

ROBERT J. MATHER
U.S. Department of Justice
Civil Rights Division
Disability Rights Section
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 307-2236

RONALD R. GALLEGOS (013227)
Assistant U.S. Attorney
230 N. 1st Ave., Room 4000
Phoenix, Arizona 85025-0085
(602) 514-7661

Attorneys for the United States

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

WILLIAM D. FERGUSON and)	
ELIZABETH T. FERGUSON,)	
husband and wife,)	
)	NOS. CIV 95-0260-PHX-RCB
Plaintiffs,)	CIV 95-2742-PHX-RCB
)	CIV 96-305-PHX-EHC
)	(Consolidated)
v.)	
)	UNITED STATES' BRIEF AS
CITY OF PHOENIX,)	<u>AMICUS CURIAE</u> IN
a municipality,)	OPPOSITION TO DEFENDANT'S
)	MOTION FOR SUMMARY
)	JUDGMENT
Defendant.)	
)	
)	
)	

I. INTRODUCTION AND SUMMARY

Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq., and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, require 9-1-1 telephone emergency services to provide access to individuals with disabilities, including those with hearing impairments, that is direct and as

effective as that available to non-disabled individuals.

Plaintiffs in these consolidated cases are deaf or have hearing impairments and they use TDD's (telecommunications devices for the deaf) for telephone communications. The claim in each case is that the City of Phoenix has violated the ADA and the Rehabilitation Act by its failure to provide direct and effective 9-1-1 emergency services to individuals who use TDD's.

Defendant has moved for summary judgment in the Ferguson action, claiming that it responded appropriately to Ferguson's 9-1-1 calls in August 1994, and January 1995. It further claims that, in any event, its 9-1-1 system is now "state of the art," as a result of the implementation of a TDD call diverter in August 1995, eliminating any need for injunctive relief at this point.¹

Defendant acknowledges, however, that the current 9-1-1 system provides access only if the caller transmits electronic tones in order for the call to be automatically diverted to one of the two positions equipped with TDD's:

If the caller fails to initiate the audible tone, the system cannot detect that it is a TDD call and cannot automatically divert the call to the [the Center's] TDD equipment.

Defendant's Motion for Summary Judgment at 3 (October 13, 1995). Prior to implementation of the diverter system in August 1995, the system relied on 9-1-1 call takers to hear and recognize the electronic tones and then manually transfer the calls to a TDD-equipped auxiliary unit. Thus, both before and after the

¹ The City further argues that damages are not available to plaintiffs.

diverter system was put in place, the Phoenix system required the transmission of electronic tones in order for the system to respond properly to TDD calls.

Defendant neglects to mention, however, that not all TDD's transmit electronic tones. Furthermore, even on TDD machines that do have such capability, transmitting the tones requires callers to press certain keys on their keyboard, a procedure not typically used by TDD callers. Finally, TDD callers may be unaware (or forget under the stress of an emergency) that the transmission of electronic tones is required in order for the 9-1-1 system to divert the call to a predetermined TDD-equipped position.

The ineffectiveness of the 9-1-1 system is illustrated by the experiences of the plaintiffs in each of these actions who made TDD calls to 9-1-1 at various times before and after the diverter system was in place.² As the facts detailed below demonstrate, the system simply did not respond appropriately to their TDD calls. On each occasion described by plaintiffs, they made a series of calls to 9-1-1, because the system did not on any occasion recognize their first call as a TDD call. Their calls were disconnected by 9-1-1 call takers either because Baudot tones were not transmitted or, even when they were transmitted, were not recognized promptly or at all. Even where

² The Fergusons made calls to 9-1-1 on three occasions, two prior to and the third subsequent to their filing suit. Affidavits of the plaintiffs in the consolidated actions were submitted in support of the plaintiffs' opposition to summary judgment in the Ferguson action.

the callers eventually did receive a TDD response on later calls, there were significant delays and confusion.

The Phoenix 9-1-1 system provides speaking callers the immediate ability to communicate their emergency needs. The Phoenix system did not, at the time of the Fergusons' calls, and does not now, provide effective telephone access to individuals who must use TDD's for telephone communications. While Defendant emphasizes the fact that police were dispatched to the Fergusons' residence on both occasions (the regular practice is to dispatch police on hang up calls), this fact is relevant only to the measure of damages, not to the question of liability. The Fergusons did not have the same opportunity to communicate their emergency needs that speaking callers have when they make an initial call to Phoenix's 9-1-1 system, because its TDD 9-1-1 policies, practices, and procedures required additional steps for TDD callers (transmitting electronic tones) and because call takers were inadequately trained to respond even when TDD tones were transmitted.

