UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

STEVEN PRAKEL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 4:12-cv-45-SEB-WGH**
	)	
THE STATE OF INDIANA, et al.,	)	
	)	
Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

In 2010 and 2011, Plaintiff Steven Prakel, who is deaf, attended a series of court proceedings to support his mother, Carolyn Prakel, who was the defendant. Mr. Prakel repeatedly requested that Indiana's Dearborn Superior Court No. 1 and Dearborn Circuit Court provide sign language interpreter services so that he could understand the proceedings. On each occasion, the Defendants refused to provide an interpreter or any other auxiliary aids or services for Mr. Prakel.

In this lawsuit, the Prakels allege that the Defendants' actions violated the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504"), which prohibit discrimination on the basis of disability and affirmatively require covered entities to provide appropriate auxiliary aids and services to individuals with disabilities when necessary to ensure equally effective communication. Carolyn Prakel further alleges that the Defendants' failure to provide effective communication to her son denied her the benefit of his informed perspective and emotional support throughout the proceedings – benefits the judicial system routinely affords to litigants whose relatives are not deaf. The Defendants assert that neither the ADA nor Section 504 impose any effective communication obligations on them with respect to

courtroom spectators or others not directly involved in court proceedings. The parties' cross-motions for summary judgment are pending.

The material facts of this case are undisputed and the core argument at issue between the parties is a straightforward question of law: whether the ADA and Section 504 require state and local courts to furnish appropriate auxiliary aids and services where necessary to ensure that members of the public who are deaf can access public court proceedings as fully and effectively as those who are not deaf. The answer is unequivocally yes. Indeed, the Department of Justice directly addressed this specific issue in technical assistance guidance published nearly two decades ago: "The obligation of public entities to provide necessary auxiliary aids and services is not limited to individuals with a direct interest in the proceedings or outcome. Courtroom spectators with disabilities are also participants in the court program and are entitled to such aids or services as will afford them an equal opportunity to follow the court proceedings." *See* U.S. Dep't of Justice, Title II Technical Assistance Manual Supp. II-7.1000 at 39 (1994), *available at* http://www.ada.gov/taman2up.html.

Because the Defendants' position regarding the meaning of the ADA and Section 504 contravenes the Department of Justice's longstanding interpretation of the law, the United States respectfully submits this Statement of Interest to reiterate the broad protections afforded by the ADA and Section 504 in this context. The United States does not address the Defendants' additional arguments.

LEGAL AUTHORITY TO FILE THIS STATEMENT OF INTEREST

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517[1] because this litigation implicates the proper interpretation and application of the ADA, Section 504, and the Department of Justice's regulations implementing Title II of the ADA, 28 C.F.R. pt. 35, and Section 504, 28 C.F.R. pt. 42, subpt. G.[2] In particular, the Department has primary responsibility for enforcement of Title II with respect to the services, programs, and activities relating to state and local courts and the administration of justice. 28 C.F.R. § 35.190(b)(6). Further, the Defendants receive federal financial assistance from the Department. *See* Defs. Resp. to Mot. to Compel at 1 (Docket 50); Defs.' Ex. I, 30(b)(6) Dep. Tr. of David Remondini at 63:20-64:2; Pls.' Ex. O., Letter of Chief Judge Randall Shepard to the United States Department of Justice, Dated Sept. 4, 2009, at 1; Pls.' Ex. V, Defs.' Resp. to Pls.' Sec. Req. for Produc. of Docs. No. 4. Accordingly, the United States has a strong interest in the resolution of this matter.

FACTS

The relevant material facts to decide this case are not in dispute. Plaintiff Steven Prakel is deaf. Defs' Mem. at 3. Mr. Prakel's primary mode of communication is American Sign Language, and in order to access spoken communications, Mr. Prakel requires a qualified sign

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

[2] Congress delegated to the Department the authority to promulgate regulations under Title II, 42 U.S.C. § 12134(a). The Department is also responsible for coordinating and enforcing Section 504. *See* Exec. Order 12,250; 28 C.F.R. pt. 41. Accordingly, the Department's regulation and interpretation thereof are entitled to substantial deference. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Auer v. Robbins*, 519 U.S. 452, 463 (1997); *Olmstead v. L.C.*, 527 U.S. 581, 597-98 (1999) ("Because the Department of Justice is the agency directed by Congress to issue regulations implementing Title II . . . its views warrant respect.") (internal citations omitted).

language interpreter. Pls.' Mem. Supp. Partial Mot. Summ. J. ("Pls.' Mem."), Ex. C, Decl. of Steven Prakel ¶¶ 4-6. For example, Mr. Prakel uses sign language interpreters through the video relay service to make telephone calls, and attended classes conducted in American Sign Language at the National Technical Institute of the Deaf. *Id.* ¶¶ 7, 23. Mr. Prakel is only able to follow court proceedings when appropriate auxiliary aids and services such as qualified sign language interpreters are provided. *Id.* ¶ 9; Pls.' Ex. D, Decl. Carolyn Prakel ¶ 7.[3]

