Disability and Guardianship Project
Disability and Abuse Project
1717 E. Vista Chino – A7-667 – Palm Springs, CA 92262
(818) 230-5156 • www.spectruminstitute.org

April 24, 2018

ADMINISTRATIVE DOCKET

Hon. Nathan L. Hecht
Supreme Court of Texas
Judicial Council of Texas
201 W. 14th Street - Suite 104
Austin, TX 78711

Re: Records Request per Rule 12 of the Rules of Administration

Dear Chief Justice:

We are writing to you in your capacity as Chief Justice of the Supreme Court of Texas as well as in your capacity as Chair of the Judicial Council.

We hereby make a request for records pursuant to Rule 12 of the Rules of Administration. Spectrum Institute recently filed an ADA complaint with the Supreme Court.

We are requesting copies of or access to any records pertaining to a "self-evaluation" of the state's adult guardianship system that may have been conducted by the Supreme Court or by the Judicial Council pursuant to obligations under Title II of the Americans with Disabilities Act (ADA Reg. 35,105) or Section 504 of the Rehabilitation Act (504 Reg. 42.505). Copies of those regulations are enclosed.

These regulations require a public entity that employs 50 or more persons to evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of Title II or Section 504.

As the enclosed analysis of the DOJ explains, this regulation applies to all services, programs, and activities provided or made available by public entities. Title II "applies to anything a public entity does." The scope of Title II includes activities of the judicial branch of state and local governments. All governmental activities of public entities are covered, even if they are carried out by contractors. Section 504 applies to all activities of government entities that receive federal funds. Judicial proceedings are considered to be a governmental service.

If a "self-evaluation" of the level of ADA compliance or non-compliance of the state's adult guardianship system has never been conducted by the Supreme Court or the Judicial Council, this would be a good time to initiate such an evaluation – especially in view of the recent testimony of David Slayton to Congress explaining the level of dysfunction of the guardianship system. (See enclosed excerpts from his written testimony to the Special Committee on Aging.)

As the materials supplied to the Supreme Court in our ADA complaint explain, the state's guardianship system is under the administrative supervision of the Supreme Court. The Supreme Court has ultimate authority to regulate that system. The executive branch has literally no involvement in oversight of the guardianship system.

Since there are virtually never any appeals by guardianship respondents or wards – because they don't know how to appeal or lack the ability to do so because of the nature of their disabilities – the Supreme Court is unable to use its adjudicative authority to make corrections in the system to ensure that it complies with the ADA and Section 504. Therefore, the only avenue for redress for this class of respondents is by invoking the administrative authority and responsibility of the Supreme Court.

The Supreme Court knows, as do the judges and attorneys who participate in guardianship proceedings, that respondents and wards have significant disabilities that impair their ability to understand these proceedings, to communicate effectively in them, or to have meaningful participation in them. The Supreme Court and lower courts and attorneys know that, as individuals and as a class, guardianship respondents face major obstacles that impair their ability to have meaningful participation in their cases. If ever there was a need for "self evaluation" of the level of compliance or non-compliance with the ADA and Section 504 were to exist, it would be in connection with adult guardianship proceedings. ADA duties are triggered by "known disabilities" and do not depend on requests for accommodations. (See Pierce v. District of Columbia.)

We look forward to hearing from the custodian of records of the Supreme Court and the custodian of records of the Judicial Council as to whether such records exist. If they do, we will supply the necessary fee to pay for copying and mailing of such records to us.

If they do not – because a self-evaluation of the guardianship system has never been done by the Supreme Court or the Judicial Council, such an evaluation should be initiated as soon as possible.

Respectfully submitted:

Thomas F. Coleman
Legal Director
Spectrum Institute

Enclosures:

1) Rule 12, Rules of Judicial Administration
2) ADA Title II Regs., Section 35.105
3) Section 504 Regs., Section 42.505
4) Section-by-Section Analysis of the DOJ of Title II Regs.
5) Commentary on scope of Section 504 and Title II
6) Opinion of the Oregon Attorney General
7) Excerpts from testimony of David Slayton to Congress
8) Excerpts from opinion: Pierce v. District of Columbia

RULES OF JUDICIAL ADMINISTRATION - Updated With Amendments Effective May 2, 2017 –

Rule 12. Public Access to Judicial Records

12.1 Policy. The purpose of this rule is to provide public access to information in the judiciary consistent with the mandates of the Texas Constitution that the public interests are best served by open courts and by an independent judiciary. The rule should be liberally construed to achieve its purpose.