This Court should deny Defendant's motion for summary judgment on the issues of liability, and the availability of injunctive relief, and compensatory damages.³

³ The United States addresses in this brief only plaintiffs' claims under title II and section 504 and, with respect to relief, only the issues of injunctive relief and the availability of compensatory damages under the two statutes.

II. FACTUAL BACKGROUND⁴

1. Telecommunications Devices for the Deaf⁵

A. In General

A TDD is a device used with a standard telephone to communicate with persons who are deaf, hard of hearing, or who have speech impairments by typing and reading communications. It is similar to the teletypewriters used by Western Union to "wire" transmissions. The TDD transmits each typed letter by an electronic code called Baudot. The code is sent as audible tones similar to those used by facsimile machines. Exhibit A, Dunne's Declaration ¶ 5.

Conversing in this manner is very similar to a spoken conversation, except that it is typed and read, instead of spoken and heard. A TDD user types his or her conversation, which is read on a display by the other person using a TDD. During the conversation, only one TDD at a time can transmit tones through the telephone line. Both parties must use TDD's to communicate,

⁴ Defendant's Statement of Facts filed in support of its summary judgment motion are cited herein as "DSOF." Other references include: Plaintiffs' Statement of Facts filed in opposition to defendant's summary judgment motion as "PSOF"; Defendant's Summary Judgment Motion cited as "DSJ"; Defendant's Answer to the Complaint as "Answer"; Defendant's Interrogatory Responses as "Interrog. Resp."; and Defendant's Answers to Interrogatories as "Interrog. Ans."

⁵ Attached as exhibit A is the declaration of Toni Dunne, an expert in the field of TDD and 9-1-1 technology, to provide background and explanation of the technological issues presented.

unless they utilize a telephone relay service. Ex. A, Dunne's Dec. ¶ 6.⁶

A person using a TDD does not use the telephone differently than a hearing person other than adding the use of this device. Just as a hearing person will dial a telephone number and wait to hear a person answer with a greeting before proceeding to speak, a TDD caller will dial a telephone number and wait to read a person type a greeting and the "GA" (go ahead) protocol before beginning to converse in text. A TDD user does not typically press keys while awaiting a response to his or her call. Pressing keys at this time would not be considered common practice among TDD users. It is an additional step that could be considered "foreign" TDD protocol. Ex. A, Dunne's Dec. ¶ 7.

B. Receiving and Responding to TDD Calls

Calls coming via TDD must be recognized in one of three ways: silent calls, calls emitting Baudot tones, and those emitting a recorded TDD announcement. Ex. A, Dunne's Dec. ¶ 8.

Silent calls. When a 9-1-1 call taker answers a call with a spoken greeting but hears no voice response, typing a message via TDD will determine promptly if the caller did not respond by voice because he or she is calling via TDD. Ex. A, Dunne's Dec. ¶ 9.

⁶ Telephone relay services involve a communications assistant who uses both a standard telephone and a TDD to type voiced communication to the TDD user and read the typed communication to the voice telephone user. Title IV of the ADA requires telephone companies to provide relay services. Relays may not be used as a substitute for direct access to telephone emergency services (28 C.F.R. pt. 35, app. A at 464 (1994)).

Calls emitting Baudot tones. TDD callers may transmit or try to transmit Baudot tones to alert the Center that the call is being sent via a TDD. Some, but not all, TDD's transmit audible Baudot tones when the caller presses a key(s) immediately after the call is received. Ex. A, Dunne's Dec. ¶ 10.

Calls emitting recorded TDD announcements. Some TDD's have a feature called a "TDD announcer." When a call is answered, the TDD transmits a spoken recording (such as, "HEARING IMPAIRED CALLER. USE TDD") to announce that a TDD is necessary to converse with the caller. The TDD announcer does not emit Baudot tones. Ex. A, Dunne's Dec. ¶ 11.