Plaintiff Carolyn Prakel, who is hearing, is Steven Prakel's mother. Pls.' Ex. D, Decl. Carolyn Prakel ¶ 3. She was a criminal defendant in probation revocation proceedings in Dearborn Circuit Court and misdemeanor proceedings in Dearborn Superior Court No. 1 in 2010 and 2011. Id. ¶¶ 4-5; Defs.' Ex. C, Dep. Judge Cleary at 8:11-17; Defs.' Ex. E, Dep. Judge Humphrey at 12:5-6, 13-14. The proceedings were open to the public. Defs.' Ex. C, Dep. Judge Cleary at 16:7-12. Mr. Prakel wanted to attend the court proceedings to "provide her with emotional support" and so he "could understand what occurred and what would happen to her." Pls.' Ex. C, Decl. of Steven Prakel ¶¶ 8, 10-11, 11-14, 32. Ms. Prakel likewise wanted her son to attend the court proceedings to provide her emotional support and so she could better understand the legal jeopardy she faced. Pls.' Ex. D, Decl. Carolyn Prakel ¶¶ 6, 14.

The Prakels' Requests for Interpreter Services to Superior Court No. 1

Prior to an April 29, 2010 hearing concerning Ms. Prakel, Mr. Prakel called Superior Court No. 1 to request interpreter services. Pls.' Ex. C, Decl. Steven Prakel ¶¶ 10-11; Pls.' Ex. M, Defs.' Responses to Pls.' Requests for Admissions No. 2. Despite Mr. Prakel's request, Superior Court No. 1 did not provide an interpreter when he attended the hearing and he was

[3] Unless otherwise noted, all exhibits referenced here are those the parties attached to the parties' motions for summary judgment.

unable to follow the proceedings. Pls.' Ex. C, Decl. Steven Prakel ¶¶ 15, 17; Pls.' Ex. D, Decl. Carolyn Prakel ¶ 8.

In May 2010, Mr. Prakel called Superior Court No. 1 a second time, and requested interpreters for all of his mother's proceedings, but the court representative explained that the court would not provide interpreters unless he was a witness or defendant. Pls.' Ex. C, Decl. Steven Prakel ¶¶ 11-13, 15, 17. When Mr. Prakel persisted in his request, the court's representative informed Mr. Prakel that she would ask Judge Jonathan Cleary, the judge presiding over Ms. Prakel's case. Judge Cleary scheduled a hearing for June 23, 2010 to consider Mr. Prakel's interpreter request. *Id.* ¶ 13; Pls.' Ex. G, Setting Form, *State of Indiana v. Carolyn Prakel*, Hearing on Request for Interpreter, filed May 25, 2010.

When Mr. Prakel arrived at Superior Court No. 1 on June 23, 2010, he learned that an interpreter would not be provided for the hearing to determine whether the Court would provide him with interpreters for all proceedings. Further, after a court employee would not communicate with Mr. Prakel by exchanging notes, he left the courthouse upset. Pls.' Ex. C, Decl. Steven Prakel ¶¶ 15-21; Pls.' Ex. D, Decl. Carolyn Prakel ¶¶ 9-10; Defs.' Ex. C, Dep. Judge Cleary at 14:2-12. At the June 23, 2010 hearing, Judge Cleary explained that Mr. Prakel was welcome to attend the "public hearing," "welcome to bring a sign interpreter[,] and his mother is welcome to sign to him," but the court would not provide him an interpreter because he was not a witness. Defs.' Ex. F, Tr. of Proceedings at 6.

In April 2011, Ms. Prakel had another court appearance. Pls.' Ex. D, Decl. Carolyn Prakel ¶¶ 16. Mr. Prakel, in advance of the hearing, again contacted the court through the relay service to request interpreter services, but no interpreter was provided for the hearing. Pls.' Ex. C, Decl. Steven Prakel ¶ 37; Pls. Ex. D, Decl. Carolyn Prakel ¶¶ 16-17.

The Prakels' Requests for Interpreter Services to Dearborn Circuit Court

In May 2010, Mr. Prakel contacted Magistrate Judge Kimberly Schmaltz's chambers at the Dearborn Circuit Court via video relay to request interpreters. Pls.' Ex. C, Decl. Steven Prakel ¶¶ 22-24. Court officials, including Connie Sandbrink, told Mr. Prakel the court would not provide him an interpreter unless he was a witness or a litigant. *Id.* ¶ 25; Defs.' Ex. E, Dep. Judge Humphrey at 16:1-6. When Mr. Prakel persisted, Ms. Sandbrink told him to file a written request. Pls.' Ex. C, Decl. Steven Prakel ¶ 26. Mr. Prakel sent the court a written request on May 20, 2010. Pls.' Ex. E, Letter from Steven Prakel to Judge Humphrey, Dearborn Circuit Court. Judge James Humphrey received Mr. Prakel's written request for interpreters and consulted with the Indiana Supreme Court, Division of State Court Administration about the request on at least two occasions. Defs.' Ex. E, Dep. Judge Humphrey at 14:10-13. When Mr. Prakel did not receive a response, Mr. Prakel called the court via video relay to inquire about the status of his requests, but the court refused to accept his call. Pls.' Ex. C, Decl. Steven Prakel ¶¶ 28-29. Because the court would not provide Mr. Prakel with interpreters during the criminal proceedings, Ms. Prakel paid $264.00 for interpreter services to enable her son to observe her criminal proceedings in Dearborn Circuit Court. Pls.' Ex. Q, Invoices for Interpreter Svcs. at 1-2.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "With cross-motions [for summary judgment], . . . review of the record requires that [the Court] construe all inferences in favor of the party against whom the motion under consideration is made." *O'Regan v. Arbitration Forums, Ins.*, 246 F.3d 975, 983 (7th Cir. 2001). If the party

against whom summary judgment is sought "does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994).

