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Right to Be Heard: The Obligation of State Courts to Pay for Interpreters for Deaf Litigants

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THE RIGHT TO BE HEARD: THE OBLIGATION OF STATE COURTS TO PAY FOR INTERPRETERS FOR DEAF LITIGANTS

INTRODUCTION

Approximately 24 million deaf and hard of hearing people live in the United States,[1] many of whom do not communicate through the exchange of spoken words. Instead, depending on a number of factors such as severity of hearing loss, age of onset, parental attitudes, education, and cultural identification,[2] deaf individuals generally rely on visual forms of communication to understand and to make themselves understood by the hearing world.[3]

Consequently, most deaf people cannot comprehend situations where others use spoken language as the sole medium of communication unless that communication is somehow made visible.[4] In situations involving legal rights, it is especially

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[1] Michael F. Kelleher, *The Confidentiality of Criminal Conversations on TDD Relay Systems*, 79 CAL. L. REV. 1349 (1991) (citing S. REP. NO. 116, 101st Cong., 1st Sess. 77 (1989)).

[2] There has been a distinction between the term "deaf" referring to audiological deafness, and the term "Deaf," referring to sociological deafness. Many regard deaf individuals not as suffering from a pathology, but rather as belonging to a distinct cultural and linguistic minority. *See* JAMES WOODWARD, HOW YOU GONNA GET TO HEAVEN IF YOU CAN'T TALK WITH JESUS: ON DEPATHOLOGIZING DEAFNESS 1 (1982).

[3] While some deaf people are exceptionally skilled at lip-reading, many communicate primarily through one of the manual languages. "Very few people can read lips well enough to understand speech, even under optimum conditions. Information collected during the 1972 National Census of the Deaf Population indicated that 21.4 percent of deaf adults who completed one or more years of senior high school considered their lip-reading ability to be poor to nonexistent." SY DUBOW ET AL., LEGAL RIGHTS: THE GUIDE FOR DEAF AND HARD OF HEARING PEOPLE 6 (4th ed. 1992) (noting J. SCHEIN AND M. DELK, THE DEAF POPULATION OF THE UNITED STATES 63 (1974)).

[4] For those deaf persons who use a manual language, a sign language interpreter changes spoken words and concepts into signs, and vice versa. In the United States, deaf people use several different sign languages including: American Sign Language (ASL), which is considered to be the language of the Deaf community and has a unique, visually-based structure; Signed Exact English (SEE), which is an exact replication of spoken English in signs; pidgin Signed English, which establishes a middle ground between ASL and SEE by using a mixture of American Sign Language vocabulary and English syntax; and Cued Speech, which makes use of simple hand positions near the mouth

critical that information is readily understandable to deaf individuals. Recognizing this problem as early as 1925, Judge Bricken of the Alabama Court of Appeals wrote:

> In the absence of an interpreter, it would be a physical impossibility for [a deaf individual] to know or understand the nature and cause of the accusation against him . . . he could only stand by helplessly . . . without knowing or understanding, and all this in the teeth of the mandatory constitutional rights which apply.[5]

While courts may acknowledge the special needs of deaf litigants, some states do not take the additional critical step of paying for an interpreter to assist the deaf litigant. The provision of an interpreter in the courtroom does not guarantee the deaf individual equal access to the court unless the state bears the expense of that interpreter. Still, twenty-six[6] of forty-nine[7] state statutes addressing the provision of interpreters for deaf litigants in court proceedings declare that, when an interpreter is provided for a deaf litigant in a civil suit, the interpreter's fees will be paid by one or more of the parties as the court may direct, or may be taxed as costs of court.[8]

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to clarify different sounds that look alike to a lip-reader. OLIVER SACKS, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF 23, 29-30, 70-71 & n.74 (Pan Books Ltd. 1991) (1989).

For deaf people who do not use a signed language, other accommodations are available, including oral interpreters, computer aided transcription (real-time captioning), assistive listening systems and, occasionally, the process of writing back and forth. DUBOW et al., *supra* note 3, at 2-5, 77, 191-94.

[5] Terry v. State of Alabama, 105 So. 386, 388 (Ala. App. 1925).

[6] The following states allow their courts to consider interpreter fees as litigation expenses in civil cases: Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, Ohio, Oregon, Pennsylvania, Texas, Vermont, Virginia, Washington, Wisconsin and Wyoming. The District of Columbia has a similar statute. The National Center For Law and Deafness, Summary of State Interpreter Laws (August 1991) (unpublished, on file with the National Center for Law and Deafness) [hereinafter State Interpreter Laws Summary].

[7] While Alaska does not have a statute regarding court sign language interpreters, the Department of Justice has ordered state courts to provide interpreters for deaf parties at the expense of the State. *Id.* at 1.

[8] State statutes regarding relating to interpreter fees in civil cases can be divided into three categories. First, twelve states provide that interpreter fees

Part I of this article provides an overview of legislation affecting deaf litigants and argues that those state laws that permit courts to allocate interpreter fees to deaf litigants or to tax them as court costs violate Title II of the Americans With Disabilities Act of 1990, ("ADA")[9] and the Department of Justice regulations implementing the ADA[10] as well as the Rehabilitation Act of 1973. Based on this argument, the article analyzes the potential constitutional and non-constitutional arguments states may offer in attempting to prevent the application of federal law to their courtrooms. Part II discusses the remedies and enforcement mechanisms available to deaf litigants under the ADA. Part III presents public policy considerations for requiring states to provide and pay for interpreters and other auxiliary aides and services for deaf litigants in civil cases.[11]

I. LEGISLATION AFFECTING DEAF LITIGANTS

A. AN OVERVIEW OF THE ADA AND THE REHABILITATION ACT

Almost twenty years ago, Congress expressed a commitment to eliminate discrimination[12] against individuals with disabilities by enacting the Rehabilitation Act of 1973 ("Rehabil-

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"will be paid by the appointing authority" or by "funds available to the court/agency." Although such statutes guarantee that the court will pay the interpreter, the statutes do not prohibit courts from determining the interpreter fees to be a court expense, and taxing the litigants accordingly. Second, twenty-six states provide that the courts may tax interpreter fees as court costs, so that one or more of the litigants bear the expense. State Interpreter Laws Summary, *supra* note 6. Third, Pennsylvania's statute provides that in a civil case, the court *may* appoint an interpreter and allocate the costs at the discretion of the court. Under the Pennsylvania statute, an interpreter is not required in a civil case. 42 PA. CONS. STAT. ANN. § 7103(A) (Supp. 1992).

