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REMEDIES—THE APPEARANCE OF ACCESS: DEAF DEFENDANTS AND THE MASSACHUSETTS JUDICIARY—JUSTICE?

INTRODUCTION

A. *The Hypothetical*

John Sandoval¹ is an indigent nineteen-year-old Deaf² man accused of sexual assault on a minor. He has a court-appointed defense attorney. He has been arrested and arraigned and is being held without bail pending trial. He has been in jail for two years. John's prolonged stay in jail is partly the result of the seven times his proceedings have been continued due to the lack of legally qualified ASL/English interpreters³ in the court. Each time a motion hearing or status conference is continued for lack of an interpreter, it is a month or more before it can be rescheduled. John's attorney has an important strategy though, which precludes him from complaining about the lack of a speedy trial. He is trying to get John's confession suppressed because it was made to police officers without a qualified interpreter present—in violation of the Massachusetts Interpreter Law.⁴ Each time the proceedings are continued, his point is made loud and clear for the judge that no justice can be meted out in this case without the presence of a legally qualified ASL/English interpreter. The judge becomes increasingly frustrated throughout the two years, often shouting out on record, "Isn't there anything we can do to secure an interpreter for these proceedings?"

1. Although John Sandoval is a fictional person, his story is a composite of true stories related to the author by Deaf defendants, the author's own experiences, and several accounts related to the author by Kellie Hickey, Legal Referral Specialist at the Massachusetts Comm'n for the Deaf and Hard of Hearing (MCDHH). All identifying information has been removed.

2. "Deaf" is capitalized here because it refers to people who not only have hearing loss, but who also identify as members of the Deaf community, a linguistic and cultural minority. When referring to those people with hearing loss who do not identify as members of the Deaf community, but rather who live, socialize, and work completely in the non-Deaf world, "deaf" will be used.

3. The term ASL refers to "American Sign Language." For further definition and discussion, see *infra* Part I.C.

4. MASS. GEN. LAWS ch. 221, § 92A (2004); see *infra* note 5.

With an interpreter present the judge finally grants the motion to suppress.⁵ He binds the interpreter over for trial and the case goes forward. But without John's confession the prosecution's case is weak and John is acquitted. Meanwhile, because the judge has bound the interpreter over for the two day trial, four other court proceedings that the interpreter was scheduled for must be continued.

John's lawyer immediately files a multi-party civil suit against the Massachusetts Commission for the Deaf and Hard of Hearing (MCDHH) and the Justices of the Superior Court of Hampden County for violation of the Interpreter Law. The complaint also alleges violations of the rights of John and several other Deaf defendants, under article 12 of the Massachusetts Constitution, to a speedy trial, to be present for the proceedings against them, to confront witnesses against them, and to meaningful access to counsel.⁶ The suit also alleges violations of the Deaf defendants' due process rights.

B. *The Problem*

In 1985, the Massachusetts legislature charged MCDHH with a host of mandates, including providing and ensuring the provision of qualified ASL/English interpreters for court proceedings.⁷ MCDHH has not met its burden as charged by the Commonwealth, which has contributed to an interpreter shortage.⁸ The question is

5. MASS. GEN. LAWS ch. 221, § 92A. The Interpreter Law states in pertinent part:

Whenever a deaf or hearing-impaired person is arrested for an alleged violation of a criminal law, including a local ordinance, the arresting officer shall procure and arrange payment for a qualified interpreter to assist such person regarding any interrogation, warning, notification of rights, or taking of a statement. *No answer, statement, or admission, written or oral, made by a deaf or hearing-impaired person in response to any question by a law enforcement officer or any prosecutor, in his official capacity, in any criminal proceeding may be used against such deaf or hearing-impaired person unless such statement was made or elicited through a qualified interpreter and was made knowingly, voluntarily and intelligently* or, in the case of waiver of interpreter, unless the court makes a special finding that any statement made by such deaf or hearing-impaired person was made knowingly, voluntarily and intelligently.

Id. (emphasis added).

6. MASS. CONST. pt. I, art. 12 ("No subject shall be held to answer for any crimes of offence, until the same is fully and plainly, substantially and formally, described to him . . ."). Unless otherwise stated, "constitution" refers to the Massachusetts Constitution throughout this Note.

7. MASS. GEN. LAWS ch. 221, § 92A; MASS. GEN. LAWS ch. 6, § 194 (2004).

8. See ELIZA ANDERSON, MASS. HUMAN SERVS. COAL., PEOPLE FIRST: DISABILITY ANALYSIS OF THE STATE BUDGET 89-90 (2005), available at <http://www.mass.gov/>

what can be done to pressure the legislature into properly funding MCDHH so that it can effectively recruit and train interpreters for the courts. This Note argues that the Supreme Judicial Court has two choices: it can do here what it did in *Lavallee v. Justices in the Hampden Superior Court*,⁹ and release Deaf defendants who do not have access to counsel due to the lack of access to qualified interpreters.¹⁰ In the alternative, the court can address this problem through a writ of mandamus ordering MCDHH to recruit, train, and retain an adequate number of interpreters qualified to work in court and legal settings. In response, MCDHH—not funded for an undertaking of such magnitude—will necessarily approach the legislature for permanent funding earmarked for legal interpreter training.

This Note will first argue that Deaf defendants are currently in the same bind that indigent non-Deaf defendants were in when *Lavallee* was decided and, as such, should be freed within a reasonable time if no interpreters are available. Second, chapter 211, section 3 of the Massachusetts General Laws authorizes the court to issue a mandamus under extraordinary circumstances.¹¹ This Note will therefore argue that the severe shortage of qualified interpreters available to work in the courts, which precludes Deaf defendants from legally and meaningfully participating in the proceedings against them, is an appropriately extraordinary circumstance to warrant a writ of mandamus. Both measures would put pressure on the legislature to appropriate funds to ensure that an adequate

mddc/documents/people_first_h1fy06.pdf (identifying the shortage of legal interpreters, stating that “[t]he shortage is hampering the Commission’s ability to function and individuals’ capacity to access basic legal, emergency and human services supports”); MASS. HUMAN SERVS. COAL., PEOPLE FIRST: WHAT MASSACHUSETTS DOES FOR PEOPLE WITH DISABILITIES 38 (2005) [hereinafter PEOPLE FIRST], available at http://www.mass.gov/mddc/documents/people_first_h2fy06.pdf (identifying the severe shortage of generalist ASL/English interpreters). This author is a nationally certified ASL/English interpreter qualified by MCDHH to work in court and legal settings. She has firsthand, intimate knowledge of the state of interpreter services in Massachusetts. Statistics are not always available, despite the best efforts of this author to obtain them. Some anecdotal evidence will be used in this Note, although every effort has been made to cite authority where possible.

9. *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004).

10. *Id.* at 912 (ordering the release of indigent defendants not assigned counsel after seven days). “[T]he principle[] of procedural due process . . . include[s] the right to be heard, which necessarily includes the right to be heard by counsel.” *Id.* at 902 (citing *Commonwealth v. Torres*, 806 N.E.2d 895, 897 (Mass. 2004)).

11. See *infra* Part II.E.2; see also MASS. GEN. LAWS ch. 211, § 3 (2004).

number of interpreters are recruited, trained, and paid to work in court and legal settings.

Part I of this Note will outline a brief history of the circumstances in Massachusetts that led to the current shortage of qualified court and legal interpreters. Part I will also describe the Deaf community, its language (ASL), culture, traditions, and norms. Finally, Part I will examine relevant case law. Part II argues that, based on analogous case law, the solution to the interpreter shortage should be the release of Deaf defendants who cannot be provided interpreters in a timely fashion or, alternatively, the issuance of mandamus. The judiciary can and should intervene when the civil rights of a group of individuals are being violated by the policies of inaction, and sometimes overt obstruction, promulgated by the agency charged with their protection.

I. BACKGROUND

There is a crisis-level shortage of qualified ASL/English interpreters available to work in the courts in Massachusetts.¹² The lack of interpreters for Deaf defendants in the courts violates both state statutes and the Massachusetts Constitution.¹³ The Supreme Judicial Court of Massachusetts has made it clear that such deprivation of defendants' rights to counsel and to access the proceedings against them is impermissible.¹⁴ Not only are Deaf defendants' rights violated by the shortage of interpreters, but the judiciary's ability to mete out justice is also stymied.

12. ANDERSON, *supra* note 8, at 89-90 (identifying the shortage of legal interpreters, stating "[t]he shortage is hampering the Commission's ability to function and individuals' capacity to access basic legal, emergency and human services supports").

13. *See id.*; MASS. CONST. pt. I, art. 12. Although it will become clear throughout this Note that Deaf defendants' federal constitutional rights are also implicated, other articles have addressed that issue already. Therefore, this Note only discusses the Massachusetts justice system. *See, e.g.*, Michele-Lee Berko, Comment, *Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant*, 97 DICK. L. REV. 101 (1992); Gregory G. Sarno, Annotation, *Ineffective Assistance of Counsel: Use or Nonuse Of Interpreter at Prosecution of Hearing-Impaired Defendant*, 86 A.L.R. 4TH 698 (2007); Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the ADA*, 8 J.L. & HEALTH 155 (1994); Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice if You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163 (1994); *Attorneys, Deaf Clients and the Americans with Disabilities Act*, 2004-JAN W. VA. LAW. 30; Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843.

14. *Lavallee*, 812 N.E.2d 895.

