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Disability Rights Section
Civil Rights Division
U.S. Department of Justice

Comments of the National Association of the Deaf on Notice of Proposed Rulemaking on Title II of the Americans with Disabilities Act, 28 C.F.R. Part 35 CRT Docket No. 105; AG Order No. 2967-2008

The National Association of the Deaf (NAD) submits these comments in response to the notice of proposed rulemaking (NPRM), 73 Fed. Reg. 34466 (June 17, 2008), released by the U.S. Department of Justice (the "Department") to amend regulations implementing Title II of the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability in state and local government services.

The NAD was established in 1880 by deaf leaders who believed in the right of the American deaf community to use sign language, to congregate on issues important to them, and to have its interests represented at the national level. These beliefs remain true to this day, with American Sign Language as a core value. As a nonprofit federation, the mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of deaf and hard of hearing individuals in the United States of America. The advocacy scope of the NAD is broad, covering the breadth of a lifetime and impacting future generations in the areas of early intervention, education, employment, health care, technology, telecommunications, youth leadership, and more. For more information, please visit www.nad.org.

The NAD appreciates the opportunity to submit comments on the Department's proposed changes to the Title II rules. For each section of the Title II rules for which comments were sought and are provided, the language proposed by the Department appears first in *italicized print*, followed by our comments on that section. Similarly, for each question posed in the NPRM for which comments were sought and are provided, the question(s) appears first in *italicized print*, followed by our response. Additional comments are provided in the final section.

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28 C.F.R. § 35.160(e): Stadiums

28 C.F.R. § 35.160(e): Sports stadiums. One year after the effective date of this regulation, sports stadiums that have a seating capacity of 25,000 or more shall provide captioning on the scoreboards and video monitors for safety and emergency information.

Question 49: The Department believes that requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 has the potential of creating an undue burden for smaller entities. However, the Department requests public comment about the effect of requiring captioning of emergency announcements in all stadiums, regardless of size. Would such a request be feasible for small stadiums?

Question 50: The Department is considering requiring captioning of safety and emergency information in sports stadiums with a capacity of 25,000 or more within a year of the effective date of the regulation. Would a larger threshold, such as sports stadiums with a capacity of 50,000 or more, be more appropriate or would a lower threshold, such as stadiums with a capacity of 15,000 or more, be more appropriate?

Question 51: If the Department adopted a requirement for captioning at sports stadiums, should there be a specific means required? That is, should it be provided through any effective means (scoreboards, line boards, handheld devices, or other means), or are there problems with some means, such as handheld devices, that should eliminate them as options?

Question 52: The Department is aware that several major stadiums that host sporting events, including National Football League football games at Fed Ex Field in Prince Georges County, Maryland, currently provide open captioning of all public address announcements, and do not limit captioning to safety and emergency information. What would be the effect of a requirement to provide captioning for patrons who are deaf or hard of hearing for game-related information (e.g., penalties), safety and emergency information, and any other relevant announcements?

The proposed regulation raises three distinct issues: (1) whether sports stadiums are required to provide auxiliary aids and services to ensure that the game-day experience is fully accessible to individuals who are deaf or hard of hearing; (2) whether providing such auxiliary aids and services would be an undue burden; and (3) what steps sports stadiums must take to make the game-day experience accessible. These issues are addressed in turn.

Stadiums Are Required To Make the Game-Day Experience Fully Accessible to Individuals Who Are Deaf or Hard of Hearing

Sports stadiums are largely inaccessible to individuals who are deaf or hard of hearing. Sports stadiums remain largely inaccessible even though all, if not virtually all,

games are already captioned on television for individuals who are deaf or hard of hearing, in compliance with FCC regulations.[1] Since most stadiums remain inaccessible, fans who are deaf or hard of hearing fans get more information if they stay home and watch the game on television rather than attend in person. The Department should address this systematic inaccessibility of sports stadiums by issuing a regulation that clarifies that stadiums are required to provide auxiliary aids and services to make the game-day experience fully accessible for individuals who are deaf or hard of hearing.

Title II is clear on the obligations of public entities to provide captioning for individuals who are deaf or hard of hearing in stadiums. Title II was enacted to ensure that individuals with a disability can participate in or receive the "benefits of the services, programs, or activities of a public entity" and are not "subjected to discrimination by any such entity."[2]

In response to Question 52 about what stadiums are required to caption, Congress' mandate is comprehensive: Title II's nondiscrimination requirement means that stadiums must caption all aural information, including play-by-play commentary, unless doing so would be an undue burden or fundamental alteration. Captioning only safety and emergency information does not begin to fulfill the congressional mandate that stadiums do not discriminate against individuals who are deaf or hard of hearing in the benefits of the services, programs, and activities that the stadiums have to offer.

As presently drafted, the proposed regulation may confuse rather than clarify the obligations that stadiums have under Title II. Although the proposed regulation would merely remove undue burden as a defense for larger stadiums in connection with the captioning of safety and emergency information, Pro-Football, Inc. and WFI Stadium, Inc. (hereinafter "the Redskins") have asserted in the ongoing case *Feldman v. Pro-Football, Inc.*,[3] that the notice of proposed regulation means that it is not now required to caption any aural information at all. The Redskins assert that the proposed regulation would "require, for the first time, the captioning of 'safety and emergency information' only in stadiums seating more than 25,000."[4] The Redskins further claim that this proposed regulation and Question 29 "demonstrate that the Department does not believe that there are requirements for the captioning of stadium public address announcements under existing law."[5]

Such an interpretation of the proposed regulation to mean that stadiums are not now required to provide captioning runs afoul of the statutory language of Title II. As described, Congress could not have been clearer in requiring that sports stadiums provide auxiliary aids and services to ensure that individuals who are deaf or hard of hearing can participate in or receive the "benefits of the services, programs, or activities of a public

[1] *See generally* 47 C.F.R. § 79.1 (requiring generally that all television broadcasts be captioned).
[2] 42 U.S.C. § 12132.
[3] Case No. AW-06-2266, (D. Md.).
[4] *Defs.' Notice of Suppl. Filing*, Case No. AW-06-2266 (D. Md.) (filed July 18, 2008)..
[5] *Id.*

entity" and are not "subjected to discrimination by any such entity."[6] Consequently, any final regulation that provides otherwise would conflict with the unambiguous language of the statute.[7]

A much clearer final regulation that enforces Title II would state that a public entity's stadiums are required to caption *all* aural information, including public address systems in the stadium bowl, public address systems in concourse areas, and televisions located throughout the stadium. Because Title II's defense of undue burden would remain generally available, it is unnecessary to repeat in any final regulations that stadiums may be entitled to the defense of undue burden.

The Department should further clarify that the regulation applies to all events at a public entity's stadiums, not just sporting events at sports stadiums. Stadiums often host speaker events, concerts, circuses, and other performances. These events have been and continue to remain largely inaccessible to individuals who are deaf or hard of hearing. There is nothing in Title II to support a distinction between sports stadiums and arenas hosting non-sporting events. Consequently, the final regulation should require that all events at all stadiums be fully accessible to individuals who are deaf or hard of hearing unless providing captioning would be an undue burden.

Providing Captioning Would Not Be an Undue Burden

The proposed regulation would work a change in existing law only to the extent that larger stadiums would not be able to assert undue burden as an affirmative defense with respect to captioning safety and emergency information. Larger stadiums would still have the opportunity to demonstrate, on a case-by-case basis, that captioning all other aural information would be an undue burden. Smaller stadiums would also still have the opportunity to show, on a case-by-case basis, that captioning any aural information would be an undue burden.

In response to Questions 49 and 50, the Department's focus on undue burden is misplaced. In the ongoing case about whether the Washington Redskins' FedExField must caption all aural information projected into the stadium bowl and concourse areas, the defendants have not asserted undue burden as an affirmative defense. The Redskins could not plausibly claim undue burden because the hardware they purchased to provide the captioning cost less than $5,000.[8] The Redskins pay $550 per game, or $5,500 per year, to employ a stenocaptioner to do the live captioning of play-by-play commentary.[9] The cost of providing captioning barely registers when compared to what the Washington Redskins earn in revenues each year and the total worth of the sports franchise. Similarly, the cost of providing captioning is minimal when compared to the resources of

[6] 42 U.S.C. § 12132.
[7] *See generally Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984); *cf. Ball v. AMC Entertainment, Inc.*, 246 F. Supp. 2d 17, 23 (D.D.C. 2003) (explaining that any DOJ regulation stating that movie theaters are not required to provide closed captioning would not be upheld if inconsistent with the ADA).
[8] *Br. for Pls.* at 9, *Feldman v. Pro-Football, Inc.*, Case No. AW-06-2266 (D. Md.).
[9] *Id.*

public entities, and the Department should clarify that all public entities are required to caption all aural information to make the game-day experience fully accessible for individuals who are deaf or hard of hearing.

More broadly, the focus on the number of seats in a stadium would impermissibly introduce a new factor into undue burden analysis. Under current regulations, undue burden is a broad inquiry that takes into account multiple factors and must be determined on an individual case-by-case basis.[10] Consequently, the focus should be on the public entity's resources and not on the number of seats that the stadium may have.

In particular, a public entity's sports teams, such as public college and university basketball and hockey teams, generate significant revenues even though they play in stadiums that seat fewer than 25,000 people. Comcast Center, for example, seats less than 25,000 people but is home to the Maryland Terrapins. Comcast Center also hosts numerous other sporting and non-sporting events that attract large crowds. These events have been and continue to remain largely inaccessible to individuals who are deaf or hard of hearing even though these events at Comcast Center generate significant revenues and the cost of providing captioning would be minimal. The Department should clarify that all stadiums hosting a public entity's sports teams are required to make their games fully accessible to individuals who are deaf or hard of hearing.

Stadiums Should Provide Captioning in the Same Line of Sight as the Jumbotron or Other Projectors of Visual Information and the Field of Play or Activity

In Question 51, the Department asked whether a specific means should be required for displaying captioning. The Department should require that captioning be in the same line of sight as Jumbotrons or other visual information that is displayed in conjunction with aural information. This may necessitate more than one caption display, such as displays in the same line of sight as the field of play and displays on or near the Jumbotron or other video displays. In the Washington, DC area, the few stadiums that do provide captioning generally place the captioning on ribbon boards that are not in the same line of sight as the Jumbotrons. FedExField displays the captioning on ribbon boards that are at the 50-yard line while the Jumbotrons are located in the endfield zones. The Washington Nationals display captioning behind the fences in right field and left field while the Jumbotron is located above the fence in center field. The placements of these ribbon boards mean that individuals who are deaf or hard of hearing can see the captions in line of sight with and that correspond to audio information conveyed about the field of play. However, they cannot see the captions in line of sight with and that correspond to audio information conveyed about video being shown on the Jumbotron. As a result, individuals who are deaf or hard of hearing often miss what is being said or displayed or both. This access is not equal to that of hearing fans who can watch the Jumbotron or field of play while listening to the public address announcer. To remedy this situation, stadiums can place captioning on the Jumbotron or place ribbon boards adjacent to the Jumbotron screens. Either solution would place captioning in the same line of sight as the Jumbotrons and ensure equal access for individuals who are deaf or

[10] 28 C.F.R. §§ 35.150 and 35.164.

hard of hearing. For comparable and appropriate lines of sight with the field of play or action, ribbon boards can be strategically placed in different parts of the stadium.

In a similar context, courts have held that stadiums must provide comparable lines of sight for wheelchair users.[11] In these cases, courts ruled that stadiums violated Title III by placing wheelchair users in locations where they might miss some of the action, such as when individuals in front of them stand. In a similar set of cases, courts ruled that movie theaters violated Title III by placing wheelchair accessible areas in locations where wheelchair users had to crane their necks at odd angles to view the movie screen.[12] Like the wheelchair users in these cases, individuals who are deaf or hard of hearing should have lines of sight comparable to those of individuals without a disability. Stadiums can achieve this by placing captioning the same lines of sight as the Jumbotrons or other projections of visual information.

Also in Question 51, the Department asked about the feasibility of handheld captioning devices as an option for displaying captions. Handheld captioning devices are ineffective because a person cannot both view the captions and watch the Jumbotrons and/or game action at the same time. Further, there is usually a significant time delay between the time something is announced over the public address system and the time that the captions appear on the device. This delay has been as long as 10 minutes. Because aural information is generally time-sensitive (such as play-by-play commentary and safety information), delayed captions do not result in effective communication.[13]

Finally, the availability of handheld captioning devices would require individuals to self-identify as deaf or hard of hearing in advance of the game. Many individuals may be unwilling to self-identify or may be unaware handheld captioning devices are offered. In contrast, captions that are placed on or near the Jumbotrons or other appropriate locations throughout the stadium will result in a accessible game-day experience for all individuals, not just individuals who self-identify as deaf or hard of hearing in advance of the game. Such captions would benefit even hearing individuals who cannot hear the public address announcer over the roar of the crowd.

For these reasons, the Department should eliminate handheld captioning devices as an option for making stadiums accessible to individuals who are deaf or hard of hearing. Instead, the Department should adopt a requirement that captions must be placed in the same lines of sight as the field of play or action and also on the Jumbotrons or the equivalent that ensures that captions are in the same lines of sight as the

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[11] *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997).

[12] *E.g.*, *United States v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003); *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003).

[13] Recently, the Telecommunications and Electronic and Information Technology Advisory Committee (TEITAC) proposed that information provided in alternate formats, or otherwise via accessible means be "as timely, accurate, complete and efficient" as information made available to individuals who do not have disabilities, unless an undue burden would be imposed on the covered entity. The same standard should apply here. TEITAC Report to the Access Board: Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology, Sec.6-C: IVR, Auto-Attendant and Messaging (April 2008).

Jumbotrons or other projections of visual information. Further, the captions must have sufficient size and contrast to ensure readability, and be timely, accurate, complete, and efficient.

Regardless of how captions are provided, stadiums should be made aware that individuals who are hard of hearing may still require assistive listening devices.

The Department Should Revise the Proposed Regulation

In light of the above comments, the Department should revise the proposed regulations as follows:

> 28 C.F.R. § 35.160(e): ~~Sports~~ Stadiums. ~~One year after the effective date of this regulation, sports stadiums that have a seating capacity of 25,000 or more shall~~ Stadiums shall provide captioning on the scoreboards and video monitors for all aural information projected in any portion of the stadium that is open to the public, including, but not limited to, all aural information projected over public address systems in the stadium bowl and concourse areas and all aural information projected by any television located in any portion of the stadium that is open to the public. Captioning shall be placed in the same line of sight as the field of play or activity, the Jumbotron, video monitor, and other projectors of visual information that accompanies the projected aural information. Captions must have sufficient size and contrast to ensure readability, and be timely, accurate, complete, and efficient.

28 C.F.R. § 35.104: Definitions

Auxiliary Aids and Services

Auxiliary aids and services includes—(1) Qualified interpreters, notetakers, computer-aided transcription services, written materials, exchange of written notes, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, text telephones (TTYs), videotext displays, video interpreting services (VIS), accessible electronic and information technology, or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.

The Department's new definition of auxiliary aids and services revises the definition by proposing to (1) include video interpreting services (VIS); (2) include accessible electronic and information technology; (3) include the exchange of written notes; and (4) revise the nomenclature for TTY devices. These items are addressed in turn.

Video Interpreting Services. First, the term "video interpreting services" (VIS) is more commonly referred to, in the community, in the profession, among providers, by the Federal Communications Commission, and by others, as "video remote interpreting"

(VRI) services.[14] As such, the NAD strongly recommends that the term "video remote interpreting (VRI) services" be used to avoid confusion that may be caused by the introduction of a new and unfamiliar term.[15]

Second, the NAD urges the Department to reference this auxiliary aid or service in the same part of the definition that references qualified interpreters, because it is simply another means of providing qualified interpreters. In other words, the list of examples of auxiliary aids and services should read as follows: "Qualified interpreters on site or through video remote interpreting (VRI) services . . . ."

Accessible Electronic and Information Technology. The onset of the Internet and digital technologies – all of which have taken place since the Department first promulgated the Title II regulations in 1990 – have revolutionized the way that most Americans communicate and receive information. For this reason, the inclusion of "accessible electronic and information technology" strengthens and updates the definition of auxiliary aids and services. This addition will assist in ensuring that public entities make use of the increasingly varied technologies available to ensure effective communication *between* individuals and public entities, as well as communication access *by* people with disabilities to those services and programs.

Exchange of Written Notes. While there may be times during which the "exchange of written notes" is appropriate, its inclusion as an auxiliary aid or service is not appropriate. The "exchange of written notes" usually does not result in effective communication for anything but the most brief, uncomplicated, and inconsequential of communication exchanges.[16] The effectiveness of exchanging written notes is inherently limited by a number of factors including the reading and writing skills of the individuals involved in the communication exchange, and the speed at which writing or typing occurs. Because the speed at which people communicate orally or using sign language averages 200+ words per minute, reducing the communication exchange to its lowest common denominator – the exchange of written notes – inherently results in abbreviated,

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[14] See, e.g., National Association of the Deaf at http://www.nad.org/ComplaintAgainstStAgnesHospital; About.com: Deafness at http://deafness.about.com/od/interpreting/qt/videoremoteterp.htm; Registry of Interpreters for the Deaf description of the "Practice of Interpreting" at http://www.rid.org/content/index.cfm/AID/58; service providers such as Sorenson at http://www.sorensonvri.com/, SignOn at http://www.signonvri.com/, Sign Language Interpreting Services, Ltd. at http://www.slisva.com/id7.html, AccessAmerica at http://www.accessamericavri.com/, Birnbaum Interpreting Services at http://www.bisvri.com/, Deaf Link at http://www.deaflink.com/vri/vri.html, Interpretek at http://www.interpretek.com/services/video-remote-interpreting.php, and others; the Federal Communications Commission (FCC) Consumer Facts at http://www.fcc.gov/cgb/consumerfacts/videorelay.html, and FCC Public Notice, DA-05-2417A1 (Sept. 7, 2005) at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-05-2417A1.doc.

[15] See further discussion, *infra*, in the section discussing the definition of "video interpreting services" about distinguishing video interpreting services (or video remote interpreting services) from video relay services.

[16] See, *infra*, further discussion about "effective communication" with respect to proposed regulation 28 C.F.R. § 36.303(c)(1)(ii) ("The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place. . . .").

rudimentary, truncated, and often incomplete communication. In other words, the exchange of written notes almost never conveys all of the information that would otherwise be conveyed orally or through sign language. As such, the "exchange of written notes" should be used *only* for brief, uncomplicated, and inconsequential communication, or when the provision of qualified interpreter or computer aided real-time transcription or other auxiliary aids or services would result in an undue burden or fundamental alteration.

The experience of the NAD and the overwhelmingly vast majority of the deaf and hard of hearing community contradict the assertion by the Department that covered entities do not realize that the "exchange of written notes" "is available to them."[17] Instead, it is our experience that the "exchange of written notes" is relied upon and used by covered entities all too often and inappropriately. Furthermore, the inclusion of "exchange of written notes" as an example of an auxiliary aid or service would likely cause some covered entities to rely on this mode of communication inappropriately – even more than they do today.[18] Simply put, the NAD agrees with the Department that "the exchange of written notes is inappropriate for lengthy or complicated communications"[19] and, therefore, for this and the reasons stated here, it should not be included as an example of an "auxiliary aid or service."

Consistent with the deaf and hard of hearing communities' experiences with the exchange of written notes, written materials by themselves do not always facilitate effective communication. For example, if a workshop is given for which transcripts or PowerPoint slides are available, many covered entities provide transcripts or copies of PowerPoint slides to the individual who is deaf or hard of hearing and expect that to be sufficient. But if there is audience interaction, the individual who is deaf or hard of hearing may still be unable to follow the audience interaction or understand the questions being asked and the answers given. Further, the provision of written materials alone preclude the individual with a disability from being able to fully participate if the individual is, for example, unable to speak for himself or herself without the use of another type of auxiliary aid or service. Therefore, the Department must make clear that written materials alone is not always appropriate and may not result in effective communication.

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[17] 73 Fed. Reg. at 34528.

[18] The NAD has received reports that health care providers provide a "notetaker" (usually someone on their staff who takes notes about the health care provider's communication to the deaf or hard of hearing patient) and believe that this is an appropriate auxiliary aid or service because it is included in this list of "examples." The NAD has also received complaints that many covered entities provide transcripts or copies of PowerPoint slides to the individual who is deaf or hard of hearing and expect that to be sufficient. But if there is audience interaction, the individual who is deaf or hard of hearing may still be unable to follow the audience interaction or understand the questions being asked and the answers given. Further, the provision of written materials alone preclude the individual with a disability from being able to fully participate if the individual is, for example, unable to speak for himself or herself without the use of another type of auxiliary aid or service. For these reasons, reliance on written materials is often an inappropriate and ineffective auxiliary aid or service.

[19] *Id.*

Reference to TTYs. The Department also improves this regulation by using the term "text telephones (TTYs)" in place of telecommunications devices for deaf persons (TDDs) throughout these regulations. This revised nomenclature is consistent with the terminology used by other federal agencies (including the Federal Communications Commission and Architectural and Transportation Barriers Compliance Board), as well as the communities of individuals with disabilities who use these devices. Not all individuals who use and rely on TTYs are deaf. Other users include individuals with speech impairments or those who wish to communicate with individuals who have TTYs.

The Department, however, should not continue to emphasize the use of TTYs as the primary mode of telecommunications access for people who are deaf and hard of hearing. This past decade has seen a considerable migration away from these devices by people with hearing loss, in favor of more advanced telecommunications technologies that provide multiple voice, text, and video functions, take advantage of digital technologies, and often utilize Internet-based technologies. The Department's rules need to make clear that these newer devices – which often allow users to select communication in one or more modes and can sometimes allow the use of multiple modes in a single communication – are also considered auxiliary aids under the ADA. To this end, the Department should replace the phrase "text telephones (TTYs)" with "voice-, text-, and video-based telecommunications products and systems, including TTYs, videophones, and captioned telephones, or equally effective telecommunications systems."

Other Recommended Changes. In addition to the above, the following comments respond to the Department's proposed changes to the definition of auxiliary aids and services:

- The term "support service providers (SSPs)" should be included on the list to emphasize that SSPs are an auxiliary aid or service that can be provided to ensure equal access for individuals who are deaf-blind.[20] The need for SSPs is described more fully in the section on SSPs in these filed comments.

- The term "computer-aided transcription services" should be changed to "computer aided real-time transcription services." This will ensure that covered entities provide simultaneous, rather than after-the-fact, transcription of aurally delivered information and effective communication. A predominant form of this service is now commonly referred to as "Communication Access Realtime Translation" (CART).[21]

- The phrase "individuals with hearing impairments" has been appropriately replaced with the more appropriate term "individuals who are deaf or hard of hearing."

[20] Individuals who are deaf-blind make up a diverse group. "Deaf-blind" includes people who are deaf and have tunnel vision, deaf and have low vision, hard of hearing and have low vision, hard of hearing and have tunnel vision, hard of hearing and blind, and totally deaf-blind.
[21] See http://www.cartinfo.org/.

- Recent years have seen the rise in the number of individuals receiving cochlear implants (CI). A cochlear implant cannot be used concurrently with a hearing aid in the same ear. Some individuals have opted to get CIs in both ears which preclude the use of hearing aids at all. Therefore, the auxiliary aid "telephones compatible with hearing aids" should be rewritten as "telephones compatible with hearing aids and cochlear implants" in order to reflect the needs of this particular subset.

In light of the above comments, the Department should revise the proposed regulations as follows:

> 28 C.F.R. § 35.104: Examples. The term auxiliary aids and services includes—(1) Qualified interpreters on site or through video remote interpreting (VRI) services, support service providers (SSPs), notetakers, computer aided real-time transcription services, written materials, ~~exchange of written notes,~~ telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids and cochlear implants, closed caption decoders, open and closed captioning, voice-, text-, and video-based telecommunications products and systems, including TTYs, videophones, and captioned telephones, or equally effective telecommunications systems, videotext displays, ~~video interpreting services,~~ accessible electronic and information technology, or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.

Qualified Interpreter

Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral interpreters, and cued speech interpreters. Oral interpreter means an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. Cued speech interpreter means an interpreter who functions in the same manner as an oral interpreter except that he or she also uses a hand code, or cue, to represent each speech sound.

The new definition is an improvement because it recognizes that there are different types of interpreters such as sign language interpreters, oral interpreters, and cued speech interpreters. The Department should make the definition more comprehensive by including interpreters who provide services for individuals who are deaf-blind,[22] certified deaf interpreters who can meet specific communication needs,[23]

[22] Individuals who are deaf-blind make up a diverse group. "Deaf-blind" includes people who are deaf and have tunnel vision, deaf and have low vision, hard of hearing and have low vision, hard of hearing and have tunnel vision, hard of hearing and blind, and totally deaf-blind.

[23] See "Standard Practice Paper: Use of a Certified Deaf Interpreter," Registry of Interpreters for the Deaf, at http://www.rid.org/UserFiles/File/pdfs/120.pdf.

and speech-to-speech interpreters who facilitate communication with people who have speech disabilities.

The Department's current definition defines a qualified interpreter as someone "who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary."[24] The Department should restore the requirement that interpreters be capable of interpreting both receptively and expressively. This language was carefully crafted for the first set of ADA standards to make absolutely certain that interpreters are both (1) capable of understanding what a person with a disability is communicating and (2) having the skills to convey information back to that individual. These are two very different skill sets, both of which are equally important in achieving effective communication. For example, in a medical setting, a sign language interpreter must have the necessary skills to understand the grammar and syntax used by an American Sign Language (ASL) user (receptive skills), and the ability to interpret complicated medical information – presented by medical staff in English – back to that individual in ASL (expressive skills).

Although the Department has stated that qualified interpreters are not necessarily certified interpreters, and vice versa, there is a high correlation between certification and qualifications. Many public entities have provided interpreters who are not qualified and not certified. Often, the "interpreter" will be an individual who has minimal sign language skills, such as an individual who has taken one or more sign language classes. The provision of such "interpreters" does not result in effective communication. To ensure that the interpreting services provided result in effective communication, the Department should require public entities to obtain, when possible, and provide interpreters who are certified. To this end, the Department should include a requirement that interpreters should be "certified, where possible, by a recognized certification agency." This is the language contained in the Department's section 504 regulations.[25] The Department should clarify in the preamble that while certification is not conclusive proof that an interpreter is qualified, a certified interpreter should be provided whenever possible.

The reference to "cued speech interpreters," should be changed to "cued language interpreters" and the description should be modified for accuracy. Considering that descriptions are provided for other kinds of interpreters, the Department should also include a description for sign language interpreters.

In light of the above comments, the Department should revise the proposed regulations as follows:

Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary, and, whenever possible, is certified. Qualified interpreters include, for example, sign language interpreters, oral interpreters, deaf-blind interpreters, certified

[24] 28 C.F.R. § 35.104.
[25] 45 Fed. Reg. at 37630 (June 3, 1980).

deaf interpreters, ~~and~~ cued ~~speech~~language interpreters, and speech-to-speech interpreters. Sign language interpreter means an interpreter who has special skill and training to interpret for individuals who use American Sign Language, signed English or other signed language systems. Oral interpreter means an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. Deaf-blind interpreter means an interpreter who has specialized skills and training to effectively interpret for individuals who are deaf and blind. This may be done via tactile or close-vision "signing" or other preferred mode of communication of the individual with dual hearing and vision losses in order to effectively communicate with another individual who may be hearing, deaf, hard-of-hearing, or deaf-blind. Certified deaf interpreter means an interpreter who has special skill and training to meet specific communication needs. Cued ~~speech~~language interpreter means an interpreter who ~~functions in the same manner as an oral interpreter except that he or she also uses a hand code, or cue, to represent each speech sound~~has special skill and training in the use of the Cued Speech system of handshapes and placements, along with non-manual information such as facial expression and body language, to visually show auditory information, including speech and environmental sounds. Speech-to-speech interpreter means an interpreter who has special skill and training to interpret for individuals who have speech disabilities.

Video Interpreting Services

Video interpreting services (VIS) means an interpreting service that uses video conference technology over high-speed internet lines. VIS generally consists of a videophone, monitors, cameras, a high-speed internet connection, and an interpreter.

First, the term "video interpreting services" (VIS) is more commonly referred to, in the community, in the profession, among providers, by the Federal Communications Commission, and by others, as "video remote interpreting" (VRI) services.[26] As such, the NAD recommends that the term "video remote interpreting (VRI) services" be used to avoid confusion that may be caused by the introduction of a new and unfamiliar term.

Second, for purposes of clarity, the term should be defined as:

[26] See, e.g., National Association of the Deaf at http://www.nad.org/ComplaintAgainstStAgnesHospital; About.com: Deafness at http://deafness.about.com/od/interpreting/qt/videoremoteterp.htm; Registry of Interpreters for the Deaf description of the "Practice of Interpreting" at http://www.rid.org/content/index.cfm/AID/58; service providers such as Sorenson at http://www.sorensonvri.com/, SignOn at http://www.signonvri.com/, Sign Language Interpreting Services, Ltd. at http://www.slisva.com/id7.html, AccessAmerica at http://www.accessamericavri.com/, Birnbaum Interpreting Services at http://www.bisvri.com/, Deaf Link at http://www.deaflink.com/vri/vri.html, Interpretek at http://www.interpretek.com/services/video-remote-interpreting.php, and others; the Federal Communications Commission (FCC) Consumer Facts at http://www.fcc.gov/cgb/consumerfacts/videorelay.html, and FCC Public Notice, DA-05-2417A1 (Sept. 7, 2005) at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-05-2417A1.doc.

Video remote interpreting (VRI) services means ~~an interpreting service that uses~~ qualified interpreter services delivered through the use of video conference technology ~~over high-speed internet lines~~. ~~VIS~~ VRI generally consists of ~~a videophone, monitors, cameras~~ video cameras and monitors, microphones and speakers, a high-speed Internet or other connection, and ~~an~~ a qualified interpreter.

The Department should distinguish VRI services from video relay services (VRS), which is defined in 47 C.F.R. § 64.601(26) as follows: "A telecommunications relay service [TRS] that allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment. The video link allows the CA [communications assistant] to view and interpret the party's signed conversation and relay the conversation back and forth with a voice caller." VRS is designed to provide functionally equivalent *telephone* services, funded through the Interstate TRS Fund and overseen by the Federal Communications Commission (FCC) pursuant to Title IV of the ADA. According to the FCC, "VRI is the use of an interpreter located at a remote location through a video connection when two people are together and they need an interpreter. VRS may not be used in such circumstances. VRS is a type of telephone call."[27] Further, the FCC notes that VRS "cannot be used as a substitute for 'in-person' interpreting services or for Video Remote Interpreting (VRI). . . . Video Remote Interpreting (VRI) is a service that is used when an interpreter cannot be physically present to interpret for two or more persons who are together at the same location. This service uses a video connection to provide access to an interpreter who is at a remote location. As with 'in-person' interpreters, VRI services are generally contracted and paid for on a fee-for-service basis. . . . We are mindful that employers, state and local government entities, and public accommodations are required under the ADA to provide persons with hearing disabilities a reasonable accommodation, and that the accommodation may entail the use of a sign language interpreter. However, VRS cannot be used as a substitute for using an in-person interpreter or VRI in situations that would not, absent one of the parties' hearing disability, entail the use of the telephone."[28]

Both VRS and VRI services utilize a qualified interpreter at a remote location who is able to see the person with a disability and interpret between that individual and another party. The Department needs to make clear that "VRI" refers to services that typically involve communication between individuals at the same location, and that qualified interpreters are typically contracted and paid for on a fee-for service basis by the covered entity. For purposes of Title II, the public entity would have the obligation to provide and pay for VRI services when its usage would result in effective communication.

28 C.F.R. § 35.136: Service Animals

28 C.F.R. § 35.136(a): General. Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a

[27] FCC Consumer Facts at http://www.fcc.gov/cgb/consumerfacts/videorelay.html.
[28] FCC Public Notice, DA-05-2417A1 (Sept. 7, 2005) at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-05-2417A1.doc.

disability, unless the public entity can demonstrate that the use of a service animal would fundamentally alter the public entity's service, program, or activity.

Question 11: Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the ''common domestic animal'' prong of the proposed definition?

This is a much needed clarification that service animals may accompany an individual with a disability. Individuals who are deaf or hard of hearing have often encountered such restrictions when accompanied by their service animals.

The NAD approves of the Department's comment that "a service animal may accompany its owner to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, rest rooms, and all other areas of the facility where visitors are permitted . . . ."[29] This language is very helpful, and must be maintained in the final rule, because many service animal users, when using these facilities, have encountered restrictions that are not consistent with the ADA, despite the lack of any demonstrable harm whatsoever. The NAD objects, however, to any language that indicates specific exceptions to the use of service animals in other hospital and healthcare settings.[30] Any exception to the use of service animals should only be permissible where there is a demonstrable fundamental alteration or direct threat, meaning that the public entity has the burden of establishing that the presence of a service animal will cause a significant risk of substantial harm to health or safety, that cannot be sufficiently mitigated or eliminated through the provision of reasonable accommodations, or will fundamentally alter the nature of the service or program.

In response to Question 11, the NAD supports the current Department rule that has no size limitation for service animals. Many individuals who are deaf or hard of hearing use a service animal to provide balance support and would thus need a service animal of an appropriate height and strength to perform that task. If, as a practical matter, the size or weight of an individual's service animal creates a direct threat or fundamental alteration for a particular public entity, the proposed regulations allow for the animal's exclusion or removal.[31]

28 C.F.R. § 35.150: Existing Facilities

28 C.F.R. § 35.150(b)(2) Safe harbor. If a public entity has constructed or altered elements in an existing facility in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standard, such public entity is not, solely because of the Department's adoption of the proposed standards, required to retrofit such elements to reflect incremental changes in the proposed standards.

[29] 73 Fed. Reg. at 34481.
[30] *Id.*
[31] See generally the proposed § 35.136(a).

This proposed safe harbor is wholly unsupported by the statutory language of the ADA. There is nothing in Title II that provides the Department with the authority to promulgate safe harbors with respect to the 2004 ADAAG.

Under the current regulations, a public entity is required to remove architectural barriers and communication barriers that are structural in nature, unless the public entity can demonstrate that such removal would not be a fundamental alteration or an undue burden.[32] A demonstration that removal is not a fundamental alteration or an undue burden can be made only on a case-by-case basis. What is a fundamental alteration or an undue burden in one instance may not be in another context. A grandfathering clause would obliterate this individualized inquiry by exempting all existing facilities that comply with the 1991 Standards, whether or not it would be a fundamental alteration or an undue burden for the covered entity to remove any barriers in compliance with the 2004 ADAAG.

28 C.F.R. § 35.152: Detention and Correctional Facilities

28 C.F.R. § 35.152(b)(2): Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless the public entity can demonstrate that it is appropriate to make an exception for a specific individual, a public entity—

(i) Should not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;

(ii) Should not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

(iii) Should not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would ordinarily be housed; and

(iv) Should not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.

Question 48: The Department is particularly interested in hearing from prison administrators and from the public about the potential effect of the assignment scheme proposed here on inmates and detainees who are deaf or who have other disabilities. Are there other, more appropriate tests to apply?

The NAD urges the Department of Justice to require that public entities give inmates who are deaf or hard of hearing the choice between a prison with a mainstreamed setting (an "integrated" setting with inmates without disabilities) that would not deprive them of visitation because of location or a prison or unit designed specifically for inmates who are deaf or hard of hearing that may be at a different or more distant location.

The Department should clarify that regardless of the preferences of inmates, all options provided should be fully accessible to individuals who are deaf or hard of

[32] 28 C.F.R. § 35.150(a)(3).

hearing. In particular, public entities should be required to make mainstream prison settings fully accessible to individuals who are deaf or hard of hearing who choose such a setting. The availability of other options such as a prison with other inmates who are deaf or hard of hearing should not excuse compliance with the ADA with respect to the mainstream prison setting.

The NAD has grave concerns that the language in subsection (b)(2), "Unless the public entity can demonstrate that it is appropriate to make an exception for a specific individual . . .," will be the exception that swallows the whole. While the intention of this section is to create an assignment scheme that will allow an individual with a disability who can be better served in a less integrated setting, to be served in that less integrated setting, the NAD is concerned, given the longstanding practices of many public entities to segregate, cluster, and warehouse prisoners and detainees, that this exception will be used to justify the status quo.

The NAD is concerned that practices, such as assigning a more restrictive classification due to the mere existence of a disability, will continue. For example, the city and county of Denver places inmates with disabilities in more restrictive classifications based solely upon the inmate's disability. The mere existence of a disability, such as deafness, should not warrant administrative segregation, without further analysis of the inmate's actual abilities or risks. The assignment to administrative segregation based only on the basis of the disability label, without any individualized analysis of the safety risk that may or may not exist, cannot be condoned.

In light of these concerns, the NAD proposes that the language be amended to read:

> 28 C.F.R. § 35.152(b)(2): Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. ~~Unless the public entity can demonstrate that it is appropriate to make an exception for a specific individual, a public entity—~~Unless the individual with a disability and the public entity agree that it is appropriate to make an exception for a specific individual, or the public entity can demonstrate that the individual with a disability poses a direct threat to the health or safety of self or others that cannot be eliminated by reasonable modifications— . . .

28 C.F.R. § 35.160: Communications

The Department's proposed changes to its "general" provisions on Communications raises a number of issues concerning: (1) the need to provide auxiliary aids and services for companions with disabilities, (2) the need for a public entity to give primary consideration to the request of an individual with a disability in the provision of an auxiliary aid or service, (3) clarification of when it is permissible to rely on a companion to interpret or facilitate communication, and (4) guidance on the provision of

qualified interpreters through video interpreting services. Each of these is discussed below.

28 C.F.R. § 35.160(a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public with disabilities, and companions thereof are as effective as communications with others.

In its general mandate for public entities to take appropriate steps to ensure effective communication, the Department has proposed to include "companions" of people with disabilities – along with applicants, participants, members of the public with disabilities. NAD agrees that it may not be clear to public entities that the obligation extends to "companions with disabilities," especially when the companion is accompanying or associated with an individual *without* a disability. The Department notes that there are times when a public entity needs to communicate with a family member, friend, or associate of the program participant in order to effectively provide its services to that participant. As the Department notes in its preamble to this section, these situations can involve parents of public school children or relatives of persons needing immediate medical care when the parents or relatives are deaf or hard of hearing. The Department states, "In such situations, if the companion is deaf or hard of hearing . . . it is the public entity's responsibility to provide an appropriate auxiliary aid or service to communicate effectively with the companion." [33] The NAD strongly agrees.

There are often times when a public entity needs to or would otherwise communicate with a companion with a disability in order to effectively provide its services: to the program applicant or participant; or to the companion. The NAD strongly agrees that where a public entity would otherwise communicate with a companion *without* a disability, the public entity must provide appropriate auxiliary ands and services when necessary to ensure effective communication with a companion *with* a disability.

However, as written, the proposed change suggests that the term "companions" is limited to companions of individuals with disabilities, which we believe was not intended. Companions with disabilities may be companions of individuals with or without disabilities.

For this reason, the NAD recommends that the placement of the term "companions thereof" in section (a)(1) should be changed as follows:

> 28 C.F.R. § 35.160 (a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, <u>companions</u>, and members of the public with disabilities~~, and companions thereof~~ are as effective as communications with others.

[33] 73. Fed. Reg. at 34497.

28 C.F.R. § 35.160(a)(2) For purposes of this section, companion means a family member, friend, or associate of a program participant who, along with the participant, is an appropriate person with whom the public entity should communicate.

First, the scope of a public entity's obligation is not limited to "program participants." As such, the NAD recommends that the rule use the term "individual." Second, the inclusion of the phrase "along with" the participant or individual is troubling because there may be times when it is not appropriate to communicate with a particular individual, such as in the case of communicating with minors. However, more importantly, a place of public entity is obligated to provide auxiliary aids and services to an individual *with a disability*, even when a companion is present. As such, the NAD requests that the Department clarify that, under this section, public entities are not to seek out, limit, or restrict communication with or to companions *instead* of and when it would otherwise be appropriate to communicate with the individual with a disability.

To fulfill what appears to be the Department's intent under this section, NAD recommends that the Department further clarify that effective communication must be provided to the companion with a disability, even if (1) the participant does not have any disability (such as in the case of a deaf parent with a hearing school child) and (2) the participant is not physically present with the companion (such as in the case of a deaf parent attending a parent-teacher conference without the hearing child.)

To prevent such a misinterpretation and make clear that the rules are intended to apply to companions with disabilities in the situations described above, NAD recommends the following changes:

> 28 C.F.R. § 35.160(a)(2) For purposes of this section, companion <u>with a disability</u> means a family member, friend, or associate of ~~a program participant~~<u>an individual with or without a disability,</u> who, along with the ~~participant~~<u>individual</u>, is an appropriate person with whom the public entity ~~should~~<u>would otherwise</u> communicate, <u>whether or not the individual is in the same physical location as the companion</u>.

28 C.F.R. § 35.160(b) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities and their companions, who are individuals with disabilities, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

The NAD notes the addition of the phrase "and their companions, who are individuals with disabilities," to the current regulation, 28 C.F.R. § 35.160(b)(1).

As noted above, a companion with a disability may be a companion of an individual with *or without* a disability. For example, a private hospital may need to provide appropriate auxiliary aids and services to communicate with a patient's parent or spouse who is deaf or hard of hearing. In this instance, the patient may be an individual

with or without a disability. For this reason, the NAD recommends the deletion of the word "their" from this general mandate.

More importantly, the NAD notes that this provision has been renumbered to reflect the deletion of current regulation 28 C.F.R. § 35.160(b)(2). The NAD strongly opposes the deletion of that provision, as discussed further below.

For these reasons, the NAD recommends the following changes:

> 28 C.F.R. § 35.160(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities and companions with disabilities an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

In its preamble, the Department states:

> The Department is proposing to amend Sec. 35.160(b)(2) to recognize that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. This addition is a codification of the Department's longstanding position, which is included in the Department of Justice's The Americans with Disabilities Act, Title II Technical Assistance Manual . . .. For example, an individual who is deaf or hard of hearing may need a qualified interpreter to discuss with municipal hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication (e.g., dosage, side effects, drug interactions, etc.), or to explain follow-up treatments, therapies, test results, or recovery. In comparison, in a simpler, shorter interaction, the method to achieve effective communication can be more basic. For example, an individual who is seeking local tax forms may only need an exchange of written notes to achieve effective communication.[34]

The NAD recognizes the Department's intent to codify earlier guidance. The NAD appreciates that the Department recognizes that the "type of auxiliary aid or service necessary to ensure effective communication" will depend on the circumstances of each case. Individuals who are deaf or hard of hearing have a wide range of communication abilities. What may work for one individual may not ensure effective communication for another individual who is deaf or hard of hearing. Similarly, a particular auxiliary aid or service may work for an individual in a particular communication context, but may not ensure effective communication in a different context.

A similar change was proposed in the Department's NPRM for Title III.[35] See proposed regulation 28 C.F.R. § 36.303(c)(1)(ii).[36]

[34] 73 Fed. Reg. at 34497-98
[35] 73 Fed. Reg. at 34529.
[36] 73 Fed. Reg. at 34554-55.

However, instead of *amending* 28 C.F.R. § 35.160(b)(2), as described above in the preamble, the Department appears to have *deleted* 28 C.F.R. § 35.160(b)(2) entirely. The NAD strongly opposes this deletion.

For the past 18 years, the Department has required public entities to defer to the request of a person with a disability when determining the type of auxiliary aid or service that must be provided. This mandate, at 28 C.F.R. §35.160(b)(2), states:

> *In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.*

The NAD has grave concerns about the deletion of this section. There are approximately 31 million Americans with varying degree of hearing loss and consequently, a wide range of communication needs. In 1991, the Department recognized the importance of giving primary consideration to the expressed choice of the individual, and honoring that choice unless the public entity could "demonstrate that another effective means of communication exists or that use of the means chosen would not be required."[37] Nothing has changed since that time to make the need for such deference to an individual's selected auxiliary aid or service any less important. To the contrary, if anything, the proliferation of new technologies now available to accommodate varied communication needs have made deference to their expressed choices even more vital.

Further, the Department should provide additional guidance about what "effective communication" means. Too often, the determination of whether communication or an auxiliary aid or service is effective is made unilaterally from the perspective of the public entity only, and often without consideration of the perspective of the individual with a disability. Communication is a "two-way street." As such, communication assessments should be informed by dialogue between the public entity and the individual with a disability, whenever possible. Communication assessments should also be conducted initially, regularly, and as needed. When a public entity decides not to provide a requested auxiliary aid or service, the public entity should provide the individual with a disability with the basis for the determination in accordance with 28 C.F.R. § 35.164.

In order to avoid misunderstandings about how to achieve effective communication on the part of the public entities covered by this Title, it is critical for the Department to keep in place its rule requiring a public entity to give primary consideration to the requested auxiliary aid or service of each individual with a disability.

For these reasons, the NAD opposes deletion of and urges the Department to reinstate 28 C.F.R. §35.160(b)(2), with the changes articulated in the preamble to the rules, as follows:

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[37] 56 Fed. Reg. 35712 (July 26, 1991).

28 C.F.R. §35.160(b)(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place. In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

28 C.F.R. § 35.160(c)(1) A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.

This regulation codifies existing law. As the Department has observed in Appendix A to the current Title II regulations, "notwithstanding that the family member or friend is able to interpret or is a certified interpreter, the family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret 'effectively, accurately, and impartially.'"

The Department's preamble should make absolutely clear that children are not to be used for interpreting purposes. Very often interpreters are needed in settings where it would be inappropriate for children to be involved – such as those involving medical issues, domestic violence or other situations involving the exchange of confidential or adult-related material. Children are often hesitant to turn down requests to interpret, as this often involves putting them in the difficult position of having to turn down a request for assistance from a parent, family member, or an adult with apparent authority. But using a child as an interpreter, especially for inappropriate communications – a common practice even to this day – can result in irreparable harm to the child.

28 C.F.R. § 35.160(c)(2) A public entity shall not rely on an individual accompanying an individual with a disability to interpret or facilitate communication, except in an emergency involving a threat to public safety or welfare, or unless the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.

The NAD has serious concerns about the exception that permits a public entity to rely on an individual accompanying an individual with a disability to interpret or "facilitate communication" in an emergency involving a threat to public safety or welfare.

As proposed, the Department's new rule may be interpreted to mean that a public entity may not only "rely on" but may also request, require, or coerce such action, when only acceptance of a voluntary offer should be permitted. While this may be appropriate in situations where interpreters are not otherwise immediately available, in the past, public entities, in particular hospitals, law enforcement, and courts, have frequently sought to rely on individuals accompanying individuals who are deaf or hard of hearing

to interpret for those persons without making any efforts to secure qualified interpreter services. The Department should not condone such practices. Public entities, especially entities that are expected to encounter and handle emergency situations, should not be relieved of their obligations to provide auxiliary aids and services at any time, even in the event of an emergency. There are at least two compelling reasons for this.

First, the provision of an interpreter will often be quite feasible (and not constitute an undue burden) in an emergency – if the entity makes the necessary pre-arrangements. Many hospitals, law enforcement agencies, courts, and other entities have contractual arrangements with interpreter agencies that ensure the provision of qualified interpreters on very short notice.[38] For example, in pending childbirth situations, interpreting agencies often assign one of their interpreters to a mom-to-be and that interpreter remains "on call" with a pager at all time; when the birth is imminent, the interpreter is immediately notified and can arrive at a hospital within minutes. Additionally, video remote interpreting (VRI) services makes qualified interpreter services available within minutes and can be provided until a qualified interpreter can arrive on site. It would be unfortunate if this section, read incorrectly, prompted hospitals, law enforcement agencies, courts, or other entities to discontinue such pre-arrangements, under the mistaken belief that they are no longer required to provide interpreters in childbirth and other emergency situations.

Second, even where it is difficult to secure interpreter services initially during an emergency, under the ADA, public entities are under an obligation to continue efforts to secure these services when the emergency begins to subside. For example, although it may be difficult to find interpreter services during and immediately after a major hurricane, once individuals are moved to protected areas and the situation stabilizes, public entities handling such an emergency must attempt to secure interpreters even if this was not possible while the situation was out of control.

Additionally, it is critical for the Department to acknowledge that the need for interpreters and other forms of effective communication escalates in the event of an emergency or threat to public safety. During the aftermath of Hurricane Katrina, for example, the need for effective communication was at a premium, to provide displaced persons with the information they needed to find food, shelter, and safety. Rather than allow the existence of an emergency to be an excuse *not* to provide auxiliary aids and services, it is precisely at this time when these auxiliary aids and services may be *most* needed. The Department should have a separate rule that unequivocally establishes a public entity's obligation to provide timely and effective communication in the event of public emergencies – through interpreters, computer-aided real time transcription services (if computers are available), captioning, alternate formatted materials, and other methods, as needed for the situation at hand.[39]

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[38] The NAD has prepared an advocacy statement on communication access in state and local courts. This statement is available online at www.nad.org/2008communicationaccessadvocacystatement.

[39] A number of public entities already have begun using text alerts to reach individuals who are unable to hear in times of emergency. This is but one example of how public entities can plan in advance for emergencies.

As for the remainder of § 35.160(c)(2), the NAD agrees that it would be appropriate for companions to interpret when "the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances." The NAD requests the Department to make clear, however, that it is equally important for the public entity to notify the individual with a disability, in advance, that the individual has a right to request and receive auxiliary aids and services from the public entity, and the estimated time when they can be provided if requested. In addition, the public entity should also notify the companion, in advance, that he or she may decline to interpret or facilitate communication. An individual who is unaware of his or her ADA rights may decide to use a companion just because he or she believes that is the only way to facilitate communication with the public entity. Yet, often companions – even if they have some signing skills – are not expert enough to handle complicated interpreting situations, such as those involving the exchange of information with medical personnel, for example. Improper communication in these settings can result in dangerous outcomes and should be avoided.

Finally, the Department's rules should make absolutely clear that children are not to be used for interpreting purposes. Very often interpreters are needed in settings where it would be inappropriate for children to be involved – such as those involving medical issues, domestic violence or other situations involving the exchange of confidential or adult-related material. Children are often hesitant to turn down requests to interpret, as this involves putting them in the difficult position of having to turn down a request for assistance from a parent, family member, or an adult with apparent authority. But using a child as an interpreter, especially for inappropriate communications – a common practice even to this day – can result in irreparable harm to the child.

28 C.F.R. § 35.160(d): Video Interpreting Services

28 C.F.R. § 35.160(d): Video interpreting services (VIS). A public entity that chooses to provide qualified interpreters via VIS shall ensure that it provides—

(1) High quality, clear, real-time, full-motion video and audio over a dedicated high-speed internet connection;

(2) A clear, sufficiently large, and sharply delineated picture of the interpreter's head and the participating individual's head, arms, hands, and fingers, regardless of his body position;

(3) Clear transmission of voices; and

(4) Training to nontechnicians so that they may quickly and efficiently set up and operate the VIS.

First, the term "video interpreting services" (VIS) is more commonly referred to, in the community, in the profession, among providers, by the Federal Communications

Commission, and by others, as "video remote interpreting" (VRI) services.[40] As such, the NAD recommends that the term "video remote interpreting (VRI) services" be used to avoid confusion that may be caused by the introduction of a new and unfamiliar term.[41]

VRI is potentially a means of delivering the services of a qualified interpreter in hospitals and other settings, particularly in emergency situations and at locations where qualified interpreters are not available. Unfortunately, the growth of VRI services has outpaced research on its use and the development of technical guidance and best practices for VRI providers, public entities, and deaf and hard of hearing individuals. Without careful consideration of the limitations of VRI, use of VRI services can result in communication that is *not* effective, thereby violating the ADA, jeopardizing patient safety, and decreasing quality of care.

If VRI service is used when a qualified interpreter is needed, it should be provided *only* when it is expected to and actually results in effective communication. On-site interpreters have more physical flexibility, have greater access to visual and auditory cues and information present in the environment, do not suffer from technology or equipment malfunctions, and respond immediately to communication events as they arise. In short, on-site interpreter services are not subject to many of the limitations experienced by VRI services.

The Department should clarify that VRI services may not always be appropriate, such as when the individual has suffered physical or mental injury or has minimal language skills. Public entities should be required to evaluate the needs of both the individual seeking an interpreter and the situation for which the interpreter is needed in order to best determine whether VRI or on-site interpreting would be effective. For example, VRI may be effective when used as an interim measure in emergency situations until an interpreter can arrive on the scene or for certain scheduled, non-complex, communication events. By contrast, an on-site interpreter will likely be needed in complicated medical or legal situations, especially those involving conversations among several individuals. There are also certain populations, such as populations of individuals who are deaf-blind, for which VRI will not be effective and an on-site interpreter will be necessary.[42]

As such, qualifying language should be added to ensure that the technical guidance in this provision is not exclusive. The Department should further clarify that the interpreter's arms, hands, and fingers must also be visible, in addition to the interpreter's head as follows:

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[40] See footnote 26.

[41] See further discussion *supra*, in the section discussing the definition of "video interpreting services" about distinguishing video interpreting services (or video remote interpreting services) from video relay services.

[42] The NAD has prepared position papers on the use of video remote interpreting services. These position papers are available online at www.nad.org/2008VRIpositionpaper and www.nad.org/2008VRSadvocacystatement.

28 C.F.R. § 35.160(d): Video remote interpreting services (VRI). A public entity that chooses to provide qualified interpreters via VRI shall ensure, at a minimum, that it provides—

(1) High quality, clear, real-time, full-motion video and audio over a dedicated high-speed internet connection;

(2) A clear, sufficiently large, and sharply delineated picture of the interpreter's head, arms, hands, and fingers, and the participating individual's head, arms, hands, and fingers, regardless of ~~his~~their body position;

(3) Clear transmission of voices; and

(4) Training to nontechnicians so that they may quickly and efficiently set up and operate the VRI.

28 C.F.R. § 35.161: Telecommunications

28 C.F.R. § 35.161(a): Where a public entity communicates by telephone with applicants and beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

The NAD agrees with the Department's decision to change the title of this section from "Telecommunication Devices for the Deaf" to "Telecommunications," and to adopt the terms "text telephones (TTYs)" and "individuals who are deaf or hard of hearing or have speech impairments."

As noted in our comments to the definitions section above, TTYs remain in use among certain segments of the population of individuals who are deaf and hard of hearing (mostly lower income, rural and senior citizens). As such, the NAD concurs that public entities should have, when possible, TTYs to enable direct communication with individuals who are deaf or hard of hearing or have speech impairments. The NAD also recognizes that "equally effective telecommunications systems" can be accomplished and provided through the use of telecommunications relay services.

With respect to its employees who are deaf or hard of hearing, public entities also have the obligation to provide telephones that are compatible with hearing aids and cochlear implants and equipped with volume control as a reasonable accommodation. In addition, public entities also need to provide equally effective video, text, and video telecommunications equipment and services, such as videophones and captioned telephones, for its employees who are deaf or hard of hearing to enable them to perform their job functions.

28 C.F.R. § 35.161(b): When a public entity uses an automated attendant system for receiving and directing incoming telephone calls, that automated attendant system must provide effective communication with individuals using TTYs or a telecommunications relay system.

This proposed regulatory language will go a long way in ensuring that automated attendant systems are accessible to relay users.

The FCC commented on the difficulty TTY users and relay users have accessing interactive menus:

> FCC staff has informally received information suggesting that many consumers with disabilities may be continuing to have difficulties accessing and using voicemail and interactive menu services. For example, these systems may remain largely inaccessible to users of text telephones (TTYs) who wish to interact with these systems directly. In addition, we understand that TTY users who seek to use telecommunications relay service (TRS) to access interactive and voice menus may be frequently encountering lengthy delays or are frustrated by their inability to complete calls to schools, banks, employers and other public and private institutions that use these systems. It also appears that many interactive menus may not allow adequate time for a TTY user to have the information from the automated device relayed to the caller's TTY and a response from the caller relayed back to the device through TRS. We have also received reports that the sounds or instructions provided with some interactive and voice menus may often be so fast that a person who is hard of hearing or is cognitively delayed cannot process them quickly enough.[43]

Although the FCC has imposed accessibility obligations on providers of interactive menu services pursuant to 47 U.S.C. § 255,[44] the FCC has not enforced these obligations and most providers of interactive menu services have done nothing to make their products and services accessible.

It remains extremely cumbersome, if not impossible, for relay users to navigate these systems. Relay service communications assistants often cannot type fast enough to keep up with the automated messages and generally must record and replay the automated message and/or redial the number repeatedly in order to relay verbatim the contents of the automated messages. For complex automated attendant systems, the communications assistant may take a half-hour or more to relay verbatim all of the options available when a hearing person can quickly go through the options.

It is critical for the automated systems covered by this section to be accessible by people who use auxiliary aids and services (including TTYs), but also by people with all types of disabilities, whether or not these individuals use any specialized equipment. The

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[43] *Reminder to Manufacturers and Providers of Voice Mail*, 15 F.C.C.R. 19088, 19088-89 (2000). *See also In re Telecomms. Relay Services*, 15 F.C.C.R. 5140, 5179 ("TRS users are either unable to make calls that encounter interactive menus or other recorded messages or must frequently place a succession of calls to leave a message with, or access the information provided by, such systems.").

[44] *See In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 F.C.C.R. 6417, 6455-61 (Sept. 29, 1999).

rapid-fire nature of many automated systems makes them very difficult to use by people with cognitive, mobility, vision and hearing disabilities, whether or not these individuals are using adaptive equipment of any kind. It was for this reason that the Telecommunications and Electronic and Information Technology Advisory Committee (TEITAC) proposed the following very specific requirements for these systems when they are purchased and used by the federal government. The NAD urges the Department to adopt these same requirements for the acquisition and use of automated attendant systems used by public entities:

- Ensure that all functions that are accessible to voice users are directly accessible to users of real time text.
- Provide full player controls that allow users to pause, rewind, slow down and repeat all messages and prompts;
- Provide prompts without any background sounds that would reduce intelligibility.[45]

As a last resort, public entities should further make these systems accessible by providing an option to select a live person, who can communicate directly or via TRS with the caller. When possible, many relay users choose to bypass interactive menus by instructing the communications assistant to hold for a live voice. When the relay user can reach a live voice, he or she can state the purpose of the call and get directed to the right person much faster than would be the case if he or she had to go through all the options in an automated attendant system.

The failure of most manufacturers to design their systems to be accessible is in part due to the failure of public entities to demand their accessibility. Stated otherwise, without a specific ADA requirement to this effect, there was no impetus for public entities to demand the accessibility of these systems, and consequently a lack of incentive for manufacturers to include access features in the design of their systems. The proposed rule will hopefully reverse this trend.

The Department's proposed regulation is a much needed enforceable regulation that will force public entities to make their automated attendant systems accessible to individuals who are deaf or hard of hearing.

28 C.F.R. § 35.161(c): A public entity shall respond to telephone calls from a telecommunications relay service established under title IV of the Americans with Disabilities Act in the same manner that it responds to other telephone calls.

This new regulation is a much-needed codification of existing law. Congress enacted Title IV to provide individuals who are deaf or hard of hearing or who have speech impairments the functional equivalent of voice telephone services. [46]Simply put,

[45] TEITAC Report to the Access Board: Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology, Sec.6-C: IVR, Auto-Attendant and Messaging (April 2008)
[46] 47 U.S.C. § 225(a)(3); S. Rep. No. 101-116, at 79-80 (1989).

the availability of TRS made it unnecessary for public entities to purchase, install, and maintain the equipment necessary (i.e., TTYs), and train their employees to use the equipment and have the skills necessary to communicate directly with people who are deaf or hard of hearing or who have speech impairments.

When public entities refuse to accept relay calls or treat relay calls differently than voice telephone calls, relay calls are no longer the functional equivalent of voice telephone calls. To ensure functional equivalency, public entities must accept relay calls in the same manner that they accept voice telephone calls. To ensure equal access and equal opportunity, public entities must make reasonable modifications in policies, practices, or procedures to enable the use of TRS to receive and make telephone calls from and to individuals with disabilities.

Some public entities have refused to accept relay calls on the ground that communicating through a communications assistant would violate confidentiality requirements. These and other public entities have cited confidentiality concerns even though FCC regulations make clear that the communications assistant is merely a transparent conduit whose presence does not violate confidentiality rules.

In particular, the FCC has explained that health care providers do not violate the Health Insurance Portability Access Act of 1996 ("HIPAA") when they speak with patients through a relay service:

> Some health professionals have been concerned that contacting patients and discussing health related information via TRS poses a possible violation of the Privacy Rule because a "third party," the TRS CA, hears the information being discussed as the call is relayed. Some state TRS facilities have informed the FCC that health professionals are requiring all of the facility's CAs to sign disclosure forms before they will use TRS to contact patients with hearing or speech disabilities.
>
> We therefore emphasize that all forms of TRS, including " traditional" TTY based relay, Internet Protocol (IP) Relay, Video Relay Service (VRS), and Speech-to-Speech (STS), can be used to facilitate calls between health care professionals and patients without violating HIP[A]A's Privacy Rule.[47]

The FCC has further observed that "[b]usinesses and other voice telephone users sometimes refuse to accept TRS calls, or hang up on TRS users, in the mistaken belief that TRS calls are sales calls or 'third-party' calls, or would involve a breach of customer confidentiality.").[48]

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[47] *Clarification of the use of Telecomms. Relay Servs. (TRS) and the Health Ins. Portability and Accountability Act (HIPAA)*, 19 F.C.C.R. 10,677, 10,677-78 (June 16, 2004).
[48] *Telecommunications Relay Services, the Americans with Disabilities Act of 1990, and the Telecommunications Act of 1996*, 12 F.C.C.R. 1152, 1169 (Jan. 14, 1997).

Public entities sometimes refuse to accept relay calls because they have read reports of or experienced receiving IP text relay calls made by people posing as individuals with disabilities for the purpose of perpetrating fraudulent commercial transactions. That some IP text relay calls are placed for this purpose is unfortunate but no different from the fact that many telephone calls are placed for the same purpose. Many public entities screen against fraudulent transactions by implementing security measures that ask for identifying information such as the caller's name, birth date, and mother's maiden name. The same measures that are used to safeguard against fraudulent transactions attempted through telephone calls should be used to safeguard against fraudulent transactions attempted through relay calls.

For these reasons, public entities have no legitimate reason for not accepting relay calls. In fact, public entities have every incentive to accept relay calls because the alternative would be a requirement to purchase, install, and maintain the equipment necessary, and train their employees to use the equipment and have the skills necessary to communicate directly with people who are deaf or hard of hearing or who have speech impairments. The proposed regulation is a much-needed reinforcement of the requirement that public entities accept relay calls in the same manner that they accept telephone calls.

In addition, the Department should clarify that public entities cannot restrict or limit acceptance of relay calls based on the form of relay service. Some covered entities have had a policy of accepting only relay calls placed to or from a TTY. Such a policy is unreasonable because it would shift the burden of accommodations entirely onto individuals who are deaf or hard of hearing or who have speech impairments to purchase, install, and maintain TTY equipment and the cost of telecommunications services necessary to operate TTYs. Further, such a policy would reduce telecommunications for public entities and individuals with disabilities to the lowest common denominator and not enable either to benefit from the advantages of advanced telecommunications. In addition, such a policy can result in ineffective communication. For example, video relay service enables telecommunications in American Sign Language, which is the first language for many individuals who are deaf or hard of hearing. If these individuals are limited to TTYs or text-based relay services, the mandate to ensure effective communication may be impossible to achieve.

The Department should further make clear that public entities cannot limit or restrict the receipt of relay calls to a separate telephone number. While separate numbers may be necessary for public entities to communicate directly, such as with TTY users, they are unnecessary and discriminatory for relay users. Use of separate numbers typically restricts the placement and transfer of calls to the appropriate person or department within the public entity. Further, if relay calls are directed to one telephone number, these calls may experience inferior service, such as longer wait times or more unanswered calls, compared to telephone users.

Finally, the Department should make clear that public entities cannot ask security-related questions beyond what they ask of hearing callers. Public entities should not be

permitted to evade the letter of the new regulation by making it more burdensome to call through relay than it is for hearing individuals to call through voice telephone services.

New – 28 C.F.R. § 35.161(d) – offering the opportunity to make outgoing telephone calls on more than an incidental convenience basis.

The NAD recommends that the Department consider adding a provision in the Title II regulations that mirrors the Title III provision related to offering the opportunity to make outgoing telephone calls on more than an incidental convenience basis. Public entities, such as hospitals and other health care facilities, educational institutions, temporary lodging facilities, and detention facilities, routinely provide the opportunity for individuals to make telephone calls. Unfortunately, an equal opportunity to make outgoing calls is not always provided individuals who are deaf or hard of hearing. Inclusion of a new provision in this section, which would mirror a similar provision in Title III, would make this obligation clearer to public entities. As such, the NAD recommends the following addition:

> 28 C.F.R. § 35.161(d): A public entity that offers an applicant, participant, or member of the public the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make available, upon request, text telephones (TTYs), and other voice, text, and video-based telecommunications products and systems, such as videophones and captioned telephones for the use of an individual who is deaf or hard of hearing, or has a speech impairment.

The past decade has seen a considerable migration away from TTYs by individuals who are deaf or hard of hearing, in favor of more advanced telecommunications technologies that provide multiple voice, text, and video functions, take advantage of digital technologies, and often utilize Internet-based technologies. The proposed regulation would include such advanced technologies, such as videophones, captioned telephones, instant messaging, and other technologies in regular use by people who are deaf or hard of hearing to place TRS ("relay") or direct "point-to-point" calls. Individuals who are deaf or hard of hearing are increasingly using videophones and other equipment as their principal means of making relay calls.

Today, video communication – both direct "point-to-point" calls and calls made to telephone users through video relay service (VRS) – has surpassed text-based communication services as the preferred, regular, daily communication method for individuals who use and rely on American Sign Language (ASL). This is because the ability to communicate in ASL via video – either directly or through VRS – enables people who use ASL to converse comfortably and naturally, using emotional context and other non-verbal information that can not be conveyed through text. Video communication also enables ASL users to participate in conference calls and access interactive voice response systems that employ menu prompts because the communications assistant interprets the communication in real-time and virtually at the same speed as voice communication. Put simply, this form of telephone communication allows ASL users to finally have natural, real-time conversations with one another and

with telephone users that mirror the speed and style of voice-to-voice conversations. In fact, for individuals who communicate primarily in ASL, access to a videophone may be the only way they can communicate effectively with a person who uses a telephone.

The popularity of video communication among individuals who use ASL is reflected in the skyrocketing use of VRS. Every month, millions of minutes are processed by the VRS industry. In contrast, the use of TTY relay services has dropped approximately 50% in the last few years. Similarly, the use of "point-to-point" video services, which allow individuals who are deaf and hard of hearing to communicate directly with each other over the Internet, has become a routine and daily form of communication for people who use ASL – much the same as hearing people call each other using voice telephones. Clearly, ASL users have stopped using TTYs over the public switched telephone network (except when necessary) and use VRS or direct video communication whenever given the opportunity and access to do so.

The Department should encourage public entities to provide these and other new technologies to enable individuals who are deaf or hard of hearing to place outgoing calls. Such would fulfill Congress' intent that the ADA "keep pace with the rapidly changing times."[49]

28 C.F.R. § 35.162: Telephone Emergency Services

The Department has not proposed any changes to its rule on telephone emergency services, which currently reads: *"Telephone emergency services, including 9-1-1 services, shall provide direct access to individuals who use TDD's and computer modems."*

This section was originally designed to make sure that public safety answering points (PSAPs) responded directly to calls made via TTYs, so that people who are deaf or hard of hearing or who have a speech disability would not have to experience the delays inherent with calls made indirectly, through TRS. This section, as originally drafted, fails to take into consideration newer technologies that will make it possible for people who are deaf or hard of hearing to contact PSAPs directly using text or video over digital, wireless, and Internet-based technologies. The current 9-1-1 system is based on circuit-switched telephone technology that, for the most part, can only receive voice and TTY calls. However, there is significant work currently being done by numerous public safety, industry and government groups to facilitate the development of a Next Generation 9-1-1 (NG9-1-1) system that is expected to begin to have initial deployments in 2009. NG9-1-1 will be enabled by an interconnected system of local, regional and state emergency services IP networks that is capable of handling text, data, images and video from wireless and digital communications devices. The US Department of Transportation (DOT) has taken a leadership role on this issue and is currently in the final

[49] H.R. Rep. No. 101-485, pt. 2, at 108.

stages of a two-year NG9-1-1 research and development project. DOT reports its overall vision for this system as follows:

> USDOT believes that a fundamental reexamination of the technological approach to 9-1-1 is essential as our public safety emergency service networks struggle to accommodate the challenges of wireless communications and digital devices. Cellular service and most other commercial and public safety communications systems are transitioning to IP-based networks. These technologies should enable major advances in the ability of all users and public safety responders to send or receive critical information to, from and beyond the emergency services internetwork, such as emergency calls in American Sign Language via video or medically-relevant data transmitted from a vehicle crash.[50]

DOT has indicated that it expects local government agencies to continue to serve as answering points for emergency calls and communications services that are increasingly delivered by digital devices over IP-networks under the future system. Recently, the issue of NG 9-1-1 received a boost with the passage the "New and Emerging Technologies 911 Improvement Act of 2008," a statute that imposes the obligation to provide 9-1-1 services on IP-enabled voice service providers, and directs the development of a national plan "for migrating to a national IP-enabled emergency network capable of receiving and responding to all citizen-activated emergency communications and improving information sharing among all emergency response entities." Relevant to the Department's Title II rules, that plan must "identify solutions for providing 9-1-1 and enhanced 9-1-1 access to those with disabilities and needed steps to implement such solutions, including a recommended timeline." The new statute also directs groups representing people with disabilities to be consulted in the development of such plan.

The NG 9-1-1 system offers great promise for people who are deaf and hard of hearing. Finally, these individuals will be able to directly access PSAPs using their preferred mode of communication, whether by video, text, instant messaging, or other means. However, for this migration to ensure that people who are deaf and hard of hearing are not left behind, as the rest of our country makes this dramatic transition to a digitally based and Internet-capable emergency system, ADA rules promulgated by the Department must make clear the obligation of public entities to provide direct access to their PSAPs by new technologies used by people with disabilities, as these PSAPs make the transition to NG 9-1-1.

The NG 9-1-1 system offers great promise for people who are deaf and hard of hearing. Finally, these individuals will be able to directly access PSAPs using their preferred mode of communication, whether by video, text, or instant messaging or other means.[51] However, for people who are deaf and hard of hearing to be fully included as our nation transitions to a digitally based and Internet-capable emergency system, the Department must become cognizant of the major changes that will be implemented by

[50] See http://www.its.dot.gov/ng911/next_gen_911_sys.htm#Next (retrieved July 24, 2008).
[51] If communicating by video, it is assumed that a VRS interpreter would also be connected to the call.

this transition, and ensure – through its new rules – that local PSAPs make the changes necessary to ensure effective communication to and from people with disabilities when NG 9-1-1 is implemented in their communities.

In light of the above, the NAD proposes the following changes to 28 C.F.R. § 35.162:

> 28 C.F.R. § 35.162 Telephone emergency services, including 9-1-1 services, shall provide direct access to and with individuals who use ~~TDD's and computer modems~~ TTYs. In addition, these services shall provide direct access to and with individuals who use other text, and video-based telecommunications products and systems, to the extent technically feasible and as required by the NG 9-1-1 transition.

28 C.F.R. § 35.172: Investigation and Compliance Reviews

28 C.F.R. § 35.172(a): The designated agency shall investigate complaints for which it is responsible under § 35.171.

This proposed regulation deletes the word "each" as it appears before "complaint" in the current version of § 35.172(a). In proposing this modification, the Department seeks to give designated agencies the discretion not to select Title II complaints for investigation or resolution.

The NAD strongly opposes the proposal to eliminate the requirement that the Department or other designated agency investigate each complaint, because it is crucial that all Title II complaints each be investigated, as has always been the case under Section 504.

There are far fewer Title II complaints than Title III complaints. If the Department is overloaded, its response should be to obtain additional resources to address the additional complaints, not to reduce civil rights enforcement for people with disabilities. For example, the Department of Transportation, with strong support from the disability community, obtained additional funding for more robust enforcement of the Air Carrier Access Act. The disability community will support and work towards such a goal alongside the Department.

The Department's obligation to investigate all Title II complaints remains crucial because Title II entities are providing vital programs and services to all members of the community. People with disabilities have few other avenues of redress if state and local governments fail to provide equal opportunity to people with disabilities.

Furthermore, federal enforcement via an administrative remedy in disability civil rights, as in all civil rights, plays a crucial role. For example, it must be noted that the lack of a thorough administrative remedy in Title III has had many deleterious

consequences. Since the Department opens very few Title III complaints, the only recourse available for nearly all Title III violations, if advocacy fails, is litigation. The Department should be expanding its capacity to investigate every Title III complaint, not deteriorating its enforcement of Title II to match what is already an unacceptable situation in Title III.

The federal government must stand as the guarantor of civil rights when the violator is state or local government. Otherwise, the power differential between individuals with a disability and the state or local governments that are obligated to serve them is much too great for any alternate routes to justice to be open or effective.

And lastly, it must be noted that the very complaints that the Department will ignore, the "on the edges," less-significant, daily and ordinary types of discrimination; that is, those that are common and don't rise to the top, are exactly the ones that need an administrative remedy, because these are not the types of issues that people will have the resources with which to bring a lawsuit. These are exactly the types of situation that an attorney will not take (which, again, echoes the problems we have today in Title III). Thus, the Department's proposal will, in effect, allow discrimination in all those ways, rather than protecting against it. If the Department does not investigate each and all Title II complaints, this will be a very serious step backwards.

The above comments about the importance of a thorough administrative remedy and the necessity that every Title II complaint be investigated, apply equally to every Title II administrative agency, not only the Department of Justice.

In light of these concerns, the Department should not amend § 35.172 as proposed.

Assistive Listening Systems

Question 1: The Department believes it would be useful to solicit input from the public to inform us on the anticipated costs or benefits for certain requirements. The Department therefore invites comment as to what the actual costs and benefits would be for these eight existing elements, in particular as applied to alterations, in compliance with the proposed regulations (side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses), as well as additional practical benefits from these requirements, which are often difficult to adequately monetize.

The NAD limits its comments regarding Question 1 to consideration of assistive listening systems.

<u>Assistive Listening Systems: Benefits</u>

The Department asks about the benefits of assistive listening systems (ALS). ALS are critically important and provide substantial benefits to a significant number of people with hearing loss. They provide access in a way no other system provides: they enable many people with hearing loss to hear music, voice, and sounds in situations where the acoustics are poor, the facility is large, or the source of the sound too distant to get adequate access. The NAD knows of people who have despaired of ever attending a large pubic event again, or even a meeting with a group of people, who have rejoined their community and had access to events or services with friends and family because they could use ALS. In short, ALS are effective communication "ramps" for many people with hearing loss. ALS enables many people with hearing loss to access programs and services that would otherwise be inaccessible. An ALS is an appropriate and effective way to provide communication access for many people with hearing loss.

A person with a hearing loss may be able to hear and understand in situations involving one-on-one communication in a quiet environment, often with the use of a hearing aid or cochlear implant. It becomes progressively more difficult to hear and understand when (1) the background noise increases, (2) the distance increases between the listener and source of the sound, or (3) there is distortion of the source of the sound (i.e., reverberation or poor acoustics).

Public address systems typically do not help people with hearing loss in the same way they help people who don't have a hearing loss. The signal from a public address system is sent through the air in a room that may well be noisy, produces echoes, is acoustically dismal, or the signal itself is of such poor quality to be rendered unintelligible. People with "normal" hearing may have trouble understanding the words from a distorted public address system, but people who have a hearing loss find it virtually impossible to do so. People with hearing loss are significantly less able to filter out background noise in a way that people who can hear do in noisy situations, so they need additional tools (such as ALS) do to so. In a facility using only a public address system, a person with a hearing loss will not have access to that program.

There are currently an estimated 31 million Americans with hearing loss. For many people with hearing loss, an ALS provides access to programs, events and services. In addition, considering the numbers of returning veterans with hearing loss,[52] our aging population, and our noisy society, it is anticipated that even larger numbers of Americans will develop hearing loss: an estimated 78 million by 2030.[53]

If the 2004 ADAAG standards are not adopted for ALS, large numbers of Americans who have a hearing loss and for whom ALS provides an effective means to access programs and services, will find that public entities may be inaccessible for years to come.

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[52] The Department of Veterans Affairs reports that, at the end of fiscal year 2003, disabilities of the hearing system, including hearing loss, was the "third most common type of disability among compensated veterans." J. Durch & L. Humes, *Military Medical Technology* (March 2008).
[53] *Newsweek* (March 2005).

The 2004 ADAAG provides an additional huge benefit to people with hearing loss by setting standards for neckloops: a hearing aid compatible coupling device that enables many people who wear hearing aids to use their hearing aids to the best advantage. People who use hearing aids and can use neckloops have often found that they cannot use headset receivers or earbuds typically provided by facilities. Some headset receivers currently in use create feedback for someone wearing a hearing aid, producing a whistling sound that is disturbing to others. Earbuds cannot be used at all with a hearing aid. Providing a coupling device that works properly, gives better sound, and does not create feedback that others in the vicinity can hear is a huge benefit for people with hearing loss at a minimal cost for facility owners: neckloops are typically sold at a retail cost of approximately $50.00 each.

Assistive Listening Devices: Costs

The Department also asks about costs of ALS. The NAD believes the costs are not as onerous as presented in the Regulatory Impact Analysis (RIA).

The Department indicates that the cost of compliant receivers would be $500 more than non-complaint receivers. While $500 may be the cost of purchasing a entirely new receiver on a retail basis, the same new receiver may purchased at wholesale prices for significantly less than cited, for as little as $150.

The NAD believes that for existing facilities in compliance with the 1991 rules, the cost could be significantly less. Some facilities have hearing aid compatible headsets available. Some facilities have receivers with neckloops. Other facilities have receivers with a plug that will accept a neckloop which would cost about $50.00, even if purchased at retail prices or approximately $25.00 purchased at wholesale prices.

The Department makes no mention of the cost of retrofitting instead of purchasing new equipment. For example, one performing arts venue in Washington, DC, purchased stethoscope-style receivers which had no input for a jack and, therefore, no way to accept a neckloop. They returned those to the manufacturer to have a jack installed. These receivers now successfully work with neckloops. While the NAD believes that retrofitting may not be the best option, it is another way that faculties can reduce the costs of compliance with 2004 ADAAG without sacrificing accessibility for the large numbers of people with hearing loss who wish to attend, understand and participate fully in programs, events and services.

The 2004 ADAAG also note that induction loop systems may be chosen as one type of ALS. Facilities that have already chosen and installed induction loop systems should not need to spend additional funds to come into compliance with the 2004 ADAAG. Facilities that choose to install an induction loop system do not need hearing aid compatible receivers because the induction loop sends a signal to the hearing aid that has a telecoil, and for those without a hearing aid, the loop receivers provided will suffice. This, again, is a way to reduce the overall cost of a system to facilities.

In addition, the NAD notes that the 2004 ADAAG standards reduce the scoping for these receivers significantly for large facilities. Under the new scoping, only 25% (but no less than two) receivers would need to be hearing aid compatible. This too provides a significant cost saving.

Question 2: The Department would welcome comment on whether any of the proposed standards for these eight areas (side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses) should be raised with the Access Board for further consideration, in particular as applied to alterations.

The NAD limits its comments regarding Question 2 to consideration of assistive listening systems.

The Department seeks comments on returning to the ADAAG only new matters raised by the initial Regulatory Impact Analysis (RIA) or by public comments to the RIA. The NAD sees no new matters raised by the initial RIA or by public comments to the RIA. Further, the NAD sees the scoping requirements provided under the 2004 ADAAG standards regarding assistive listening systems (ALS) as beneficial both to industry and to persons with hearing loss.

The NAD sees many possible cost savings for public entities under the 2004 ADAAG standards. The NAD does not believe costs of the 2004 ADAAG standards in regards to ALS are disproportionate to the benefits. In fact, the NAD believes that the benefits far outweigh the potential costs. The NAD further believes the 2004 ADAAG provides standards that take into consideration the needs and concerns of the public facilities when providing services and the concerns of people with hearing loss. These standards should not be raised with the Access Board for further consideration, but rather should be adopted by the Department as proposed in regard to ALS.

Question 5: The Department seeks information from arena and assembly area administrators on their experiences in managing ALS. In order to evaluate the accuracy of the assumptions in the RIA relating to ALS costs, the Department welcomes particular information on the life expectancy of ALS equipment and the cost of ongoing maintenance.

The NAD believes that ALS are sturdy and virtually indestructible systems. The transmitters for FM and the emitters for infrared ALS can last between 10 and 20 years with normal use. The NAD understands that one performing arts venue in New Jersey is still using an ALS purchased in the1980s. One performing arts venue in Washington, DC, purchased a system in the early 1990s and replaced it in late 1999, only because it wanted to upgrade to a two-channel system. Another performing arts venue in Washington, DC, bought a system in the early 1980s and later bought a new one because it wanted to switch from FM to Infrared. The FM system was repurposed and is being used to provide audio description services.

The only part of the system that might "fail" is the receiver because it is the part of the system that requires the most handling. Receivers can be dropped or bent, headsets can be snapped, batteries can be improperly inserted and split the receiver case, and on/off controls can be clogged with dirt. As such, receivers may need to be maintained by proper cleaning and storage or replaced. It is estimated that, with frequent heavy usage, about one in three receivers may need to be replaced in five years due to breakage, damage, or disrepair. Receivers generally cost between $150 and $250 each.

ALS receivers may also require ear buds and batteries. Rubber ear buds, which can be cleaned and reused, cost approximately $.02 to $.10 each. Some systems use regular double AA or triple AAA batteries and these probably have to be replaced after about 12 to 24 hours of use. Rechargeable batteries can also be used, but should probably be replaced once or twice a year. Infrared ALS receivers usually have a special rechargeable battery which can last between two to five years.

To be "hearing aid compatible," usually means having an ALS receiver that can be coupled with a hearing aid with a telecoil switch. The cost for a hearing aid compatible receiver is the same for receivers that do not couple with the telecoil switch. The difference between a receiver that is compatible with a hearing aid and a receiver that is not is often the presence or absence of an output jack. All FM receivers and most infrared receivers have the output jack. Neckloops cost about $25 each. Generally, FM systems are purchased with headsets and neckloops are optional. With infrared systems, the headset is usually built into the receiver, so the receiver must have an output jack to use a neckloop. Some infrared headset receivers have a telecoil incorporated in them. People who use cochlear implants typically have their own "patch cords" which can be plugged into the standard output jacks on the ALS receiver that are compatible with their cochlear implants.

The NAD hopes this information assists the Department to evaluate the accuracy of the assumptions in the RIA relating to ALS costs.

Support Service Providers for Individuals who are Deaf-Blind

The Department should recognize support service providers (SSPs) as an auxiliary aid or service that may be provided to ensure equal access for individuals who are deaf-blind.[54] Inclusion of SSPs as an auxiliary aid or service will inform and instruct covered entities that individuals who are deaf-blind face unique challenges and that auxiliary aids and services should be tailored accordingly.

The term "support service provider" was coined in the 1980s during a convention of the American Association of the Deaf-Blind (AADB). The success of these conventions had always depended on the work of interpreters and guides to make it

[54] As described in footnote 1, individuals who are deaf-blind make up a diverse group. "Deaf-blind" includes people who are deaf and have tunnel vision, deaf and have low vision, hard of hearing and have low vision, hard of hearing and have tunnel vision, hard of hearing and blind, and totally deaf-blind.

possible for the delegates who were deaf-blind to work and socialize in an unfamiliar environment. Most of these SSPs were volunteers. By developing the concept of support service providers, AADB began the work of defining the duties and responsibilities of SSPs, and ways to give them greater professional status. This in turn helped make it possible to set up programs and SSP services for people who are deaf-blind.

An SSP can be any person, volunteer or professional, trained to act as a link between persons who are deaf-blind and their environment. They typically work with a single individual, and act as a guide and communication facilitator.

The SSP serves as the eyes and ears of the person who is deaf-blind. There are two key components of an SSP's function. First, the SSP relays visual and environmental information that may not be heard or seen by the person who is deaf-blind. This is done in the language and communication mode that is accessible to the person who is deaf-blind. Second, the SSP acts as a human guide while walking or taking public transportation. The SSP may also make transportation available by driving.

An important aspect of the relationship between the person who is deaf-blind and an SSP is that the former makes all decisions. The SSP can provide information to the individual to assist in considering options, but at no point should the SSP make choices and decisions. The professional SSP strives to be helpful but objective, supportive yet empowering, and sparing in expressing their personal preferences while providing services.

As part of focus groups during the 2006 AADB Conference, delegates who are deaf-blind were asked to describe how they use SSP services. A wide variety of responses were elicited: shopping, reading mail, attending social, family, sports, theatrical events, camping, workshops, museum tours, and others.

Interpreters and SSP roles both differ and have numerous similarities. Some of the precepts they have in common include: remaining impartial, maintaining confidentiality, and working in a variety of settings. The differences fall into several areas. Interpreters work with people who are deaf, hard of hearing, or deaf-blind. SSPs work solely with people who are deaf-blind or have have some combination of hearing and vision loss.

Support service providers do not replace the roles of other professionals, including personal care attendants, teachers, and interpreters.

<u>What SSPs can do:</u>

- SSPs can serve as a guide when escorting a person to/from a meeting room, a restroom in an office, or through a lunch line during a workshop.

- SSPs should provide visual and environmental information which can take several forms: describing who is in a room, the activity and mood; reading the menu if the

print is not legible and voicing/interpreting that to the person who is deaf-blind; or locating food items in a grocery store.

- SSPs can provide support to individuals who are deaf-blind in their homes, at their place of employment, in their own community or elsewhere.

What SSPs do not do:

- SSPs do not provide personal care, e.g., bathing and grooming.
- SSPs do not run errands alone for the person who is deaf-blind.
- SSPs do not make decisions for the person who is deaf-blind.
- SSPs do not teach or instruct.
- SSPs should refrain from formal interpreting in medical, legal, business, or other settings. An SSP who is also a professional interpreter should be careful to differentiate which role they are assuming in any particular situation.

In light of the above comments, the Department should include in § 35.104 a definition for SSPs as follows:

> Support service provider (SSP) means an individual who relays visual and environmental information that may not be heard or seen by an individual who is deaf-blind. The SSP relays the information in the language and communication mode that is accessible to the person who is deaf-blind. The SSP can ensure physical access by serving as a guide.

Supplemental Comments

The NAD provides these additional comments for consideration by the Department in its rulemaking process and, where indicated, specifically with respect to the ADAAG. The Department has indicated its intention to propose adoption of the standards contained in the 2004 ADAAG. The NAD supports adoption of the 2004 ADAAG without further delay. The NAD is opposed, as a general matter, to the Department sending any provisions of the 2004 ADAAG back to the Access Board for revisions. If, however, provisions are returned to the Access Board, the NAD requests consideration of the following comments which relate to the ADAAG.

Telecommunications

The 2004 ADAAG continues to emphasize the provision of TTYs. However, this past decade has seen a considerable migration away from these devices by people who are deaf or hard of hearing, in favor of more advanced telecommunications technologies.

These technologies provide multiple voice, text, and video functions, take advantage of digital technologies, and often utilize Internet-based technologies. In addition to TTYs, people who are deaf or hard of hearing are using other devices, such as videophones and captioned telephones, described further below, along with computers, pagers, and PDAs. The ADAAG needs to be updated to reflect these advanced technologies and devices – which allow users to select between modes of communication and often allow users to select the simultaneous use of multiple modes of communication.

For example, Section 217 of the 2004 ADAAG governs the provision of "public" telephones (i.e., coin-operated or coinless public pay telephones, public closed-circuit and courtesy phones). The standards articulated at 704.4 and 704.5 are even narrower, applying only to TTYs that may be required at a public *pay* telephone. Unfortunately, like the ADA regulations discussed above, these sections have become seriously outdated. Specifically, Section 217.4 focuses exclusively on the provision of TTYs in various public locations. It ignores, entirely, advanced communication technologies, especially the widespread use of video communications by people who are deaf or hard of hearing, for point-to-point communication and for communication with telephone users through a video relay services (VRS),[55] and the rapidly expanding use of captioned telephones and captioned telephone relay services.

TTYs rely on an antiquated protocol called Baudot, which only allows conversation to take place at slow speeds, in half-duplex modes. Individuals must type out their conversations and wait, painstakingly, until the other party to the conversation is finished before responding. These inefficiencies are causing digital, Internet-based, and wireless text communications to rapidly replace TTYs in the homes and workplaces of people who are deaf and hard of hearing across America. This is especially true for people who use American Sign Language (ASL) who, through video communications, are finally able to have a real-time conversation that flows at the same pace as voice communication, far more naturally than text, and allows the display and conveyance of intonations and emotions. People would not be expected to type out all of their conversations if they typically used their voices to communicate; nor should people be expected to type out their conversations if they communicate in sign. It is discriminatory and against the overarching intent of the ADA not to enable the opportunity for these individuals to communicate effectively in their language.

The ADAAG needs to be brought into the 21st Century. Wherever the guidelines require TTY placements in hospitals, transportation facilities, shopping malls, and other public locations, the guidelines should be revised to require devices using advanced technologies that respond to the wide variety of communication methods (text, voice or video) used by individuals who are deaf or hard of hearing or who have a speech disability to achieve equal access and effective communication. The ADAAG should mandate devices that are now available that provide voice, text, and video communication capabilities in a single device that can meet multiple communication needs. Moreover, the guidelines should acknowledge that even these "advanced"

[55] VRS is a form of Telecommunications Relay Service (TRS). See http://www.fcc.gov/cgb/consumerfacts/videorelay.html

technologies may change, and that devices that use successor technologies may be needed in the future to ensure equal access and effective communication. The bottom line is that provisions need to be added to the ADAAG to ensure that, where public telephone services are offered, people who are deaf or hard of hearing or who have a speech disability are given the same opportunity using methods of communication that meet their needs, including videophones, captioned telephones, voice carryover, hearing carryover, and all related forms of telecommunications relay services.

Videophones

Wherever broadband (high speed Internet connection) is available, people who are deaf or hard of hearing are connecting to each other and to the world through videophones (video conference technology). With videophones, people can communicate using ASL, instead of having to type what they want to say. They are able to more fully express themselves, with intonation and emotion, which cannot be expressed in text. Calls made on a videophone flow back and forth naturally, just like a telephone conversation; there is no need to take turns or wait for a typed response. Videophone conversations take place naturally and much more quickly than text-based communication (i.e., by using a TTY), because the average rate of speaking *or* signing is 200+ words per minute; much faster than anyone can type.

Videophones provide a link to the world through VRS. VRS enables people who communicate in ASL and people who communicate by voice, to communicate with each other by placing or receiving calls through a VRS communications assistant who is a qualified sign language interpreter.

Captioned Telephones

A captioned telephone works like any telephone, with callers talking and listening to each other, except that real-time captions are displayed on the phone's built-in screen. The captioned telephone user reads the words while listening to the voice of the other party, simultaneously, to fully understand the conversation taking place. The captioned telephone user responds using his or her voice. The captions are generated by a relay service communications assistant (CA) by re-voicing what the caller (or called party) says and using voice recognition technology, which converts the CA's spoken words into text. Captioned telephone relay services can also be provided through the Internet, in which case the deaf or hard of hearing person can use any phone and read the captions which are displayed on a computer.

Captioned telephone relay services enable individuals who are deaf or hard of hearing, and who use their voices to communicate, to converse naturally over the telephone. Individuals who are deaf or hard of hearing and able to communicate with a captioned telephone do not need to type their side of the conversation, a skill and process required with TTYs. Eliminating the need to type avoids the resultant reduced speed of communication and delays that are inherent in the use of TTYs. This distinction has also been the key to making telecommunications accessible to vast numbers of people who are

unable to type, such as children and senior citizens. Until the advent of the captioned telephone and captioned telephone relay services, many of these individuals did not have *any* means of making or receiving calls independently. Since then, thousands of these individuals have praised the ways that captioned telephones have kept them gainfully employed, connected with their family and friends, and involved in other activities that have kept them socially active.

Two-Way Communication Systems

The NAD advocates for accessible two-way communication systems that now rely on hearing and speech, wherever they are used. In the ADAAG, the requirement for accessible two-way communication systems must be expanded. First, such systems must provide for equivalent two-way visual or text communication; not just visual "signals" and not reliant solely on antiquated TTYs. Second, the requirement needs to be expanded to include more than those systems used to gain admittance to a building, facility, or restricted area. For example, auditory/oral based intercom systems at banks, fast-food, and other drive-through facilities have been a source of great frustration for deaf and hard of hearing individuals. Similarly, auditory/oral based intercom systems are often found in elevators, to be used in the event of an emergency or breakdown. The inaccessibility of these communication systems increases anxiety and fear. Digital communication (visual, text-based, and auditory) and advanced technologies (digital cameras, touch-screen menus, and computer-based text communications) can make two-way communication systems accessible to individuals who are deaf or hard of hearing and should be required.

Fire Alarm Systems

The ADAAG must go further to safeguard the lives, safety, and health of people who are deaf or hard of hearing, particularly by ensuring effective smoke and fire alarm systems and alerting devices, especially in public and sleeping areas.

The 2004 ADAAG sets forth, in section 215 (Fire Alarm Systems):

> "EXCEPTION: In existing facilities, visible alarms shall not be required except where an existing fire alarm system is upgraded or replaced, or a new fire alarm system is installed."

The NAD strongly opposes this exception. It is imperative that fire alarm systems in all existing facilities be accessible to people who are deaf or hard of hearing. Anything less compromises the life, safety, and health of these individuals and their families, including children, who depend on them.

Section 215 covers public and common use areas, employee work areas, transient lodging guest rooms, and residential facilities. Of these, transient lodging guest rooms are subject to a scoping limitation in section 224.4. The number of rooms required to have "communication features" range from about 10% of rooms in smaller facilities to

about 5% in larger facilities. Fire alarms alert to conditions that are matters of life and death, and should not be subject to a scoping table such as found in ADAAG section 224.4 for transient lodging guest rooms. Visible alarms should be a mandatory requirement for all spaces. All fire alarm systems in new and existing facilities should be audible and visible from anywhere within the space they serve – all areas that are open to the public, all work and common areas that are open to employees, and all transient lodging guest rooms.

When fire alarm systems are required, they must comply with ADAAG section 702. Section 702.1 requires "*permanently installed* audible and visible alarms complying with the NFPA 72 . . ." (emphasis added). Guest rooms with "communication features" must comply with sections 7.4 and 7.5 of NFPA 72 (2002 edition) which sets out audible and visible alarm signal parameters. The NAD is concerned because NFPA 72 section 7.5.4.4.1 (Sleeping Areas) says: "Combination smoke detectors and visible notification appliances and or combination smoke alarms and visible notification appliances shall be installed in accordance with the applicable requirements of Chapter 5, Chapter 7, and Chapter 11." Grave concern exists because many transient lodging facilities (i.e., hotels and motels) routinely provide "combination" smoke detector/visible notification devices. Often, these combination devices are not even permanently installed. However, and more importantly, combination devices are not activated unless or until smoke can be detected inside the guest room. This level of alerting is not equivalent to the facility's system that triggers audible emergency alarms throughout the building whenever and wherever smoke or fire is detected by the system anywhere in the building. Such combination devices, alone, are extremely hazardous, particularly in multi-level facilities, because they do not activate when a facility's fire alarm system is engaged.

The NAD urges the Department to require that 100% of all fire alarm systems in new and existing facilities, when activated, are audible *and visible* from anywhere within the space they serve, including inside guest rooms. Further, all visible alarms must be permanently installed and must be activated when a facility's fire alarm system is engaged.

Public Address Systems

Public address (PA) systems exist and are used in a wide variety of facilities to provide information aurally only (without a concurrent visual component) – such as in convention centers, shopping malls, stores, and transportation facilities, to name a few. Think about the volume and variety of information you hear conveyed over PA systems in different contexts. For people who are deaf or hard of hearing, visual access to the same information must be provided. Without access to the same information, individuals who are deaf or hard of hearing are isolated from communication and information that is otherwise available to others in the same environment. Information conveyed over a PA system can and should be made accessible in visual, text-based format for people who are deaf or hard of hearing. This visual information is likely to be equally beneficial to everyone, especially considering that the quality of the audio or the environment in which

it is conveyed often makes the information indiscernible even for people with "normal" hearing.

For example, Section 810.7 of the 2004 ADAAG applies to some transportation facilities and requires that, "[w]here public address systems convey audible information to the public, the same or equivalent information shall be provided in a visual format." Even with such a requirement, in practice, the result is often a summary or an abbreviated visual display of destination name, arrival and departure times. Real-time information conveyed over a PA system, such as announcements about delays, boarding, or gate changes, is almost never conveyed visually in anything approaching "equivalency" or timeliness. As such, the NAD recommends that ADAAG ensure that real-time captioning and text displays are provided whenever and wherever such PA systems are used. Redundant public information is not only accessible when it is presented in formats that are both audible and visible; it is also more effective for everyone.

Detention and Correctional Facilities

Section 232.2.2 of the 2004 ADAAG requires at least 2% of the general holding cells and general housing cells to be equipped with audible emergency alarm systems. Permanently installed telephones within these cells must have certain "communication features." First, this scoping requirement is significantly less than the incidence of hearing loss in the general population (approximately 10%) and even less than the incidence of hearing loss in the inmate population (approximately 35%) as reported by some studies. Second, the provision applies to "general holding cells and general housing cells" but not special holding cells. Further, the "communication features" called for in the regulations fail to address some of the most common barriers faced by deaf and hard of hearing inmates. Few cells have permanently installed telephones within the cell, and the requirement to make any such phone "accessible," according to the guidelines, is limited to the provision of a volume control feature. More importantly, "emergency alarm systems" are only a small part of the amplified information that controls every aspect of the daily lives of inmates.

The NAD receives many letters from inmates who explain that announcements are made over a central loudspeaker or public address system at repeated intervals, instructing inmates what to do and when to do it. For example, mealtimes are announced and inmates who do not hear the announcement have missed the opportunity for meals completely. Announcements made before opening cell doors (for meals, exercise, or random searches) may not be heard and failure to comply with the command to exit a cell has resulted in unwarranted disciplinary action. Systems that deliver audible announcements, signals, and/or emergency alarms must be made accessible to all inmates who are deaf or hard of hearing.

Further, the NAD receives many letters from detainees and inmates who report that the facility does not have a TTY or other means of providing telecommunications access. Telecommunications access is frustrated further when a facility has a TTY, but the TTY is not made as accessible as the regular phone system made available to

detainees or inmates without disabilities. Most often, the TTY is secured in an administrative office and made available to the deaf or hard of hearing inmate only on a very restricted and limited basis. While such arrangements may comply with section 217.4.8 that requires that "at least one TTY shall be provided in at least one secured area," the result is often extremely limited and unequal access. Similarly, as described above, guidance should be updated to reflect developments in technology that provide multiple voice, text, and video functions, such as videophones and captioned telephones. In addition, detention and correctional facilities should provide access to advanced forms of telecommunications relay services for deaf and hard of hearing inmates, and for hearing inmates who communicate with family and loved ones who are deaf or hard of hearing.

Conclusion

The NAD urges the Department to adopt the recommendations set forth above to ensure clarity in the regulations and provide the guidance necessary to implement and reflect the intent of the ADA.

Respectfully submitted,

_____/ s / _____
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