[9] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (Supp. II 1990) and 47 U.S.C. §§ 225, 611 (Supp. II 1990)).

[10] 28 C.F.R. pt. 35 (1992).

[11] For the purposes of this article, the term "interpreter" will include all auxiliary aids and services for deaf litigants. For a list of other auxiliary aids and services, see *supra* note 4.

[12] The Rehabilitation Act prohibits discrimination by federal employers and contractors, as well as all entities that are recipients of federal financial assistance.

itation Act").[13] Section 504 of the Rehabilitation Act embodies this commitment by providing:

> No otherwise qualified individual with handicaps . . . shall, . . . solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any *program or activity* receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[14]

The Civil Rights Restoration Act of 1987[15] amended section 504 of the Rehabilitation Act by attempting to explain the scope of the phrase "program or activity"[16] as particular operations of departments, entities of state or local governments, colleges and universities, education systems, or entire corporations.[17] While the amendment was intended to clarify the lan-

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[13] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-794 (1988)).

[14] 29 U.S.C. § 794(a) (1988) (emphasis added).

[15] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

[16] Prior to the Restoration Act amendments, there was much debate over the interpretation of the term "program or activity." Three Supreme Court cases — Grove City College v. Bell, 465 U.S. 555 (1984), Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), and United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986) — defined "program or activity" to also restrict coverage under the civil rights acts to an unprecedented extent.

Prior to *Grove City College*, courts and commentators generally assumed that a broad interpretation of "program or activity" was correct: all parts of an institution were subject to § 504 if any part received federal financial assistance for any purpose. Marc Charmatz & Sarah Geer, *Program Specificity and Section 504: Making the Best of a Bad Situation,* 20 LOY. L.A. L. REV. 1431, 1434-35 (1987).

[17] Section 4 of the Civil Rights Restoration Act of 1987 states:

> For the purposes of this section, the term 'program or activity' means all of the operations of:
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> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
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> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

guage of the Rehabilitation Act, it was not wholly successful, as the definition of "program or activity" still remains a subject of substantial litigation. In this litigation, many entities argue that their programs or activities do not receive federal financial assistance, and therefore that they are not obligated under section 504 of the Rehabilitation Act to provide accommodations for individuals with disabilities. The outcome of such litigation has been mixed.[18]

More recently, in the ADA, signed into law in July 1990, Congress reiterated the commitment it made in the Rehabilitation Act by stating that the purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ."[19] Unlike the Rehabilitation Act, the ADA's anti-discrimination provisions reach beyond programs and activities that receive federal funding. Under Title II of the ADA, *all* "services, programs, and activities" of state and local governments must provide equal access to individuals with disabilities.[20] The ADA represents a significant change because traditionally, litigants have had difficulty proving that entities are recipients

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(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency . . . , system of vocational education or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship . . . ;

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole partnership; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3).

[18] *See, e.g.*, Bonner v. Arizona Dep't of Corrections, 714 F. Supp. 420 (D. Ariz. 1989); Leake v. Long Island Jewish Medical Ctr., 695 F. Supp. 1414 (E.D.N.Y. 1988).

[19] 42 U.S.C. § 12101(b)(2) (Supp. II 1990).

[20] Section 202 of Title II, Subtitle A — "Prohibition Against Discrimination and Other Generally Applicable Provisions" — provides that "subject to the provisions of this title, 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 U.S.C. § 12132 (Supp. II 1990). Other sections of the ADA require equal access to employment opportunities, public accommodations, and telecommunications services.

of federal financial assistance and thus are within the reach of the Rehabilitation Act.[21]

The ADA and its accompanying regulations include state judicial systems in their broad definition of "public entity."[22] On July 26, 1991, the Department of Justice ("DOJ") issued the regulations and analysis to Title II that clarify this definition by noting that "[T]itle II applies to anything a public entity does . . . [it] is not limited to 'Executive agencies,' but includes activities of the . . . *judicial branches* of State and local governments."[23] The DOJ regulations specifically dictate that:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.[24]

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[21] For cases dealing with the issue of the federal financial assistance requirement, see Moore v. Sun Bank of N. Florida, 923 F.2d 1423 (11th Cir. 1991) (discussing whether national bank's participation in Small Business Administration's guaranteed loan program constitutes receipt of federal financial assistance); Locascio v. City of St. Petersburg, 731 F. Supp. 1522 (M.D. Fla. 1990) (discussing whether construction of stadium is part of federally funded project which was "program or activity" subject to Rehabilitation Act); Bonner v. Arizona Dep't of Corrections, 714 F. Supp. 420 (9th Cir. 1989) (discussing whether prison's receipt of federal aid brings it within reach of Rehabilitation Act, even if plaintiff's particular program does not receive federal money).

[22] Section 201 of Title II defines "Public Entity" as: "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . ." 42 U.S.C. § 12131(1) (Supp. II 1990).

[23] 28 C.F.R. pt. 35, app. A (1992) (interpreting 28 C.F.R. § 35.102) (emphasis added).

[24] 28 C.F.R. § 35.130(f) (1992). Furthermore, the regulatory Analysis to paragraph (f) explains: "The Department has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504." 28 C.F.R. pt. 35, app. A (1992). The analysis of the Department's § 504 regulation for its federally assisted programs states that where a court system has an obligation to provide qualified interpreters, it "has the corresponding responsibility to pay for the services of the interpreter." Nondiscrimination Based on Handicap in Federally Assisted Programs, 45 Fed. Reg. 37,620, 37,630 (1980).

Federal law clearly provides that a state that refuses to provide and pay for an interpreter in a civil action acts in a discriminatory manner.

B. ELEMENTS OF A DISCRIMINATION CLAIM UNDER THE ADA

In order to prove discrimination under the ADA, a claimant must first show that she is "a qualified individual(s) with a disability."[25] The regulations define "disability" as "a physical . . . impairment that substantially limits one or more of the major life activities of . . . [an] individual."[26] The regulations further provide that the term "physical impairment" specifically includes "speech and hearing impairments."[27] Thus, a deaf claimant is considered to be an individual with a disability under the ADA.

Once an individual's disability has been established, the ADA requires that the individual be "qualified" to participate in or receive the benefits of a program or activity. The ADA defines a "qualified individual with a disability"[28] as:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies or practices, the removal of architectural [or] communication . . . barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[29]

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[25] 42 U.S.C. § 12131(2) (Supp. II 1990).

[26] 28 C.F.R. § 35.104 (1992). Other definitions of disability include an individual who has a record of such an impairment or who is regarded as having such an impairment. *Id.*

[27] 28 C.F.R. § 35.104 (1992).

[28] The notion of a "qualified individual with a disability" first appears in the Rehabilitation Act. Courts have interpreted the term to mean that individuals are qualified if they meet all of the program's requirements despite their disability, or with reasonable accommodations. *See* DeLong v. Brumbaugh, 703 F. Supp. 399 (W.D. Pa. 1989) (deaf individual is "otherwise qualified" to serve as a juror despite her deafness if sign language interpreter services are provided). *See also* Strathie v. Pennsylvania Department of Transportation, 716 F.2d 227, 230-31 (3rd Cir. 1983); Nelson v. Thornburgh, 567 F. Supp. 369, 378-81 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir.), *cert. denied*, 469 U.S. 1188 (1984).

[29] 42 U.S.C. § 12131(2) (Supp. II 1990).

A deaf litigant attempting to obtain state-paid interpreter services is qualified to participate in the "program or activity" merely by her involvement in a civil suit in state court. In summary, state court systems are covered by the ADA, and deaf persons who participate in state court litigation may avail themselves of the ADA's protection.

While the ADA and the Rehabilitation Act both explicitly require state courts to provide auxiliary aids to deaf litigants in civil proceedings,[30] twenty-six state statutes[31] permit their courts to assign the costs of an interpreter to one or more of the parties, including the deaf litigant. The discriminatory element is actualized when a judge uses her discretion to allocate the interpreter fees to the deaf litigant, or taxes the fees as court costs. Consequently, while most state statutes mandate the presence of interpreters in the courtroom, this is not sufficient to guarantee equal access to the judicial system.[32] To ensure equal access, the ADA requires state judicial systems to provide and pay for sign language interpreters for deaf parties in civil cases.[33]

C. STATES' REACTION TO THE APPLICATION OF THE ADA TO THEIR COURTS

Although Congress intended the ADA, as well as the Rehabilitation Act, to apply to the states, states are likely to attempt to prevent the application of these federal laws to their courts.[34] As previously discussed, Title II defines "public enti-

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[30] *See supra* text accompanying note 24.

[31] *See supra* note 6.

[32] *See supra* note 8.

[33] Interestingly, only two deaf individuals have sued state court systems to require those systems to pay for interpreter fees under the Rehabilitation Act. Avraham v. Zaffarano, No. 90-4759, 1991 WL 147541 (E.D. Pa. 1991); Herrold v. Duckett, No. 92-CV-1698 (D. Md. Nov. 5, 1992). Two possible explanations account for this. First, the traditional difficulty in proving that a court system receives federal financial assistance within the meaning of the Rehabilitation Act presents a block to such litigation. Second, most state civil statutes leave the assessment of interpreter fees to the judge's discretion, and, in many instances, judges have not chosen to assess those fees against the deaf litigant. Often, the individual's attorney will request this. Telephone Interview with Marc Charmatz, Attorney, National Association of the Deaf Legal Defense Fund (Oct. 31, 1991).

[34] *See, e.g.*, Avraham v. Zaffarano, No. 90-4759, 1991 WL 147541 (E.D. Pa

ty" to include "any State";[35] and the Department of Justice regulations specify that "[T]itle II . . . extends the prohibition of discrimination . . . to all activities of State governments."[36] Section 502 of the ADA asserts that "[a] State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court . . . for a violation of this chapter."[37] Despite such explicit language, states may argue that the federal government, through the ADA and the Rehabilitation Act, should not be permitted to dictate the operations of state and local judicial systems. In addition, states may forward the following legal arguments to support their claim that the ADA should not apply to their programs.

States may first argue that our system of government places limits on federal power and that these limits should prohibit the application of federal law to state court procedure. These limitations include the Tenth Amendment and the Federal Anti-Injunction Act, as well as the doctrines of federalism and comity.

Expansive readings of the Necessary and Proper Clause and the Commerce Clause have all but relegated the Tenth Amendment, designed to protect the states from an overreaching federal government,[38] to a nominal status. From 1976 to 1985, the Tenth Amendment was imbued with substantial practical significance by the Supreme Court decision in *National League of Cities v. Usury*.[39] In 1985, however, the Court reversed itself in *Garcia v. San Antonio Metropolitan Transit Authority*,[40] which explicitly overruled *National League of*

1991).

[35] 42 U.S.C. § 12131(1) (Supp. II 1990).

[36] Nondiscrimination on the Basis of Disability in State and Local Government, 56 Fed. Reg. 35,694, 35,694 (1991).

[37] 42 U.S.C. § 12202 (Supp. II 1990) (footnote omitted). Additionally, § 502 of the ADA states, "In any action against a State for a violation of the requirements of this chapter, remedies . . . are available . . . to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State." *Id.*

[38] The Tenth Amendment states that "The Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[39] 426 U.S. 833 (1976) (barring application of the federal Fair Labor Standards Act (FLSA) to state and municipal employees).

[40] 469 U.S. 528 (1985) (upholding application of the FLSA to municipally

Cities.[41] Nevertheless, in attempting to invoke the protection of the Tenth Amendment, states may argue that courtroom procedures lie near the heart of state sovereignty, and as such the Tenth Amendment should protect these procedures from federal intervention. Yet, so long as *Garcia* stands, states are unlikely to find sympathy in federal courts.

The Constitution strikes a delicate balance between federal supremacy and state sovereignty through the Tenth and Eleventh Amendments, the Supremacy Clause,[42] the Commerce Clause and the Necessary and Proper Clause. Maintaining this balance within the judiciary, federal courts will sometimes refrain from interfering in state courts under the doctrines of federalism and comity. The Supreme Court described federalism as "the fundamental constitutional independence of the States and their courts,"[43] and defined comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that their institutions are left free to perform their separate functions in their separate ways."[44]

States may argue that Title II of the ADA offends the notions of federalism and comity by allowing the federal government to regulate the legislative, executive, and judicial functions

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owned and operated mass-transit systems).

[41] *Garcia* resulted from Justice Blackmun's change of heart regarding the application of the FLSA to state employees. The *Garcia* opinion refers to the problems encountered by the Court in trying to distinguish between traditional and non-traditional government functions. Unable to produce a workable standard, the majority overturned *National League of Cities*, and in doing so, destroyed virtually all practical significance of the Tenth Amendment.

[42] U.S. CONST, art. VI, cl. 2.

[43] Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286-287 (1970).

[44] Younger v. Harris, 401 U.S. 37, 44 (1971); *See also* Judice v. Vail, 430 U.S. 327, 334 (1977); Huffman v. Pursue Ltd., 420 U.S. 592, 601 (1975). The *Younger* Court also explained that the concepts of federalism and comity represent "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Younger v. Harris, 401 U.S. at 44. *See generally* MICHAEL WELLS, THE ROLE OF COMITY IN THE LAW OF FEDERAL COURTS, 60 N.C. L. Rev. 59 (1981).

of state and local governments.[45] States may also argue that the Federal Anti-Injunction Act prohibits federal courts from interfering with state proceedings.[46]

Currently, however, these limitations provide few meaningful checks on the power of the federal government, and do not secure states' abilities to perform their traditional functions free from federal interference. Other federal laws, such as the Education for All Handicapped Children Act (EAHCA),[47] which are similar in scope to the ADA, have survived similar state federalism challenges. For example, in *John H. v. Brunelle*,[48] a plaintiff brought suit against several defendants, including the State of New Hampshire, for alleged violations of the EAHCA. The New Hampshire District Court held that the plaintiff could sue the state in federal court under the EAHCA, and further decided that an investigation of state statutes in a federal court forum was permissible.[49] "A determination of whether the EAHCA has been violated, must necessarily involve an inquiry regarding the state statutes promulgated in response to the federal mandate. A court cannot discuss the EAHCA in a vacuum but must look to the state statutes as an integral part of its inquiry."[50]

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[45] Federal courts are likely to reject such arguments by finding congressional authority for the application of the ADA to state programs in the Commerce Clause and the Fourteenth Amendment. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that a motel that refused to rent rooms to blacks could constitutionally be reached by the Civil Rights Act under the Commerce Clause); Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that a restaurant that served mostly local patrons could still be reached by the Civil Rights Act through the Commerce Clause).

[46] The Federal Anti-Injunction Act provides in relevant part: "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1988); This statute was designed to avert needless friction between state and federal courts. Mitchum v. Foster, 407 U.S. 225, 232-33 (1972).

[47] 20 U.S.C. §§ 1400-1485, now the Individuals with Disabilities Education Act (IDEA).

[48] 631 F. Supp. 208 (D.N.H. 1986).

[49] *Id.*

[50] *Id.* at 212. Similarly, in Association of Retarded Citizens of North Dakota v. Olson, 713 F.2d 1384 (8th Cir. 1983), state officials appealed a district court decision ordering them to rectify violations of federal and state constitutional and statutory rights of mentally retarded citizens. The state defendants petitioned the court to abstain, claiming that the exercise of federal

This case and others[51] indicate that federalism-based challenges to Title II of the ADA are likely to be unsuccessful. More significant, however, is a recent motion in the case of *Avraham v. Zaffarano*.[52] Plaintiff Avraham brought suit against the Commonwealth of Pennsylvania as well as a Pennsylvania claims court judge for failure to provide and pay for interpreter services for his small claims action. Pennsylvania law permitted the judge to use her discretion in assessing interpreter fees against a deaf individual.[53] The state defendants brought a motion to dismiss based on federalism grounds, but this challenge was unsuccessful and the plaintiff's discrimination claim survived the motion to dismiss. From this decision and similar cases under other federal laws,[54] it is unlikely that federalism arguments will invalidate plaintiffs' challenges to discriminatory state laws.

II. THE CONSEQUENCES OF A STATE'S DENIAL OF EQUAL ACCESS TO A DEAF LITIGANT

It is not likely that states will choose to voluntarily comply with the requirements of Title II of the ADA by amending their statutes to require the provision and payment of interpreters for all deaf litigants. Section 504 of the Rehabilitation Act has required state courts to provide accessible forums for individuals with disabilities for almost twenty years; most states, however, still have not complied willingly.[55] Title II of the ADA took effect January 26, 1992, and yet, to date, the majority of states have not modified their laws to require court-appointed inter-

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jurisdiction in state affairs was an inappropriate interference with the state's operation of its institutions. The court held that federal jurisdiction was proper and, citing Moe v. Brookings, 659 F.2d 880 (8th Cir. 1981), stated that "cases involving questions of civil rights are the least likely candidates for abstention." *Olson*, 713 F.2d at 1391. Furthermore, the court held that the district court's order was permissible as it only required state officials to develop a program, and that "this [could] hardly be classified as an unreasonable intrusion into professional judgment." *Id.* at 1392.

[51] *Id.*

[52] No. 90-4759, 1991 WL 147541 (E.D. Pa. 1991).

[53] *See supra* note 8.

[54] *See supra* text accompanying note 49. *See also* Herrold v. Duckett, No. 92-CV-1698 (D. Md. Nov. 5, 1992).

[55] *See* State Interpreter Law Summary, *supra* note 6.

preters at state expense.[56] The resistance of states to bring their laws into compliance places the burden on deaf individuals to force such compliance by litigation. Deaf persons must challenge those discriminatory state laws through actual "cases or controversies"[57] in order to receive equal access to the judicial system.[58]

A. REMEDIES AND ENFORCEMENT UNDER THE ADA

Title II section 203 of the ADA specifies the remedies available to an individual bringing a discrimination claim.[59] A litigant who challenges a state law as discriminatory has a private right of action for three kinds of relief: an injunction, a declaratory judgment, or damages.

A deaf individual seeking to enforce Title II to ensure the provision of paid interpreter services in a state court may bring an action in federal court challenging the state law.[60] The exact nature of the discrimination lawsuit and the relief sought will depend largely on the stage of the litigation in the underlying civil suit. There are three possible scenarios in the timing of the commencement of the underlying suit in relation to the federal discrimination suit.

First, if the underlying civil suit has not yet begun, the deaf litigant may seek a declaratory judgment or an injunction in federal court by arguing that the state law discriminates

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[56] *Id.*

[57] U.S. CONST. art. III, § 2.

[58] Under § 502 of the ADA, the doctrine of state immunity under the Eleventh Amendment is abrogated:

> A State shall not be immune under the eleventh amendment to the Constitution . . . from an action in (footnote omitted) Federal or State court . . . for a violation of this chapter. In any action against a State for a violation of the requirements of this Chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State." 42 U.S.C. § 12202 (Supp. II 1990).

[59] The ADA adopts the remedial scheme set forth in § 794(a) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1988), which adopted the remedial scheme of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000h (1988).

[60] *See* Avraham v. Zaffarano, No. 90-4759, 1991 WL 147541 (E.D. Pa. 1991); Herrold v. Duckett, No. 92-CV-1698 (D. Md. Nov. 5, 1992).

against deaf litigants by failing to guarantee paid interpreter services.[61] In response, the state may claim that the federal court lacks jurisdiction to hear the issue since the underlying suit has not yet begun in state court and therefore no actual "case or controversy" exists.[62] If the state's argument succeeds, the deaf litigant may be forced to commence the underlying suit in state court before bringing a discrimination claim under Title II of the ADA.[63] Moreover, in the underlying claim, the deaf litigant must request an interpreter at the state's expense.[64] If the state denies this request on the grounds that state law does not require an interpreter for civil matters, only then may the deaf litigant seek an injunction from the federal court to enjoin the state court from enforcing its discriminatory practices, as well as a declaratory judgment that the state law violates the ADA.[65]

Second, the deaf litigant may bring the federal discrimination suit after the underlying state civil proceeding has begun. If she chooses this option, however, the litigant must consider before filing suit whether she can afford to pay for an interpreter if the state court refuses to do so, since she may ultimately be burdened with interpreter costs if the federal suit is unsuccessful. The deaf litigant may also be forced to seek an injunction against the same judge hearing her underlying case.[66] This may create problems of bias and prejudice against the litigant.

Third, a deaf litigant may commence a discrimination suit after the final decision of the underlying civil proceeding has

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[61] The state may argue that such a judgment would violate principles of federalism and comity and that the federal court should not be permitted to interfere in state court procedure. *See supra* note 46 and accompanying text.

[62] U.S. CONST. art. III, § 2.

[63] Depending on the presence of federal funding, the claims may also be brought under § 504 of the Rehabilitation Act.

[64] State Interpreter Laws Summary, *supra* note 6.

[65] *See* Flast v. Cohen, 392 U.S. 83, 95 (1968) (discussing limitations on federal courts and noting that an advisory opinion does not constitute a justiciable question); Lane v. Reid, 559 F. Supp. 1047, 1049 (S.D.N.Y. 1983) (explaining the necessity of an actual, not hypothetical, case or controversy).

[66] *See* Pulliam v. Allen, 466 U.S. 522 (1984) (holding that judicial immunity does not extend to injunctive and declaratory relief under § 1983). Because some state statutes leave the assessment of interpreter fees to the discretion of the judge, the judge, as well as the state and/or county, may be a viable defendant.

been rendered. After fully litigating the initial civil claim, the litigant could subsequently sue the state, county, and state judge for declaratory relief and monetary damages, including damages for discrimination.[67] Alternatively, the deaf litigant could pay the interpreter fees under protest and later sue the state or local entity under the ADA. Such a strategy still may not guarantee equal access to the state judicial system. If the action is brought after the resolution of the underlying civil claim, the state will likely argue that the resolution has rendered the federal issue moot.[68] Although most federal courts agree that requests for declaratory relief are not mooted by later circumstances if the declaratory judgment is predicate to a claim for damages,[69] not all requests for declaratory relief are accompanied by requests for damages.

While it appears that Title II enforcement claims have the best chance for relief if brought after the resolution of the underlying claim, a deaf litigant faces risks at any point, and a federal court may decide to dismiss the case regardless of the status of the underlying claim.[70]

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[67] Under the judicial immunity doctrine, judges may not be held personally liable for their judicial actions. While the ADA provides that the Eleventh Amendment will not serve to immunize the states from enforcement of the ADA, it is unclear whether judicial immunity will apply to the individual decisions of state judges who act under color of state law. *See generally* Mireless v. Waco, 112 S. Ct. 286 (1991); Timothy M. Parks, Note, Stump v. Sparkman *Revisited: The State of Judicial Immunity After* Mireless v. Waco, 28 WILLAMETTE L. REV. 625 (1992).

[68] *See* Murphy v. Hunt, 455 U.S. 478, 481 (1982) (commenting on the necessity of a 'live' issue); County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (detailing the conditions for determining if a case is moot).

[69] *See* Winsett v. McGinnes 617 F.2d 996, 1004 (3rd Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1093 (1981).

[70] Even if a deaf litigant receives a favorable declaratory judgment, practical difficulties may arise in enforcing the judgment. For example, in the criminal setting, if the state refuses to pay interpreter fees, a criminal conviction cannot be enforced. In a civil case, however, if a state court asserts that financial restraints prevent it from paying for the interpreter's services, how can the federal declaratory judgment be enforced? For one possible solution, see Kroll v. St. Charles County, Mo. 766 F. Supp. 744, 753 (E.D. Mo. 1991) ("[A] District Court may have the authority to order a property tax increase after exploring every other fiscal alternative.").

B. SPECIAL ISSUES REGARDING INJUNCTIVE REMEDIES

Assuming the federal case survives dismissal as a threshold matter, deaf litigants may face additional problems in attempting to obtain injunctions against state judicial systems. If successful, an injunction could compel a state court to provide a state-paid interpreter for an individual deaf litigant as well as all future deaf litigants. In attempting to protect themselves against such injunctions, states may invoke the Federal Anti-Injunction Act as well as the doctrines of federalism and comity, claiming (1) if litigants can obtain these kinds of relief from a federal court, the state court would be divested of its judicial independence to try a claim within its jurisdiction; and (2) that the state appellate courts would also be deprived of their proper role. Although such arguments have not been successful in the EAHCA cases,[71] it is not clear how persuasive they will be in the state court context. However, if preliminary indications may be relied upon, it appears that these arguments will not be fatal to discrimination claims.[72]

Distinctions exist between injunctions designed to apply to entire "systems" (e.g., courts, police, etc.), and injunctions applicable only to single cases. System-wide injunctions have the capacity to provide more straightforward and comprehensive relief to deaf litigants than injunctions in individual cases because system-wide injunctions have the potential to provide relief from discriminatory state laws for *all* potential deaf litigants. However, system-wide injunctions correspondingly bring about the most serious challenges from the states. The potential hurdles are federalism, comity, and the Federal Anti-Injunction Act, as well as the requirement of proving that the state court judge's conduct resulted in a denial of the right to services. If the deaf litigant clears these hurdles, the second requirement is not as difficult to meet. Most state statutes leave the decision of assessing interpreter costs to the presiding judge's discretion,[73] and thus the judge's decision can be said to directly cause the denial of the right to an interpreter.

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[71] *See supra* text accompanying notes 50-51.

[72] Avraham v. Zaffarano, No. 90-4759, 1991 WL 147541 (E.D. Pa. 1991).

[73] State Interpreter Laws Summary, *supra* note 6; Pulliam v. Allen, 468 U.S. 522 (1984).

In *Swann v. Charlotte-Mecklenburg Board of Education,*[74] the Supreme Court allowed a system-wide injunction remedy because the segregation imposed by law had been implemented by state authorities, as distinguished from when "responsible authorities played no affirmative . . . [role] in depriving . . . [respondents] of any constitutional rights."[75] Consequently, if responsible authorities deny litigants their rights by administrative conduct, courts may decide that a system-wide injunction is appropriate relief.[76]

An alternative strategy to a system-wide injunction is a single-case injunction against the state.[77] A state may argue that enjoining enforcement of a state statute violates the Federal Anti-Injunction Act.[78] The Anti-Injunction Act applies only *after* a state statute has been challenged by a litigant asking a federal court for declaratory or injunctive relief.[79] While Congress has expressly authorized exceptions to the Anti-Injunction Act,[80] it has not declared actions brought under the ADA's remedial scheme as such an exception. Therefore, states may attempt to invoke the Anti-Injunction Act as a defense against being compelled to change their rules of court.

The Anti-Injunction Act, however, only expressly prohibits injunctions that stay state court proceedings.[81] A deaf litigant attempting to obtain paid interpreter services generally does not desire a stay of a state court proceeding. The litigant's goal is

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[74] 402 U.S. 1 (1971).

[75] Rizzo v. Goode, 423 U.S. 362, 377 (1976).

[76] *But cf.* O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (holding that an injunction "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" would not be granted).

[77] With a single-case injunction, federalism arguments may prove to be less compelling, since the relief sought in the federal proceeding is less comprehensive.

[78] Kroll v. St. Charles County, Mo., 766 F. Supp. 744 (E.D. Mo. 1991).

[79] States will likely argue that a federal court providing declaratory relief is as violative of the Anti-Injunction Act as an injunction itself. *See* Cunningham v. A.J. Aberman, Inc., 252 F. Supp. 602, (W.D. Pa. 1965), *aff'd,* 358 F.2d 747 (3d. Cir. 1966); Garrett v. Hoffman, 441 F. Supp. 1151 (E.D. Pa. 1977).

[80] For example, the Supreme Court has held that claims under § 1983 fall within the "expressly authorized Act of Congress" exception to the Anti-Injunction Act. Mitchum v. Foster, 407 U.S. 225 (1972).

[81] 28 U.S.C. § 2283 (1988).

to further the state civil action with an interpreter provided at state expense. Furthermore, in order to avoid any potential conflict with the Anti-Injunction Act, a litigant may attempt to direct the injunction toward the *judicial official* acting under that state statute, rather than against the statute itself.[82]

III. POLICY CONSIDERATIONS FAVORING THE PROVISION OF PAID INTERPRETER SERVICES

The first two sections of this article addressed the legal obligations of Title II of the ADA and the possible mechanisms for enforcement. Compelling policy rationales also exist for requiring state courts to provide and pay for interpreters for deaf persons participating in civil suits.

For individuals who do not communicate through an exchange of spoken language, an interpreter is a necessity. A deaf individual who uses a signed language will need the services of a qualified interpreter in order to translate the meaning of spoken words into sign language and translate the signed messages into English for the hearing participants. This is particularly important in a courtroom because of the serious nature of the communication and the need for complete understanding, as well as the fact that many legal terms will be unfamiliar to a deaf individual whose first language is not English.[83] Additionally, a court proceeding is an oral process. Unlike written transcripts, an interpreter provides more than a simple translation of words into signs; an interpreter conveys important tones and secondary meanings of words that are

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[82] If a litigant attempts to get an injunction through a § 1983 action, the state may raise judicial immunity as a defense. *See* Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969). A defense of judicial immunity, however, is not limited to § 1983 actions.

[83] Most people learn their native language by hearing it spoken around them from infancy, but a person who is born deaf or who loses the ability to hear when very young cannot learn English this way. Therefore, despite normal intelligence, a deaf individual may have limited competence in English. For such people, English is virtually a second language. They may have a limited English vocabulary and grammar, a condition that can lead to numerous misunderstandings. The extensive use of idioms in English also poses significant reading problems for deaf people. For example, the expression "under arrest" in the *Miranda* warnings would be confusing to many deaf individuals because "under" to them means only "beneath." DUBOW et al., *supra* note 3, at 6.

necessary for the deaf litigant to fully understand and participate in the litigation process.

Due to the widespread misconception that all deaf people can lip-read, a question may still arise about the need for interpreters. However, very few deaf people can read lips well enough to understand speech, as even the best lip-readers in a one-on-one situation can only understand 26% of what is spoken.[84] Even if a deaf individual is an exceptionally skilled lip-reader, some meanings cannot be assumed simply by examining the context of the communication, especially in a forum as complex and unfamiliar as a courtroom proceeding.[85] Additionally, there are many situations in which lip-reading can be more difficult — for example, when the speaker does not articulate carefully or has a regional or foreign accent; when the lips are obscured by a beard or mustache; or when the speaker is not well-lighted, is in motion, or is not directly facing the lip-reader.[86]

Many perceive the use of written communication as an adequate alternative to the use of interpretive aides. However, written conversations may be tedious, cumbersome, and time consuming, and the writer may omit much of the information that would otherwise be exchanged so that the deaf person does not get the same amount of detail as a hearing person.[87] Another problem with using written notes as a means of communicating is the different levels of educational experience and ability to comprehend written material across the deaf population.[88] Many deaf people, especially those for whom hearing

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[84] *Id.* at 5 (quoting EUGENE MINDEL & MCCAY VERNON, THEY GROW IN SILENCE: THE DEAF CHILD AND HIS FAMILY (1971)). This low level of comprehension occurs because many English speech sounds are not visible on the mouth or lips. Certain spoken words or sounds create similar lip movements, making it difficult to distinguish between words. Lip-reading, however, is not impossible. There are some oral deaf individuals who do not use any of the manual languages and who are able to successfully use lip-reading to receive information. *See* HENRY KISOR, WHAT'S THAT PIG OUTDOORS? (1990).

[85] The ambiguity of lip-reading is demonstrated by the fact that the sounds of T, D, Z, S, and N all look identical on the lips. The words "right," "ride," and "rise" would be indistinguishable to a deaf person. The meaning of entire sentences can be lost because a key word is misunderstood. DUBOW et al., *supra* note 3, at 7.

[86] *Id.* at 7.

[87] *Id.* at 2.

[88] *See* McCay Vernon & Joan Coley, *Violation of Constitutional Rights:*

has been absent since birth or lost in infancy before language was acquired, have difficulty understanding written English.[89] For these prelingually deaf people, some form of manual communication is usually the first language and English is a second language.[90] Consequently, written communication is unlikely to give a deaf participant the same level of understanding that a hearing person enjoys.[91]

Clearly, requiring a deaf individual to lip-read courtroom proceedings or to participate in written exchanges are unsatisfactory options because they fail to provide the deaf person with equal access to the court. Without providing for equal opportu-

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The Language Impaired Person and the Miranda Warnings, AMERICAN ANNALS OF THE DEAF Vol. II No. 4 (April 1978). Additionally, only about 10% of prelingually deaf adults read at a 6.0 grade level or above. *Id.* at 3.

[89] SACKS, *supra* note 4, at 7, 12.

[90] Dr. Oliver Sacks describes prelingually deaf people as being in a category that is "qualitatively different from all others. *Id.* at 7. "[T]o be born deaf is infinitely more serious than to be born blind — at least potentially so. The prelingually deaf, unable to hear their parents, risk being severely retarded, if not permanently defective, in their grasp of language unless early and effective measures are taken." *Id.* at 8.

These effective measures often include the learning of a manual language, which becomes the child's first language. Although some deaf signers use Signed English or Signed Exact English, many more use American Sign Language ("ASL"). ASL has a grammatical structure that is considerably different from English, and many deaf people do not acquire English grammar and syntax easily. Consequently, interpreters familiar with the entire range of language capabilities must be available to deaf people in order to ensure effective communication. *See* DUBOW et al, *supra* note 3, at 2.

[91] The hearing world has failed to truly recognize American Sign Language as being linguistically independent of English. If a native Spanish speaker were involved in a court proceeding and he was not familiar with the use of English, he would not become more familiar if conversations were written rather than spoken. Yet this is the exact assumption made by many hearing people in their attempts to have deaf persons communicate through an exchange of written notes. The failure of the use of written material as an adequate substitute for an interpreter becomes clearer when examined in the criminal context. Evidence places the reading level of the Miranda warning at sixth to eighth grade. Thus, deaf individuals who read English at lower levels may not understand the warning when it is given to them in writing, and in that sense, cannot be said to have been given the warning at all. This problem is not limited to the criminal setting, but extends to any setting involving complex language and concepts. Vernon & Coley, *supra* note 88, at 3. Although many deaf individuals do not have high English reading comprehension levels, this simply reflects the fact that ASL, rather than English, is their first language.

nity to understand the proceedings, it is impossible to truly satisfy the demands of justice.

State and local courts claim that deaf litigants have access to their court systems because the courts do not prohibit them from filing actions and appearing in court. However, the discrimination here is more invidious. It is "comparable to opening a courtroom door at the top of a flight of steps, or opening a door of an inaccessible bus, and saying disingenuously to a person in a wheelchair, 'You may come in.'"[92] State and local courts have not met their responsibility to deaf individuals simply by claiming that their courts are open and available. This statement must be made meaningful by making necessary and reasonable accommodations, including the provision of interpreter services.

Unlike other civil rights laws, the ADA does not and *cannot* have as its goal simply to provide identical treatment to all members of society. In the case of disability, identical treatment is inherently discriminatory because it prevents equal access. The United States Commission on Civil Rights has identified two types of discrimination against individuals with disabilities: intentional and unintentional discrimination.[93] The Commission describes unintentional discrimination as existing "when handicapped people cannot participate in services, programs and activities because of barriers that were not consciously constructed to have such an effect. . . . Although not motivated by ill will or conscious efforts to keep out handicapped people, these barriers exclude just as surely as deliberate prohibitions do."[94] If the goal of equal rights is to be met, it must be accomplished through the affirmative elimination of barriers, both physical and communicative.[95]

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[92] Memorandum of Law in Opposition to the Motion to Dismiss of Defendants at 11, Avraham v. Zaffarano, No. 90-4759, 1991 WL 147541 (E.D. Pa. 1991).