12.6 Procedures for Obtaining Access to Judicial Records.

(a) ***Request***. A request to inspect or copy a judicial record must be in writing and must include sufficient information to reasonably identify the record requested. The request must be sent to the records custodian and not to a court clerk or other agent for the records custodian. A requestor need not have detailed knowledge of the records custodian's filing system or procedures in order to obtain the information.

12.6 Procedures for Obtaining Access to Judicial Records.

(a) ***Request***. A request to inspect or copy a judicial record must be in writing and must include sufficient information to reasonably identify the record requested. The request must be sent to the records custodian and not to a court clerk or other agent for the records custodian. A requestor need not have detailed knowledge of the records custodian's filing system or procedures in order to obtain the information.

(f) ***Recipient of Request not Custodian of Record***. A judicial officer or a presiding officer of a judicial agency who receives a request for a judicial record not in his or her custody as defined by this rule must promptly attempt to ascertain who the custodian of the record is. If the recipient of the request can ascertain who the custodian of the requested record is, the recipient must promptly refer the request to that person and notify the requestor in writing of the referral

Americans with Disabilities Act Title II Regulations

Part 35 Nondiscrimination on the Basis of Disability in State and Local Government Services

(current as of October 11, 2016)

§ 35.105 Self-evaluation.

- (a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.
- (b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.
- (c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:
    - (1) A list of the interested persons consulted;
    - (2) A description of areas examined and any problems identified; and
    - (3) A description of any modifications made.
- (d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self- evaluation.

§ 35.106 Notice

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

Thomas F. Coleman

From: Tom Coleman - Spectrum Institute <tomcoleman@spectruminstitute.org>
Sent: Wednesday, April 18, 2018 10:02 AM
To: 'Thomas F. Coleman'
Subject: DOJ regs about 504 complaints

28 CFR 42.505 - Administrative requirements for recipients.

prev | next

§ 42.505 Administrative requirements for recipients.

(a)*Remedial action.* If the Department finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this subpart, the recipient shall take the remedial action the Department considers necessary to overcome the effects of the discrimination. This may include remedial action with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program when such discrimination occurred, and with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b)*Voluntary action.* A recipient may take steps, in addition to the requirements of this subpart, to increase the participation of qualified handicapped persons in the recipient's program or activity.

(c)*Self-evaluation.*

(1) A recipient shall, within one year of the effective date of this subpart, evaluate and modify its policies and practices that do not meet the requirements of this subpart. During this process the recipient shall seek the advice and assistance of interested persons, including handicapped persons or organizations representing handicapped persons. During this period and thereafter the recipient shall take any necessary remedial steps to eliminate the effects of discrimination that resulted from adherence to these policies and practices.

(2) A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Department on request:

(i) A list of the interested persons consulted,

(ii) A description of areas examined and problems identified, and

(iii) A description of modifications made and remedial steps taken.

(d)*Designation of responsible employee.* A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall designate at least one person to coordinate compliance with this subpart.

(e)*Adoption of grievance procedures.* A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall adopt grievance procedures that incorporate due process standards (*e.g.* adequate notice, fair hearing) and provide for the prompt and equitable resolution of complaints alleging any action prohibited by this subpart. Such procedures need not be established with respect to complaints from applicants for employment. An employee may file a complaint with the Department without having first used the recipient's grievance procedures.

(f)*Notice.*

(1) A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of more than $25,000 shall, on a continuing basis, notify participants, beneficiaries, applicants, employees and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this subpart. The notification shall state, where appropriate, that the recipient does not discriminate in its programs or activities with respect to access, treatment or employment. The notification shall also include identification of the person responsible for coordinating compliance with this subpart and where to file section 504 complaints with the Department and, where applicable, with the recipient. A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this subpart. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(2) Recruitment materials or publications containing general information that a recipient makes available to participants, beneficiaries, applicants, or employees shall include a policy statement of nondiscrimination on the basis of handicap.