2. Phoenix's TDD 9-1-1 Policies, Practices, and Procedures

A. Pre-August 1995, Policies, Practices, and Procedures⁷

When the Fergusons made 9-1-1 calls on a TDD in August 1994 and January 1995, Phoenix's method for handling incoming TDD calls consisted of transferring TDD calls from primary positions to one auxiliary (alarm) position where a TDD unit was provided. Interrog. Resp., Request for Admission No. 7 at 3. This TDD unit was used to process all incoming TDD calls received via the 9-1-1 system and the dedicated 7-digit number for TDD calls. Id.; PSOF, Ex. E, Policy No. C-33 (Sept. 1994).

The 9-1-1 positions were not equipped to receive, respond to, and process incoming TDD calls. Call takers were instructed to consider an incoming call emitting "beeping tones" as a TDD

⁷ This section refers to Phoenix's TDD 9-1-1 policies, practices, and procedures in place prior to August 21, 1995, when Phoenix began using a TDD call diverter.

call and manually transfer the call to the TDD unit. PSOF, Ex. E, Policy No. C-33 (Sept. 1994). No typed instructions were given to the TDD caller to remain on line while his or her call was transferred to the TDD unit. Interrog. Resp., Request for Admission No. 13 at 4. Once the call was received by the TDD call taker, an automatic typed message was sent ("Phoenix police department, give us your name address and phone number, how can we help you?"). PSOF, Ex. E, Policy No. C-33 (Sept. 1994).

Shortly before 3 a.m. on August 14, 1994, plaintiff Ferguson attempted to call 9-1-1 four times on his TDD to report a prowler outside his home. DSOF ¶¶ 15, 16, 18-20. No communication occurred between Ferguson and the call takers for any one of the four calls. Id. According to Phoenix, the first call emitted no audible tones and was disconnected. DSOF ¶ 16. The second call emitted an audible tone and the call was manually transferred to the TDD unit within 30 seconds. After the TDD call taker sent the preprogrammed message, the call taker disconnected the call when no response was received from the caller after 27 seconds. DSOF ¶ 18; PSOF ¶ 18. Ferguson states that it appeared to him that the call had been disconnected with no communication after "considerable delay." PSOF, Ex. A (Ferguson affidavit ¶ 9). The third and fourth calls when the call takers answered by voice and heard no verbal response. DSOF ¶ 19, 20; PSOF 19, 20.

Mr. Ferguson looked outside his window, saw that the prowlers were breaking into his vehicle, and because he did not receive a response from Phoenix 9-1-1, risked his life to protect

his family and property by rushing outside to try and stop the thieves. PSOF ¶ 21.

On January 30, 1995, plaintiff Ferguson again placed a series of calls to the 9-1-1 system at approximately 8:00 p.m., to report vandals throwing rocks at his van. DSOF ¶ 22. The 9-1-1 call taker received the first call, heard no audible TDD tone or spoken communication, and terminated the call 9 seconds later. PSOF ¶ 23. Per police department policy, the call taker called Mr. Ferguson back by voice, but received a busy signal. After US West was asked to break in on the line, the US West operator advised 9-1-1 that there was no one on the line. The 9-1-1 call taker dispatched an officer to Ferguson's location. DSOF ¶ 23.

In the meantime, Mr. Ferguson redialed 9-1-1, and tapped the space bar repeatedly. The call taker heard a TDD tone but did not recognize it as coming from a TDD. The call taker asked, "Is there someone on this line?" When there was no response, she then stated, "If no one speaks, I'll have to disconnect." Plaintiff's Addendum to Ex. R of PSOF at p. 1. During that time, Mr. Ferguson had waited for a TDD response. The call taker proceeded to disconnect the call. The call taker called Mr. Ferguson's number back by voice per department policy. DSOF ¶ 24.

At the same time, Mr. Ferguson called 9-1-1 again a third and fourth time, tapping the space bar repeatedly. PSOF ¶ 25. During the third attempt, Mr. Ferguson waited approximately two minutes, and the call taker initially did not recognize the TDD tones. DSOF ¶ 25. Finally, the fourth call was connected to a

TDD call taker. PSOF ¶ 25. Defendant admits that one of the call takers stated she "had not heard the [TDD] tone before." Interrog. Resp., Request for Admission No. 20.

B. Current Policies, Practices, and Procedures

In August 1995, Phoenix implemented a new system for handling TDD calls. The City equipped two of the 30 answering positions with TDD-compatible computer keyboards. Diverter equipment was installed that has the capacity to monitor phone lines and, if Baudot tones are detected, automatically divert the call to one of the TDD-equipped positions. In order to connect the incoming call to one of the TDD-equipped positions, the new system requires TDD callers to transmit TDD tones. Interrog. Resp., Request for Admission No. 18; Interrog. Ans. ¶ 4; DSJ ¶ 3.

