Univ. of Ala.*, Civ. No. 86C-1779S (N.D. Ala., Dec. 30, 1988); *Camensch v. Univ. of Tex.*, 616 F.2d 127 (5th Cir. 1980), *vacated*, 451 U.S. 390 (1981); *Crawford v. Univ. of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977); *Barnes v. Converse Coll.*, 436 F. Supp. 635 (D.S.C. 1977).
- 164 *U.S. v. Bd. of Trs. of Univ. of Ala.*, 908 F.2d 740 (11th Cir. 1990).
- 165 *Jones v. Ill. Dep't of Rehab. Servs.*, 689 F.2d 724 (7th Cir. 1982); *Schornstein v. N.J. Div. of Voc. Rehab. Servs.*, 519 F. Supp. 773 (D.N.J. 1981), *aff'd*, 688 F.2d 824 (3d Cir. 1982) (mem.).
- 166 *Ind. Dep't of Human Servs. v. Firth*, 590 N.E.2d 154, 159 (Ind. Ct. App. 1992).
- 167 *Polkabl v. Commission for the Blind*, 183 A.D.2d 575, 575, 583 N.Y.S.2d 464 (1st Dep't 1992).
- 168 *Prince v. Rutgers Sch. of Law Camden*, No. 89-4740 (D.N.J.), Temp. Order of Nov. 27, 1989, Judge Stanley S. Brotman.
- 169 *U.S. v. Becker C.P.A. Review*, (D.D.C.), filed Dec. 1993, settled May 1994. Disability Compliance Bulletin, vol. 5, no. 4, p. 1 (June 22, 1994).
- 170 *U.S. v. Harcourt Brace Legal & Prof. Publ'ns, Inc.*, (N.D. Ill.), Consent Decree (May 1994). Disability Compliance Bulletin, vol. 5, no. 4 (June 22, 1994).
- 171 <https://nad.org/issues/about-law-and-advocacy-center>.