ANALYSIS

I. Defendants' Rejection of Mr. Prakel's Requests for Interpreter Services Violated Title II and Section 504.

Congress enacted the ADA more than two decades ago "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1); *see also Foley v. City of Lafayette*, 359 F.3d 925, 928 (7th Cir. 2004). Congress found that discrimination against persons with disabilities "persists in such critical areas as . . . communication . . . and access to public services," 42 U.S.C. § 12101(a)(3). Access to state and local courts and the ability of individuals with hearing disabilities to participate in and benefit from public services were special concerns contemplated by Congress in enacting the ADA. *See Tennessee v. Lane*, 541 U.S. 509, 527 (2004) (explaining that "Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities," and citing legislative testimony concerning the "failure of state and local governments to provide interpretive services for the hearing impaired").

Title II of the ADA thus broadly prohibits discrimination by public entities, including state and local courts, providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A plaintiff may establish a violation of Title II by showing that (1) he or she is a person

covered by the statute; (2) he or she was subjected to discrimination by the entity; and (3) the discrimination was by reason of disability. *See, e.g., Foley*, 359 F.3d at 928.

Section 504 similarly provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). While the Seventh Circuit generally construes Title II and Section 504 in a related manner "[i]n view of the similarities between the relevant provisions . . . and their implementing regulations," *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004), a plaintiff seeking to establish a violation of Section 504 must also show that the defendant is a recipient of federal financial assistance and that the defendant discriminated solely on the basis of disability. *Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 845 (7th Cir. 1999). As set forth below, the record is clear that the Defendants violated both Title II and Section 504 by repeatedly refusing to provide Mr. Prakel, who is deaf, sign language interpreters – or any other appropriate auxiliary aid or service necessary for effective communication – during his mother's criminal proceedings.[4]

[4] In this Statement of Interest, the Department addresses only the liability of the Dearborn Circuit Court and Superior Court No. 1. While the individual judges are named as Defendants, they are named in their official capacities for the courts. "Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Brandon v. Holt*, 469 U.S. 464, 471 (1985).

A. Steven Prakel was a qualified individual with a disability and had a civil right to participate in and benefit from the Courts' services, programs, and activities.

The Defendants assert that they did not have obligations under Title II and Section 504 to provide Mr. Prakel appropriate auxiliary aids and services because he was not a party, litigant, or witness to his mother's criminal proceedings. Defs.' Mem. at 24-27. The Defendants' argument, however, improperly restricts the scope of Title II and Section 504 coverage, misconstrues relevant case law, and ignores the Department's longstanding interpretation of courts' effective communication obligations, which clearly establish Mr. Prakel's right to auxiliary aids and services during the court proceedings at issue.

Title II prohibits discrimination against any "*qualified* individual with a disability," which is "an individual with a disability who, with or without . . . the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities of the public entity." 42 U.S.C. § 12131(2) (emphasis added).[5] The Section-by-Section Analysis accompanying the Title II regulation in 1991 explained:

> The 'essential eligibility requirements' for participation in some activities covered under this part may be minimal. For example, most public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only 'eligibility requirement' for receipt of such information would be the request for it.

28 C.F.R. pt. 35, App. B (discussing the definition of "qualified individual with a disability" in 28 C.F.R. § 35.104). In the context of communications, the Title II regulation specifically

[5] Section 504 similarly prohibits discrimination against any "otherwise *qualified* individual with a disability." 29 U.S.C. § 794(a). It is undisputed that Mr. Prakel is deaf – that he is substantially limited in the major life activities of hearing and speaking – and therefore has a disability within the meaning of the ADA and Section 504. *See* Defs.' Mem. at 3; Pls.' Ex. C, Decl. of Steven Prakel at ¶ 4; Pls.' Ex. D, Decl. of Carolyn Prakel ¶ 3. 42 U.S.C. § 12102(1); 29 U.S.C. § 705(9)(B), (20)(B).

includes certain categories of qualified individuals with disabilities, providing that "[a] public entity shall take appropriate steps to ensure that communications with applicants, *participants, members of the public,* and companions with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a)(1) (emphasis added); *see also* 28 C.F.R. § 35.160(b)(1) (auxiliary aids and services for qualified individuals with disabilities). Mr. Prakel was a member of the public and a participant within the meaning of Title II and the undisputed material facts of this case.