(g) The Department may require any recipient with fewer than fifty employees and receiving less than $25,000 in Federal financial assistance to comply with paragraphs (c)(2) and (d) through (f) of this section.

(h) The obligation to comply with this subpart is not affected by any State or local law or requirement or limited employment opportunities for handicapped persons in any occupation or profession.

Thomas F. Coleman

From: Thomas F. Coleman <tomcoleman@earthlink.net>
Sent: Wednesday, April 18, 2018 10:22 AM
To: 'Thomas F. Coleman'
Subject: title II regs / DOJ analysis

https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm

Title II regs / effective 2011

Part 35 Nondiscrimination on the Basis of Disability in State and Local Government Services
(current as of October 11, 2016)

Title II Regulations
1991 Preamble and Section-by-Section Analysis

Section-by-Section Analysis

Subpart A -- General

§35.101 Purpose.

Section 35.101 states the purpose of the rule, which is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (the Act), which prohibits discrimination on the basis of disability by public entities. This part does not, however, apply to matters within the scope of the authority of the Secretary of Transportation under subtitle B of title II of the Act.

§35.102 Application.

This provision specifies that, except as provided in paragraph (b), **the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in §35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794),** which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in §35.134, this part does not apply to private entities.

The scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities "conducted by" Federal Executive agencies, in that **title II applies to anything a public entity does**. Title II coverage, however, is not limited to "Executive" agencies, but **includes activities of the legislative and judicial branches of State and local governments. All governmental activities of public entities are covered, even if they are carried out by contractors**. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements. The private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Department's title III regulations at 28 CFR Part 36.

Section 35.107(b) requires public entities with 50 or more employees to establish grievance procedures for resolving complaints of violations of this part. Similar requirements are found in the section 504 regulations for federally assisted programs (*see, e.g.*, 45 CFR 84.7(b)). The rule, like the regulations for federally assisted programs, provides for investigation and resolution of complaints by a Federal enforcement agency. It is the view of the Department that public entities subject to this part should be required to establish a mechanism for resolution of complaints at the local level without requiring the complainant to resort to the Federal complaint procedures established under subpart F. Complainants would not, however, be required to exhaust the public entity's grievance procedures before filing a complaint under subpart F. Delay in filing the complaint at the Federal level caused by pursuit of the remedies available under the grievance procedure would generally be considered good cause for extending the time allowed for filing under §35.170(b).

Thomas F. Coleman

From: Tom Coleman - Spectrum Institute <tomcoleman@spectruminstitute.org>
Sent: Wednesday, April 18, 2018 10:06 AM
To: 'Thomas F. Coleman'
Subject: scope of 504 and title II -- everything that a state government does

https://www.ada.gov/ma_docf_lof.pdf

Congress enacted the ADA nearly 25 years ago "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, [and] independent living" and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to . . . pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101(a)(7), (8). Title II provides:
[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Congress enacted the ADA to broaden the coverage of the Rehabilitation Act of 1973, which similarly prohibits discrimination against individuals with disabilities by recipients of federal financial assistance. 29 U.S.C. § 794. Section 504 similarly provides:
No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .
29 U.S.C. § 794(a).

Title II covers essentially everything state and local governments and their agencies do. *See Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 209-12 (1998) (discussing the breadth of Title II's coverage). Section 504 also applies to all of the activities of agencies that are federally funded and as a general rule violations of Section 504 also constitute violations of Title II.10 As such, Title II and Section 504 apply to everything DCF does, including its investigations, assessments, removals, family preservation, provision of services, determining goals and permanency plans, setting service plan tasks, reunification, guardianship, adoption, and assisting clients in meeting such tasks.11

11 During the Departments' investigation, DCF suggested, based on *Adoption of Gregory*, 434 Mass. 117, 121 (2001), that the ADA may not be raised as a defense to proceedings to

terminate parental rights because such proceedings do not constitute a "service" under the ADA. The Justice Department has long taken the position in its regulatory guidance, technical assistance, and enforcement actions that Title II applies to everything a public entity does—all of the child welfare services it provides, including recommendations and petitions related to child welfare matters and proceedings to terminate parental rights. The legal conclusion that termination proceedings are not covered by the ADA similarly cannot be squared with the U.S. Supreme Court's unanimous pronouncement in *Yeskey*, 524 U.S. at 209-12 (finding, beyond question, that a non-voluntary motivational boot camp in state prison was covered for participation by inmates with disabilities).