If the system detects a TDD call coming in when all 9-1-1 call takers are busy, it will send a pre-programmed message to the caller stating that the caller has reached 9-1-1 and should remain on the line. The TDD call goes to the front of the queue. Once the call is on the line, the call taker receives a spoken message, "TDD call" that is repeated until the call taker presses specific buttons to transfer the call to a TDD-equipped position. Interrog. Resp., Request for Admission No. 8 at 3.

On August 28, 1995, after the diverter system was in place, plaintiff Ferguson called 9-1-1 via TDD to report a prowler seen hiding behind a neighbor's garage. The first call was disconnected by the call taker. PSOF ¶ 27. Plaintiff redialed and this time the call taker disconnected after 28 seconds, with

no communication. PSOF ¶ 28. Plaintiff made a third call, and after a few minutes delay this call was connected to a call taker with TDD equipment. While the third call was in process, plaintiffs experienced considerable delays, of more than several minutes during the communications, giving the appearance that the call taker had placed their TDD call on hold. During these delays, plaintiffs repeatedly typed to ask if the call taker was still there. PSOF ¶ 29.

On November 25, 1995, Bonnie Tucker, plaintiff in CIV 95-2742-PHX-RCB, who is deaf, called 9-1-1 via her TDD. She was calling to ascertain how the system worked with a TDD because her father, who is also deaf, had earlier in the evening tried unsuccessfully to reach 9-1-1 when he believed he was having a medical emergency. Ms. Tucker's first call was not received and recognized as a TDD call. On her second call, she explained her purpose and the call taker suggested she hang up and try again to test how the system was working. Ms. Tucker made three more calls to 9-1-1, with no response to the first two after waiting on the line 2.5 minutes and 3 minutes, respectively. The call taker advised Ms. Tucker that these two calls were identified as hang up calls even though Ms. Tucker was pressing the space bar to emit TDD tones which were apparently recognized on the final call. PSOF, Ex. B (Tucker affidavit).

On December 30, 1995, Jay Frankel, plaintiff in CIV 96-305 PHX-EHC, who has a hearing impairment, called 9-1-1 to report a theft. His TDD transmits a voice announcement to alert call takers that a TDD is required to communicate with him. Each of

his five calls was disconnected. PSOF, Ex. C (Frankel affidavit).

III. ARGUMENT

A. The Phoenix 9-1-1 System Violates Title II and Section 504

In enacting the Americans with Disabilities Act, Congress sought to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA, 42 U.S.C. §§ 12131 et seq., prohibits discrimination against qualified individuals with disabilities by State and local governments in providing public services. It provides that:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity.

Id. at § 12132.⁸

8 Section 504 of the Rehabilitation Act imposes similar requirements for entities that receive federal financial assistance. It provides as follows:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 U.S.C.A. § 794(a). In its summary judgment motion, Defendant concedes for the purpose of argument that it receives federal financial assistance and is therefore subject to the requirements of section 504. DSJ at 13, lines 11-13. DOJ's implementing section 504 regulation elaborates upon the meaning of nondiscriminatory access to programs and services for qualified individuals with disabilities:

There is no dispute that the Phoenix 9-1-1 system is subject to the requirements of title II. The City is a "public entity," as defined in the statute to be "any State or local government" or "any department, agency, . . . , or other instrumentality of a State . . . or local government." 42 U.S.C. § 12131(1)(B). Nor is it disputed that plaintiffs, who are deaf, are "individuals with disabilities" within the meaning of the ADA.⁹ Regulations promulgated under title II amplify the statute's general non-discrimination requirement.¹⁰

A recipient . . . shall provide appropriate auxiliary aids to qualified . . . persons with impaired sensory, manual, or speaking skills where refusal to make such provision would discriminatorily impair or exclude the participation of such persons. . . . Such auxiliary aids may include . . . telephonic devices.

28 C.F.R. § 42.503(f) (emphasis added). The Department of Justice's section 504 regulation, 28 C.F.R. §§ 42.501 et seq., applies to State and local enforcement agencies receiving Federal financial assistance. 42 C.F.R. § 42.502.

⁹ Section 504's "qualified person with a disability" is identical to that of title II.

¹⁰ The Department of Justice promulgated regulations to implement title II (28 C.F.R. Part 35) pursuant to statutory mandate. 42 U.S.C. § 12134(a). As interpretations of the statute, such regulations are controlling. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843-4 (1984). See Tugg v. Towey, 864 F. Supp. 1201, 1205 n. 6, 1208 (S.D. Fla. 1994) (according Department of Justice's title II regulations controlling weight). See also Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ind. 1993) (applying Chevron to give controlling weight to Department of Justice interpretation of title II); Petersen v. University of Wisconsin Bd. of Regents, 8181 F. Supp. 1276, 1279 (W.D. Wis. 1993) (same). In addition, the Department of Justice's interpretations of its own regulation, the analysis in the preamble to the regulation and the Title II Technical Assistance Manual, referenced infra, are entitled to "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). See Tugg v. Towey, 864 F. Supp. at 1208 (relying on the preamble regarding coverage

First, the regulations require that the services provided by public entities to persons with disabilities must be "as effective" in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. 28 C.F.R. § 35.130(b)(1)(iii).

Second, Section 35.130(b)(3)(i) provides:

A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration ... that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.

As pointed out in the interpretative guidance accompanying the regulation, section 35.130(b)(8) not only outlaws overt denials of equal treatment of individuals with disabilities, but also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities greater than those placed on others. 28 C.F.R. pt. 35, app. A at 453-54 (1993).

Third, public entities must make reasonable modifications to their policies, practices, and procedures, where such

of association); Fiedler v. American Multi-Cinema, Inc. 871 F. Supp. 35, 36 n. 4 (D.D.C. 1994) (granting controlling weight to the Department of Justice's Title III Technical Assistance Manual), stating that the Department, as author of the title III regulation, is the principle arbiter of its meaning and should be accorded substantial deference in interpreting its regulation); Noland, 835 F. Supp. at 483 (relying on TA Manual's interpretation of title II); Petersen, 818 F. Supp. at 1280 (same). The Title II Technical Assistance Manual, cited infra, was also issued pursuant to statutory mandate. 42 U.S.C. § 12206(c)(3).

modifications are necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(7).

Finally, as to 9-1-1 emergency services in particular, the regulation specifies that public entities offering telephone emergency services, including 9-1-1 services, must provide "direct access" to individuals who use TDD's. 28 C.F.R. § 35.162. The Department of Justice's analysis of the regulation regarding direct access to 9-1-1 emergency services explains that this rule does not establish any minimum standards of service (e.g., the quantity and location of TDD's and computer modems needed in a given emergency center), but only the performance standard through the mandate for direct access. Public entities must:

take appropriate steps, including equipping their emergency systems with modern technology, as may be necessary to promptly receive and respond to a call from users of TDD's and computer modems. Entities are allowed the flexibility to determine what is the appropriate technology for their particular needs.

28 C.F.R. § 35.162, App. A at. 464 (1993).

Pursuant to statutory mandate, 42 U.S.C. § 12206(c)(3) & (d) (Supp. II 1990), the Department of Justice has published its Title II Technical Assistance Manual (1992 & Supp. 1994) ("TA Manual," attached as Exhibit C) to provide guidance for the public in understanding and complying with the statute and the regulation.¹¹ Regarding the title II requirement for access to

¹¹ The Department's interpretations of its regulation found in the Technical Assistance Manual are entitled to deference. See n. 10, supra.

9-1-1 emergency services, the TA manual states:

Many public entities provide telephone emergency services by which individuals can seek immediate assistance from police, fire, ambulance, and other emergency services. These . . . [9-1-1 emergency services] are clearly an important public service whose reliability can be a matter of life or death. Public entities must ensure that these services . . . are accessible to persons with impaired hearing and speech.

TA Manual at ¶ II-7.3100, p. 41.

The TA Manual explains that public entities are prohibited from imposing any additional dialing or space bar requirements upon individuals with disabilities for access to 9-1-1 systems:

Additional dialing or space bar requirements are not permitted. Operators should be trained to recognize incoming TDD signals and respond appropriately. In addition, they also must be trained to recognize that "silent" calls may be TDD or computer modem calls and to respond appropriately to such calls as well.