Defendants suggest that mere "spectators" of court proceedings cannot be qualified individuals with disabilities. Defs.' Mem. at 24-27. This argument is without merit. In the court proceedings involving the Prakels, the courts did not limit public access to the courtroom. Thus, any member of the public was qualified to watch the proceedings. Mr. Prakel is a qualified individual with a disability, protected by Title II, simply because he was a member of the public seeking to attend the public court proceedings. 28 C.F.R. § 35.104, 35.160(a)(1).

Pursuant to Indiana law, "[c]riminal proceedings are presumptively open to attendance by the general public." Ind. Code Ann. § 5-14-2-2; *see also Sparks v. State*, 953 N.E.2d 674 (Ind. App. 2011) ("The importance of the right to an open trial was recognized by our legislature, which provided by statute for open trials and a procedure courts must follow to exclude the general public from such proceedings."); *Hackett v. State*, 266 Ind. 103, 110 (1977) ("The Indiana Constitution provides for a public trial in all criminal prosecutions.").

Furthermore, as a general rule, members of the public have constitutional rights to attend public criminal proceedings. In *Tennessee v. Lane* – a Supreme Court decision finding that individuals who use wheelchairs and who encounter architectural barriers in state and local courts could sue for money damages – the Court explained: "[W]e have recognized that

members of the public have a right of access to criminal proceedings secured by the First Amendment." 541 U.S. at 527 (citing *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside* 478 U.S. 1, 8-15 (1986) and quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (explaining that the Fourteenth Amendment protects the rights of civil litigants, criminal defendants, and members of the public to have access to the courts).

Both the Supreme Court and Indiana's legislature have recognized the public's interest in and presumptive right to attend criminal proceedings such as those at issue in this case, and there is simply no basis for, and no merit to, the Defendants' assertion that these interests and rights would not be included in the broad protections afforded by the ADA and Section 504. Defs.' Mem. at 25-27, 31. Indeed, in 1993, the Department, pursuant to its congressionally delegated authority, 42 U.S.C. § 12206, issued technical assistance that specifically explained that spectators of Title II programs can be qualified individuals with disabilities. The technical assistance provides: *"Can a visitor, spectator, family member, or associate of a program participant be a qualified individual with a disability under title II?* Yes. Title II protects any qualified individual with a disability involved in any capacity in a public entity's programs, activities, or services." U.S. Dep't of Justice, Title II Technical Assistance Manual at II-2.8000 (1993), *available at* http://www.ada.gov/taman2.html (emphasis in original).[6]

[6] The Defendants claim that *Memmer v. Marin County Courts*, 169 F.3d 630, 633 (9th Cir. 1999), "at least implies that the trial was not a program, activity[,] or service with respect to the interpreter who would be analogous to a spectator." Defs. Mem. at 25. The Defendants' reliance on *Memmer* is wholly misplaced. Memmer was a litigant with a visual disability who refused a Spanish language interpreter as a reader, but was permitted to use another individual, Gossman, as a reader during her proceedings. 169 F.3d at 161-62. Both Memmer and Gossman sued under Title II, but the District Court dismissed Gossman's claim on standing grounds. *Id.* Gossman did not appeal his claim to the Ninth Circuit for the court to make such a holding.

Here, the record is clear that the essential eligibility requirements for observing Ms. Prakel's proceedings were minimal – one only needed to be a member of the public seeking to attend the proceedings. Criminal proceedings in Indiana are presumptively public, and Defendants do not dispute that each of the proceedings was public. Judge Cleary even noted during the June 23, 2010 hearing to determine whether to provide an interpreter that it was in fact a "public" hearing and that Mr. Prakel was welcome to attend the proceedings generally. *See*. Defs.' Ex. F, Tr. of Proceedings at 6. Mr. Prakel, as a member of the public, was thus "qualified" to attend the proceedings and, as discussed *infra* at 13-18, thus entitled to the effective communication protections afforded by the ADA and Section 504.

The Defendants' argument that courtroom spectators do not participate in the court proceeding and, thus, are not "participants" entitled to the ADA's and Section 504's effective communication protections, *see* Defs. Mem. at 25, 27, is at odds with Title II's broad protections and the Department's longstanding position that courtroom spectators *are* participants in the courts' programs, services, and activities. As the Department explained in technical assistance issued in 1994 on this very issue:

> The obligation of public entities to provide necessary auxiliary aids and services is not limited to individuals with a direct interest in the proceedings or outcome. Courtroom spectators with disabilities are also *participants* in the court program and are entitled to such aids or services as will afford them an equal opportunity to follow the court proceedings.
>
> ILLUSTRATION: B, an individual who is hard of hearing, wishes to observe proceedings in the county courthouse. Even though the county believes that B has no personal or direct involvement in the courtroom proceedings at issue, the county must provide effective communication, which in this case may involve the provision of an assistive listening device, unless it can demonstrate that undue financial and administrative burdens would result.

U.S. Dep't of Justice, Title II Technical Assistance Manual Supplement II-7.1000 at 39 (1994), *available at* http://www.ada.gov/taman2up.html (emphasis added). The technical assistance makes clear that Mr. Prakel qualified as a participant for purposes of the Title II regulation.

Because the record is clear that Mr. Prakel – as a "member of the public" seeking to attend the public court proceedings, and a "participant" in the court program within the meaning of the Department's Title II regulation and technical assistance – is a qualified individual with a disability, 28 C.F.R. § 35.160(a)(1), the Defendants were required to "take appropriate steps to ensure that communications" with him were "as effective as communications with others." *Id.*

B. Defendants failed to provide Mr. Prakel appropriate auxiliary aids and services necessary for effective communication during the courts' proceedings in violation of Title II and Section 504.

The Defendants' failure to provide auxiliary aids and services to Mr. Prakel is a clear violation of the ADA and Section 504. It is undisputed that the Defendants denied Mr. Prakel interpreters on five different days of court proceedings, despite repeated requests and that the Defendants did not offer any other auxiliary aid or service. Pls.' Ex. C, Decl. of Steven Prakel ¶¶ 8, 10-11, 11-18, 32. And there is no dispute that Mr. Prakel requires a qualified sign language interpreter to access spoken communications during court proceedings. Pls.' Ex. C, Decl. of Steven Prakel ¶¶ 4, 6, 7, 9; Ex. D, Decl. of Carolyn Prakel ¶ 7. Accordingly, the Defendants were required to provide Mr. Prakel with a sign language interpreter unless so doing would result in a fundamental alteration or undue burden, affirmative defenses that were not asserted with respect to this case.

The Title II regulation states plainly: "A public entity *shall furnish appropriate auxiliary aids and services* where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to

participate in, and enjoy the benefits of, a service, program, or activity of a public entity." 28 C.F.R. § 35.160(b)(1) (emphasis added); *see also* 28 C.F.R. § 42.503(f) (requiring the provision of auxiliary aids and services under Section 504). Furnishing appropriate auxiliary aids and services is among the "appropriate steps" required to ensure effective communication under the Title II regulation. 28 C.F.R. § 35.160(a)(1). The term "auxiliary aids and services" under the regulations implementing both Title II and Section 504 explicitly includes "qualified interpreters," among other examples. 28 C.F.R. § 35.104; 28 C.F.R. § 42.503(f).[7]

Public entities are not required to take any action that would result in a fundamental alteration or undue burden. 28 C.F.R. § 35.164. If an auxiliary aid or service would result in a fundamental alteration or undue burden, the public entity is still required to take any other action that does not result in a fundamental alteration or undue burden but would nevertheless ensure that, to the maximum extent possible, the individual with a disability still receives the benefits or services provided by the public entity. 28 C.F.R. § 35.164.

The Defendants assert various arguments in an effort to negate responsibility for denying Mr. Prakel interpreters, none of which are availing. Defendants argue that (1) Title II requires only that they make reasonable accommodations; (2) any right to accommodations is not absolute, but rather involves a balancing of interests; (3) they are not required to provide interpreters for spectators because they are not required to provide "personal devices and services" under the Title II regulation; and (4) a requirement that a spectator be provided an interpreter "would place an undue burden on the court system and put a strain on already limited

[7] Pursuant to the Title II regulation, public entities are required to "give primary consideration to the requests of individuals with disabilities" when "determining what types of auxiliary aids and services are necessary." 28 C.F.R. § 35.160(b)(2). In making the determination of what auxiliary aids and services to provide, public entities are required to consider various factors, such as context, complexity, and the communication methods of the individual. 28 C.F.R. § 35.160(b)(1)-(2). Defendants flatly denied Mr. Prakel any auxiliary aid or service.

court resources." Defs.' Mem. at 27. Defendants misunderstand and misapply the applicable Title II regulatory provisions.

First, the Defendants argue that Title II only requires that the courts make reasonable accommodations for Mr. Prakel. *See* Defs.' Mem. at 24-27. Defendants' argument ignores their Title II effective communication obligations. While one provision of the Title II regulation requires covered entities to make reasonable modifications of policies, practices, and procedures where necessary to avoid discrimination, 28 C.F.R. § 35.130(b)(7), the violations at issue in this case are explicitly addressed in a different provision, set forth in Subpart E of the Title II regulation, as described above. 28 C.F.R. § 35.160-164; 28 C.F.R. § 42.503(e), (f). The effective communication provisions include their own requirements and defenses and are separate from and independent of the reasonable modification obligations imposed by other parts of the Title II regulation.

Second, the Defendants cite *Alexander v. Choate*, 469 U.S. 287, 290-91 (1985), a Section 504 case decided before Title II was enacted or its regulation was promulgated, for the proposition that "any right to accommodations is not absolute, but rather involves a balancing of interests." Defs. Mem. at 24-25. The portion of *Choate* Defendants cite relates to discussion of the holding of *Southeastern Community College v. Davis*, 442 U.S. 396, 412-13 (1979), that Section 504 does not require fundamental or substantial alterations, but does require reasonable ones. The "balancing of interests" Defendants suggest the Court must consider is already memorialized in the Title II regulation – Defendants are obligated to furnish appropriate auxiliary aids and services, and the Title II regulation sets forth an affirmative defense of fundamental alteration to alleviate public entities of such obligations under certain circumstances. *See* 28 C.F.R. §§ 35.160, 35.164 ("This subpart does not require a public entity

to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity."). The 1991 regulatory guidance accompanying the Title II regulation explains that the affirmative defense of fundamental alteration was included in consideration of *Davis* and its Circuit Court progeny. 28 C.F.R. pt. 35, App. B (discussing 28 C.F.R. § 35.164). However, Defendants have not asserted fundamental alteration as a defense to Mr. Prakel's requests for interpreters, nor have they produced any evidence that providing interpreters would in any way fundamentally alter the court proceedings at issue here.

Third, the Defendants claim that courts should not be required to provide interpreters to spectators under the "personal devices and services" exemption in the Title II regulation. Defs.' Mem. at 26. The provision which Defendants cite provides: "This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing." 28 C.F.R. § 35.135. This provision is not applicable to these facts. Instead, the Prakels' interpreter requests are governed by the communication provisions of the Title II regulation that specifically state, "[a] public entity shall furnish appropriate *auxiliary aids and services* where necessary to afford qualified individuals with disabilities…an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity. 28 C.F.R. § 35.104. The definition of "auxiliary aids and services" explicitly includes "qualified interpreters." 28 C.F.R. § 35.104. The Title II regulation also explicitly includes a definition for "qualified interpreters." *Id.* Furthermore, none of the examples provided are analogous to the provision of an interpreter for an individual who seeks to participate as a spectator in court proceedings. Each of the examples relates to devices or services provided for "personal" use –

by its terms, completely unrelated to the services, programs, or activities of the public entity. The example of readers for personal use or study in 28 C.F.R. § 35.135 is instructive: while readers for personal use or study are not required by the Title II regulation, the definition of "auxiliary aids and services" specifically includes "qualified readers" who may assist individuals who are blind or have low vision. *See* 28 C.F.R. § 35.104.

Fourth, Defendants also raise, but misapply, the affirmative defense of undue burden. Defendants assert that requiring them to provide Mr. Prakel with appropriate auxiliary aids and services will result in undue burden to the entire Indiana court system. *See* Defs.' Mem. at 24-27. Mr. Prakel seeks to assert his own rights for five occasions in 2010 and 2011 in two of Indiana's courts – not as to the entire Indiana court system or the entire deaf population. The Defendants' argument serves nothing more than to commence an irrelevant parade of horribles. Moreover, Defendants have produced no evidence that they took any of the required steps to properly assert the affirmative defenses of undue burden or fundamental alteration. The Title II regulation makes clear that the decision that compliance would be an undue burden or fundamental alteration must be made by the head of the public entity or designee "after considering all resources available for use in funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion." 28 C.F.R. § 35.164. Even where such a finding is made and an auxiliary aid or service is not provided, a public entity is still required to provide auxiliary aids and services that do not result in undue burden or fundamental alteration but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity. Here, the Defendants neither provided the requested interpreters nor proposed any alternative type of auxiliary aid or service to ensure effective communication in order to enable

Mr. Prakel to receive the benefits of the courts' proceedings and Defendants have provided none. 28 C.F.R. § 35.164.

There is no dispute of material fact, and the violation is clear. Dearborn Superior Court No. 1 and Dearborn Circuit Court repeatedly refused to provide Mr. Prakel with interpreters, which he repeatedly requested, and which he needed to obtain the aural content of his mother's criminal proceedings. 28 C.F.R. § 35.160(b)(1). By denying Mr. Prakel interpreters, the Defendants denied Mr. Prakel effective communication, and ultimately an equal opportunity to participate in, and enjoy the benefits of, their services, programs, and activities – namely, the court proceedings. 28 C.F.R. § 35.160(a)(1), (b)(1).

II. Defendants' denials of auxiliary aids to Mr. Prakel were intentional.

While the Seventh Circuit has noted that a showing of intentional discrimination is necessary for damages under Title II, and Section 504 by extension, it has not established a standard of intent. *See Morris v. Kingston*, 368 Fed. App'x 686, 689-90 (7th Cir. 2010). Nonetheless, each Circuit that has addressed the issue has found that intentional discrimination can be demonstrated by a showing of discriminatory animus, but may also be "inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *see also Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012); *Loeffler*, 582 F.3d at 275; *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-39, n.13 (9th Cir. 2001); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999); *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994). Intentional discrimination "does not require a showing of personal ill will or animosity towards the disabled

person." *Meagley*, 639 F.3d at 389; *Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009).

In applying the deliberate indifference standard for purposes of Mr. Prakel's damages claim, this court should adopt the two-part test adopted by the Ninth and Tenth Circuits: "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood." *Duvall*, 260 F.3d at 1138-39; *Barber*, 562 F.3d at 1229. As to the first element, the *Duvall* court explained that "[w]hen the plaintiff has alerted the . . . entity to his need for accommodation (or where the accommodation is obvious, or is required by statute or regulation), the . . . entity is on notice that an accommodation is required." *Id.* To meet the second element of the test, "a failure to act must be the result of conduct that is more than negligent, and involves an element of deliberateness." *Id.* at 1140. In *Duvall*, the Ninth Circuit found an individual who was deaf could demonstrate intentional discrimination when he called the county court to request a videotext display for his trial and the court made a "deliberate decision to deny [the] requests for a particular auxiliary aid and service without making any effort to determine whether it would have been possible to provide the requested accommodation." 260 F.3d at 1139.[8]

Deliberate indifference, contrary to the Defendants' argument, does not require a prior judicial finding that the challenged actions violate the law. Defs.' Mem. at 32. Defendants cannot point to any case including such a requirement. Moreover, while ignorance of the law is never an excuse, each Defendant here was uniquely capable of finding the applicable regulations,

[8] This Court should reject Defendants' reliance on *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994) that deliberate indifference requires an objective component that harm must be sufficiently serious and a subjective component that the defendant "must act with a sufficiently culpable state of mind." *Hathaway* is a case decided under 42 U.S.C. § 1983 concerning the "deliberate indifference" standard used in the Eighth Amendment context, and thus inapplicable to these facts and the "deliberate indifference" standard for Title II and Section 504 cases.

technical assistance, and caselaw and recognizing the substantial likelihood of violating Mr. Prakel's federally protected rights. As set forth above, the obligation of a state or local court to provide appropriate auxiliary aids and services necessary for effective communication for spectators in its public court proceedings is abundantly clear and information is readily available. The Justice Department has even issued technical assistance directly on point. *See* discussion *supra* at 11, 12.

Furthermore, the Supreme Court has outlined the obligations of courts to comply with Title II in comparable circumstances. *See Lane*, 541 U.S. 509. In *Lane*, the Supreme Court explained that "Title II . . . seeks to enforce [a] prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 522-23. The *Lane* Court then identified numerous constitutional guarantees to attend and participate in court proceedings, *including those applicable even to members of the public*. *See* discussion *supra* at 10-11.

Beyond this, there is no dispute that both Judges Cleary and Humphrey, and Magistrate Judge Schmaltz, received clear requests by Mr. Prakel for sign language interpreters for Ms. Prakel's proceedings, and that these judges repeatedly denied those requests. *See* discussion *supra* at 4-6. Judge Humphrey consulted on more than one occasion with the Division of State Court Administration, but persisted in refusing to provide an interpreter. Defs.' Ex. E, Dep. Judge Humphrey at 16:16-20, 22:13-16, 24:15-17.

Judge Cleary even held a hearing in which he considered whether to provide Mr. Prakel an interpreter for his mother's proceedings, where Ms. Prakel's attorney explained that it might be worth consulting with the Judicial Commission or someone else. Defs.' Ex. F, Tr. of Proceedings, June 23, 2010 at 4. Judge Cleary's notice of the court's effective communication

obligations is further reflected in his deposition testimony that Dearborn Superior Court No. 1 regularly receives requests for sign language interpreters for litigants, and that the court regularly relies upon an interpreter named Jack Baker. Defs.' Ex. C, Dep. Judge Cleary at 10:11-11:15. Defendants thus were clearly on notice of Mr. Prakel's effective communication needs. Defendants repeatedly denied these requests or ignored them. *See Loeffler*, 582 F.3d at 276 (finding deliberate indifference where hospital ignored multiple requests for interpreters and communication devices). Defendants also admit that it is "[t]he practice" of the Dearborn Circuit Court and Dearborn Superior Court No. 1 to refuse to provide interpreter services for spectators. Pls.' Ex. N, Defs.' Am. Resp. to Pls.' Req. for Admis. at 1.

Lastly, Defendants have produced no evidence that they even engaged in the process required by the Title II regulation to determine the type of auxiliary aid or service necessary to ensure effective communication, after considering the relevant factors, such as the nature, length, and complexity of the communication; the context; and the method of communication; after giving primary consideration to Mr. Prakel's request. *See* 28 C.F.R. § 35.160(b)(1)-(2). Nor have the Defendants produced any evidence that they offered any other auxiliary aid or service that might have been effective for Mr. Prakel.

Mr. Prakel repeatedly sought, but was denied, his rights under Title II and Section 504. The Defendants refused to even engage in the process of determining what auxiliary aids and services were necessary for effective communication as required by Title II. Consequently, the record is clear that the Defendants were deliberately indifferent to Mr. Prakel's federally protected rights.

III. Carolyn Prakel suffered "associational discrimination" under Title II and Section 504 due to her relationship with her son.

Defendants erroneously argue that Carolyn Prakel, who is hearing, does not have the right to pursue discrimination claims against the Defendants for their refusal to provide her son with sign language interpreters during her court proceedings. Defendants mischaracterize Ms. Prakel's claim as a third-party claim that she is asserting on Mr. Prakel's behalf. In reality, Ms. Prakel asserts an independent claim based on discrimination against her because of her association/relationship with Mr. Prakel.