Thomas F. Coleman

Subject: FW: Oregon AG opinion discusses appointment of counsel as an ADA accommodation

Opinion OP 1998-7
November 12, 1998

Excerpts from attorney general opinion

The ADA, 42 USC § 12101 et seq., protects qualified individuals with disabilities from discrimination on the basis of a disability.(2) Title II of the ADA covers discrimination in state and local government services, programs and activities. Title II coverage is not limited to "executive agencies," but includes activities of the judicial branches of state and local governments. 28 CFR § 35.102.

Title II prohibits discrimination on the basis of disability, stating: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 USC § 12132. The United States Department of Justice (US DOJ) has issued rules implementing the requirements of Title II in 28 CFR Part 35, including additional commentary contained in Appendix A of Part 35. The ADA and implementing regulations require state and local government entities, including state courts, to modify policies, practices and procedures to prevent disability discrimination, to remove communication barriers, and to provide accessible services.

1. Reasonable modifications to rules, policies or practices;
2. Removal of communication barriers; or
3. Provision of auxiliary aids and services.

42 USC 12131(2). Collectively, these three elements are referred to as reasonable accommodation.(8) "An accommodation is generally any change in the work [or court] environment or in the way things are customarily done that enables an individual with a disability to enjoy equal opportunities." ***Thomas v. Davidson Academy***, 846 F Supp 611, 618 (MD Tenn 1994); *accord* ***Burch v. Coca-Cola Co.***, 119 F3d 305, 314-15 (5th Cir 1997) ("In all cases a reasonable accommodation will involve a change in the status quo, for it is the status quo that presents the very obstacle that the ADA's reasonable accommodation provision attempts to address.").

A public entity must "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications

with others." 28 CFR § 35.160. Individuals with mental impairments may have difficulty communicating as a result of their mental impairment or because of a separate physical impairment. The requirement of removing communication barriers can refer to the availability of telecommunications that permit a person with a disability to call the courthouse, or providing information and signs about the courthouse facilities. It may also include the provision of "auxiliary aids and services," . . . .

In ***Motto v. City of Union City***, 177 FRD at 309-10, a federal court found that the assistance of legal counsel was an "equally effective means of communication" when it denied a plaintiff's request for learning disability specialist to paraphrase complex language. The court found it would accommodate plaintiff's condition "simply by asking legal counsel to phrase questions in a manner which renders them more understandable."

Historically, the appointment of qualified legal counsel has been sufficient to assist individuals in understanding and participating in the judicial proceedings. Counsel serves the function of advising clients about the judicial process. An attorney representing a client with a mental disability has an obligation to attempt to communicate effectively with a client who has special needs in order to determine the client's point of view and desired action. *See* Zuckerman, Charmatz, Mental Disability Law: A Primer (4th ed 1992) at 16 [*hereinafter* "Primer"]. Certain institutionalized patients who have a diagnosis of mental illness may also receive legal and protective services through the system created under the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 USC § 10841.