A. *The Scope of the Problem and the Supporting Statistics*

Deaf defendants in the United States require the use of ASL/English interpreters in legal proceedings; without interpreters, Deaf defendants would not be able to exercise their Fifth and Sixth Amendment rights under the U.S. Constitution.¹⁵ Such interpreters must be specially trained and highly skilled to work in court and legal settings. The Massachusetts legislature recognized these needs when it passed and later amended the Interpreter Law—a law distinct from spoken language statutes—that exclusively protects the communication access rights of Deaf people in the courts.¹⁶ The legislature recognized that unless this standard is met, Deaf defendants' constitutional rights will be violated.¹⁷

The legislature further recognized the unique communication access needs of the Deaf community by establishing MCDHH and charging it with the duties of both qualifying interpreters and referring appropriate interpreters to court and legal assignments.¹⁸ However, there are not nearly enough interpreters who are qualified to work in court and legal settings to meet the needs of Deaf defendants,¹⁹ let alone all the other Deaf parties who need interpreters for their proceedings.²⁰ For example, Deaf people who have been arrested sit in jail sometimes for days without understanding what is happening to them or why they were arrested because of the length of time it takes to obtain the services of an interpreter. Sometimes, as in the hypothetical case of John Sandoval, their time in jail is much longer. Such deprivation of freedom violates part I, article 12, of the Massachusetts Constitution, which guarantees a defendant's right to due process, to understand the

15. For a comprehensive examination of the nexus between the provision of qualified ASL/English interpreters for Deaf defendants and their constitutional rights, see Berko, *supra* note 13; Sarno, *supra* note 13; Simon, *supra* note 13; McAlister, *supra* note 13; *Attorneys, Deaf Clients and the Americans with Disabilities Act*, *supra* note 13; LaVigne & Vernon, *supra* note 13.

16. MASS. GEN. LAWS ch. 221, § 92A (2004).

17. *Id.*; see also MASS. CONST. pt. I, art. 12 (“No subject shall be held to answer for any crimes of offence, until the same is fully and plainly, substantially and formally, described to him . . .”).

18. An Act Establishing a Commission for the Deaf and Hard of Hearing, ch. 716, 1985 Mass. Acts 1106 (codified as amended at MASS. GEN. LAWS ch. 6, §§ 191-199 (2004)).

19. Although the shortage affects Deaf people in all legal settings, the focus of this Note is solely on Deaf defendants.

20. Telephone Interview with Kellie Hickey, Statewide Court and Legal Interpreter Referral Specialist, Mass. Comm'n for the Deaf & Hard of Hearing, in Dorchester, Mass. (Oct. 21, 2005).

charges against him or her, and to counsel.²¹ In order to comfortably fill the existing interpreter requests,²² which do not include jury duty,²³ MCDHH would need to more than double its pool of quali-

21. MASS. CONST. pt. I, art. 12. Article 12 states in pertinent part, "No subject shall be held to answer for any crimes of offence, until the same is fully and plainly, substantially and formally, described to him." *Id.* It goes on to track the due process, jury of one's peers, right to face witnesses, and right to remain silent language of the U.S. Constitution, which states "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." *Id.*; see U.S. CONST. amend. VI.

22. From January 2004 through December 2004 there were 1274 official requests for interpreters for court or legal assignments in Massachusetts. Statistics compiled by Kellie Hickey, Statewide Court and Legal Interpreter Referral Specialist, Mass. Comm'n for the Deaf & Hard of Hearing, in Dorchester, Mass. (Apr. 30, 2007) (on file with author). Of these requests, 62 were withdrawn by the requestor (this could be for reasons such as the case being settled or the defendant pleading out, but it could also be because the referral specialist could predict that no interpreter would be available), and 102 requests were cancelled (this could be due to attorney or witness illness, miss-scheduling, or other reasons). *Id.* Of the 1274 official requests, only 847 were filled. *Id.* Ms. Hickey forewarned the author that because she is the one person holding everyone's schedules and doing legal referral for the whole state, not all of the unfilled assignments are reflected in these statistics. She is able to see when it will be impossible to fill requests based on the number of requests she has already filled for a specific time period and persuade court clerks to get a continuance for those conflicting dates. She informed the author that there are "many more" continuances, or technically unfilled requests, that are not reflected in the above mentioned statistics. E-mail from Kellie Hickey, Statewide Court & Legal Interpreter Referral Specialist, Mass. Comm'n for the Deaf & Hard of Hearing, in Dorchester, Mass., to author (Sept. 1, 2005) (on file with author). Because not all of the continuances are reflected in these numbers, the actual fill rate is probably considerably lower. *Id.* Of the total 1274 requests, 369 were for two or more interpreters. Statistics compiled by Kellie Hickey, *supra*. Because there are so few interpreters available, the requests requiring two or more interpreters are especially difficult to fill. *Id.* Every time these requests are made, the ability of the referral specialist to fill them goes down. Telephone Interview with Kellie Hickey, *supra* note 20.

23. MCDHH currently has a moratorium on referring interpreters for Deaf people selected for jury duty. Form Letter from Kellie Hickey, Statewide Court & Legal Interpreter Referral Specialist, Mass. Comm'n for the Deaf & Hard of Hearing, to members of the Deaf community seeking to participate in jury duty (Sept. 1, 2005) (on file with author). The policy is unwritten, but the letter, prepared by Kellie Hickey which, is sent to Deaf people who want to participate when called for jury duty reads, in pertinent part:

fied interpreters.²⁴ In fact, under the current system, the referral specialist at MCDHH, seeing that no interpreters will be available, often convinces court clerks to reschedule proceedings according to when interpreters will be available.²⁵ Thus, many requests are diverted to future dates without ever being officially logged as “unfilled.”²⁶ To fully meet the needs of Deaf people involved in the legal system, the number of interpreters would probably have to increase threefold.²⁷

This crisis-level shortage of interpreters qualified to work in court and legal settings is not new. The pool of qualified interpreters has been more or less the same for thirty years.²⁸ If anything, because the pool of interpreters is static but the number of requests

Currently requests for Jury Duty in Massachusetts are unfilled. Although we are aware of the public outcry from members of the Deaf community wanting to perform their civic duty, there are many factors that continue [to] block communication access at this time.

In Massachusetts, there exist only a handful of legally qualified sign language interpreters The demand is so high for these individuals, that often times they are booked months in advance. Any jury assignment would require at least two interpreters . . . if not more. With so few qualified people in the state, we must prioritize our resources by scheduling interpreters . . . for daily court proceedings (i.e. arraignments, pretrials, trials) and other out of court legal requests (i.e. arrests, attorney client meetings, depositions).

. . . .

There has been an agreement between MCDHH and AOTC/Jury Commissioners office that when we receive the requests for jury duty, they are postponed for at least a year due [to] the lack of interpreters Until there is an increase in legally qualified interpreters . . . in Massachusetts, we do not foresee a change in filling these requests.

Id.

24. As of the writing of this Note, there are thirteen ASL/English interpreters deemed qualified to work in the Massachusetts courts who actually reside and work in the Commonwealth. Telephone Interview with Kellie Hickey, *supra* note 20. Of those thirteen interpreters, the approximate equivalent of 4.5 interpreters are willing and able to accept court assignments on a consistent, full-time basis. *Id.*

25. *Id.*

26. *Id.*

27. This estimate is based on the professional opinion of Kellie Hickey, Statewide Court & Legal Interpreter Referral Specialist, Massachusetts Comm’n for the Deaf & Hard of Hearing. *Id.*

28. Interview with Joan Wattman, Massachusetts court & legal interpreter since 1976, in Plainfield, Mass. (Aug. 5, 2005).

continues to rise,²⁹ the crisis is worse now than it was even ten years ago.³⁰

B. *The History and Laws that Led to the Ongoing Interpreter Crisis*

“Disability advocates have been very successful in using statutes and legislative action, rather than court cases, to address equal protection by building on the traditional government function of social welfare.”³¹ Before the Americans with Disabilities Act,³² or section 504 of the Rehabilitation Act of 1973,³³ were passed, Massachusetts led other states in passing the critically important Interpreter Law, which applies only to Deaf people, in 1971.³⁴ The text of the original law, which has since been amended,³⁵ provided, in relevant part:

29. Requests continue to rise because of the passage of the Americans with Disabilities Act (ADA) and an increased level of judicial awareness of its mandates, MCDHH’s educational presentations to the courts and law enforcement about courts’ duties to Deaf parties, and the rising visibility of interpreters in general. See Americans with Disabilities Act, 42 U.S.C. § 12101 (2000). *Tennessee v. Lane* was the seminal case determining that all qualified people with disabilities have a right to unhindered access to the courts. *Tennessee v. Lane*, 541 U.S. 509 (2004). The case involved a disabled man who was a criminal defendant in Tennessee. *Id.* at 513-14. Due to the lack of wheelchair access at his local courthouse, he was forced to crawl up the courthouse stairs to appear at his proceeding. *Id.* When the proceeding was continued, he refused to crawl up the stairs again or allow the court’s personnel to carry him on the subsequent date. *Id.* at 514. He sued the state of Tennessee under Title II of the ADA, which prohibits discrimination against qualified people with disabilities with respect to public services. *Id.* at 513. The issue before the Supreme Court was whether Title II was appropriately exercised by Congress as part of its enforcement power under the Fourteenth Amendment, as applied to cases implicating the fundamental right of a person to access the courts. *Id.* The Court held that it was indeed a valid exercise of Congress’s enforcement power and that Title II governs in cases concerning qualified people with disabilities having access to the courts. *Id.* at 533-34.

30. Interview with Joan Wattman, *supra* note 28.

31. Sarah S. Geer, *When “Equal” Means “Unequal”—And Other Legal Conundrums for the Deaf Community*, in LANGUAGE AND THE LAW IN DEAF COMMUNITIES 82, 118-19 (Ceil Lucas, ed. 2003).

32. Americans with Disabilities Act, 42 U.S.C. § 12101 (prohibiting discrimination against qualified people with disabilities in employment and state and public accommodations, including access to courts).

33. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2000)) (prohibiting discrimination against people with disabilities by entities receiving federal funding and specifically requiring the use of qualified interpreters for Deaf people).

34. Act of June 29, 1971, ch. 459, 1971 Mass. Acts 306 (codified as amended at MASS. GEN. LAWS ch. 221, § 92A (2004)) (providing for the appointment of interpreters for Deaf people in Superior Court).

