IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA, Plaintiff v. BECKER, CPA REVIEW, LTD., Defendant	CV-92-2879 (TFH/AK)

REPLY TO DEFENDANT'S OPPOSITION TO
UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Introduction

The United States submits this Reply to Defendant's Opposition to the United States' Motion for Partial Summary Judgment. The United States and the Becker company generally agree on the facts and law as set out in the papers supporting the government's motion for partial summary judgment.[1] Disputes exist only with respect to the application of the law[2] to the

[1] Genuine factual disputes exist as to claims made on behalf of Mr. Summers and others, the appropriate amount of civil penalties, and damages for Mr. Jex. The United States has not sought summary judgment on these issues, and will not address Defendant's arguments concerning these matters as they are beyond the scope of the United States' Motion for Partial Summary Judgment.

[2] The Becker company has utterly failed to address Count II of the United States' Complaint, in which the government alleged that Defendant had violated section 309 of the ADA, 42 U.S.C. § 12189. See discussion in Corrected Memorandum of Points and Authorities in Support of United States Motion for Partial Summary Judgment ("U.S. Corrected Memorandum") at 38-40, and United States' Opposition to Defendant's Motion for Summary Judgment ("U.S. Opposition") at 23, which are incorporated herein by reference.

facts.[3] This case is, therefore, ripe for summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 377, 323-24 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

Analysis

I. Defendant's policy and practices prevented persons with hearing impairments from receiving opportunities for the full and equal enjoyment of the Becker course.

Section 302(a) of title III requires public accommodations to ensure that persons with disabilities have the full and equal enjoyment of the entities' goods, services, and advantages.[4] 42 U.S.C. § 12182(a) (1990). "Full and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 55 (1990) (Judiciary Committee). Specific statutory and regulatory provisions applying this standard require covered entities:

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[3] Paragraphs 1-112 of the United States "Facts" were submitted as "Corrected Rule 108(h) Statement," Exhibit B to Motion of October 12, 1993. Paragraphs 113-246 were submitted as "Rule 108(h) Statement in Opposition to Defendant's Motion for Summary Judgment" (filed Oct. 25, 1993).

Likewise, United States' exhibits 1-32 were submitted as "Corrected Exhibits 1-32," Exhibit C to the Motion for Leave to Submit (filed Oct. 12, 1993). Exhibits 33-45 were filed in support of the U.S. Opposition. Exhibits 46 and 47 are attached hereto.

[4] Accord, ADA title II, 42 U.S.C. §§ 12131-65 (1990) (State and local government programs); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973) (federally funded programs) (amended by Pub.L. 95-602, Title I, §§ 119, 122(d), Nov. 6, 1978, 92 Stat. 2982, 2987). See discussion of section 504's regulations, infra at 9-12.

(1) to provide auxiliary aids and services to ensure effective communication (42 U.S.C. § 12182(b)(2)(A)(iii) and 28 C.F.R. § 36.303[5]);

(2) to provide equal opportunities to participate in or benefit from the entity's goods, services, and advantages to persons with disabilities (42 U.S.C. §§ 12182(b)(1)(A)(i) and (ii), and 28 C.F.R. §§ 36.202(a) and (b)); and

(3) to make reasonable policy modifications (42 U.S.C. § 12182(b)(2)(A)(ii) and 28 C.F.R. §36.302).[6]

Congress intended that each of these standards be applied in a manner consistent with section 302(a)'s mandate of "full and equal enjoyment." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 104 (1990) (Committee on Education and Labor). Entities like the Becker company must provide goods and services in a manner that achieves a qualitatively equal level of opportunities to obtain goods, services, and advantages across the full range that is offered to others.

A. The ADA requires the Becker company to provide appropriate auxiliary aids and services in order to ensure equal opportunities for participation and for receipt of equal services and advantages.

In two ways, the Becker company misdefines the appropriate measure of whether a particular auxiliary aid or service provides

[5] The Department's title III regulation and published interpretation of the regulation are entitled to controlling weight unless they are plainly erroneous. Stinson v. United States, 113 S. Ct. 1913, 1919 (1993) (citations omitted). The United States hereby incorporates by reference its discussion of judicial deference to agency interpretation in U.S. Opposition at 29-33.

[6] Policy modifications are necessary as established through the discussion of auxiliary aids and services, infra at 3-8, and opportunities for equal participation, infra at 15-18. The United States has already shown that the necessary policy modifications are reasonable, U.S. Corrected Memorandum at 37-38, U.S. Opposition at 40-41, and hereby incorporates these arguments by reference.

effective communication. First, it relies on a results-oriented test to determine an auxiliary aid's effectiveness. Defendant's Opposition to United States' Motion for Partial Summary Judgment ("Defendant's Opposition") at 19-20. Second, it concentrates on determining what level of "apprehension" is required for effective communication. See, e.g., Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Defendant's Memorandum") at 14; Defendant's Opposition at 19-20. Both approaches are misguided.

1. Section 302 applies an opportunity-oriented test rather than a results-oriented test.

The Becker company misdefines the appropriate measure of effective communication by employing a results-oriented test. See, e.g., Defendant's Opposition at 19-20. As a consequence, the Becker company draws too closely the connection between its 'J-note' method and former students' examination results. Although there is undoubtedly some connection between the effectiveness of a particular auxiliary aid or service and success on the exam, no perfect causal connection exists. Intelligence, diligence in studying, class attendance, physical health, sleeping habits, nervousness, test-taking skills, and other factors may contribute to a candidate's exam success or failure. Moreover, a candidate's exam failure may be caused by a lack of confidence and motivation resulting from the Becker company's discrimination. See Exhibit 46 (Kaplan Dep. at 472-73) (Q: "Do you have an opinion as to whether a deaf student not

hearing other students' questions would have any effect on his or her motivation?" A: "Oh, yes, definitely. Definitely.").

Congress rejected the use of results-oriented tests for determining whether a particular auxiliary aid or service has provided effective communication: "'Full and equal enjoyment' does not encompass the notion that persons with disabilities must achieve the identical result or level of achievement of nondisabled persons, but does mean that persons with disabilities must be afforded equal opportunity to obtain the same result." S.Rep. No. 116, 101st Cong., 1st Sess. at 60 (1990) (emphasis added) (Committee on Labor and Human Resources); see also H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 2 at 101 (Committee on Education and Labor); H.R. Rep. No. 485, 101st Cong. 2nd Sess., pt. 3 at 55 (1990) (Judiciary Committee).

The Becker company's focus on exam success as a measurement of the effectiveness of the 'J-note' method relies, in part, on its claimed past success in accommodating students with hearing impairments through the 'J-note' method. See, e.g., Defendant's Memorandum at 17, 18; Defendant's Opposition at 16, 17, 20. Even if this claim had overwhelming factual merit, which it does not,[7] it ignores a fundamental precept of title III: the effectiveness of accommodations must be measured against the individual needs of each person with a disability. Even if some former Becker students who had requested interpreters had been

[7] See discussion of Mr. Jex's and former Becker students' experiences with the 'J-notes' in the U.S. Corrected Memorandum at 12, 14, 18-20; U.S. Opposition at 9-11; and Facts ¶¶ 57-62, 72, 89-101, 111, 171, 172, 218.

accommodated by the 'J-note' method, there is no guarantee that this method will provide effective communication to all present and future students with hearing impairments. Indeed, the Becker company concedes this point: "Becker recognizes that the J-Notes accommodation may not work for everyone." Defendant's Opposition at 17. From this concession must follow the conclusion that a results-oriented test based wholly on former students' exam success cannot be an appropriate measure of whether the 'J-note' method will provide effective communication to a particular individual.[8]

2. Section 302 focuses on the comparative quality of the delivery of a good or service, not on "apprehension."[9]

The Becker company determines whether a student with a hearing impairment has received "effective communication" by whether that student "apprehends" enough information -- by using

[8] The Becker company also concedes that each person with a hearing impairment faces unique needs and has different communication concerns that must be taken into account. Defendant's Opposition at 28. This concession further demonstrates the futility of making decisions that will affect future students on the basis of former students' exam results. Significantly, this concession contrasts sharply with the Becker company's earlier assertion that, in its professional opinion, the 'J-note' method would be more effective for all students with hearing impairments than would be sign language interpreters. Defendant's Memorandum at 8; Letter of Dec. 17, 1992, from N. Becker to J. Dunne (Defendant's Exhibit 36).

[9] Although the Becker company sets out "apprehension" as a talisman for effective communication, it never articulates what level of "apprehension" might be required by section 302. Instead, Defendant states merely that its communication was effective because some former Becker students who used the 'J-note' method passed some or all of the CPA examination, and argues that, therefore, the 'J-note' method worked for them. See discussion of the Becker company's application of a results-oriented test, supra at 4-6.

the 'J-notes' -- to pass the CPA examination. Defendant's Opposition at 19. This approach fails to account for other benefits available to hearing students. Hearing students' motivation to study and learn is increased through instructors' expressed interest in their success. See Facts ¶¶ 37, 38. Hearing students remember the information long after first "apprehending" it because their comprehension is reinforced through a variety of formats. Facts ¶ 38. Hearing students benefit from instructors' responses to questions; they benefit even when an instructor merely responds that a question is off-target, because this response clarifies for the entire hearing audience what their attention should be focused upon. See id. Students with hearing impairments do not receive any of this crucial interaction when they are relegated to reading the instructors' manual. It is simply not enough that the 'J-notes' contain many of the accounting concepts tested by the CPA examination.

Section 302(a) of the ADA mandates that persons with disabilities receive the "full and equal enjoyment" of public accommodations' goods and services. 42 U.S.C. § 12182(a). The auxiliary aids provision of section 302(b), in describing actions that violate section 302(a), specifically defines discrimination as the failure to ensure that no individual with a disability is treated differently or denied services. 42 U.S.C. § 12182(b)(2)(A)(iii). Accord, 28 C.F.R. § 36.303(a); see also Department of Justice's preamble to the title III regulation, 28 C.F.R. pt. 36, App. B at 594 (1992) (hereinafter "Analysis").

Whether the Becker company communicated effectively with persons with disabilities, then, should be judged partly by whether a lack of appropriate auxiliary aids or services had the effect of denying to them opportunities for the full and equal enjoyment of the Becker course.

Instead of attempting to determine a minimally-acceptable level of "apprehension," or of focusing on a results-oriented test, this Court should apply a qualitative measurement that meets the "full and equal enjoyment" standard of section 302(a). Section 302(b)(2)(A)(iii)'s definition of discrimination as the denial of services or as different treatment due to the "absence of auxiliary aids and services" must be read as mandating that the appropriate auxiliary aid or service be provided. The controlling inquiry is whether, in light of a particular individual's disability and communication needs, the 'J-note' method provides that person with opportunities for full enjoyment of the Becker course that are equal to opportunities enjoyed by their peers.

3. The title III standard derives from section 504 of the Rehabilitation Act of 1973 and is the same standard as applied under title II.

Defendant wrongly argues that the "full and equal enjoyment" standard of title III, as applied to the auxiliary aids and services requirement, imposes a lesser standard than those applicable under section 504 of the Rehabilitation Act of 1973 and title II of the ADA. See Defendant's Opposition at 6-14.

a. Section 504 of the Rehabilitation Act.

The Becker company contends that this Court should not heed the case law developed under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973), amended by Pub.L. 95-602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987, that establishes that sign language interpreters may be appropriate and necessary in educational settings. See, e.g., Defendant's Opposition at 11-12. The Becker company's argument is flawed because it ignores the substantial historic link between title III and section 504.

Congress and the Department drew title III's qualitative standard of "full and equal enjoyment" directly from the regulations and case law giving force to section 504. Section 504 protects the civil rights of persons with disabilities in federally assisted and federally conducted programs. 29 U.S.C. § 794 (as amended).

Section 501(a) of the ADA states in relevant part: "Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title."[10] 42 U.S.C. § 12201(a). See also Rothschild v.

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[10] In fact, Congress explicitly recognized that title III extends section 504's prohibition of discrimination to private entities:

> Section 504 of the Rehabilitation Act of 1973 prohibits Federal agencies and recipients of Federal financial assistance from discriminating against persons with disabilities. The purpose of title III of the legislation is to extend these general prohibitions

Grottenthaler, 907 F.2d 286, 291 (2d Cir. 1990) ("regulations, promulgated pursuant to 29 U.S.C. § 794(a), are 'an important source of guidance on the meaning of § 504.'" (citations omitted)). Title III's "full and equal enjoyment" standard, as well as the specific statutory and regulatory provisions defining its scope, incorporates standards developed under section 504 of the Rehabilitation Act; contrary to Defendant's suggestion, nothing in the statute provides otherwise.[11]

Congress derived the "auxiliary aids and services" requirement of section 302(b)(2)(A)(iii), the "equal opportunity to participate" provision of section 302(b)(1)(A)(i), and the prohibition of "unequal benefits" in section 302(b)(1)(A)(ii) directly from section 504 regulations.[12] See, e.g., Department of Justice regulations for federally-conducted programs, 28

> against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream of American life. Title III fulfills these purposes in a clear, balanced, and reasonable manner.

S.Rep. No. 116, 101st Cong., 1st Sess. at 58 (1990) (Committee on Labor and Human Resources).

[11] While section 504 does not itself contain the phrase "full and equal enjoyment," 29 U.S.C. § 794, the relevant statutory and regulatory provisions under title III defining the scope of "full and equal enjoyment," namely the auxiliary aids provision and the regulatory mandate of effective communication, are expressly drawn from interpretations of section 504's prohibition of discrimination.

[12] See discussion of section 302(b)(1)(A)(i) (equal opportunity to participate) and (ii) (unequal benefits), infra at 15-18.

C.F.R. § 39.160(a)(1) (1992) ("The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency"), and for federally-assisted programs, 28 C.F.R. §§ 42.503(b)(1)(ii) and (iv) (1992) (ensuring the "equal opportunity to achieve the same benefits that others achieve" as well as the "equal opportunity to participate"), and 28 C.F.R. § 42.503(e) ("Recipients [of federal funds] shall insure that communications with their . . . beneficiaries are effectively conveyed to those having impaired vision and hearing"). See also 45 C.F.R. § 84.44(d)(1) (1981) (Department of Health and Human Services section 504 regulation for postsecondary education) ("A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.").

The Department has explicitly recognized that the "effective communication" language of section 36.303(c) derives from these and similar regulations, see, e.g., 28 C.F.R. § 39.160(a) (Department of Justice section 504 regulation for federally conducted activities) ("The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public");

Analysis at 593; and has expressly incorporated case law under section 504 in its analysis of the regulation. Analysis at 595; see also U.S. Corrected Memorandum at n.16.

The Becker company argues that the United States extends the provisions of the Rehabilitation Act beyond their scope. Defendant's Opposition at 11. This position is without merit in light of the uniform statutory and regulatory language, congressional history, and administrative analysis linking these provisions. Thus, the Court may properly follow the long line of cases interpreting section 504 to require the provision of sign language interpreters in educational settings. See, e.g., cases cited in U.S. Opposition at 34, n.12. These cases establish that sign language interpreters are appropriate and necessary in educational settings. The Court should reject Defendant's argument that section 504 case law is inapposite to the issues before the Court.

b. Title II of the ADA.

The Court should likewise reject the Becker company's misleading argument that the United States is attempting to impose upon it the "primary consideration" standard of title II, 42 U.S.C. §§ 12131-65 (1990). See Defendant's Opposition at 6-10. Titles II and III of the ADA require entities to provide effective communication; any distinction between the regulations issued under the titles lies not in this shared mandate, but in the procedures for achieving that end. Title II entities must give primary consideration to the expressed choices of persons with disabilities, or select other auxiliary aids and services

that are equally appropriate. 28 C.F.R. § 35.160(b)(2). Consistent with congressional intent,[13] title III entities are strongly encouraged to consult with persons with disabilities when selecting the appropriate auxiliary aids and services. Analysis at 594. Under both titles, covered entities have the ultimate responsibility for choosing auxiliary aids and services that will provide effective communication. Both types of entities are liable if they make the wrong choice.

In listing the obligations under the title II standard of effective communication, the Becker company misconstrues language used by the Department in its Title II Technical Assistance Manual. In its explanation of "primary consideration," the Department explained, "It is important to consult with the individual to determine the most appropriate auxiliary aid or service, because the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective." Title II Technical Assistance Manual at 36 (Exhibit 47).

Defendant contends that this language requires that governmental entities "must provide the most appropriate auxiliary aid or service" as determined by the individual with a disability, as opposed to the title III standard of providing whatever auxiliary aid or service will lead to effective

[13] H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 107 (1990) (Committee on Education and Labor) ("The Committee expects that the public accommodation will consult with the individual with a disability before providing a particular auxiliary aid or service").

communication. Defendant's Opposition at 8, 9 (emphasis in the original). This mischaracterization of the language in the Title II Technical Assistance Manual is not supported by the ADA, the title II regulation, or the Department's Analysis. When the "most appropriate auxiliary aid" language is considered in the context in which it appears, the standard illuminated is one of objective, not subjective, appropriateness. The Department did not intend in its Title II Technical Assistance Manual to imply, and indeed did not imply, that title II requires a qualitatively better auxiliary aid or service than is required under title III. Indeed, such a statement would contravene the "effective communication" standard established in the regulations.

Instead, under both titles the covered entities should strive to find the most appropriate auxiliary aid or service that will furnish effective communication given all the relevant factors: communication length and complexity, subject matter, setting, and the individual's particular communication skills and requirements. The Title II Technical Assistance Manual explicitly states that a covered entity does not have to honor the expressed choice of an individual with a disability if "it can demonstrate that another equally effective means of communication is available . . . . " Title II Technical Assistance Manual at 36 (Exhibit 47); accord, Title II Analysis at 451 ("The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists . . . . "). This statement clarifies that governmental entities, like the public accommodations covered by title III, do not have

to rely exclusively on the determination of appropriateness made by a person with a disability. Instead, they may take into account a wide range of factors that go well beyond any individual person's determination that a particular auxiliary aid or service would be "most appropriate" for him or her.

In the title III Analysis, the Department explains that although public accommodations generally have flexibility in choosing appropriate auxiliary aids and services, sign language interpreters may be the only means of providing effective communication in a wide range of complex and lengthy communications such as involving health, legal, or financial matters.[14] Analysis at 594. In the context of the Becker course, sign language interpreters may be necessary to provide effective communication to some persons, like Mr. Jex. In such circumstances, what determines compliance is not whether an entity has given "primary consideration" to the expressed choice of a person with a disability, or whether the entity has consulted with the person. Regardless of the procedure followed, the Becker company is legally responsible for providing effective communication and is fully liable for failing to do so.

B. The Becker company has failed to meet the ADA standard and has effectively denied access to large components of its course for some people with disabilities.

Students with hearing impairments who have to rely on the 'J-note' method are effectively excluded from class participation

[14] See discussion in U.S. Corrected Memorandum at 26; U.S. Opposition at 27-28.

because they have no real access to other students' questions or instructors' responses, cannot ask their own questions, cannot be involved in classroom discussions of sample exam problems, and are deprived of any access to illustrations of accounting principles drawn from their instructors' own professional experiences. Like the auxiliary aids requirement of section 302(b)(2)(A)(iii), proper analysis of the "participation" and "equal benefits" provisions of sections 302(b)(1)(A)(i) and (ii) must take into account the "full and equal enjoyment" standard of section 302(a). They must also be read in conjunction with the auxiliary aids and services requirement of section 302(b)(2)(A)(iii). The Becker company violated the ADA to the extent that it provided a means of communication that fell short of offering opportunities for "full and equal" participation in the Becker course and "full and equal" benefits of the course to persons with disabilities.

The right to participate cannot be grounded on minimal opportunities for participation compared to opportunities provided to others; instead, the Becker company must provide opportunities for full participation in the various media and in all interaction that takes place in the Becker course. When a student merely reads part of the information being conveyed and is precluded from asking questions during class, for example, or when the student is prevented from benefitting from the discussion of other students' questions, he or she is effectively removed from the learning environment of his or her peers. Deprived of opportunities to apply, evaluate, and question in

class the material presented, the student is foreclosed from full and equal participation in the educational process. Cf., Rothschild v. Grottenthaler, 907 F.2d 286, 291 (2d Cir. 1990) (under section 504, school district had to provide sign language interpreters for the deaf parents of a hearing child to enable them to participate fully in school-initiated activities such as parent-teacher conferences).

When determining whether the Becker company discriminated against an individual like Mr. Jex, the Court should apply the following test: whether the student, in the absence of sign language interpreters, is incapable of fully and equally participating in the Becker course, and thereby receiving the full and equal benefits of the course. Even if persons are capable of communicating in an educational setting without the provision of sign language interpreters, if they are denied full and equal participation in the absence of interpreters, except in circumstances not applicable here,[15] companies like the Becker company are obligated to provide interpreters.

Through the 'J-note' method, the Becker company supplies students with hearing impairments a different course from the one provided to hearing students, in violation of section 302(b). 42 U.S.C. § 12182(b)(1)(A)(iii) ("It shall be discriminatory to provide an individual [with a disability] . . . with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, .

[15] The Becker company has not raised the affirmative defenses of fundamental alteration or undue burden.

. . . "). Although the 'J-notes' contain a nearly verbatim transcript of the taped lecture, they do not and cannot enable persons with hearing impairments to participate in important aspects of the Becker course: interaction, instructor feedback, motivation, affirmation, and explanations of difficult concepts in the context in which they arise. A person with a hearing impairment who is limited to reading the 'J-notes' and handouts for the entire four-hour or eight-hour class, while others participate in these ways and maintain a focus on applying information, receive a different and inferior "service" from the Becker company.

II. The Becker company discriminated against Rod Jex.

The Becker company now states that, when necessary for effective communication, it will provide sign language interpreters. Defendant's Opposition at 30. This concession suggests a proper recognition that sign language interpreters are sometimes necessary to provide students with hearing impairments with effective communication of and full participation in the Becker course. The Becker company has failed to, and indeed cannot, show that Mr. Jex is not an individual for whom sign language interpreters are necessary in the context of the Becker course. See, e.g., Facts ¶¶ 146-63.

Throughout most of 1992, it was the Becker company's policy not to provide sign language interpreters under any circumstances, and instead to impose the 'J-note' method upon students with disabilities who requested auxiliary aids and services. See, e.g., Facts ¶¶ 50, 54, 68-70. The company's

discriminatory behavior was particularly evident from its treatment of Mr. Jex.[16]

Mr. Jex's need for interpreters in the Becker course is evidenced by his reliance on sign language as his primary method of communication. He has used sign language in other post-graduate educational settings, work-related conferences, religious and athletic activities, and in virtually all other aspects of his daily life. Facts ¶¶ 46, 47, 51, 146-63; see also discussion in U.S. Opposition at 11-13; Kaplan Decl. at ¶ 24 (Exhibit 14). Mr. Jex had substantial auxiliary aids and services in college: he used oral interpreters, tutors, and note-takers. Facts ¶ 207. As he became proficient in sign language during college, he requested sign language interpreters. Facts ¶ 193. These requests evidence his perceived need for sign language interpreters in educational settings. See Rothschild v. Grottenthaler, 907 F.2d 286, 291 (1990). The Becker company has recognized that "self-assessment is a proper measure of accommodation under the ADA . . . " Defendant's Memorandum at 31

[16] There are material issues of fact as to Mr. Summers and others on whose behalf the United States may seek damages. Facts ¶¶ 230, 231, 239, 240.

Counsel's statements made during the September 23, 1993 hearing before the Honorable Alan Kay, United States Magistrate Judge, do not preclude the United States from asserting claims on behalf of persons in addition to Mr. Jex and Mr. Summers, as argued by Defendant. The United States is not foreclosed from carrying out its intent to seek damages on behalf of Mr. Jex and all other similarly-situated individuals. See Complaint at ¶¶ 15, 17, and E. In fact, the Court's order requiring Defendant to provide the government with identifying information was done for the express purpose, inter alia, of allowing the government the opportunity to determine if Defendant violated the law with respect to individuals besides Mr. Jex and Mr. Summers.

(citing to Dr. Kaplan's deposition at 127-29 (Exhibit 46)); see generally Defendant's Memorandum at 28-31; Defendant's Opposition at 21-22.

Consistent with this need, Mr. Jex found the 'J-note' method deprived him of effective communication and equal participation in the Becker course. Facts ¶¶ 59-62, 171, 172, 175, 212, 218.

Not only has the Becker company failed to contravene this showing of Mr. Jex's need for an interpreter, it has also failed to meet its burden of presenting specific facts to establish that there is a genuine dispute as to whether Defendant was aware of Mr. Jex's requests for sign language interpreters. See discussion in U.S. Opposition at 13; Facts ¶¶ 164-70, 172, 173, 175, 179-82. Additionally, the Becker company has presented no evidence that company employees took any affirmative step to ensure that Mr. Jex had effective communication of and equal participation in the Becker course. In fact, the record establishes that the opposite is true: although Mr. Jex repeatedly communicated his needs to Becker company representatives including Mrs. Dittmer, Ms. Garrett, Ms. Eby, Ms. Shera, Ms. Staiman, and Mr. Hammer, each of them acted in a manner consistent with the company's policy of refusing to provide sign language interpreters. Facts ¶ 206. No one ever followed up on Mr. Jex's substantial efforts to engage in a meaningful consultation about his communication needs. Id.

Alternatively, even assuming for the sake of argument that Mr. Jex never told company representatives that the 'J-note' method was not working for him, the company was put on notice when he brought his own sign language interpreter. The fact that

he brought his own interpreter evidenced his belief that sign language interpreters were necessary for him in the context of the Becker course. Cf. Rothschild v. Grottenthaler, 907 F.2d 286, 291 (2d Cir. 1990) (the fact that deaf parents of a hearing child provided their own sign language interpreters for parent-teacher conferences was some evidence of their belief that sign language interpreters were necessary for their meaningful participation in those conferences). No one ever asked him why he had gone to that trouble, despite the fact that Becker company representatives were aware of the interpreter's presence. Facts ¶¶ 177-78; see also discussion in U.S. Opposition at 13, 17-18.

The Becker company additionally has not produced evidence of sufficient specificity to refute Mr. Jex's testimony regarding the large amount of classroom interaction that took place in the classes he attended, including instructors' clarifications of the taped lecture, questions and responses, classroom discussion, etc., with respect to which he was denied any opportunity to participate. Facts ¶¶ 171, 175-78; see also Bennett Dec. ¶ 6 (Exhibit 38); Baisey Dep. at 106-108 (Exhibit 44); Facts ¶¶ 20, 141. Although Mr. Baisey and other Becker company representatives were present during four of the five lectures Mr. Jex attended during the summer of 1992, Facts ¶¶ 171, 175-77, neither they nor anyone else has denied the accuracy of his accounts. Mr. Jex's observation that there is substantial classroom interaction is corroborated by other students, including Ms. Palm (Exhibit 39 at ¶ 5); Ms. Bennett (Exhibit 38 at ¶ 6); and Mr. Bergman (Exhibit 12 at ¶ 5). Defendant has not

presented sufficient specific evidence to preclude summary judgment for the United States on this issue.

Although the Becker company states generally that classroom interaction is minimal, it does not have sufficiently specific facts to support this broad claim. See Defendant's Memorandum at 4 (citing Baisey Dep. at 105-107, 133-41). Mr. Jex reports that many instructors, such as Murray Bradford, Thomas Cooke, and Gary Dittmer, interrupt the taped lecture far more often than does Mr. Baisey. Facts ¶ 184. Mr. Jex's testimony is corroborated by Ms. Garrett's comments during a June 26, 1992 conversation with Mr. Jex that "at least one of the instructors in D.C. do[es] put an awful lot of himself into the program which would not be [appropriate] for you." Exhibit F[17] to Jex Supp. Dec. (Exhibit 36) (where, from the context of a later statement made by Ms.

[17] This exhibit is one of many transcripts of conversations between Mr. Jex and Becker company employees. These transcripts were made concurrently with the actual conversations, through a TDD (telecommunication device for deaf persons) with print-out capabilities. They have been authenticated by Mr. Jex in his Supplemental Declaration of Oct. 21, 1993 (Exhibit 36), in which the substance of these conversations also appears.

The TDD transcripts are admissible as evidence. First, to the extent that they serve as notice to Mr. Jex of the Becker company's official policy at various dates, they have a separate legal significance beyond the truth of the matter asserted, and therefore do not fit within the definition of hearsay. Fed. R. Evid. 801(c). Additionally, the Becker company employees' statements reflected in the TDD transcripts are offered as evidence against Defendant and are "statement[s] of which the party has manifested an adoption or belief in [their] truth." Fed. R. Evid. 801(d)(2)(B). See, e.g., Defendant's Memorandum at 5 (citing Defendant's Exhibit 17). Moreover, they are "statement[s] by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . " Fed. R. Evid. 801(d)(2)(D).

Garrett, it appears that this instructor is Gary Dittmer). See also Jex Supp. Dec. ¶ 16 (Exhibit 36).

Further assuming for the sake of argument that Mr. Jex did not inform Becker company representatives that he was having trouble with the 'J-note' method, his failure to do so is excusable under the futile gestures doctrine. See discussion in U.S. Opposition at 38-40. Because the Becker company uniformly told him prior to December 1992 that it would not provide sign language interpreters regardless of his disability and communication skills, it was not incumbent upon him to keep asking.

In its Opposition, the Becker company suggests that in the spring and summer of 1992, it only wanted Mr. Jex to use the 'J-notes' on a trial basis. Defendant's Opposition at 18 (citing Defendant's Exhibit 21). This suggestion is a self-serving, post hoc attempt to revise history. The record contains no suggestion that the Becker company ever represented, prior to December 1992, that it would provide Mr. Jex with sign language interpreters if the 'J-note' method proved unsuccessful for him. Indeed, the record is replete with statements to the contrary. See, e.g., Facts ¶ 206.

The Becker company has not met its burden under Celotex and Anderson v. Liberty Lobby that it come forward with specific evidence demonstrating that there are genuine issues remaining for trial. The Court should declare that the Becker company's treatment of Mr. Jex violated the ADA.

III. **The Court should grant the United States' request for equitable relief**.

The Becker company suggests that the United States' request for equitable relief is too general in nature to be granted. Defendant's Opposition at 29-30. Defendant is correct that injunctive relief should contain sufficient specificity to give the Becker company adequate notice of the types of conduct prohibited by the injunction. To that end, the United States requests that the Court issue a declaratory judgment that Defendant violated sections 302 and 309 of title III, and hold further proceedings to determine the appropriate form of specific injunctive relief. In order to ensure that the Becker company does not continue its discriminatory practices, the Court, with substantial input from the parties, should craft language requiring the Becker company (1) to provide sign language interpreters and other auxiliary aids and services in certain specified circumstances, such as when the student relies on sign language in his or her daily life or has relied on sign language in other educational settings; (2) to report semi-annually all requests for auxiliary aids and services and the disposition thereof to the United States for monitoring; and (3) to refrain from engaging in other specified categories of discriminatory behavior. Each of these suggested injunctive provisions, to be articulated in greater detail at a future proceeding, falls within the broad categories outlined by the government in its Complaint. All are appropriate here.

A declaratory judgment by the Court can, and should, be confined to the facts before the Court. The law requires that entities assessing the extent of their obligation to provide auxiliary aids and services carefully consider the factual context of the communication setting. Consistent with this approach, the Court's declaration that the Becker company violated the ADA by failing to provide sign language interpreters and other appropriate auxiliary aids and services will not impact all entities in the way that it will affect the Becker company and others in fields such as exam preparation courses or education. Restaurants, department stores, hotels, and other related industries generally will not be affected in the same way. For example, holding that sign language interpreters may be necessary for some students in the Becker course would not mean that a fast-food restaurant would have to provide sign language interpreters for its customers with hearing impairments. The nature and setting of the communication is vastly different.

IV. The Court should award damages to Mr. Jex and civil penalties to the United States.

The Becker company is liable to Mr. Jex for its failure to provide him with the full and equal enjoyment of the Becker course by failing to provide him with effective communication and opportunities for full and equal participation. Pain and suffering may form a legitimate basis for monetary relief under title III. Analysis at 626. The record reflects that Mr. Jex suffered from the Becker company's discriminatory treatment of him. See, e.g., Facts ¶¶ 171-72, 175, 217. To avoid such

damages, Defendant must therefore come forward with specific facts establishing that damages are inappropriate in this case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Becker company has not met this burden: all of its arguments concern the appropriate amount of damages for Mr. Jex, not whether damages per se should be awarded to him. There is simply no evidence to establish that Mr. Jex did not suffer, both economically and psychologically, from Defendant's discrimination. It is only the quantification of his suffering that remains at issue.

The Becker company also argues that civil penalties are inappropriate. Defendant's Opposition at 31-32. Again, it has not met its burden under Anderson v. Liberty Lobby of demonstrating specific facts that go to the imposition of civil penalties, per se. Defendant has only argued that it has attempted, in good faith, to comply with the law. Good faith is only relevant to the quantification of civil penalties. See generally 42 U.S.C. § 12188(b)(2)(C)(5). Furthermore, Congress has said that "The 'good faith' standard referred to in this section is not intended to imply a willful or intentional standard -- that is, an entity cannot demonstrate good faith simply by showing that it did not willfully, intentionally, or recklessly disregard the law." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 128 (1990) (Committee on Education and Labor). Here, the Becker company cannot assert that its provision of the 'J-notes' insulates it from the imposition of civil penalties.

In its discussion of the type of good faith conduct necessary to defeat the imposition of civil penalties, Congress stated, "Of course, once an individual has identified and requested a specific auxiliary aid, the public accommodation cannot subsequently claim that the aid could not have been reasonably anticipated." Id. Here, the Becker company cannot complain that it was unaware of Mr. Jex's need for sign language interpreters; civil penalties are particularly appropriate because Defendant had actual and repeated notice of Mr. Jex's request for sign language interpreters. Facts ¶ 260.

Courts should impose civil penalties where, as here, they will "vindicate the public interest." H.R. Rep. 485, 101st Cong., 2d Sess., pt. 3 at 68 (1990) (Judiciary Committee). The Becker company is very large: nationwide, approximately thirty percent of all accountants who pass the CPA examination are Becker course graduates. Facts ¶¶ 7, 8. Because the Becker company is a recognized industry leader in the crucial area of test preparation courses, imposition of civil penalties in this case will greatly deter similar companies from violating the ADA. Educational and professional opportunities for persons with disabilities will increase, thus furthering the fundamental goal of the ADA: "to bring persons with disabilities into the economic and social mainstream of American life." S.Rep. No. 116, 101st Cong., 1st Sess. at 2 (1990) (Committee on Labor and Human Resources).

The Court should declare that civil penalties against the Becker company are appropriate to vindicate the public interest,

and should hold further evidentiary proceedings to determine the amount of penalties to be imposed. At this future proceeding, "the [C]ourt should consider the nature and circumstances of the violation, the degree of culpability, . . . the financial circumstances of the violator, the goal of deterrence, and other matters as justice may require." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 68 (1990) (Judiciary Committee).

Conclusion

There are no remaining factual disputes with respect to the United States' request for a declaratory judgment, injunctive relief, or the imposition of monetary damages for Mr. Jex and civil penalties. This Court should enter partial summary judgment in the government's favor. The Court should further allow the United States to complete its discovery of the Becker company's fiscal status as relevant to the issue of civil penalties, and hold proceedings as to liability with respect to

other former Becker students, the appropriate amount of damages to be awarded to Mr. Jex, and civil penalties to the United States.

Respectfully submitted,

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