Attorneys are themselves generally subject to the ADA, either as a Title II public entity if their services are paid under contract or employment with the government or as a public accommodation as defined in Title III of the ADA.(14) *See* 28 CFR Part 36. Under both Title II and Title III of the ADA, an attorney is obligated to provide reasonable accommodations, 28 CFR §§ 35.130(7), 36.302, and to "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 CFR 35.160; 28 CFR § 36.303(c). *See e.g.*, ***Cooper v. State***, 565 NW2d 27, 31 (Minn App 1997), *review denied* (reviewing effectiveness of assistance of counsel for failure to provide sign language interpreter for meetings with hearing impaired defendant). Consequently, as a part of the attorney's representation of a client with a mental impairment, an attorney subject to the ADA is required to provide necessary accommodations to permit the client to obtain the benefits of legal counsel, at no additional cost to the client. 28 CFR §§ 35.130(f), 36.301(c).(15)

Because of the significant role of attorneys in advising clients with mental impairments about judicial proceedings as well as the legal and ethical obligations on attorneys who represent impaired clients, appointment of counsel (at no cost to the unrepresented party) may provide "other effective means of communication," *see* ***Motto v. City of Union City***, 177 FRD at 309-310, or an appropriate "modification of policies and procedures" in cases where the mentally impaired party does not appear to be able to understand the judicial proceedings.

All of the programs, services, or activities of the Judicial Department are subject to the requirements of Title II of the ADA. Under Title II, even the Judicial Department's activities performed through contractual or other arrangements are subject to the same standards as the courts,(17) and the Judicial Department can be held accountable for the discriminatory conduct of its component entities.(18) 28 CFR § 35.130(b)(1) and (3). Consequently, all contracts should specify that the contractor is responsible for compliance with Title II of the ADA.

Abuse of Power: Exploitation of Older Americans by Guardians and Others They Trust

Excerpts from the Testimony of David Slayton to the
U.S. House of Representatives Special Committee on Aging
April 18, 2018

Texas Judicial Council Official Tells Congress of Rampant Noncompliance with Reporting Requirements – An Admission of ADA Violations by the Court System

"In Texas, there are 50,478 active guardianships . . . with 5,186 new guardianship cases filed last fiscal year, a 7% increase over Fiscal Year 2016. Only 2,804 guardianship cases were closed during that period. The number of active guardianships has increased by 37% in the past five years and is one of the fastest growing case types in the state. We estimate that the value of the estates under guardianship in our state to be between $4-$5 billion. These cases are overseen primarily by constitutional county judges – judges who are not required to be law-trained and who also oversee the administration of counties. In a few of Texas' 254 counties, the cases are overseen by law-trained specialty probate courts. Almost all of these courts are tasked with monitoring the cases with no additional staff resources."

"Since [2015], the [*Guardianship Compliance Pilot Project]* has reviewed over 27,000 guardianship cases in 27 counties. . . . The project has made **disturbing discoveries** . . . . [G]uardians are required to file four basic items with the judge upon appointment or annually: 1) a bond; 2) an inventory of the assets in the estate; 3) an annual report of the person; and 4) an annual accounting of the transactions from the estate. Overall, 43% of cases were found to be **out of compliance** with reporting requirements. The vast majority of the cases out of compliance were cases where the guardian was a family member or friend. While the numbers tell a disturbing story, the findings from reviews of filed accounting and reports tell a more disturbing story. The project regularly found **unauthorized withdrawals** from accounts; **unauthorized gifts** to family members and friends; unsubstantiated and **unauthorized expenses**; and the **lack of backup data** to substantiate the accountings."

Comment by Spectrum Institute: Reporting and monitoring are services that are supposed to be provided by the courts to seniors and people with disabilities who are wards in guardianship proceedings. Due to the nature of their disabilities, these wards are unable to monitor their own cases or to "blow the whistle" to complain when their guardians disobey statutory reporting requirements. These wards are being denied access to justice, as required by the Americans with Disabilities Act, due to the failure of the judiciary to require compliance with these requirements. Courts are supposed to provide a service of "protection" in guardianship cases. They are failing miserably in this role and there is little that the people they are supposed to protect can do about it. This testimony by a representative of the Texas Judicial Council is an admission that the judicial branch is violating its duty under the Americans with Disabilities Act to provide access to justice to people with disabilities under its protection. Note: The testimony fails to mention that most wards in Texas are not seniors – but are younger adults with developmental disabilities.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM PIERCE,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	Civ. No. 13-cv-0134 (KBJ)
	)	
DISTRICT OF COLUMBIA,	)	
	)	
DEFENDANT.	)	
	)	