35. See MASS. GEN. LAWS ch. 221, § 92A (2004).

In any proceeding in the superior court to which a deaf person is a party or a witness, the presiding justice shall appoint a qualified interpreter to interpret the proceedings for such person, unless such person waives in writing the appointment of such interpreter. For the purposes of this section, a person shall be deemed to be deaf if he has a physical handicap which prevents him from speaking or from hearing fully.³⁶

Then, in 1974, just after the Rehabilitation Act of 1973 went into effect, the Massachusetts legislature passed the law establishing the Massachusetts Office on Deafness (MOD), to be housed under the auspices of the Massachusetts Rehabilitation Commission.³⁷ The purpose of establishing the MOD was to address the growing concern that Deaf people's unique communication access needs were not being addressed by the newly burgeoning disability-rights movement, and that as such, Deaf people were falling through the cracks on every front, as well as suffering discrimination unique to their population.³⁸

It was not until 1978 that the federal government passed the Federal Court Interpreters Act³⁹ and many states followed suit. The purpose of this law was to protect the constitutional rights of Deaf people and others who spoke languages other than English in court and legal proceedings.⁴⁰ The public and its elected representatives were beginning to understand that without interpretation, Deaf people and people who spoke languages other than English were not able to meaningfully participate in any legal proceeding.⁴¹ They were realizing that

too often . . . constitutional mandates [we]re violated out of ignorance and fear. Ignorance on the part of the criminal justice system because [it] d[id] not know the actual consequences of deafness . . . and fear . . . because the system d[id] not understand deaf persons and deaf persons do not understand the system.⁴²

36. Act Providing for the Appointment of Interpreters for the Deaf in Court Proceedings, ch. 459, 1971 Mass. Acts 306.

37. An Act Establishing an Office of Deafness in the Massachusetts Rehabilitation Commission, ch. 805, 1974 Mass. Acts 804, *repealed by* An Act Establishing a Commission for the Deaf and Hard of Hearing, ch. 716, § 1, 1985 Mass. Acts 1106.

38. H.R. 5679, 168th Gen. Ct., 2d. Ann. Sess., § 1(1)-(3) (Mass. 1974).

39. Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978) (codified as amended at 28 U.S.C. § 1827 (2000)).

40. Rob Hoopes, *Trampling Miranda: Interrogating Deaf Suspects*, in LANGUAGE AND THE LAW IN DEAF COMMUNITIES, *supra* note 31, at 21, 28.

41. *Id.*

42. McAlister, *supra* note 13, at 163-64.

But Massachusetts was at the forefront, leading the way by passing the Interpreter Law and the laws establishing the MOD.⁴³

There is little legislative history available to describe what happened in Massachusetts in the 1970s that led to the passage of these vital state laws. But it is clear from subsequent events that between 1974 and 1985 Deaf people came together in Massachusetts to lobby for their communication access rights.⁴⁴ In June of 1985, the Task Force on Deafness submitted its official report to the Secretary of the Executive Office of Human Services.⁴⁵ The Task Force stressed the Deaf community's pressing need for an independent agency to protect and ensure its rights.⁴⁶ It proposed the formation of MCDHH,⁴⁷ and less than a year later, by executive order of then-Governor Michael Dukakis, the agency was established.⁴⁸ MCDHH was a new agency, separate from the Massachusetts Rehabilitation Commission, with its own budget and newly appointed Deaf commissioner, Barbara Jean Wood.⁴⁹

Among other tasks, the legislature charged MCDHH with promulgating and coordinating public policy, advocating for the needs of Deaf people in the Commonwealth, providing and ensuring the provision of interpreter services, ensuring the accessibility and quality of existing services, and recommending new services to the Governor as needed.⁵⁰ The current section of the law entitled "Functions of Commission" states that MCDHH "shall serve as the principal agency of the commonwealth, on behalf of deaf and hard of hearing persons."⁵¹ Further, MCDHH explains in its mission statement:

43. An Act Providing for Interpreters for the Deaf in Court Proceedings, ch. 459, 1971 Mass. Acts 306 (codified at MASS. GEN. LAWS ch. 221, § 92A (1971)); An Act Establishing an Office of Deafness in the Massachusetts Rehabilitation Commission, ch. 805, 1974 Mass. Acts 804, *repealed by* An Act Establishing a Commission for the Deaf and Hard of Hearing, ch. 716, § 1, 1985 Mass. Acts 1106 (codified at MASS. GEN. LAWS ch. 6, §§ 191-199 (1985)).

44. TASK FORCE ON DEAFNESS, EXECUTIVE OFF. OF HUMAN SERVS., REPORT OF THE TASK FORCE ON DEAFNESS (1985).

45. *Id.*

46. *Id.* at 14.

47. *Id.*

48. *Agency Established for the Hearing Disabled*, BOSTON GLOBE, Jan. 5, 1986, at 35, available at 1986 WLNR 279392 (Westlaw).

49. Jean Dietz, *Head of Deaf Commission Sworn In: Silent Applause Greets New Leader*, BOSTON GLOBE, Apr. 21, 1986, at 25, available at 1986 WLNR 278258 (Westlaw).

50. MASS. GEN. LAWS ch. 6, §§ 191-199 (2004).

51. *Id.* § 194.

All functions and services are carried out in order to enable deaf and hard of hearing individuals to have access to information, services, education, and opportunities which will be equal to those of able-bodied people who hear and which will enable each deaf and hard of hearing individual to live productively and independently while assuming fullest responsibilities as a citizen.⁵²

After MCDHH was established, the legislature amended the Interpreter Law several times, expanding its reach and charging MCDHH with ever more responsibility in protecting the communication access rights of Deaf people. The current version of the Interpreter Law provides, in pertinent part:

In any proceeding in any court in which a deaf . . . person is a party or a witness, or proceeding involves a juvenile whose parent, or parents, is deaf . . . or in any proceeding before an executive or legislative board . . . or other body of the state . . . such court or body shall appoint a qualified interpreter to interpret the proceedings, unless such deaf . . . person knowingly, voluntarily, and intelligently waives, *in writing* the appointment of such interpreter. . . . *In no event shall the failure of the deaf . . . person to request an interpreter be deemed a waiver of such appointment.*

. . . . *In any criminal proceeding wherein counsel has been appointed to represent an indigent defendant, the court shall also appoint a qualified interpreter for such defendant, whenever such defendant is deaf . . . to assist in communication with counsel in all phases of the preparation and presentation of the case.*

. . . .
 “Qualified interpreter” . . . an interpreter *shall be deemed qualified . . . by the Office of Deafness* Said office of deafness shall coordinate *all* requests for qualified interpreters and shall maintain a list of all such interpreters from which it shall fill such requests.⁵³

Not only did the legislature expand the law from its original form to include all legal proceedings, not just superior court proceedings, as was provided in the 1971 version,⁵⁴ but it also designated MCDHH as the only entity empowered to determine interpreters’ qualifica-

52. Mass. Comm’n for the Deaf & Hard of Hearing, Vision and Mission Statement, <http://www.mass.gov/mcdhh> (follow the “Vision and Mission Statement” hyperlink) (last visited May 9, 2007).

53. MASS. GEN. LAWS ch. 221, § 92A (2004) (emphasis added). The Office on Deafness is now called MCDHH, but the law has not been changed to reflect this.

54. Act Providing for the Appointment of Interpreters For the Deaf in Court Proceedings, ch. 459, 1971 Mass. Acts 306.

tions for court and legal interpreting assignments.⁵⁵ Further, it mandated that MCDHH would become the sole entity that would maintain the list of qualified interpreters and refer them on request.⁵⁶ This, in effect, deprived the court of its ability to select and hire interpreters itself, giving MCDHH that power instead.⁵⁷ Indeed, for a judge or an attorney to do her own interpreter referral would be a violation of Massachusetts law.⁵⁸

C. *ASL is a Complete and Separate Language from English and Deaf People Often Are Not Fluent Users of English*

Courts do not necessarily understand why ASL/English interpreters are so important to Deaf people's access to the courts.⁵⁹ Importantly, ASL is a complete and rich language, completely separate from English, with its own vocabulary, grammar, and syntax.⁶⁰ ASL is in no way dependent on spoken or written English, which is linear, but instead is a visual/gestural language communicated in space and perceived through the eyes; there is no written form.⁶¹ People who identify as part of the Deaf community use ASL as their primary mode of communication.⁶² In addition to using a different language than the mainstream population, Deaf people are members of a unique and separate culture.⁶³ This creates an additional layer of complexity for Deaf people, because "[d]ifferences in language go hand in hand with differences in culture, since language is an integral part of culture."⁶⁴ According to the most recent demographic information compiled and analyzed by MCDHH,

55. MASS. GEN. LAWS ch. 221, § 92A.

56. *Id.*

57. *Id.*

58. *Id.*; An Act Establishing a Commission for the Deaf and Hard of Hearing, ch. 716, 1985 Mass. Acts 1106-1107 (codified at MASS. GEN. LAWS ch. 6, § 194 (1985)) (stating that MCDHH is the only entity allowed to refer interpreters to court and legal settings).

59. SUBCOMM. ON COURT INTERPRETERS, COMM. ON FAIRNESS & EQUAL ACCESS TO JUSTICE, A REPORT ON INTERPRETER SERVICES IN THE VERMONT COURTS 2, 6 (2004) available at <http://www.vermontjudiciary.org/Library/PDF/resources/Rpts/interrpt.pdf>.

60. HARLAN LANE, *WHEN THE MIND HEARS* 213 (Vintage Books 1989) (1984).

61. *Id.* at 212-13; see also Nat'l Inst. on Deafness & Other Communications Disorders, American Sign Language, <http://www.nicdc.nih.gov/health/hearing/asl.asp> (last visited May 9, 2007).

62. CHARLOTTE BAKER & CAROL PADDEN, *AMERICAN SIGN LANGUAGE: A LOOK AT ITS HISTORY, STRUCTURE AND COMMUNITY* 3 (1978).

63. *Id.*

64. Roger W. Shuy, *The Language Problems of Minorities in the Legal Setting*, in *LANGUAGE AND THE LAW IN DEAF COMMUNITIES*, *supra* note 31, at 1.

there are approximately 13,300 culturally Deaf people (users of ASL) in Massachusetts.⁶⁵

In addition to the fact that ASL is a separate language from English, the pervasive problem of poor education in the United States has led to many Deaf people never learning English as a second language.⁶⁶ Most Deaf adults have a fourth grade reading level.⁶⁷ The *Miranda* warning is supposedly written at an eighth grade level,⁶⁸ although there is not consensus in the field of ASL/English interpreters that this is so.⁶⁹ Regardless, most Deaf adults, because of their reading level, do not have access to the warning through spoken or written English. Further, there is a pervasive misconception that all Deaf people can speak or at least speech-read (lip-read), and if they profess not to be able to, then they are just being lazy or uncooperative, or worse, that they are trying to run a scam on the people around them who can hear (hereinafter "hearing people").⁷⁰ However, speech-reading is a complex and in-

65. Mass. Dep't of Health & Human Servs., Mass. Comm'n for the Deaf & Hard of Hearing, Demographic Information on People Who are Deaf or Hard of Hearing, <http://www.mass.gov/mcdhh> (follow the "Demographic Information on People Who Are Deaf or Hard of Hearing" hyperlink) (last visited May 9, 2007).

66. For a comprehensive examination of the factors leading to Deaf people's lack of English literacy, see generally Annabelle Dyer et al., *Predictors of Reading Delay in Deaf Adolescents: The Relative Contributions of Rapid Automatized Naming Speed and Phonological Awareness and Decoding*, 8 J. DEAF STUD. & DEAF EDUC. 215 (2003), available at <http://jdsde.oxfordjournals.org/cgi/reprint/8/3/215.pdf>; HAROLD A. JOHNSON, U.S. DEAF EDUCATION TEACHER PREPARATION PROGRAMS: A LOOK AT THE PRESENT AND A VISION FOR THE FUTURE (2003), available at <http://www.coe.ufl.edu/copsse/docs/IB-9/1/IB-9.pdf>.

67. Dr. Jane Kelleher Fernandes, Deaf Education Today: The Status Quo, <http://clerccenter.gallaudet.edu/Products/Sharing-Ideas/deafed/tsq.html> (last visited May 9, 2007) ("Frank Bowe (1991) in *Approaching Equality* reiterated that deaf children seem to reach a plateau at third grade reading comprehension levels."). In this Note, the author specifically avoids using the word "illiterate," because although many Deaf adults are not fluent in English, most Deaf users of ASL are fluent and fully literate in ASL. Their culture is replete with ASL poetry, storytelling, and literature, with which most Deaf adults are familiar and adept. See generally McAlister, *supra* note 13.

68. SY DUBOW ET AL., LEGAL RIGHTS: THE GUIDE FOR DEAF AND HARD OF HEARING PEOPLE 176 (5th ed. 2000).

69. Professional discussion with legal interpreters at the Iron Sharpens Iron Conference for Legal Interpreters in Atlanta, Georgia, in May 2004. The issue of whether the *Miranda* warning is written at the eighth grade level was discussed but not resolved at the court and legal interpreters training offered by AOTC and MCDHH, if the fall of 2000. See also AOTC and MCDHH: THE AMERICAN LEGAL SYSTEM WITH EMPHASIS ON THE MASSACHUSETTS COURT SYSTEM FOR INTERPRETERS SERVING DEAF AND HARD OF HEARING INDIVIDUALS (Lewana Clark ed., 2000) (training manual on file with author).

70. See generally HARLAN LANE, THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY (Vintage Books 1993) (1992); Los Angeles Comm'n on Assaults

accurate art.⁷¹ Only approximately 30 percent of speech sounds are visible on the lips, the rest being formed in the mouth and throat.⁷² Even the best lip-reader, under the perfect set of environmental circumstances (with optimal lighting, no visual distractions, a calm emotional state, and no obstructions to the speaker's mouth or face), can only understand about 30 percent of verbal speech.⁷³ As author Beryl Lief Benderly notes, "Few things so easily remove a person from the normal life of society as a loss of hearing. The person who cannot hear is a permanent foreigner in the country of speech."⁷⁴

D. *The Need for ASL/English Interpreters and the Process of Qualifying Them*

1. The Qualification of Interpreters

The Registry of Interpreters for the Deaf, Inc. (RID, Inc.) was established in 1964.⁷⁵ It was incorporated in 1972,⁷⁶ when it established a national testing system, creating professional standards for ASL/English interpreters in the United States.⁷⁷ In addition to developing a generalist test for certifying interpreters to work in most settings, RID, Inc. also developed a special certificate for interpreters desiring to work in court and legal settings, the Specialist Certificate: Legal (SC:L).⁷⁸ This test is still used today by many states to

Against Women, Understanding Deafness, <http://www.lacaaw.org/deaffaq.html> (last visited May 9, 2007); Off. for Disability Issues (New Zealand), History, <http://www.odi.govt.nz/what-we-do/nzsl-history.html> (last visited May 9, 2007); WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDE FOR POLICY AND PRACTICE IN THE STATE COURTS 166 (1995), available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter7Pub.pdf. The author's anecdotal experience, corroborated by extensive conversations over many years with legal interpreter colleagues, as well as general media portrayal of Deaf people, also supports this statement.

71. McAlister, *supra* note 13, at 173.

72. *Id.* at 172.

73. *Id.*

74. BERYL LIEFF BENDERLY, DANCING WITHOUT MUSIC: DEAFNESS IN AMERICA 25 (Gallaudet University Press 2002) (1980).

75. Registry of Interpreters for the Deaf, Inc., <http://www.rid.org> (last visited May 9, 2007).

76. *Id.*

77. Registry of Interpreters for the Deaf, About NTS (National Testing System), <http://www.rid.org/education/testing/index.cfm/AID/82> (last visited May 9, 2007); Registry of Interpreters for the Deaf, About RID, <http://www.rid.org.aboutRID/overview/index.cfm> (last visited May 9, 2007).

78. SPECIALIST CERTIFICATE: LEGAL (SC:L) EXAMINATION INFORMATION BULLETIN 3 (2006), available at http://www.rid.org/UserFiles/File/pdfs/Certification_Documents/SCL_Candidate_Bulletin.pdf.

ensure that only the most skilled and highly trained interpreters are working in the courts.⁷⁹

In Massachusetts, MCDHH is the agency responsible for ensuring the qualifications of such interpreters.⁸⁰ MCDHH recognizes the RID SC:L, but it also has its own stringent qualifying system for those interpreters who want to work in the courts.⁸¹ This has been true since the legislature originally charged the MOD—before it became MCDHH—with developing criteria for qualifying legal interpreters to comply with the 1971 Interpreter Law.⁸² When the Interpreter Law was amended to include all court proceedings, not just those happening in superior court, the legislature added the requirement that MCDHH must develop its policies for qualifying legal interpreters in conjunction with the Massachusetts Registry of Interpreters for the Deaf, the local chapter of RID, Inc., and the Massachusetts State Association of the Deaf, the local chapter of the national political and social justice action group of the Deaf community—the National Association of the Deaf.⁸³

So, even before RID, Inc. established its national testing system in 1972 to ensure that interpreters had minimum qualifications, the Massachusetts legislature already understood that Deaf defendants and parties needed to be able to have court proceedings presented to them in ASL, as evidenced by the passage of the 1971 Interpreter Law. The qualifying system MCDHH developed in response to this legislative mandate is still used today by the agency, side by side with, or sometimes instead of, the RID SC:L to assure that qualified interpreters are working in Massachusetts courts.⁸⁴

79. *Id.*

80. MASS. GEN. LAWS ch. 221, § 92A (2004) (“[MCDHH] shall coordinate all requests for qualified interpreters and shall maintain a list of all such interpreters from which it shall fill requests.”).

81. *Id.* MCDHH deems interpreters qualified “based upon the recommendations of the Massachusetts Registry of the Deaf, the Massachusetts State Association of the Deaf and other appropriate agencies.” *Id.*

82. An Act Providing for the Appointment of Interpreters for The Deaf in Superior Court Proceedings, ch. 459, 1971 Mass. Acts 306 (codified at MASS. GEN. LAWS ch. 221, § 92A (1971)).

83. An Act Establishing a Commission for the Deaf and Hard of Hearing, ch. 716, 1985 Mass. Acts 1106 (codified at MASS. GEN. LAWS ch. 221, § 92A (2004)).

84. Based on the author’s personal knowledge. There is no written policy on this from MCDHH. The author was “MCDHH approved” to work as an interpreter in the courts prior to receiving her SC:L, having completed a rigorous training program and over one hundred hours of externship under a seasoned legal interpreter. Of the thirteen interpreters qualified to work in the Massachusetts courts, only three hold the SC:L. Telephone interview with Kellie Hickey, *supra* note 20. The other ten are “approved” by MCDHH to work in courts and other legal settings. *Id.*

2. The Need for Qualified Interpreters in Court

Having qualified and highly skilled interpreters working in the courts and other legal settings is critical to Deaf parties' understanding of the proceedings, especially for Deaf criminal defendants.⁸⁵ Without the aid of an interpreter, a Deaf defendant is effectively denied access to those proceedings, although such access is guaranteed by the Massachusetts Constitution.⁸⁶ Massachusetts law states that "[a] person accused of crime shall at his trial be allowed to be heard by counsel, to defend himself, to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face."⁸⁷ The legislature strove to ensure that Deaf people would be able to communicate with counsel, aid in their own defense, and in all ways participate meaningfully in any proceedings in which they were involved.⁸⁸ It made sense that the agency to oversee and ensure the highest standards for interpreters would be MCDHH, with its Deaf commissioner, its commitment to hiring Deaf staff, and its knowledge of Deaf people's language and culture.⁸⁹ Standards such as the RID SC:L and the Massachusetts approval process for qualified interpreters desiring to work in the courts and legal settings are critical. Unless such standards are maintained by people who understand ASL and the interpreting process, any person who looked to court personnel like they could sign would end up working in the courts.⁹⁰

85. REPORT ON INTERPRETER SERVICES IN THE VERMONT COURTS, *supra* note 59, at 6.

86. The Massachusetts Constitution states, in pertinent part, "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him." MASS. CONST. pt. I, art. 12. It goes on to track the due process, jury of one's peers, right to face witnesses, and right to remain silent language of the U.S. Constitution. *Id.* For a comprehensive examination of the case law that supports this proposition, see Berko, *supra* note 13; Sarno, *supra* note 13.

87. MASS. GEN. LAWS ch. 263, § 5 (2004).

88. MASS. GEN. LAWS ch. 221, § 92A (2004).

89. For a complete understanding of the mandates of MCDHH, which include hiring competent Deaf staff whenever possible, see MASS. GEN. LAWS ch. 6, §§ 191-199 (2004).

90. Based on the author's anecdotal experience, having worked as an interpreter throughout the United States; informal discussion with legal interpreters at the Iron Sharpens Iron Conference for Legal Interpreters in Atlanta, GA, May 2004; informal discussion with legal interpreter colleagues in New York, California, Tennessee, Kentucky, Rhode Island, New Hampshire, and Maine. Without stringent standards as to who can and cannot work in court, courts tend to do what is convenient and low in cost, regardless of the effectiveness of the communication with Deaf parties. *Id.*; see also *supra* text accompanying note 59.

Without clear, accurate interpretation by an interpreter who is fluent in ASL, the Deaf defendant has little chance of understanding the message, which means little chance of understanding his rights, his attorney, and the proceedings in general.⁹¹ In *United States ex rel. Negron v. New York*, the Court of Appeals for the Second Circuit observed, “[T]he government does not dispute the nearly self-evident proposition that an indigent defendant who could speak and understand no English would have a right to have his trial proceedings translated so as to permit him to participate effectively in his own defense.”⁹² Indeed, a lack of appropriate grammatical and “syntactic information can be catastrophic to the Deaf individual[] . . . [it would be] somewhat akin to a hearing person trying to make sense of the indecipherable word salads of schizophrenics.”⁹³ In sum, by passing the 1971 Interpreter Law and its 1985 amendment, and by establishing MCDHH and charging it with qualifying interpreters for court and legal settings, the legislature recognized the critical need for highly skilled ASL/English interpreters in the courts in order to allow Deaf defendants to fully participate in the proceedings against them.

E. *The Case Law*

1. *Lavallee v. Justices in the Hampden Superior Court*⁹⁴

The situation faced by John Sandoval in the hypothetical above is similar to that faced by Nathaniel Lavallee in *Lavallee v. Justices in the Hampden Superior Court*⁹⁵ in that neither had access to an attorney, albeit for different reasons. On May 3, 2004, Mr. Lavallee was arraigned without the benefit of counsel in the Springfield District Court in Springfield, Massachusetts.⁹⁶ Thereafter, he and eighteen other indigent defendants, also arraigned without counsel being present, were held in lieu of bail or under preventive detention pending assignment of counsel and the start of their proceedings.⁹⁷ Mr. Lavallee and the other indigent defendants faced this predicament because of a crisis level shortage of counsel for indi-

91. Hoopes, *supra* note 40, at 33-34.

92. *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970).

93. Hoopes, *supra* note 40, at 34.

94. *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004).

95. *Id.* at 901.

96. *Id.*

97. *Id.* at 901-02.

gent defendants available to the courts.⁹⁸ The shortage reached a crisis level as a result of “the low rate of . . . compensation [for defense attorneys for the indigent] authorized by the annual budget appropriation.”⁹⁹ The Supreme Judicial Court found that the rates of pay for counsel that could be assigned to indigent defendants in Massachusetts were “among the lowest in the nation.”¹⁰⁰ As a result, private attorneys stopped accepting defense bar appointments from the courts and, on the dates at issue, there had been no defense counsel present in the Springfield District Court for two consecutive days.¹⁰¹

The Supreme Judicial Court rejected the Attorney General’s suggestion that one solution to this shortage could be that the district attorney would charge more crimes as civil rather than criminal infractions, thereby removing the need for appointed counsel.¹⁰² The court, in describing why this was not an appropriate remedy, stated, “The discretion of the district attorney to charge certain offenses as civil infractions is an exclusively executive prerogative, and a judge’s discretion with respect to sentencing should be based on the customary factors governing disposition, not on the difficulties of securing counsel for the defendant.”¹⁰³ The court was emphasizing that not only was the legislature encroaching on the court’s boundaries, but also that the court would not, as a remedy, encroach upon the executive.¹⁰⁴ Further, the court seemed to be saying that it had a right to function as it always had without changing or bending the rules because of the legislature’s failure to raise the pay of defense attorneys appointed to represent indigent clients.¹⁰⁵

In the end, the court found that indigent defendants were receiving disparate treatment in the courts based on their economic status, in violation of the Massachusetts Constitution.¹⁰⁶ It held that incarcerating indigent defendants without providing access to counsel violated those defendants’ article 12 right to counsel, which mirrors the Sixth Amendment right to counsel under the U.S. Con-

98. *See id.* at 899.

99. *Id.* at 900.

100. *Id.*

101. *Id.* at 901.

102. *Id.* at 906-07.

103. *Id.*

104. *Id.*

105. *Id.* at 906.

106. *Id.*

stitution.¹⁰⁷ The court found that the lack of defense counsel for indigent defendants was a chronic problem; it led to the infringement of their constitutional rights.¹⁰⁸ The court further found that the cause of the shortage of private counsel for indigent defendants was the low rate of pay authorized by the state legislature, combined with its chronic under-funding of the Committee for Public Counsel Services (CPCS), the Commonwealth's publicly funded defense bar.¹⁰⁹ Without adequate funding, CPCS could not hire enough staff attorneys to represent all of the indigent defendants who needed their services; nor, regardless of funding, could CPCS attorneys represent defendants where there were conflicts of interest.¹¹⁰ Private defense attorneys who could be assigned to indigent defendants were needed to supplement the services provided by CPCS.¹¹¹ But the legislature had not increased the appropriation to CPCS for private attorneys so it could pay a higher hourly rate, and so over time, private attorneys took fewer and fewer cases until the crisis-level shortage the *Lavallee* defendants faced had developed.¹¹²

The court concluded that “[t]he continuation of what is now an unconstitutional state of affairs cannot be tolerated.”¹¹³ In explaining its holding the court stated “Proceedings in which a defendant cannot participate meaningfully may not be allowed to proceed.”¹¹⁴ The court then held that indigent defendants who did not have counsel appointed must be released after seven days, regardless of the charges against them, and that all charges must be dismissed without prejudice after forty-five days if counsel still had not been appointed.¹¹⁵ In addressing the Attorney General's concerns about the public's safety upon the release of potentially dangerous criminals, the court stated that while it shared his concerns, the responsibility for providing counsel to indigent defendants was squarely on the State.¹¹⁶ Although the court was “confident that all branches [of state government would] work diligently” to address

107. *Id.* at 903; see U.S. CONST. amend VI; MASS. CONST. pt. I, art. 12.

108. *Lavallee*, 812 N.E.2d at 903.

109. *Id.* at 900.

110. *Id.*

111. *Id.* at 909.

112. See *id.* at 900-01.

113. *Id.* at 910.

114. *Id.* at 911.

115. *Id.* at 912.

116. *Id.* at 907, 910.

the problem,¹¹⁷ it also intimated that by virtue of its disposition of this case, it had the ability to put pressure on the legislature in particular to find a monetary solution.¹¹⁸ Within a month, the Massachusetts legislature raised the hourly pay rates for court-appointed defense counsel.¹¹⁹

2. Injunctive Relief under *Judge Rotenberg Educational Center* and *Sheriff of Suffolk County*

Where injunctive relief to aggrieved parties could affect a public agency's ability to carry out its discretionary functions, the courts give deference to the agency's interpretation or implementation of its own regulations.¹²⁰ But when an agency's implementation of its regulations violates the law, it is appropriate for courts to intervene.¹²¹ Further, when an agency's policies encroach on the functions of the judiciary, the court can order a writ of mandamus requiring the agency to take affirmative steps to eliminate such encroachment.¹²²

The cases that govern here are *Judge Rotenberg Educational Center v. Commissioner of the Department of Mental Retardation* and *Attorney General v. Sheriff of Suffolk County*.¹²³ In each of these cases, the Supreme Judicial Court took the extraordinary step of issuing a writ of mandamus ordering an executive body to take a specific action.¹²⁴ These cases stand for the proposition that mandamus can issue when (a) the legislature is not adequately funding a program mandated to protect the constitutional rights of individuals and the court deems it appropriate to put pressure on the legislature to fully fund the program at issue; (b) an executive agency or

117. *Id.* at 910.

118. *Id.* at 908 (explaining what other state courts have done to put pressure on their legislatures to raise the rates of pay for attorneys representing indigent clients).

119. SPANGENBERG GROUP, INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM 4 (2005), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/MAindigdefreform2005.pdf>.

120. *Correia v. Dep't of Pub. Welfare*, 605 N.E.2d 1233, 1237 (Mass. 1993).

121. *Id.* ("When an agency's implementation of its regulations violates the law . . . it is entirely appropriate for a court to order relief.")

122. *See Att'y Gen. v. Sheriff of Suffolk County*, 477 N.E.2d 361 (Mass. 1985).

123. *Id.*; *Judge Rotenberg Educ. Ctr. v. Comm'r of Dep't of Mental Retardation*, 677 N.E.2d 127 (Mass. 1997).

124. *Sheriff of Suffolk County*, 477 N.E.2d at 361 (affirming the trial judge's orders to the sheriff of Suffolk County); *Judge Rotenberg Educ. Ctr.*, 677 N.E.2d at 152 (affirming the lower court's writ: "These considerations [that the trial court judge's order swept too broadly], however, do not affect our conclusion that the judge did not otherwise exceed her authority").

government body is obstructing the court from its timely and efficient administration of justice; or (c) an agency takes action, or takes no action, in violation of an individual's constitutional rights.

In *Judge Rotenberg Educational Center*, the families of several children with autism and mental retardation sued the Department of Mental Retardation (DMR) for failing to continue providing certain aversive therapies that they felt would prolong the lives of their children.¹²⁵ A substituted judgment order was entered by the probate court in accordance with DMR's regulations, and the parties entered into a settlement agreement.¹²⁶ However, the director of the Office for Children, a designee of DMR, refused in bad faith to follow the order which required certifying the Judge Rotenberg Educational Center to provide the aversive therapy treatment.¹²⁷ The Supreme Judicial Court, on appeal, acknowledged that it could not replace DMR's judgment with its own regarding certification and the applicable regulations, because that would be carrying out an executive function.¹²⁸ However, the court held that it could require that DMR (and thereby the Office for Children) follow the probate court's order requiring certification where an agency meets DMR's requirements for certification.¹²⁹ In other words, an agency must follow its own regulations which adhere to its legislative mandate, and a court can compel the agency to do so. The court stressed that

allowing the department to ignore a judge's order would intrude on the function of the courts, for there is no doubt that the ability to enter orders is necessary to the very existence of the court and essential to the maintenance of the court's authority. . . . It is just this sort of intrusion that art. 30 prohibits.¹³⁰

In *Attorney General v. Sheriff of Suffolk County*, the Supreme Judicial Court issued a mandamus ordering the Boston City Council to build a seventeen-story jail facility.¹³¹ There was overcrowding at the original jail facility that made it impossible for all of the prisoners to be housed there.¹³² This meant that many prisoners had to

125. *Judge Rotenberg Educ. Ctr.*, 677 N.E.2d at 132-33.

126. *Id.* at 131-32.

127. *Id.* at 132.

128. *Id.* at 139.

129. *Id.* at 139-40.

130. *Id.* (citing *Att'y Gen. v. Sheriff of Suffolk County*, 477 N.E.2d 361 (Mass. 1985); *Chief Admin. Justice of the Trial Court v. Labor Relations Comm'n*, 533 N.E.2d 1313 (Mass. 1989)).

131. *Att'y Gen. v. Sheriff of Suffolk County*, 477 N.E.2d 361, 364 (Mass. 1985).

132. *Id.* at 362.

be housed in, and transported to and from, other jails and prisons, sometimes hours away.¹³³ This made speedy administration of justice for those prisoners problematic.¹³⁴ The court found that the City Council was encroaching upon the judiciary through its non-feasance in refusing to build the jail.¹³⁵ The court issued a mandamus to force the City Council to build a particular jail that would allow for the more efficient operation of the courts.¹³⁶ In so doing, the court stated “the City Council’s failure to construct a suitable jail . . . may interfere with the functioning of the judicial branch,” and that such interference was impermissible.¹³⁷

II. ANALYSIS

A. *The Court Should Give Deaf Defendants Interpreters or Let Them Go*

The Supreme Judicial Court has clear precedent for releasing Deaf defendants who have not received interpreter services in a timely fashion.¹³⁸ The similarities between *Lavallee* and the hypothetical subject of this Note cannot be ignored. Without access to a defense attorney through a legally qualified ASL/English interpreter, a Deaf defendant cannot meaningfully participate in the proceedings, nor can he access counsel or participate in his own defense. Just as CPCS, with its inadequate state funding, was unable to procure enough attorneys from its staff to cover all of the indigent defense needs for the state,¹³⁹ so MCDHH, with its inadequate state funding, is unable to procure enough interpreters to cover all of the needs of Deaf defendants for the state.¹⁴⁰ Were the court faced with an actual case like the hypothetical John Sandoval’s, it should apply its reasoning used in *Lavallee* and hold that Deaf defendants who are being held in jail and who do not receive interpreter services in a timely manner should be released.

Regarding indigent defendants not having access to defense attorneys, the *Lavallee* Court concluded that “the continuation of

133. *Id.*

134. *See id.*

135. *Id.* at 365.

136. *Id.* at 366.

137. *Id.* at 365.

138. *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 901 (Mass. 2004).

139. *Id.*

140. *Id.*; PEOPLE FIRST, *supra* note 8, at 37-38 (identifying the severe shortage of ASL/English interpreters).

what is now an unconstitutional state of affairs cannot be tolerated,”¹⁴¹ and “[p]roceedings in which a defendant cannot participate meaningfully may not be allowed to proceed.”¹⁴² Likewise, when a Deaf defendant like John Sandoval cannot communicate with his attorney because no qualified ASL/English interpreter is available, he is unable to “participate meaningfully” in his own defense or in any proceedings against him. The Interpreter Law requires that courts appoint MCDHH-qualified interpreters for Deaf defendants.¹⁴³ Without a qualified court interpreter, a Deaf defendant in practical effect does not have access to counsel and as such should be released under the same terms as those set out in *Lavallee*.¹⁴⁴

Further, as in *Lavallee*, Deaf defendants are routinely “held . . . without the assistance of counsel”¹⁴⁵ for several days and sometimes weeks, because no interpreters are available.¹⁴⁶ Holding Deaf defendants without explanation while they wait for interpreters to become available deprives them of their liberty, which implicates “the principles of procedural due process in Article 12 of the Massachusetts Declaration of Rights.”¹⁴⁷ One of the rights implicated is “the right to be heard, which necessarily includes the right to be heard by counsel.”¹⁴⁸ Without the assistance of an interpreter, Deaf defendants cannot be heard by the courts or by counsel, and therefore, their article 12 due process rights are being violated.

The *Lavallee* court held that such violations are impermissible for indigent defendants;¹⁴⁹ likewise, they should not stand where Deaf defendants are concerned. The court stated that it could not “countenance allowing a criminal prosecution to proceed against a defendant who does not have the benefit of counsel up to and including a trial on criminal charges for which he could face incarceration.”¹⁵⁰ Without interpreters, Deaf defendants do not “have the benefit of counsel” either. Thus, just as the indigent defendants

141. *Lavallee*, 812 N.E.2d at 910.

142. *Id.* at 911.

143. MASS. GEN. LAWS ch. 221, § 92A (2004).

144. *Lavallee*, 812 N.E.2d at 912.

145. *Id.* at 902.

146. Telephone Interview with Kellie Hickey, *supra* note 20.

147. *Lavallee*, 812 N.E.2d at 902; MASS. CONST. pt. I, art. 12.

148. *Lavallee*, 812 N.E.2d at 902.

149. *Id.* at 903.

150. *Id.* at 907.

were released where no counsel could be appointed, so should Deaf defendants be released where no interpreters can be obtained.¹⁵¹

In fashioning this remedy, the court's clear intention was to pressure the legislature to immediately increase the pay of attorneys appointed to represent indigent defendants.¹⁵² This intent was evidenced by the court's reference to several other states' supreme court cases on this same issue, where those courts did use their inherent power to temporarily raise the pay of defense attorneys for indigent defendants pending action from their respective legislatures.¹⁵³ The court was clearly telling the legislature and the executive (the Attorney General) to take whatever steps were necessary to ensure the efficient administration of justice by the courts.

The court should make a similar order here: where a case must be continued more than once due to lack of interpreter availability, the Deaf defendant should either be released or have his pending case dismissed. Such an order would put the same kind of pressure on the legislature to adequately fund MCDHH to enable it to recruit, train, and maintain qualified interpreters for court and legal settings.

B. *Alternatively, the Court Should Order MCDHH to Recruit, Train, and Retain Interpreters*

1. *The Court Should Order MCDHH to Fulfill its Nondiscretionary Duty*

The Supreme Judicial Court can and should issue a writ of mandamus ordering MCDHH to recruit, train, and retain an ade-

151. *See id.*

152. *Id.* at 907-08; Spangenberg Group, Major Reform Legislation Passed in Massachusetts, <http://www.spangenberggroup.com/news/MassReformLegislation.html> (last visited May 9, 2007) (citing *Lavallee* as a catalyst for the legislature's appropriation of funds to increase the pay of counsel appointed to indigent defendants); Issue Source.org, Issue: Public Defender Pay, <http://www.issuesource.org/issue.cfm?ID=134> (last visited May 9, 2007) (describing *Lavallee* as the point at which "[t]he uproar reached a crescendo," which then led to the increase in pay for counsel appointed to indigent defendants).

153. *Lavallee*, 812 N.E.2d at 907-08 (citing *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 67-68 (Mo. 1981); *State v. Lynch*, 796 P.2d 1150, 1164 (Okla. 1990); *N.Y. County Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397 (N.Y. Sup. Ct. 2003)) ("In other circumstances State courts of last resort have granted preliminary relief in the form of increased compensation rates, but have simultaneously directed their Legislatures to amend permanently the compensation rates for indigent representation. A New York trial court recently issued a permanent injunction directing that counsel be paid ninety dollars per hour, and removed the statutory fee cap until the Legislature changed the rates and increased its appropriation for compensation for indigent representation.").

quate pool of legally qualified interpreters to work in the courts. Because the Massachusetts legislature has recognized the need for Deaf defendants to have interpreters in court and legal settings, and because the fill rate is still so low, there is a conflict. Not only are Deaf people being denied access to their proceedings, but also, the courts are unable to adjudicate their criminal cases in a timely fashion.

Whether the court can intervene to order MCDHH to fulfill its legislatively mandated duties is governed by the Massachusetts Constitution's Separation of Powers provision,¹⁵⁴ which provides:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.¹⁵⁵

Issuing a writ of mandamus against MCDHH does not violate the Separation of Powers Clause. First, when an agency violates the constitutional or statutory rights of an individual, the court may intervene and order the agency to fulfill its legislative mandate. Second, under extraordinary circumstances, and when there is no other legal remedy, the court can order structural injunctive relief via a writ of mandamus. The writ of mandamus exists to compel performance of a clear, non-discretionary duty.¹⁵⁶

When the legislature issues a mandate to an agency, the court must give deference to that agency's policies in carrying out the mandate.¹⁵⁷ On the rare occasion that an agency does not fulfill its mandate sufficiently, the court must tread lightly and will assume the agency is fulfilling its mandate without intervention or supervision.¹⁵⁸ However, "[w]hen an agency's implementation of its regu-

154. MCDHH does not, in general, provide direct services like other agencies, and so it does not have a consumer grievance policy which would include an administrative hearing. Telephone conversation with Patricia Ford, Deputy Commissioner of Policies, MCDHH, in Dorchester, Mass. (Jan. 13, 2006). Because of this, it does not fall within the Massachusetts Administrative Procedure Act (MAPA). Therefore no analysis under MAPA will be undertaken in this Note.

155. MASS. CONST. pt. I, art. 30 (a court can only order an executive body to do something if it does not violate the separation of powers—"the judicial shall never exercise the legislative and executive powers or either of them").

156. See generally *id.*; MASS. GEN. LAWS ch. 211, § 3 (2004).

157. *Correia v. Dep't of Pub. Welfare*, 605 N.E.2d 1233, 1237 (Mass. 1993).

158. *Id.* (citing *In re McKnight*, 550 N.E.2d 856, 859 (1990)) ("Where, as here, an injunction arguably affects a public agency's exercise of its discretionary functions,

lations violates the law, it is entirely appropriate for a court to order relief.”¹⁵⁹ Also, “[a]n agency regulation that is contrary to the plain language of the statute and its underlying purpose may be rejected by the courts.”¹⁶⁰ In other words, if an agency’s policies overreach the statute governing it, the court can step in only to ensure the agency adheres to the letter and spirit of the law.¹⁶¹ The court “interferes” only to redress the harm the agency causes by overreaching its mandate.¹⁶² Thus the court serves a vital role in preserving the separate functions of each branch of government so that each may operate smoothly and efficiently.

Here, MCDHH’s policies have been, and continue to be, in contravention of its legislative mandate to provide or ensure the provision of interpreter services.¹⁶³ As such, the court can step in.¹⁶⁴ MCDHH overreached its mandate when it created a policy requiring nationally certified legal interpreters from neighboring states to submit both their certification and further documentation of their training and work experience to prove that they were qualified.¹⁶⁵ This is a needlessly redundant requirement¹⁶⁶ since national certification for legal settings exceeds the requirements of the

courts must tread lightly in ordering action contrary to the agency’s interpretation of its own regulations.”).

159. *Id.* (citation omitted).

160. *Smith v. Comm’r of Transitional Assistance*, 729 N.E.2d 627, 633 (Mass. 2000).

161. *Id.*

162. *Id.* at 637. “Although injunctive as well as declaratory relief may sometimes be necessary to ensure that an agency will fulfil its statutory mandate, ‘it has been our practice to assume that public officials will comply with the law declared by a court and that consequently injunctive orders are generally unnecessary.’” *Id.* (quoting *Mass. Coal. for the Homeless v. Sec’y of Human Servs.*, 511 N.E.2d 603, 614 (Mass. 1987)).

163. MASS. GEN. LAWS ch. 6, §§ 191-199 (2004).

164. *See Smith*, 729 N.E.2d at 633.

165. Conversation with Karen Higgins, former Director of CART & Interpreter Servs., Mass. Comm’n for the Deaf & Hard of Hearing (Jan. 24, 2003). In order to sit for the SC:L or to be MCDHH-approved, an interpreter must submit proof of hours mentored by an experienced legal interpreter holding her SC:L, as well as hours worked in each specific court or legal setting. Once an interpreter passes the SC:L, there is no need to keep this documentation. *See* SPECIALIST CERTIFICATE: LEGAL (SC:L) EXAMINATION INFORMATION BULLETIN, *supra* note 78, at 4-5.

166. MCDHH has not officially repealed the old policy since Karen Higgins left her position as Director of CART and Interpreter Services. However, Amy Williamson-Loga told the author that she was offered court and legal work by MCDHH after Ms. Higgins departure, without requiring any documentation beyond a copy of her SC:L and the author’s recommendation. Conversation with Amy Williamson-Loga, CI & CT, SC:L (2005).

MCDHH approval process.¹⁶⁷ MCDHH's policy effectively prevented those interpreters from working in Massachusetts, since once an interpreter is nationally certified for legal assignments, there is no need to retain documentation of one's mentorship hours, specific court assignments or training.¹⁶⁸ MCDHH's policies have made it difficult, if not impossible, for qualified, out-of-state interpreters to work in Massachusetts.

A parallel can be drawn to the holding in *Judge Rotenberg Educational Center*.¹⁶⁹ Although *Judge Rotenberg Educational Center* addressed malfeasance, by analogy, the same kind of judicial intervention is appropriate in the case of an agency's nonfeasance. Here, by not recruiting, training, and increasing the pool of qualified legal interpreters,¹⁷⁰ MCDHH is encroaching on the courts' abilities to administer justice, as proceedings involving Deaf defendants cannot go forward without qualified interpreters present.¹⁷¹

MCDHH has been aware of the severe shortage of legally qualified interpreters for many years and has done little to remedy the situation.¹⁷² In 2000, MCDHH co-sponsored, in conjunction with the Administrative Office of the Trial Court, a single intensive training for working interpreters who wanted to pursue work in the courts and legal settings.¹⁷³ This has been the only in-court legal training MCDHH has sponsored since its inception in 1985.

167. See SPECIALIST CERTIFICATE: LEGAL (SC:L) EXAMINATION INFORMATION BULLETIN, *supra* note 78, at 11. RID, Inc. requires a performance exam that is evaluated by qualified raters from all over the United States. MCDHH only requires training and mentorship, but no performance exam.

168. See *supra* note 165.

169. *Judge Rotenberg Educ. Ctr. v. Comm'r of Dep't of Mental Retardation*, 677 N.E.2d 127 (Mass. 1997).

170. Some interpreters have actually been prevented from working within the state. MCDHH had a policy for several years requiring the same extensive documentation of qualifications for interpreters with their SC:L as those seeking to become MCDHH approved to work in the courts. This policy was cumbersome and duplicative, since in order to sit for the SC:L an interpreter must also submit the same documentation to RID, Inc. For those who took their SC:L exams years ago, retrieving that documentation can be problematic and as a result, several interpreters over the years have declined to "jump through the hoops." Since the RID SC:L exceeds the MCDHH approval system in terms of quality assurance, the policy serves no discernable purpose.

171. MASS. GEN. LAWS ch. 221, § 92A (2004).

172. See PEOPLE FIRST, *supra* note 8 (identifying the severe shortage of ASL/English interpreters, and yet only asking for a funding increase for CART reporters).

173. AOTC & MCDHH: THE AMERICAN LEGAL SYSTEM WITH EMPHASIS ON THE MASSACHUSETTS COURT SYSTEM FOR INTERPRETERS SERVING DEAF & HARD OF HEARING INDIVIDUALS (Lewana Clark ed., 2000) (training manual on file with the author).

The law establishing MCDHH clearly states that MCDHH “shall serve as the principal agency of the commonwealth, on behalf of deaf . . . persons.”¹⁷⁴ It further states that MCDHH “shall promote development of new services when necessary, . . . provide . . . interpreting services,” and “determine the need for further services, mak[ing] recommendations to the governor” as necessary.¹⁷⁵ The law also states that MCDHH may apply for both federal and local grants, and it may also apply for private grants and bequests to “aid in the financing of programs or policies of the commission.”¹⁷⁶ Although MCDHH has often engaged in partnerships with other state agencies, there is no evidence this author has been able to obtain that it sought or received private funding to start or maintain vital projects prior to 2006.¹⁷⁷ The legislature made MCDHH responsible for adequate provision of interpreting services for the courts and the commission has not fulfilled its duty. Thus, the court can and should issue a writ of mandamus, ordering MCDHH to fulfill its legislatively mandated duty.

Similarly, in *Sheriff of Suffolk County*, the City Council of Boston challenged the propriety of the court’s issuance of a mandamus to compel the City Council to appropriate funds to build a city jail.¹⁷⁸ The court stated that the challenge was without merit because “[t]he obligation of the City Council to provide a suitable jail is not discretionary.”¹⁷⁹ As noted earlier, the law of mandamus exists to compel performance of a clear, non-discretionary duty on the part of any agency, court, or governmental entity.¹⁸⁰ The court thus has the right, in extraordinary circumstances, to use a mandamus to compel an arm of the executive to carry out its non-discretionary duty, especially when, by failing in such a duty, the executive is encroaching on another branch of government.

MCDHH has a non-discretionary duty to provide and ensure the provision of interpreter services,¹⁸¹ a duty it has failed to fulfill.

174. MASS. GEN. LAWS ch. 6, § 194 (2004).

175. *Id.*

176. MASS. GEN. LAWS ch. 6, § 192 (2004).

177. In June 2006, MCDHH hired a Projects Coordinator—a person responsible for seeking out additional sources of funding. Telephone conversation with Mary Kate Laughran, Human Res. Liaison, Mass. Comm’n for the Deaf & Hard of Hearing in Dorchester, Mass. (Feb. 27, 2006).

178. *Att’y Gen. v. Sheriff of Suffolk County*, 477 N.E.2d 361, 363-34 (Mass. 1985).

179. *Id.*

180. MASS. GEN. LAWS ch. 211, § 3 (2004) (“[Courts] may issue such writs . . . as may be necessary or desirable for the furtherance of justice, the regular execution of the laws . . . and the securing of [the courts’] proper and efficient administration . . .”).

181. MASS. GEN. LAWS ch. 6, §§ 191-199 (2004).

Aside from partnering with the Administrative Office of the Trial Court one time in 2000, MCDHH has done little to increase the pool of interpreters qualified to work in court and legal settings. MCDHH has not secured permanent funding for training to remedy the severe shortage of interpreters for the courts; instead it funds only sporadic trainings.¹⁸² Such one-time trainings do not work to increase the pool of legally qualified interpreters, as evidenced by the static number of interpreters for the courts over the last thirty years.¹⁸³ Thus, under the standards set in *Sheriff of Suffolk County* and *Judge Rotenberg Educational Center*, the court can and should order MCDHH to abide by its non-discretionary mandates and do whatever it must to increase the pool of interpreters for the courts.