The Title II regulation provides: "A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 28 C.F.R. § 35.130(g); *see also Doe v. County of Ctr.*, 242 F.3d 437, 447 (3d Cir. 2001) (quoting H.R. Rep. No. 101-485(III), at 38 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 461, the ADA "protects persons who associate with persons with disabilities and who are discriminated against because of that association. This may include family, friends, and persons who provide care for persons with disabilities.").

Similarly, Section 504 provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . ." 29 U.S.C. § 794a. The "person aggrieved" need not be an individual with a disability. *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 279 (2d Cir. 2009) (permitting associational discrimination claim under Section 504) (cited favorably by *Hale v. Pace*, No. 09-c-5131, 2011 U.S. Dist. LEXIS 35281 at *12 (N.D. Ill. March 31, 2011)); *Popovich v. Cuyahoga Cnty. Ct. of Common Pleas*, 150 F.App'x 424, 427-28

(6th Cir. 2005) (same). Title II likewise adopts the "remedies, procedures, and rights" of Section 504. 42 U.S.C. § 12132.

Courts recognize associational discrimination claims where individuals without disabilities are denied or provided an unequal benefit because of disability-based discrimination. *A Helping Hand, LLC v. Balt. County*, 515 F.3d 356, 363 (4th Cir. 2008) ("[A] cause of action based on ADA associational discrimination permits a plaintiff to bring suit on its own behalf for injury it itself suffers because of its association with an ADA-protected third party."). For example, in *Doe v. County of Ctr.*, the Third Circuit found a valid associational discrimination claim for the parents of a child with HIV against a foster care agency which, by policy, required notification of the biological parents of foster children that an individual in their home had HIV. 242 F.3d at 447. *Doe* reasoned that this requirement treated the adoptive parents differently because of their association with their disabled child. *Id.*

Courts have also found associational discrimination claims where covered entities failed to meet their effective communication obligations, including the failure of the criminal justice system to provide appropriate auxiliary aids and services. For example, in *Niece v. Fitzner*, the court held that the plaintiff, a hearing prisoner, had stated a valid claim for associational discrimination against the prison for not providing teletypewriter services for him to speak with his fiancée who was deaf. 922 F. Supp. 1208, 1216 (E.D. Mich. 1996) ("Title II protects interaction between persons with a disability and those without by providing a separate cause of action to individuals discriminated against because of their relationship with a person with a disability."). *See also Falls v. Prince George's Hosp. Ctr.*, No. 97-1545, 1999 U.S. Dist. LEXIS 22551 (D. Md. Mar. 16, 1999) (holding that parent had an associational discrimination claim

under Title III of the ADA because hospital directly discriminated against parent by requiring hearing parent to act as interpreter for child who was deaf).

Litigants are regularly benefited by family members and friends who observe court proceedings to provide their support and perspective. Likewise, Ms. Prakel wanted her son, with whom she lived, to fully attend her criminal court proceedings so that he could help her to better understand the legal jeopardy she faced – which included her potential incarceration. Pls.' Ex. D, Decl. of Carolyn Prakel ¶¶ 6, 14. Defendants' ongoing refusal to provide interpreters denied Ms. Prakel the opportunity to benefit from her son's informed understanding and perspective. Due to the Dearborn Circuit Court's ongoing refusal to provide interpreter services, Ms. Prakel incurred a $264 expense when she was required to provide an interpreter for Mr. Prakel at the July 6 and 7, 2010 hearings. *See* Pls.' Ex. Q, Invoices for Interpreter Svcs. at 1-2. Ms. Prakel has thus suffered distinct injuries. *Baaske v. City of Rolling Meadows*, 191 F. Supp. 2d 1009, 1016 (N.D. Ill. 2002) (requiring allegations of (1) relationship or association and (2) separate injury for associational discrimination claim under Title II); *Micek v. City of Chicago*, No. 98 C 6757, 1999 U.S. Dist. LEXIS 16263, at **12-13 (N.D. Ill. Oct. 4, 1999) (determining that associational discrimination claim requires a "specific, separate, and direct injury"). The Defendants denied Ms. Prakel with equal services, programs, or activities because of her association with Mr. Prakel in violation of 28 C.F.R. § 35.130(g).

CONCLUSION

For the reasons stated here, the United States respectfully requests consideration of this Statement of Interest in this litigation.

Respectfully submitted, this 7th day of January 2014.

ERIC H. HOLDER, JR.
Attorney General of the United States

JOSEPH H. HOGSETT
United States Attorney
Southern District of Indiana

JILL Z. JULIAN
Assistant United States Attorney
Southern District of Indiana

JOCELYN SAMUELS
Acting Assistant Attorney General
EVE L. HILL
Deputy Assistant Attorney General
Civil Rights Division

REBECCA B. BOND, Chief
KATHLEEN P. WOLFE
Special Litigation Counsel
JANA L. ERICKSON
Deputy Chief

s/William F. Lynch
WILLIAM F. LYNCH, Trial Attorney
Virginia Bar No. 71226
Disability Rights Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, N.W. (NYA)
Washington, D.C. 20530
Telephone: (202) 305-2008 (Lynch)
Facsimile: (202) 514-7821
William.Lynch@usdoj.gov

Counsel for United States of America