MEMORANDUM OPINION
(Public Version of ECF No. 82)

Incarceration inherently involves the relinquishment of many privileges; however, prisoners still retain certain civil rights, including protections against disability discrimination. *See United States v. Georgia*, 546 U.S. 151 (2006); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998). Plaintiff William Pierce—who is profoundly deaf and communicates with American Sign Language—claims that prison officials in the District of Columbia violated his right to be free from unlawful disability discrimination in 2012, when Pierce was incarcerated in the District's Correctional Treatment Facility following his guilty plea to a simple assault that arose out of a domestic dispute with his then-partner. The District's prison staff was indisputably aware that Pierce was deaf; however, during the entire 51-day period in which Pierce was held in custody, no staff person ever assessed Pierce's need for accommodation or otherwise undertook to determine the type of assistance that he would need to communicate effectively with others during his incarceration. Instead, according to Pierce, the District's employees and contractors merely assumed that lip-reading and

action. This imagined state of affairs is unquestionably inconsistent with the text and purpose of the Rehabilitation Act and the ADA, which means that the District must now face a stark reality: no matter how fervently it holds the belief that a public entity's duty to provide accommodations arises only by request, there is neither legal nor logical support for that proposition.

To be sure, there are times in which courts have held that a disabled person must request accommodation. *See, e.g., Flemmings v. Howard Univ.*, 198 F.3d 857, 858, 861–62 (D.C. Cir. 1999) (holding that an employer did not violate an employee's rights under Title I of the ADA by failing to accommodate employee's vertigo-related disabilities because employee failed to request an accommodation). But it is equally clear that the legal significance of the request requirement is merely to put the entity on notice that the person is disabled; it does not serve as a means of shifting the burden of initiating the accommodations process to the disabled individual. *See Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 403–04 (D. Md. 2011) (explaining that the "'request requirement' . . . is a function of the fact that 'a person's disability and concomitant need for accommodation are not always known . . . until the [person] requests an accommodation'") (quoting *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 283 (1st Cir. 2006) (internal quotation marks omitted)). In other words, the request performs a signaling function—*i.e.*, it alerts the public entity to the disabled person's need for an accommodation—and where, as here, the inmate's disability is obvious and indisputably known to the provider of services, no request is necessary. *See Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197–98 (10th Cir. 2007) ("[A] public entity is on notice that an individual needs an accommodation when it knows that an

individual requires one, either because that need is obvious or because the individual requests an accommodation."); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) ("When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required. . . .").

The second overarching reason that the District's legal position is untenable is that, by reading the antidiscrimination statutes as mandating that public entities provide needed accommodations but *not* as requiring those entities to take any affirmative steps to *ascertain* what accommodations might be needed, the District suggests that Section 504 and Title II permit reliance on guesswork and happenstance with respect to the provision of accommodations, when the law clearly requires otherwise. It is well-established (albeit in the employment context) that it violates the ADA if an employer with a duty to provide reasonable accommodations responds to the known disabled condition of an employee by giving that employee whatever aids the employer alone thinks might do the trick, without any actual assessment of the employee's individual condition or needs in consultation with the employee. *See, e.g., Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3d Cir. 1999) (reversing grant of summary judgment to employer because notwithstanding fact that employee's son "requested accommodations [for plaintiff], informed [the employer] about [employee's] condition, and provided [the employer] with the means to obtain more information if needed[,]" employer "offered no accommodations or assistance in finding them, made [employee's] job more difficult, and simply sat back and continued to document her failures"). To the contrary, "[o]nce an employer is aware of its responsibility to provide a reasonable

accommodation . . . it must 'identify the precise limitations resulting from the disability and potential reasonable accommodations,' which is best done through an 'informal, interactive process' that involves both the employer and the employee with a disability." *McNair v. District of Columbia*, 11 F. Supp. 3d 10, 16 (D.D.C. 2014) (quoting 29 C.F.R. § 1630.2(o)(3)).