2. The Court Should Issue Mandamus in Response to Legislative and Executive Encroachment on the Judiciary

In *Lavallee*, the court ordered injunctive relief enjoining the courts, the Attorney General, and the District Attorney from holding indigent defendants in jail for more than seven days without an attorney appointed or continuing cases against indigent defendants not held in jail for more than forty-five days without an attorney appointed.¹⁸⁴ The court was aware that the people of the Commonwealth and legislators would not want dangerous criminals summarily released without process or safeguards.¹⁸⁵ The clear purpose of this injunctive relief was to put direct pressure on the legislature to act to raise the pay for attorneys appointed to represent indigent defendants.¹⁸⁶ The court should put similar pressure on MCDHH.

Because the legislature has not adequately funded MCDHH to recruit, train, and maintain a sufficient number of qualified interpreters to work in the courts, and MCDHH has not taken adequate steps to increase the pool of such qualified interpreters, a writ of mandamus would be warranted. Massachusetts General Laws chapter 211, section 3 states in pertinent part that “[courts] may

182. For example, as of the writing of this Note, MCDHH is currently offering a multi-part out-of-court training for interpreters who want to work in non-court legal settings. Flyer from the Mass. Comm’n for the Deaf & Hard of Hearing, Training for Out-of-Court Legal Assignments (Sept. 2006) (on file with author).

183. Interview with Joan Wattman, *supra* note 28.

184. *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 912 (Mass. 2004).

185. *Id.* at 910.

186. *See id.* at 899-902.

issue such writs . . . as may be necessary or desirable for the furtherance of justice, the regular execution of the laws . . . and the securing of [the courts'] proper and efficient administration."¹⁸⁷ Without enough interpreters to serve all Deaf parties in the Commonwealth, the judiciary cannot mete out justice in a timely or efficient manner. Justice cannot be administered without the ability of the court to secure a defendant's presence at trial.¹⁸⁸ "The ability to secure a defendant's presence at trial is of fundamental importance to the basic functioning of the judiciary, without which justice cannot be administered."¹⁸⁹ According to Massachusetts law, without an interpreter a Deaf defendant is effectively not present and the proceedings cannot go forward.¹⁹⁰

By enacting laws making MCDHH the only agency that can both qualify and refer interpreters for the courts, and then failing to adequately fund such a mandate, the legislature has contributed to the shortage of interpreters that now encroaches upon the judiciary's ability to administer justice.¹⁹¹ As such, the court can order MCDHH to secure adequate permanent funding for annual interpreter training. In the alternative, the court can order the Commonwealth to release all Deaf defendants whose cases have been continued more than once due to lack of interpreter services, with the intention of pressuring the legislature to appropriate funds to MCDHH for recruitment, training, and retention of interpreters qualified to work in the courts and other legal settings.

C. *Injunctive Relief Would Not Violate the Separation of Powers*

The circumstances under which injunctive relief can be granted are limited by the Separation of Powers Clause of the Massachusetts Constitution;¹⁹² and as the law of mandamus states unequivocally

187. MASS. GEN. LAWS ch. 211, § 3 (2004).

188. *Querubin v. Commonwealth*, 795 N.E.2d 534, 540 (Mass. 2003).

189. *Id.*

190. *See* MASS. GEN. LAWS ch. 221, § 92A (2004).

191. There is no doubt that the letter and spirit of the Interpreter Law are correct—we have already seen that requiring interpreters for court proceedings is the only way Deaf defendants can meaningfully participate. Further, it is also correct that MCDHH—in conjunction with Massachusetts Registry of Interpreters for the Deaf and the Massachusetts State Association of the Deaf—should be the qualifying and referring body. High standards for interpreters working in the courts are critical to ensuring that Deaf defendants actually have access to the proceedings. *See generally* REPORT ON INTERPRETER SERVICES IN THE VERMONT COURTS, *supra* note 59; LaVigne & Vernon, *supra* note 13; Berko, *supra* note 13.

192. MASS. CONST. pt. I, art. 30.

cally, those circumstances must be extraordinary.¹⁹³ In contrast to *Lavallee* and *Sheriff of Suffolk County*, the Supreme Judicial Court in *Commonwealth v. Leno* held that it was not appropriate to issue injunctive relief.¹⁹⁴ But in that case, the facts did not warrant it as they do here. The court stated that the separation of powers as articulated in article 30 prevents the “‘judiciary [from] substituting its notions of correct policy for that of a popularly elected Legislature.’”¹⁹⁵ In explaining the crucial importance of the separation of powers, the court stated that “[w]hether a statute is wise or effective is not within the province of courts,” and that the court’s only role is to determine whether the statute is constitutional, giving great deference to the presumption that it is.¹⁹⁶

In *Leno*, the defendants, who were trying to prevent the spread of HIV/AIDS among intravenous drug users, were convicted of needle distribution in violation of a Massachusetts statute prohibiting the sale or distribution of any drug paraphernalia without a prescription.¹⁹⁷ The basis for their appeal was the trial court’s denial of the defendants’ requested jury instruction of necessity—that they had no other legal way of preventing the spread of AIDS because of the statute preventing needle distribution.¹⁹⁸ In affirming the trial court’s verdict, the court made clear that the defendants had alternative legal recourse through the legislative process; that they could petition their legislators to change the statute prohibiting needle distribution.¹⁹⁹ The court’s point was that if the non-elected judiciary stepped in and in effect assumed a legislative function, the right of the people to create constitutional laws would be emasculated, and as such the court’s action would be a violation of the constitution.²⁰⁰

In contrast, by enacting laws regarding Deaf people and interpreters in the courts without granting adequate funding to MCDHH, the legislature has impermissibly encroached on the judiciary’s ability to function smoothly, efficiently, and without oppression of the parties to its proceedings. In fact, Deaf defendants, like the hypothetical John Sandoval, suffer egregious oppression each

193. MASS. GEN. LAWS ch. 211, § 3 (2004).

194. *Commonwealth v. Leno*, 616 N.E.2d 453 (Mass. 1993).

195. *Id.* at 457 (quoting *Zayre Corp. v. Att’y Gen.*, 362 N.E.2d 878 (Mass. 1977)).

196. *Id.*

197. *Id.* at 454.

198. *Id.*

199. *Id.* at 457.

200. *Id.*

time their cases are continued and they have to stay in jail longer than their hearing counterparts would have. Unlike in *Leno*, there is nothing for the legislature to act on here. The legislature has already passed the Interpreter Law, which expressly protects Deaf defendants' constitutional rights.²⁰¹

The problem, as in *Lavallee*, is that the legislature has not committed nearly enough funds to MCDHH to allow it to carry out its legislative mandate to ensure the provision of interpreters for the courts.²⁰² In *Lavallee*, the legislature's inadequate appropriation of funds to CPCS led to the underpayment of defense attorneys appointed to represent indigent defendants, which ultimately led to the crisis-level shortage of such attorneys in the courts. So here did the legislature's inadequate appropriation of funds both to MCDHH for training and recruitment of interpreters, and to the Administrative Office of the Trial Court for adequate payment, lead to a similar shortage.²⁰³ Thus, the interpreter shortage here is distinguishable from the situation in *Leno*, and instead, analogous to *Lavallee*'s shortage of defense attorneys. The shortage of qualified interpreters for the courts that Massachusetts now faces has arisen as a result of inadequate funding for an existing legislative mandate, and it would therefore not violate the separation of powers for the court to issue a writ of mandamus.

201. The legislature cannot solve the problem of the lack of interpreter services by repealing the Interpreter Law. Even though the Interpreter Law does not create an independent right of action, John Sandoval and his co-plaintiffs could still sue the Commonwealth for violation of their constitutional rights, as the indigent defendants did in *Lavallee*.

202. As evidenced by the lack of success in providing only sporadic trainings, MCDHH would need to have a permanent line item in its budget for annual legal interpreter trainings in order to increase the pool of interpreters available to meet the courts' needs.

203. In 2004, the minimum standard pay for interpreters for court and legal settings in several states, including Washington, D.C., was approximately \$60.00 per hour with a four-hour minimum. Informal Survey of Interpreters at the Iron Sharpens Iron Conference for Legal Interpreters, in Atlanta, GA (May 2004). In New York, interpreters earn up to \$100 per hour. Conversation with Molly Wilson, Court & Legal Interpreter, in Modena, NY (Dec. 2006). In Massachusetts, it was \$40.00 per hour until January 1, 2007. Now it is \$200 for half a day (four hours) and \$300 for all day (no lunch included and regardless of how long the workday goes). Administrative Office for the Trial Court Official Time Sheet; Conversations with legal interpreters Joan Wattman, Bonnie Kraft, and Carol Fay, regarding why qualified legal interpreters prefer not to work in the courts over the period from 2003 to 2005.

CONCLUSION

The Massachusetts courts have effectively been rendered impotent when it comes to dealing with Deaf defendants. Due to the severe shortage of legally qualified interpreters for the courts, proceedings that would otherwise move along for hearing defendants are delayed, and sometimes grind to a halt where Deaf defendants are concerned. Even though John Sandoval is a hypothetical character, he represents a composite of what real Deaf defendants suffer. Through their collective nonfeasance, both MCDHH and the legislature have impermissibly encroached on the judiciary, interfered with its ability to secure the legal presence of Deaf defendants at its proceedings, and thereby violated Deaf defendants' statutory and constitutional rights. The court has no choice but to act to safeguard its autonomy and its ability to operate timely and efficiently, as well as to protect Deaf defendants' rights. Injunctive relief is warranted here and judicial precedent supports it. Deaf defendants' rights depend on it.

*Cat B. Dvar**

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