[93] U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 41 (1983).

[94] *Id.*

[95] The Commission further asserts:

> If handicapped people cannot take full advantage of an opportunity, however, its value and effectiveness are diminished for them. Allowing a deaf person to attend a speech or other oral presentation may appear to be equal treatment, for instance, but without an interpreter or some captioning process, the presentation may be less effective for the deaf person than for the rest of the audience.

Id.

Having established that interpreter services are necessary, the focus of the question shifts to who should pay for the services. State and local courts may argue that requiring a deaf individual to pay for services does not equal a denial of participation because their laws guarantee the presence of an interpreter during the proceeding. However, since the central purpose of both the Rehabilitation Act and the ADA is to provide *equal access*, this argument is not persuasive. Access is not equal if some members of society must pay for it while others are not required to do so. A deaf litigant should not be obligated, as a condition to bringing an action in a state court system, to hire and pay for a sign language interpreter before her case comes to trial,[96] yet some judicial systems have deemed this scenario to constitute "equal access."[97]

Accessibility is part of the overall expense of operating a courtroom. To view accessibility as 'costs' to be imposed on selected members of society is inherently discriminatory.[98] When a litigant in a wheelchair needs physical access to a courtroom, the state does not assess the expense of installing and maintaining a ramp or an elevator as part of the costs of the proceeding to be paid by that litigant.[99] Interpreters provide comparable access to court proceedings for deaf litigants. Courts should not "punish" deaf individuals because they require interpreter services instead of structural accommodations in order to have meaningful access to the court system. If the state provides an interpreter to a deaf litigant, only to subse-

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[96] A lack of financial resources, high legal fees, and a dearth of public interest attorneys create obstacles for many potential litigants. This situation, although troubling, should not be compared to the situation of a deaf individual unable to bring a lawsuit due to financial inability to pay for an interpreter. While some civil rights laws promise equal results, *all* guarantee equal access. Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1371 (1986).

[97] In Rothschild v. Grottenthaler, 907 F.2d 286, 289 (2nd Cir. 1990), the United States Court of Appeals for the Second Circuit held that a school district violated § 504 of the Rehabilitation Act when it refused to provide a sign language interpreter at school district expense to deaf parents so they could participate in school conferences. The district court concluded in the same case, "meaningful access may mean more than accommodation for a privately retained sign language interpreter." Rothschild v. Grottenthaler, 716 F. Supp. 796, 800 (S.D.N.Y. 1989).

[98] Motion in Opposition to Defendant's Motion to Dismiss at 12, Avraham v. Zaffarano, No. 90-4759, 1991 WL 147541 (E.D. Pa. 1991).

[99] *Id.*

quently charge the deaf person for the service as part of "court costs," the litigant does not receive equal access.

A related argument for providing interpreters for deaf litigants at state expense can be drawn by analogy from those state laws providing that the state or county furnish foreign language interpreters at their own expense for non-English speaking litigants. For example, Massachusetts and New York State statutes provide for paid interpreter services for non-English speaking litigants.[100] A deaf individual unable to communicate through spoken English has at least an equally compelling claim for paid interpreter services as a non-English speaking individual.

Finally, states have also argued that if a deaf litigant were to prevail in her case, the sign language interpreter fees could be levied upon the opposing party. However, the deaf individual may not prevail, and even if she does, state statutes frequently provide that a judge still has discretion in the allocation of costs. The deaf individual should not be put in a position where she must decide before filing suit whether it is worth the risk to hire and pay for a sign language interpreter.

The case of *Avraham v. Zaffarano*,[101] which involved a small claims suit brought by a deaf man over a contract dispute for the sum of $175, exemplifies this point. The $175 fee that Mr. Avraham alleged was due him was important enough to him that he was willing to bring the case to court. To require him to pay his own interpreter fees would essentially exhaust whatever award he might have won,[102] and if he had lost his case, would have caused him to incur further financial losses for the sole purpose of gaining meaningful access to the justice system. The fact that interpreter costs might be assessed against Mr. Avraham or other deaf persons may have the effect of discouraging deaf individuals from using judicial remedies to redress grievances.

There simply cannot exist thorough and effective communication between deaf and hearing participants in a court proceeding without an interpreter. The interpreter is not simply an aid to the deaf litigant in the court proceeding, but rather an aid to the proceedings as a whole, in that the interpreter functions to

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[100] MASS. ANN. LAWS. ch. 221C § 2 (Law. Co-op. Supp. 1992); N.Y. CIV. PRAC. L & R 3114 (McKinney 1991).

[101] No. 90-4759, 1991 WL 147541 (E.D. Pa. 1991).

[102] The underlying small claim was settled in this case.

facilitate communication *between* deaf and hearing individuals. To require a deaf person to pay for the understanding that is needed for all participants in a legal proceeding is patently discriminatory. The responsibility to eliminate communication barriers constitutes a necessary element of court accessibility. States must assume this responsibility if the legal system is to provide meaningful access to all members of society.

CONCLUSION

Upon signing the ADA into law, President Bush stated:

> The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.[103]

It is now incumbent upon states to make this inspiring statement, and the ADA, meaningful by giving individuals with disabilities access to their justice systems. Simply opening doors to these individuals is not enough to guarantee access. State courts, like other branches of state and local governments, now have an affirmative obligation to provide the accommodations that will enable individuals with disabilities to fully participate in the mainstream of American life.

Laura L. Rovner[†]

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[103] Statement by George Bush upon signing the Americans with Disabilities Act, Pub. L. No. 101-336. 26 Weekly Comp. Pres. Doc. 1165 (July 30, 1990).

[†] Candidate for J.D., 1993. My deepest thanks to Marc Charmatz, who first introduced me to the importance of this issue as we ran many miles around the Gallaudet track, and who has provided continued guidance and support throughout the writing of this article. I am also grateful to the National Center for Law and Deafness, Professor Theodore Eisenberg, and the staff of the *Cornell Journal of Law and Public Policy*.