A caller, however, is not prohibited from announcing to the answerer that the call is being made on a TDD by pressing the space bar or keys. A caller may transmit tones if he or she chooses to do so. However, a public entity may not require such a transmission.

Id. at p. 42.¹²

12 On August 3, 1994, the U.S. Department of Justice sent a letter to the mayors of approximately 150 cities, including Phoenix, encouraging Phoenix and the other cities to "review [their] telephone emergency services to determine whether they effectively service the needs of all citizens of [their] community, as required by the law. Mather's Dec. ¶ 5; Mather's Dec., Ex. 2. The letter included a copy of a settlement agreement between the Department of Justice and the City of Los Angeles. Mather's Dec., Ex. 1. Under this agreement, the City of Los Angeles agreed to implement and maintain procedures "to ensure that telecommunicators recognize TDD tones and silent open tones and that telecommunicators will consider a silent open line a possible TDD call and respond accordingly. Mather's Dec. ¶ 3. The City also installed TDD-compatible equipment at each of the 27 individual answering stations; properly maintained the system and provided backup equipment in the event that the equipment becomes inoperable; and provided training for emergency dispatchers in the proper operation of TDD's. Mather's Dec. ¶ 3.

Both Phoenix's current diverter system and the system in place when Mr. Ferguson made his August 1994 and January 1995 calls require TDD callers to hit the space bar or other keys on their TDD machines to emit electronic tones. This requirement and other features of the Phoenix system combine to deny individuals with disabilities who use TDD's access to 9-1-1 service equal to that available to non-disabled individuals.

In August 1994 and January 1995, when the Fergusons made their calls, the primary answering positions for the 9-1-1 system were not equipped for receiving and responding to incoming TDD calls. Instead, the call taker, only if she or he heard and recognized electronic tones emitted from a TDD, would transfer the call to the TDD-equipped auxiliary position. Call takers at the primary answering positions were not trained to consider silent calls as possible TDD calls and, in any event, did not have the necessary equipment to query the lines via TDD to ascertain whether it was or not. Even when a call was recognized and transferred as a TDD call, the caller would not receive any instructions to remain on line while his or her call was transferred to the TDD unit. For the Fergusons, the result was that they were never able to communicate their emergency needs to 9-1-1 operators.

The diverter system installed in August 1995 automatically detects and diverts TDD calls only if TDD tones are transmitted. There continues to be no procedure or capability to query silent calls as possible TDD calls. If a TDD user calls 9-1-1 from a TDD that does not have the capability to emit the Baudot tones or

if the caller does not know or forgets that emission of the tones is required, the new system does not recognize it as a TDD call and treats it as a "hang up" call. It is unreasonable to expect that every TDD user can be educated about the transmission requirement, which is not the normal protocol for making TDD calls, and, then, be expected to remember to follow that procedure during an emergency.

TDD calls that do not initiate tones are effectively "silent" open-line calls. The Phoenix system treats these types of calls as hang-ups and callback procedures are initiated. If a TDD caller continues to stay on the line, waiting for a TDD response from 9-1-1, the call taker making the callback will get a busy signal. The additional time needed to callback creates an unnecessary time delay. Even though police are dispatched to a caller's residence when there is no voice response, if the caller is reporting a fire or seeking emergency medical help, these needs will not be communicated at least until police arrive. Precious time is lost, which may mean the loss of live or property in such emergencies.

By contrast, non-disabled individuals who make voice calls to 9-1-1 have the ability to communicate their emergency needs immediately. By maintaining the requirement for TDD callers to transmit the electronic tones, Phoenix puts lives in jeopardy and imposes an additional burden on individuals with disabilities to obtain the same level of service non-disabled individuals receive, in violation of 28 C.F.R. §35. In short, the Phoenix 9-1-1 system denies equal and direct access to individuals with

disabilities who must use TDD's to communicate by telephone in violation of title II of the ADA and section 504.¹³

While the government believes the undisputed evidence supports summary judgment in favor of plaintiffs on liability, entitling them to injunctive relief, there are certainly, in any event, sufficient disputes of material fact to warrant denial of defendant's motion for summary judgment.

B. Compensatory Damages are Available Remedies under Title II and Section 504

Title II and section 504 afford individuals the same remedies. Section 203 of the ADA provides that individuals shall have the same "remedies, procedures and rights" under title II as

13 The City's system is not now, but could easily become, a "state of the art" system. Each answering position could be equipped with appropriate TDD-compatible technology not only for promptly receiving and responding to TDD calls, but also for querying silent calls for possible TDD calls and making call backs in cases of disconnected TDD calls.

However, the issue of providing direct access involves more than the acquisition of equipment. It also requires the access to be "effective" which includes establishing appropriate policies, standard operating procedures, as well as providing call-takers with comprehensive training and refresher courses.

At a minimum, in order to provide effective response to calls made from TDD's, a PSAP must develop and implement standard operating procedures to ensure that call takers recognize TDD tones and silence, and that call takers will consider a silent open line as a possible TDD call and respond accordingly.

A comprehensive training program should include, but is not limited to, general information about the Americans with Disabilities Act and section 504 of the Rehabilitation Act; communication variables of individuals who are Deaf, hard of hearing or have speech impairments, including information on American Sign Language; practical instruction on equipment to include identification and processing of TDD calls; handling of telecommunication relay service calls. A training program should also include refresher courses.

those provided for section 504 which, in turn, incorporates the "remedies, procedures, and rights" under title VI of the 1964 Civil Rights Act. See 42 U.S.C. § 12133, 29 U.S.C. § 794(a). In 1986, Congress added a provision to title VI abrogating States' Eleventh Amendment immunity and clarifying that "remedies both at law and in equity" are available against State defendants under various statutes (including title VI and section 504) to the same extent as against other defendants. 42 U.S.C. 2000d-7. The ADA contains a virtually identical provision. See 42 U.S.C. 12202. The term "remedies . . . at law" clearly includes damages, see Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992), and reflects Congress' understanding that such relief is available under title VI and section 504. In Franklin, the Supreme Court held that a private plaintiff could seek compensatory damages under title IX of the Education Amendments of 1972, 20 U.S.C. 1681-1688 (title IX), whose remedies provision is also patterned on title VI. In reaching that conclusion, the Court reaffirmed the long-standing rule that where a statute provides a private right of action (either expressly or implicitly), courts must presume the availability of "all appropriate remedies" unless Congress has clearly indicated otherwise. 503 U.S. at 66 (emphasis added).

While the City cites to Franklin, it ignores the well-established principle articulated in that case when it asserts that compensatory damages are available only for "intentional" violations of title II and section 504. Leaving aside the question of whether "intentional" discrimination has been alleged

in this case, there is nothing in the statutory language to support the City's view that Congress intended to limit remedies in this fashion. The City's position is based on a faulty reading of Franklin.

Franklin did not hold that discriminatory intent was a prerequisite for recovery of damages under title IX, or that the usual presumption would not apply in the absence of such intent. The Court simply had no occasion to decide that issue since the plaintiff in Franklin alleged intentional discrimination. In dictum, Franklin drew a distinction between "intentional" and "unintentional" discrimination in rejecting the defendants' argument that "the normal presumption in favor of all appropriate remedies should not apply because title IX was enacted pursuant to the Congress' Spending Power Clause," id. at 74. The Franklin Court read Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), as suggesting that remedies for "unintentional" discrimination may be limited under Spending Clause statutes because a recipient of federal funds might lack notice that it will be liable for a monetary award for such a violation. 503 U.S. at 75. But Franklin itself did not endorse such a limitation for "unintentional" discrimination under Spending Clause legislation. Rather, the Court merely emphasized that any lack of notice problems that might exist in cases of unintentional violations would not arise in lawsuits challenging intentional discrimination because the recipients of federal funds would clearly know that such purposeful conduct is unlawful. Id. at 74-75. In this case, of course, there is also

no lack of notice because the title II regulations speak directly to the requirements for direct access to 9-1-1 emergency services for individuals with disabilities.

IV. CONCLUSION

For the foregoing reasons, this Court should deny the City's motion for summary judgment with respect to the issues of liability under title II and section 504, and the issue of the availability of compensatory damages as a remedy in this case. Submitted this 22nd day of February, 1996.

Respectfully submitted,

JANET NAPOLITANO
United States Attorney,
District of Arizona

DEVAL L. PATRICK
Assistant Attorney General
for Civil Rights

By: _____
Ronald R. Gallegos
Assistant United States
Attorney

By:
John Wodatch
Joan Magagna
Robert J. Mather
U.S. Department of Justice
Civil Rights Division
Disability Rights Section
P.O. Box 66738
Washington, D.C. 20035-6738
Tel: (202) 307-2236