This apparently comes as no news to the District—the DOC's own regulations mandate something of an interactive process with respect to accommodations insofar as they specifically direct prison officials to give preference to the requests of disabled inmates regarding the auxiliary aids to be provided. (*See* D.C. Dep't of Corr., *Program Statement 3800.3*, Ex. 9 to Rocap Decl., ECF No. 48-5, at 92, § 12(a)(2); *see also id.* § 12(b)(2) (stating that the "DOC shall honor the [inmate's] expressed choice" regarding accommodations unless, *inter alia*, "it can show that another equally effective means of communication is available").) Nevertheless, the District here resists the conclusion that the law required CTF's employees and contractors to take affirmative steps up front to evaluate Pierce's needs in order to identify which accommodations would be appropriate for him. Instead, by insisting that the accommodations process that was employed in the instant case is consistent with Section 504 and Title II, the District suggests that the law permits corrections staff to treat the reasonable accommodations mandate much like a game of chance--i.e., on the one hand, prison staff can play it safe by undertaking an ex ante assessment of the actual needs of a disabled inmate in their custody, or on the other, they can opt to forgo that expense, and if accommodations are requested, provide a hodgepodge of whatever aids are in the prison's possession, thereby betting either that the inmate will remain silent or that he

ultimately will be found to have needed no more than the auxiliary aids that the corrections facility randomly provided. There will, of course, be times when corrections staff will take that bet and get it right. *Cf.* Charles Clay Doyle et al., *Dictionary of Modern Proverbs* 287 (2012) (noting that even a broken clock gets the time right twice a day). But to the extent that the District contends that Section 504 and Title II permit public entities to engage in this sort of gamble with respect to the accommodation needs of disabled individuals whom they are required to serve, it is sorely mistaken. *See* 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.160(b)(2) (indicating that a public entity has a duty to "determin[e] what types of auxiliary aids and services are necessary" for the disabled individuals it serves).

The bottom line is this: this Court squarely rejects the legal position that the District seeks to advance in this action, which is, in essence, that the DOC acts consistently with Section 504 and Title II when it takes custody of an obviously disabled prisoner without undertaking any evaluation of that inmate's needs and the accommodations that will be necessary to ensure that he or she has meaningful access to prison services, and instead, provides a random assortment of auxiliary aids upon request and at various times based primarily on considerations of its own convenience.[12] Quite to the contrary, based on its reading of federal law, this Court holds that prison officials have an affirmative duty to assess the potential accommodation needs of inmates with known disabilities who are taken into custody and to provide the

[12] With respect to hearing-disabled inmates in particular, it appears that the District of Columbia's DOC is not the only prison system that engages in this sort of practice. *See, e.g.*, Matt Zapotosky, *Justice Dept. Looking into Treatment of Deaf Inmates in Arlington Jail*, Washington Post, July 29, 2015, available at: http://www.washingtonpost.com/local/crime/justice-dept-looking-into-treatment-of-deaf-inmates-in-arlington-jail/2015/07/29/ae910412-360a-11e5-b673-1df005a0fb28_story.html.

violation of Section 504 and Title II was manifest *from the start*, when prison employees took no steps whatsoever to ascertain what accommodations this new inmate with a known hearing disability would require so that communications with him would be "as effective as communications with others," for the purpose of ensuring that he had "an equal opportunity to participate in, and enjoy the benefits of" the prison's services, programs, and activities. 28 C.F.R. §§ 35.160(a)(1), (b)(1)–(2).

Because this Court finds that the District's deliberate indifference to Pierce's accommodation needs violated Section 504 and Title II as a matter of law, Pierce's motion for summary judgment on Claims I and II of the complaint will be **GRANTED**. Moreover, the Court finds that the District's motion for summary judgment must be **DENIED** in its entirety, because not only does this Court conclude that the District unlawfully failed to provide Pierce with meaningful access to prison services, it also holds that, on the instant record, a reasonable jury could find that CTF employees retaliated against Pierce as well. Thus, in accordance with the accompanying order, all that remains of Pierce's complaint for trial is the determination of the amount of compensatory damages to be awarded to Pierce with respect to Claims I and II, and the issue of liability (and, if necessary, damages) for Claim III.

DATE: September 11, 2015

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge