IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN KOVACS,	)	
Plaintiff,	)	Civil Action 93-2576
v.	)	PLF
DR. FUMIKAZU KAWAKAMI,	)	
Defendant.	)	

UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION

I. INTRODUCTION

Plaintiff Susan Kovacs is deaf. On December 2, 1993, she had an appointment to see the defendant, Dr. Fumikazu Kawakami, a physician who is a pulmonary specialist. Although there is disagreement between the parties regarding some of the facts surrounding the appointment, there is no dispute that the following written notes were exchanged between Ms. Kovacs and Mrs. Vella Kawakami, a general assistant in defendant's office, on December 2, 1993:

Mrs. Kawakami:	"Who send (sic) you here? We cannot take you because we cannot communicate w/ you."
Ms. Kovacs:	"First of all I have the information that you may need for deaf patients. I was referred here by Providence Hosp[ital]."

Mrs. Kawakami: "As I said we cannot communicate w/ you because we do not know sign language."

Mrs. Kawakami then left the reception area and when she returned wrote the following:

"The doctor said you have to bring your family who can talk."

Ms. Kovacs then placed her materials regarding the ADA on the desk and left the office.

Ms. Kovacs filed this lawsuit alleging that Dr. Kawakami has discriminated against her on the basis of her disability, deafness, in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. The case is now before the Court on cross-motions for summary judgment. Defendant's motion asserts that Ms. Kovacs lacks standing. Ms. Kovacs claims, based on the above exchange, and other undisputed facts, that she is entitled to judgment as a matter of law.

The United States submits that, on the basis of this note exchange and other undisputed facts, defendant's actions violate the ADA. This violation does not turn on whether Ms. Kovacs or any of the others who acted on her behalf effectively requested a sign language interpreter for her appointment. Instead, this is a very straightforward case of denial of treatment -- outright exclusion -- and unequal treatment, on the basis of disability. Defendant refused to treat Ms. Kovacs during her scheduled

appointment on the basis of her disability, even though communication was proceeding through written notes.

Plaintiff did not attempt to see Dr. Kawakami again. Under title III of the ADA, "a person with a disability [is not] require[d] to engage in a futile gesture if such person has actual notice that a person or organization covered by [title III] does not intend to comply with its provisions." 42 U.S.C. § 12188(a)(1). Defendant indicated his intent to discriminate in the future by conditioning the receipt of his services on Ms. Kovacs bringing a family member "who can talk." Defendant's abandonment of that condition and his promise to afford communication assistance in the future, coming as they do in the course of defending this suit, are insufficient to defeat plaintiff's standing and avoid injunctive relief.

The United States as amicus curiae urges the Court to rule: a) that plaintiff has standing to bring her claims for declaratory and injunctive relief; and b) that undisputed facts establish that defendant's actions violate the Americans with Disabilities Act. Accordingly, plaintiff's motion for summary judgment should be granted and defendant's motion should be denied.

II. FACTS

A. Susan Kovacs' Positive Test for Exposure to Tuberculosis and Record of Respiratory Ailments

Susan Kovacs is a 48 year-old deaf woman who is a full-time undergraduate student at Gallaudet University in northeast Washington, D.C. Plaintiff's Rule 108(H) Statement at ¶¶ 1,2.[1] All of the members of Ms. Kovacs' family are deaf, and her four children also attend Gallaudet University. Deposition of Susan Kovacs at 8 (hereinafter referred to as "Kovacs Dep."). In the fall of 1993, Ms. Kovacs experienced breathing difficulties and coughing problems and sought medical treatment at the Gallaudet University Health Service. ¶ 6; Kovacs Dep. at 17-19, ¶ 7. On November 19, 1993, Ms. Kovacs was given a skin test to determine exposure to tuberculosis. The test was positive and she was told to obtain a chest x-ray at Providence Hospital to determine whether she had active tuberculosis. ¶¶ 4, 5.

Ms. Kovacs had a chest x-ray at Providence Hospital on November 26, 1993, which was negative for active tuberculosis.[2] On or about November 29, 1993, Ms. Kovacs went again to the emergency room at Providence Hospital with a hacking cough,

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[1] Hereinafter, Plaintiff's Rule 108(H) Statement will be referred to only by paragraph number.

[2] There was some confusion in Ms. Kovacs' deposition regarding the dates on which she went to Providence Hospital. The dates are immaterial.

fatigue and difficulty breathing. Complaint Exhibit I. Hospital records note that Ms. Kovacs' complaint in coming to the Emergency Department was "'shortness of breath, cough,'" ¶ 11, and the Hospital's Diagnostic Impressions remarked that Ms. Kovacs was a "'TB converter'" and had a "'nocturnal cough.'" ¶ 12. The attending physician advised Ms. Kovacs to seek further medical consultation with a pulmonary specialist within the next five to seven days and referred her to Dr. Kawakami. ¶ 14.

B. Ms. Kovacs' Efforts to Contact Dr. Kawakami

On or about the same day of the visit to the Providence Hospital Emergency Department (November 29, 1993), Ms. Kovacs placed a call through the D.C. relay service[3] to Dr. Kawakami's office. The call was received by Maria Teresita San Juan, a part-time billing clerk employed by Dr. Kawakami, with occasional responsibility for answering the phone. ¶ 23. Ms. Kovacs scheduled an appointment for December 2, 1993. Before December 2, Ms. Kovacs sought assistance first from Providence Hospital and later the National Center for Law and Deafness in an effort to ensure that a sign language interpreter would be available for

[3] The relay service enables individuals who are deaf and use telephone communication devices for the deaf (TDDs) to communicate through an operator with an individual who does not have a TDD. The relay operator types the hearing individual's remarks to the deaf individual via the TDD, and voices the deaf individual's typed remarks to the hearing individual.

her appointment with Dr. Kawakami.[4] Ms. Kovacs told Ms. San Juan that she had tested positive for exposure to tuberculosis.[5]

C. Departure from Dr. Kawakami's Office Protocol in Handling Ms. Kovacs' Appointment

Mrs. Kawakami testified that, when new patients call to make an appointment with Dr. Kawakami, the office follows a routine protocol. The office asks the person's name, age, telephone number, as well as referral and insurance information. New patients are also instructed to bring a photo I.D., insurance I.D., medicine, and x-rays. Vella Kawakami Dep. at 20-21, 25.[6]

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[4] Although there is a dispute over whether Dr. Kawakami's office in fact received and refused a clear request to provide a sign language interpreter for the December 2, 1993 appointment, the Court can determine liability based solely on the facts that are undisputed. These disputed facts are thus not material to the nature of discrimination at issue. It is not disputed that Maria Teresita San Juan told Mrs. Kawakami about Susan Kovacs' call to schedule an appointment and that Ms. Kovacs communicated with her through a computer. San Juan Dep. at 32-36; Vella Kawakami Dep. at 52-53. It is also undisputed that Mrs. Kawakami received a call from "Gail" at Providence Hospital requesting an interpreter for Susan Kovacs (Vella Kawakami Dep. at 52, 89), and that Mrs. Kawakami received a call from Susan Shimko of the National Center for Law and Deafness regarding Susan Kovacs' appointment and the doctor's responsibilities under the ADA (V. Kawakami Dep. at 47-52).

[5] Vella Kawakami confirmed that the office was aware Susan Kovacs had tested positive. Vella Kawakami Dep. at pp. 37-40, 89.

[6] Mrs. Kawakami stressed this point in her testimony:

Q. [] When a new patient comes who's been referred from Providence, do they bring their X-rays with them?
A. By phone, we tell them if it was done somewhere else. If it is from the hospital, we ask them to go get it.

Upon arrival for appointments in Dr. Kawakami's office, new patients are routinely asked to sign in, and are given forms to fill out requesting basic patient information and insurance data. Vella Kawakami Dep. at 28, 30. If a patient who has been referred from Providence Hospital (which is next door to Dr. Kawakami's office) does not have with them the x-rays taken there, someone from the doctor's office or the patient will be sent next door to get them. Vella Kawakami Dep. at 26.[7]

None of these procedures were followed with respect to Ms. Kovacs. Ms. San Juan did not ask Ms. Kovacs to bring her x-rays with her to the appointment although she had been trained to make

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Q. So the person making the new appointment for a new patient would tell the new patient, "Please bring your X-rays with you?"
A. Yes, if they're coming for pulmonary consult.
Q. Uh-huh. Would a person coming for an appointment who had tested positive for tuberculosis be considered a pulmonary consult?
A. Yes.

Vella Kawakami Dep. at 25.

[7] While not material to the suit, defendant states that "it is not unusual for this retrieval process to take "two hours or more." Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 31 (hereinafter "Def. Opp."). This assertion is not supported by the record. In fact, it seriously misrepresents Dr. Kawakami's statements. At three different points during his deposition, Dr. Kawakami confirmed that it took only 5-10 minutes to retrieve a patient's x-rays from Providence Hospital. F. Kawakami Dep. at pp. 79, 85, 88-89. Dr. Kawakami's reference to "two hours" was to the amount of time necessary to take an x-ray at Providence. In fact, in response to the follow up question "But if they had a chest X-ray already done at Providence, it would only take you five or ten minutes to get it?", Dr. Kawakami

such requests routinely. Vella Kawakami Dep. at 25. When Ms. Kovacs arrived for her December 2 appointment with Dr. Kawakami, she was not provided with a new patient form. Ms. Kovacs was not asked her age, telephone number, or insurance information. No inquiries were made about her x-rays or other tests from Providence Hospital. This preliminary exchange of information could have taken place with handwritten notes. Instead, the notes described above were exchanged and Ms. Kovacs left the office without seeing Dr. Kawakami.

D. Ms. Kovacs' Future Needs to Seek Medical Care from Dr. Kawakami

After being turned away by Dr. Kawakami, Ms. Kovacs sought and received medical care from another pulmonary specialist.

However, Ms. Kovacs remains concerned about the health of her lungs and, as future problems develop, she states that she would like to return to Dr. Kawakami for future treatment; she believes he is the best doctor for her condition since Providence Hospital referred her to him. Aff. of Susan Kovacs at ¶ 4. Ms. Kovacs' health concerns and the likelihood that she will require the services of a pulmonary specialist in the future are not without basis. When asked in his deposition how long people remain positive for tuberculosis, Dr. Kawakami answered, "Rest of their lives." F. Kawakami Dep. at 54-55 (emphasis added). Once

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stated: "Uh-huh. That's what I told you." F. Kawakami Dep. at 89. See also Vella Kawakami Dep. at 26 (same).

someone has tested positive for exposure, active tuberculosis can develop at any time. F. Kawakami Dep. at 61. Ms. Kovacs' tuberculin skin test or "PPD" result showed a reaction of over 10 millimeters, which generally represents infection with Mycobacterium tuberculosis.[8] Approximately 25 percent of individuals exposed to Mycobacterium tuberculosis become infected. Of those, about 10 percent will develop clinically active tuberculosis at some point in their lives.")[9]

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[8] Susan Kovacs' Gallaudet University Health Service form dated November 22, 1993 (showing positive PPD reading of 10 mm diameter); See e.g., P.T. Dowling, Return of Tuberculosis: Screening and Preventative Therapy, Am. Family Physician, vol. 43 (2), Feb. 1991, at 457-467 ("[d]epending on the characteristics of the local population and individual medical risk factors, a reaction (induration) between 5 and 15 mm (or more) generally represents infection.").

Dr. Kawakami's testimony further illuminates the implications of Ms. Kovacs' PPD reading:

> Q. When somebody tests positive for TB, what does that mean?
> A. That particular person has exposed to tuberculosis bacteria. That's what that mean.
> Q. So they've just been exposed?
> A. Uh-huh.
> Q. And if they were to have a 10 millimeter or above result, that would be --
> A. It depends on the situation.
> Q. -- a strong likelihood that somebody with that is TB-positive?
> A. It's strong with 10 millimeter, yes.

F. Kawakami Dep. at 54 (emphasis added).

[9] P.T. Dowling, Return of Tuberculosis: Screening and Preventative Therapy, Am. Family Physician, vol. 43 (2), Feb. 1991, at 457-467.

The possibility that Ms. Kovacs will develop active tuberculosis is especially high during the next few years, assuming that her positive PPD resulted from recent exposure. See F. Kawakami Dep. at 71-72; 55 ("[if] PPD is positive, negative chest x-ray, you have a certain increased chance to get active tuberculosis for the next three or four years.")

Ms. Kovacs continues to be confused concerning the appropriate course of treatment for persons in her condition. As recently as mid-December 1994, Ms. Kovacs was still under the impression that she was supposed to obtain a chest x-ray every year.[10] Ms. Kovacs' deposition also reveals confusion regarding

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[10] Q. Have you seen Dr. Hines?

A. I went to the doctor recently last week or two weeks ago because I thought I was supposed to have an x-ray every year. That's what they told me I was supposed to have an annual x-ray because I was not taking whatever that NIH medication is. But they said no, it isn't good for you to have an x-ray every year, but I thought I was supposed to have it every year, so not unless I have symptoms. And I didn't have any.

Kovacs Dep. at 61. See also Kovacs Dep. at 61-65 (containing further discussion regarding Ms. Kovacs' confusion over the advisability of annual chest x-rays).

When Dr. Kawakami was asked whether he would recommend annual chest x-rays for someone who had tested positive for exposure to TB, he answered: "We don't take any annual chest X-ray, even patient with positive PPD. We don't do it unless you have symptoms - Unless you have symptoms of tuberculosis, we don't take chest X-ray . . . . Q. So you would, therefore, not recommend the annual chest X-rays? A. No. Absolutely not." F. Kawakami Dep. at 73-74.

the INH drug discussed by Dr. Kawakami in his deposition at 64-74. See Kovacs Dep. at 59-65 (stating that she "wanted some more knowledge" about whether she should take the INH drug, and reciting varying advice received from medical practitioners regarding whether she could take INH drug).[11] Ms. Kovacs' uncertainty regarding the proper course of preventive treatment for her condition is significant; as the attached 1992 "Public Health Report" issued by the Department of Health and Human Services states, "patients' understanding of their symptoms and their assessment of available health care resources are widely acknowledged as crucial to tuberculosis control."[12] All of the

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[11] Q. What did she [Dr. Hines] tell you about the medication as well as you remember; can you remember what she said about the medication?

A. I remember she said NIH or whatever the medication is, is for TB exposure and I would have to take it every day for six months, I guess two, I don't know. I don't know what I was supposed to do, but I remember she explained that part of it. What it's for, I don't remember. But anyway I couldn't take it because there was no sense in explaining it to me in depth. It would damage my liver. I don't know much about medicine.

Kovacs Dep. at 59-60. Cf. Am Fam Physician 1991 Feb; 43 (2); 457-67 ("Isoniazid therapy in persons with positive skin tests will decrease the risk of disease by 60 to 80 percent.")

[12] Arthur J. Rubel & Linda C. Garro, Social and Cultural Factors in the Successful Control of Tuberculosis, U.S. Dept. of Health & Human Servs., Nov.-Dec. 1992, Public Health Reports 107 at 626-636. (Attachment A) (Hereinafter HHS Public Health Report).

foregoing make it likely that Ms. Kovacs will seek further medical advice from a pulmonary specialist.[13]

Ms. Kovacs attends Gallaudet University which offers medical care to its students through the Student Health Service. The Student Health Service refers patients needing emergency room treatment primarily to Providence Hospital and the Washington Hospital Center, because both facilities are within a five-mile radius of Gallaudet University and are accessible by public transportation.[14] Students needing x-rays are primarily referred to Providence Hospital, due to its simplified procedures for obtaining x-rays.[15] Dr. Kawakami is one of only four pulmonary specialists to whom Providence Hospital refers patients. F. Kawakami Dep. at 48-49.[16] Dr. Kawakami's office is also located conveniently for Ms. Kovacs, since she resides in a dormitory at Gallaudet University.

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[13] This is particularly true given the recent resurgence of tuberculosis, both worldwide and in the United States. See HHS Public Health Report. See also Malcolm Gladwell, Tuberculosis Rates Increase Nationwide; Early Warnings Went Unheeded; Problem Now Is Far More Costly, The Washington Post, Mar. 9, 1992, at A1. Dr. Kawakami himself testified as to the resurgence of tuberculosis in Washington D.C., in particular. F. Kawakami Dep. at 52-3.

[14] Plaintiff's Rule 108(H) Statement at paragraph 8; affidavit of Ilnez Hines.

[15] Id.

[16] See also id. at ¶ 15.

III. ARGUMENT

A. SUSAN KOVACS HAS STANDING TO ASSERT CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Standing for Private Rights of Action Under the ADA is Critical to Effective Enforcement of this Important Civil Rights Law

The Americans with Disabilities Act of 1990 is a sweeping civil rights law designed to "provide a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities." 42 U.S.C. § 12101 (b)(1). In passing the ADA, Congress expressly found:

> unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.

42 U.S.C. § 12101 (a)(4) (emphasis added). Thus, Congress stated that a primary purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." Section 12101 (b)(2).

A key enforcement mechanism is the statute's private right of action allowing individuals to sue for injunctive and declaratory relief.[17] Under defendant's view of standing,

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[17] For private suits, title III of the ADA adopts the "remedies and procedures" set forth in title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3(a). Title II provides: "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a[n] .

however, this private right of action would be rendered a nullity.

Because damages are not available in private suits under title III of the ADA, a finding that Ms. Kovacs lacks standing would deprive Ms. Kovacs of a forum in which to vindicate her civil rights. To deny plaintiff such a forum where defendant so plainly violates her rights, both by denying her services on the basis of her disability, and by placing discriminatory conditions on her future health care, see discussion infra at 30-45, would afford Ms. Kovacs "no legal recourse to redress" discrimination, and would render the promises of the ADA meaningless. Moreover, the failure to hear plaintiff's claim would effectively immunize the sort of discrimination perpetrated by defendant. Such a concern for evisceration of the effectiveness of federal law was raised in City of Los Angeles v. Lyons, 461 U.S. 95 (1983) a case upon which defendant heavily relies. Id. at 112-3 (because of the availability of damages, "withholding injunctive relief does not mean that the 'federal law will exercise no deterrent effect in these circumstances'" quoting from O'Shea v. Littleton, 414 U.S. 488 at 503 (1974)).

Under the ADA as under the Fair Housing Act, and the Civil Rights Act of 1964, suits by "private attorneys general" are

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. . injunction . . . may be instituted by the person aggrieved[.]" 42 U.S.C. § 2000a-3(a).

critical to successful enforcement of the law where federal enforcement resources are limited. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) ("[S]ince the enormity of the task of assuring fair housing makes the task of the Attorney General in the matter minimal, the main generating force must be private suits in which. . . the complainants act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'");[18] Newman v. Piggy Park Enters., Inc., 390 U.S. 400, 401 (1968) (private attorneys general critical for enforcement of Title II of the Civil Rights Act of 1964).[19]

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[18] In Trafficante, the court noted that there were fewer than 24 attorneys dedicated to Fair Housing Act enforcement. The Department of Justice currently has 26 attorneys responsible for ADA enforcement.

[19] In other cases involving disability discrimination under the Rehabilitation Act of 1973, courts have found standing where such private attorneys general suffered injury less imminent than that facing Ms. Kovacs. For example, in DeLong v. Brumbaugh, 703 F. Supp. 399 (W.D.Pa. 1989), the court found, despite the unavailability of damages, that there was sufficient reality and immediacy to warrant the issuance of relief declaring a violation of section 504 of the Rehabilitation Act where a deaf individual was excluded from a jury. The fact that plaintiff could be called to jury service at any time was deemed sufficient. The court found that declaratory relief would serve the public interest and act as a vindication of the plaintiff's rights and of the extent of the rights of handicapped persons under section 504. See Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1113 (9th Cir. 1987) (rejecting district court's finding that request for declaratory relief was moot due to absence of current federal funding in Rehabilitation Act case, where "[s]uch relief might be appropriate as a vindication of

Congress considered access to essential services like health care to be of the highest priority. In passing the ADA, Congress explicitly found that "discrimination against individuals with disabilities persists in such critical areas as . . . health services." 42 U.S.C. § 12101(a)(3).

The ADA plainly covers discrimination like that perpetrated against Ms. Kovacs. See discussion infra. The statute provides relief to:

> [A]ny person who is being subjected to discrimination on the basis of disability in violation of this title . . . Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.

42 U.S.C. § 12188(a). Ms. Kovacs was subjected to discrimination on the basis of disability during her scheduled appointment. The discriminatory condition defendant placed on her future services -- accompaniment by a family member "who can talk" -- gave Ms. Kovacs' such actual notice that defendant did not intend to comply with the ADA for subsequent visits. As noted infra, she was not then obligated to engage in the "futile gesture" of returning to his office and subjecting herself to ongoing discrimination in order to preserve a claim against Dr. Kawakami. Id. As with other civil rights statutes, standing under the ADA should be interpreted as broadly as permissible under the

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plaintiff's position and as a public statement of the extent of handicapped persons' rights under section 504").

Constitution. Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); see also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

2. Defendant's Discrimination Imposes Actual or Imminent Injury

Defendant argues that Ms. Kovacs has failed to show injury that is "(a) concrete and particularized, and (b) actual or imminent," in order to establish standing. Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S.Ct 2130, 2136 (1992). First, he asserts that she has no further need for the services of a pulmonary specialist. Second, he promises that should she wish to see him in the future, he would provide a sign language interpreter for any appointment. Defendant's arguments are without merit.

a. It is Likely that Ms. Kovacs will Return to Dr. Kawakami's Office

What constitutes sufficient injury turns on the factual and legal contexts presented in a given case. As the Supreme Court has explained, standing does not lend itself to mathematically precise evaluations, and is to be determined chiefly by comparing the facts and allegations of the case at issue to prior standing

cases. Allen v. Wright, 468 U.S. 737, 751-752 (1984);[20] see also Foundation on Economic Trends v. Lyng, 943 F.2d 79, 82 (D.C. Cir. 1991) (quoting Justice Frankfurter's view of standing which "is more or less determined by the specific circumstances of individual situations." (citation omitted)).

The facts in the instant case show that Ms. Kovacs is threatened with an injury that is "real and immediate," and impending. Undisputed facts regarding Ms. Kovacs' positive test for exposure to tuberculosis, her bouts with respiratory ailments, and the confusion she exhibits regarding her medical condition all make it likely that Ms. Kovacs will again seek the services of a pulmonary specialist. Undisputed facts regarding the doctor's proximity to her residence and his relationship with Providence Hospital where Gallaudet refers students make it likely that Dr. Kawakami is the pulmonary specialist by whom Ms. Kovacs will be treated.

In his motion for summary judgment, defendant repeatedly emphasizes that Ms. Kovacs' chest x-ray came back negative, and that she therefore has no immediate need to see Dr. Kawakami. Defendant characterizes Ms. Kovacs' infection with Mycrobacterium tuberculosis as a mere "episode" that is now "complete and

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[20] Allen referred only to the allegations in the complaint, but at the summary judgment stage, the court must consider the full record. See Lujan, 112 S.Ct. at 2136.

finished."[21] But defendant has already testified to the contrary. In his deposition, Dr. Kawakami confirmed that a positive PPD test signals a chronic condition that puts an individual at greater risk for developing active tuberculosis throughout her life. F. Kawakami Dep. at 55. Further, Dr. Kawakami testified that the risk is greatest during the first few years following exposure. See supra at 9. He also testified that someone who tests positive and has a negative chest x-ray, but is experiencing a lot of coughing and difficulty breathing should see a pulmonary specialist. F. Kawakami Dep. at 61. These are precisely the symptoms for which Ms. Kovacs, with her positive skin test and negative chest x-ray, twice sought help from the emergency room in the recent past.[22]

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[21] Def.'s Mot. for Summ. J. at 16.

Defendant's suggestion that Ms. Kovacs' test results were a "false positive," Def. Opp. at 19, is disingenuous. Ms. Kovacs' skin test for exposure to tuberculosis was positive. The fact that Ms. Kovacs' chest x-ray was negative shows only that active tuberculosis has not yet developed, although it could at anytime throughout Ms. Kovacs' life. See F. Kawakami Dep. at 55.

[22] See Kovacs Dep. at 17-19 (discussing breathing difficulties and coughing problems, and visits to student health service for shortness of breath and cough); see also discussion at page 4, supra.

These and other symptoms of active tuberculosis -- cough, fever, weight loss, fatigue -- may or may not turn out to be related to the onset of the disease, which is why it is important to seek the advice of a specialist. This is particularly true given the inadvisability of obtaining annual chest x-rays to

It is generally not possible to make precise predictions about any individual's future need for medical care. Even for an individual with a history of respiratory ailments, it is impossible to predict whether she will develop another illness in a day, or six months or a year. What is certain, however, is how very necessary access to health care services is when a person does becomes ill. And here, where Ms. Kovacs continues to be confused about the proper course of future tests and treatment for her (see supra at 8-11), it is likely that she will seek advice from a pulmonary specialist even if active tuberculosis does not develop especially because the symptoms of tuberculosis can mirror those of less serious respiratory ailments.

Ms. Kovacs has stated a specific desire to return to Dr. Kawakami if she has further lung problems. Yet, outside of statements made in the course of this litigation, Dr. Kawakami's last communications to Ms. Kovacs indicate that she could not be treated there unless she came with a family member who could

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ascertain onset of active tuberculosis. F. Kawakami Dep. at 73-74.

It is quite probable that Ms. Kovacs will need to visit a pulmonary specialist in order to ascertain when the above-described symptoms signal active tuberculosis and when they are unrelated. The probability that Ms. Kovacs will need a pulmonary specialist's advice or treatment is increased due to her living situation (a dormitory at Gallaudet University that houses many other students.) See, e.g., F. Kawakami Dep. at 62 ("Q. Would the risk of [TB] infection increase in close living quarters? A. Absolutely. Q. Like a college dormitory? A. I think so.")

talk. Under this set of facts, Ms. Kovacs' asserted future injury is "'real and immediate.'" Whitmore v. Arkansas, 495 U.S. 149, 159 (1990).

The facts here bear no resemblance to those in cases relied upon by defendant where courts have found no standing. In Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992), plaintiffs' claim of injury was extremely remote. In Lujan, members of environmental groups challenged the failure of federal government officials to consult with foreign nations regarding overseas projects affecting endangered species. The group members submitted affidavits averring an intent to revisit project sites in Egypt and Sri Lanka at some indefinite future time, at which time they might be denied the opportunity to observe endangered animals.[23] In finding the asserted harm too speculative, the Lujan Court provided examples of other facts under which it suggested the Court would find imminent injury. Importantly, the distinction appears to turn largely upon geographic remoteness. The Court suggested that if the group members had worked with a particular animal or species of animal in the area of the world where the animal was threatened by a federal decision, the Court might well have decided the standing issue differently:

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[23] The Court found the group members had failed to establish standing based on their failure to demonstrate not merely injury but also redressability which is not at issue in this case.

> It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible -- though it goes to the outermost limit of plausibility -- to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist, see Japan Whaling Ass'n. v. American Cetacean Soc'y, 478 U.S. 221, 231, n.4, 106 S. Ct. 2860, n.6, 92 L. Ed.2d 166 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

Lujan at 2139-2140 (emphasis added).

Here, defendant is affiliated with the hospital to which the Gallaudet Student Health Service refers students. His office is located adjacent to that hospital. The hospital and office are within a five-mile radius of the school dormitory where Ms. Kovacs resides. In addition to geographic proximity, Ms. Kovacs' threat of injury is far more concrete and direct than even these hypothetical factual situations where the Lujan Court suggested it would find standing -- the immediate injury is to plaintiff, herself.

Earlier Supreme Court cases on which defendant relies are also inapposite. In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the plaintiff had been placed in a chokehold and rendered unconscious by Los Angeles police officers. His standing

"depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers". Id. at 105. The Court found that he "ha[d] made no showing that he is realistically threatened by a repetition of his experience." Id. at 109. The plaintiff in Lyons, like plaintiffs in similar cases preceding it, failed to show a likelihood of recurrence in large part because the Court would not assume that plaintiff would again break the law and be subject to arrest by the police. Lyons, 461 U.S. at 102; see id. at 109 ("Lyons' lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued"). In this case, Ms. Kovacs is not violating a law; she is seeking to exercise her statutory right to accessible health care. Moreover, the injury in Lyons depended on the unauthorized conduct of all police officers in Los Angeles. Ms. Kovacs' threat of future injury depends upon one defendant: a defendant who has harmed her in the past and who has evinced his intent to discriminate against her in the future. Id. at 102 (past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury.) See also Golden v. Zwickler, 394 U.S. 103 (1969) (allegations of future injury contingent on the prospective future candidacy of a Congressman who was appointed to the bench deemed "very unlikely"); O'Shea v. Littleton, supra,

414 U.S. 488;[24] Whitmore v. Arkansas, 495 U.S. 149 (1990);[25] and Diamond v. Charles, 476 U.S. 54 (1986).[26]

Ms. Kovacs is not seeking an advisory opinion. The circumstances here are "distinct," "palpable," and "personal" -- all terms used in this Circuit to describe proper grounds for standing. See, e.g., Foundation On Economic Trends v. Johnson, 661 F. Supp. 107, 109 (D.D.C. 1986) (plaintiffs have standing to sue only if they allege that they have suffered distinct and palpable injury"); Olympic Fed. Sav. and Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 188 (D.D.C. 1990) (litigant must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.")

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[24] In O'Shea, the Court found no case or controversy where residents of Illinois town sought injunctive relief against a magistrate and circuit court judge whom the plaintiffs alleged were engaged in illegal practices in criminal cases.

[25] The injury asserted in Whitmore depended on the possibility that a death row inmate might have his conviction and death sentence overturned through federal habeas relief, that he would be retried, and again sentenced to death, and that the Supreme Court of Arkansas might set aside the sentence because of an updated data base for comparing capital crimes. Whitmore at 157.

[26] In Diamond, the Court rejected a physician's attempt to defend a state law restricting abortions, because his complaint that fewer abortions would lead to more paying patients was "'unadorned speculation'" insufficient to invoke the federal jurisdictional power. Id. at 66; see id. at 67 ("[A]bstract concern does not substitute for the concrete injury required by Article III." (citation omitted)).

The attenuated circumstances at issue in a recent D.C. Circuit decision, Fair Employment Council of Greater Washington v. BMC Mktg. Corp., 28 F.3d 1268 (D.C. Cir. 1994), stand in stark contrast. In that case, plaintiffs were testers who brought suit alleging that an employment agency violated Title VII when it denied referrals to the black testers, while white testers with comparable credentials received referrals. The court found the likelihood that the testers themselves would be discriminated against in the future by BMC simply not credible,[27] stating,

> Whatever the exact standard for judging the likelihood of future injury [] the tester plaintiffs here have said nothing to indicate that future violation of their rights is even remotely probable. Id. at 1274.

Unlike the testers in BMC, Ms. Kovacs had both past injury and actual notice of defendant's intent to discriminate against her again in the future.

Another recent case involving plaintiffs with far more attenuated injury alleged than that here is Animal Legal Defense Fund, Inc. v. Espy, 23 F.3d 496 (D.C. Cir. 1994). In that case, the court placed particular emphasis upon the fact that the

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[27] The BMC plaintiffs only alleged future injury springing from the emotional consequences of BMC's past conduct. The only reference to other future injury was injury to third parties. "The reference to third parties, of course, does not help the tester plaintiffs establish standing; to satisfy the requirements of Article III, they must allege that they themselves are likely to suffer future injury." Id. at 1273. Plaintiff here is seeking to vindicate her own civil rights, not those of third parties.

injury alleged was a matter "wholly within [plaintiff's] control." Id. at 500. In contrast, Ms. Kovacs does not have it "wholly within her control," to avoid contracting active tuberculosis or a respiratory ailment of sufficient seriousness to require treatment from a pulmonary specialist.

Defendant also relies heavily on Aikens v. St. Helena Hosp., 843 F. Supp. 1329 (N.D. Cal. 1994). In Aikens, the animating concern is geographic proximity. The court dismissed for lack of standing the complaint of a deaf woman who brought her dying husband to a hospital emergency room when the couple was away from their primary residence on vacation. The woman alleged that the hospital violated the ADA because it failed to provide her with an interpreter. The court found the allegations in plaintiff's complaint (stating that she owned a mobile home seven miles from the hospital, and that she stays at the home only for several days each year), insufficient to show a real and immediate threat of future injury at the hands of defendants. However, Aikens was granted leave to amend her complaint and the court has now reinstated her ADA claim against the hospital, based on additional allegations that Ms. Aikens visits the locale where the hospital is located several times a year, and that she considers it reasonably possible that she might seek services at the hospital. Aikens v. St. Helena Hosp., No. C 93-3933 FMS (N.D. Cal. April 4, 1994) (copy attached as B). Courts have also

found standing other disability rights cases involving circumstances less immediate than those presented in Ms. Kovacs' case. See supra, n.18.

b. It is Likely that Ms. Kovacs will Again be Injured by Dr. Kawakami Despite His Affidavit Timed to Blunt Litigation

In the notes exchanged at her December 2, 1993 appointment, Ms. Kovacs was advised that she could not be treated then because of an inability to communicate and that she needed to come with a family member who could talk. As we demonstrate below, the refusal to afford treatment under these circumstances violates the ADA. Dr. Kawakami asserts that this circumstance could not possibly occur again because he has now promised to provide a sign language interpreter for any future appointment for Ms. Kovacs. Accordingly, defendant argues that no injury is "imminent," or, in essence, that his promise has now made the controversy moot. It is well established, however, that voluntary cessation of allegedly illegal conduct in the face of litigation does not deprive the court of the power to hear the case and issue injunctive relief. United States v. W.T. Grant, Co., 345 U.S. 629 (1953); see also County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (a dispute is not moot unless there is no expectation that the alleged violation will recur, and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"). No interim

events have irrevocably eradicated the effects of the violation, because defendant is free, at his discretion and at any time, to revoke the offer he made in his affidavit.

Courts should be especially wary of protestations of reform in the midst of litigation. Grant, 345 U.S. at 632; see also United States v. Oregon State Medical Soc'y., 343 U.S. 326, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.")[28] NAACP v. City of Evergreen, Ala., 693 F.2d 1367, 1370 (11th Cir. 1982) (reform timed to anticipate or blunt litigation is not an adequate assurance against repetition). Defendant readily admits that his change in position results purely from litigation. Indeed, defendant does not concede that he violated Ms. Kovacs' rights in any way. Cf. Donovan v. Cunningham, 716 F.2d 1455, 1460-62 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (potential for recurrence shown in part by defendant's insistence they did

[28] In Oregon Medical Soc'y, the Court found no such probability of resumption because the conduct at issue had discontinued seven years previously, and there was no threat or likelihood of its recurring. The Court found "not the slightest reason to doubt the genuineness, good faith or permanence of the changed attitudes and strategy" of defendants, which "did not consist merely of pretensions or promises but was an overt and visible reversal of policy, carried out by extensive operations which have every appearance of being permanent . . . ."

nothing wrong). Most importantly, defendant provides Ms. Kovacs with no enforceable guarantee that he will not violate her civil rights in the future.

At the time plaintiff filed her complaint, the discriminatory condition on her use of Dr. Kawakami's services, a condition that was authorized by defendant himself, was in place. It would be a manifest injustice to require plaintiff to pursue her rights -- at great monetary and personal expense -- only to have her case dismissed as moot because defendant appears to concede to her position mid-litigation.[29] Cf. Grant, 345 U.S. at 632 (determination of mootness affords defendant dismissal as a matter of right and courts should be reluctant to give defendant such a powerful weapon against public law enforcement).

Apart from the self-serving affidavit, defendant presents no evidence that the discriminatory policies have been changed. There is no indication that staff personnel have been instructed regarding the rights of persons with disabilities under the ADA or, in particular, on how deaf patients should to be treated in the future.[30] Defendant offers no policies outlining, for

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[29] Indeed, given the unavailability of damages for private rights of action under title III, the provision of attorneys fees is of critical importance to the effective prosecution of the law. See 42 U.S.C. § 12205.

[30] It is not disputed that defendant has not instructed his staff regarding non-discriminatory treatment of individuals with

example, office procedures for procuring interpreter services, nor does he provide considered modifications to his current practices. Moreover, defendant provides no evidence of contacts with sign language interpreter services or other entities able to provide appropriate communication assistance for dealing with patients with hearing impairments. Instead, Dr. Kawakami continues to equivocate by arguing that it would be an undue burden to promulgate a general policy for providing equivalent treatment of deaf patients.[31]

3. In the Alternative, Ms. Kovacs Has Standing Because Her Injury Is Capable of Repetition But Evades Review

If the Court concludes that Ms. Kovacs has not demonstrated "imminent" harm because her immediate medical needs were met by another physician and it is not sufficiently likely that she will seek out Dr. Kawakami's services in the immediate future, it should nevertheless find standing, as plaintiff's injury is one "capable of repetition but evading review." Honig v. Doe, 484 U.S. 305, 318-9 (1987), quoting Murphy v. Hunt, 455 U.S. 478, 482

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disabilities, and that he has no policies for such treatment. See F. Kawakami Dep. at 46.

[31] It is questionable whether defendant could establish that providing auxiliary aids and services for patients with hearing impairments is an undue burden. These costs can be treated like other overhead expenses that are spread out over all patients. Title III Technical Assistance Manual § III-4.3600. Furthermore, a tax credit is available for providing such assistance. 26 U.S.C. § 44 (1988 & Supp. IV January 3, 1989 - January 4, 1993).

(1981); Roe v. Wade, 410 U.S. 113, 125 (1973). The Supreme Court has recognized a plaintiff's standing to bring such a claim, where the action complained of (1) "was in its duration too short to be fully litigated prior to its cessation or expiration," and there is (2) "a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149 (1975)(per curiam); Murphy v. Hunt, 455 U.S. at 482 (1981). See Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia, 972 F.2d 365, 370 (D.C. Cir. 1992) (reasonable expectation is a lower threshold than the immediacy requirement established in Lyons and Lujan).

In this case, Ms. Kovacs was told by the referring physician at Providence Hospital on November 29 to see Dr. Kawakami within 5 -7 days. She immediately scheduled an appointment which was set for December 2, three days later. On the day of her scheduled appointment, she was discriminated against through Dr. Kawakami's refusal to serve her, in violation of law. The discrimination did not end there, however. The doctor placed a condition on her receipt of future services -- also in violation of law -- that she must return with a family member who could talk. Plaintiff was left with no choice but to return to Dr. Kawakami and subject herself to the discriminatory conditions he placed on her visit, or to seek alternate care in the four days

remaining. It would have been impossible to litigate the present controversy in the few intervening days.

In addition, for all of the reasons stated above, Ms. Kovacs has certainly established a reasonable expectation that she will, at some time in the future, require the services of Dr. Kawakami. See discussion supra at 16-19. See Klan, 972 F.2d at 370 (discussing cases in which no evidence of future plans was shown, but the court implied likelihood of repetition from nature of activity: Klan will march again; economy may change again and affect labor strikes). Indeed, plaintiff has established a substantially greater expectation that she will require medical services from Dr. Kawakami than Jane Doe established to have another unwanted pregnancy and again seek an abortion. Cf. Honig v. Doe, 484 U.S. at 318-9 n.6. Finally, short of an enforceable agreement, plaintiff has no guarantee that her civil rights will not again be violated by Dr. Kawakami. See discussion supra at 25-28.[32]

[32] In Renne v. Geary, 501 U.S. 312, 320 (1991), the Court suggested that the capable of repetition doctrine would not revive a dispute that had become moot before the action was commenced. The Court relied on the principle established in Lyons, supra, that past exposure to discrimination is not sufficient to create a live controversy where there are no present adverse effects. In this case, Ms. Kovacs has demonstrated present adverse effects -- because of both Dr. Kawakami's discriminatory policy and Ms. Kovacs' likely future medical needs.

B. DR. KAWAKAMI'S REFUSAL TO TREAT SUSAN KOVACS BECAUSE OF HER DISABILITY AND THE CONDITION PLACED ON ANY FUTURE TREATMENT VIOLATE THE ADA

To succeed as a matter of law under title III of the ADA, the plaintiff must prove that:

1) Defendant owns or operates a place of public accommodation;

2) The aggrieved individual -- Ms. Kovacs -- is an individual with a disability; and

3) Defendant is discriminating against Ms. Kovacs on the basis of her disability.

42 U.S.C. § 12182(a) & 42 U.S.C. § 12182(b).

Title III of the ADA prohibits discrimination on the basis of disability by any entity, including professional health care providers, that falls within the statute's definition of "public accommodation." There is no dispute that Dr. Kawakami is subject to the nondiscrimination requirements of title III.[33] Nor is there any dispute that Ms. Kovacs is an individual with a disability within the meaning of the ADA.[34] Because, as demonstrated below, plaintiff has proven that Dr. Kawakami discriminated against Ms. Kovacs on the basis of her disability, and continues to so discriminate by placing discriminatory

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[33] The "professional office of a health care provider" is specifically named in the definition of public accommodations. 42 U.S.C. § 12181(7)(F).

[34] The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more . . . major life

conditions on her receipt of future services, the Court should rule in favor of plaintiff as a matter of law.

The general mandate of title III provides for the "full and equal enjoyment" of the services of a place of public accommodation. Section 302(a) provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a) (emphasis added). See also 28 C.F.R. § 36.201(a).[35] To achieve that end, section 302(b) contains

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activit[y] . . . " 42 U.S.C. § 12102(2)(A). "Major life activities" include hearing. 28 C.F.R. § 36.104.

[35] Because the Department is the rule-making agency for title III, both its regulation and its interpretation of the regulation are entitled to deference. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (where Congress expressly delegates authority to an agency to issue legislative regulations, the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.") See also Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (applying Chevron to give controlling weight to Department of Justice interpretations of title II of the ADA). This Court recently recognized that the Department is entitled to deference in interpreting its title III regulation. Fiedler v. American Multi-Cinema, Inc., 1994 WL 728460 at *4 n.4 (stating that the Department, as author of the regulation, is the principle arbiter of its meaning, and according Department interpretations substantial deference) (citing Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994)). In Thomas Jefferson University, the Supreme Court reiterated the principle that agencies are afforded substantial deference in interpreting their own regulations, id. at 2386 (citing Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150-51 (1991); Lyng v. Payne, 476 U.S. 926, 939 (1986); Udall v. Tallman, 380

several general and specific prohibitions against discrimination, including, among other things:

1) the denial of an opportunity to participate in or benefit from a place of public accommodation that is equal to that afforded to others;

2) the denial of an opportunity to participate in or benefit from the services offered by a place of public accommodation;

3) the failure to provide appropriate auxiliary aids or services where necessary to ensure that no individual is excluded or denied services;

4) the use of unnecessary eligibility criteria that screen out or tend to screen out persons with disabilities; and

5) the failure to make reasonable modifications in policies, practices or procedures where such modifications are necessary to afford equal advantages or privileges to persons with disabilities.

42 U.S.C. §§ 12182(b)(1)(A)(i) & (ii); 12182(b)(2)(A)(iii); 12182(b)(2)(A)(i); 12182(b)(2)(A)(ii). To succeed on liability, plaintiff need prove only that defendant violates one of these five provisions. The following discussion first considers the general provisions which provide the framework for the nature of the discrimination at issue, and then considers in turn each of the specific prohibitions.

U.S. 1, 16 (1965)), and stated that "the agency's interpretation must be given `controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Id. (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). See also Stinson v. United States, 113 S. Ct. 1913, 1919 (1993).

1. Defendant Violated and Continues to Violate the ADA by Refusing Ms. Kovacs and By Treating Her Unequally in Future Services

a. Refusal of Treatment and Unequal Treatment

Liability in this case does not turn on whether Ms. Kovacs or others acting on her behalf effectively requested a sign language interpreter for the December 2, 1993, appointment, as defendant suggests. Rather, plaintiff should prevail because she has shown that she was denied treatment on that date and continues to be treated unequally for future appointments on the basis of her disability.

There is no question that defendant denied Ms. Kovacs "the opportunity . . . to participate in or benefit from [his] services" on the day of her scheduled appointment. 42 U.S.C. § 12182(b)(1)(A)(i); see also 28 C.F.R. § 36.202(a). Mrs. Kawakami wrote to Ms. Kovacs: "we cannot take you because we cannot communicate with you." Moreover, Dr. Kawakami did not, in fact, honor Ms. Kovacs' appointment. Similarly, Dr. Kawakami's discriminatory condition on Ms. Kovacs' future access to his services -- that she "bring her family who can talk" -- is an effective denial of participation for Ms. Kovacs, whose entire family is deaf. More to the point, by imposing such a condition on future services, Dr. Kawakami offers for future appointments an opportunity to benefit from his services that "is not equal to

that afforded to other individuals," in violation of 42 U.S.C. § 12182(b)(1)(A)(ii); see also 28 C.F.R. § 36.202(b).

Denying an individual the opportunity to receive medical care on account of that individual's disability violates the ADA. Howe v. Hull, No. 3:92CV7658, 1994 WL 682951, at *6 (N.D. Ohio Nov. 21, 1994) (denial of emergency room services to patient who was HIV+), Mayberry v. Von Valtier, 843 F. Supp. 1160, 1166 (E.D. Mich. 1994) (refusal of full and equal enjoyment of medical treatment on basis of deafness); Matter of Baby K, 832 F. Supp. 1022, 1029 (E.D. Va. 1993), aff'd on other grounds, 16 F.3d 590 (4th Cir. 1994) ("denial of medical services" would be "discrimination against a vulnerable population [and] exactly what the ADA was enacted to prohibit").

In his Answer, defendant avers that the text of the notes speak for themselves. His subtle attempts now to wrestle out of responsibility for the notes,[36] or to explain them away, does not alter the fact that the notes represented defendant's only message to Ms. Kovacs. See Def. Opp. at 8-16. The notes, and defendant's failure in fact to treat Ms. Kovacs, provide a

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[36] Defendant cannot disavow the discriminatory conduct of his employees. As in other civil rights contexts, the Court should find that the duty not to discriminate is nondelegable. See Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 552 (9th Cir. 1980); Walker v. Crigler, 976 F.2d 900, 903 n.3 (4th Cir. 1992); Asbury v. Brougham, 866 F.2d 1276, 1280 n.4 (10th Cir. 1989); Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974). See

sufficient basis upon which the court may find that Dr. Kawakami discriminated against and continues to discriminate against Ms. Kovacs.

b. On the Basis of Ms. Kovacs' Disability

In his opposition, defendant attempts to import the standard from section 504 of the Rehabilitation Act of 1973 that requires a showing of discrimination "solely by reason of . . . disability," (emphasis added), 29 U.S.C. § 794(a), into the ADA. Def. Opp. at 16. It is section 504 and not the ADA that defendant quotes to the Court in his papers. However, the plain language of the ADA does not incorporate the "solely" standard but, instead, requires merely a showing of discrimination "on the basis of disability." 42 U.S.C. § 12182(a) and (b). The omission of the "solely" standard was a deliberate act by Congress. Even in relation to title II of the ADA,[37] where the language is parallel to that in section 504, "solely" was intentionally not included:

> The Committee recognizes that the phrasing of section 202 differs from that of section 504 by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. The deletion of this phrase is supported by the experience of the executive agencies charged with implementing section 504. The regulations issued by most executive agencies use the exact language set out in section 202 in lieu of the language included in the section 504 statute.

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also Glanz v. Vernick, 756 F. Supp. 632, 636 (D.C. Ma. 1991) (applying respondeat superior doctrine to Section 504).

[37] Title II covers state and local governments.

H.R. Rept. 101-485(II), 101st Cong., 2d Sess., 85 (1990). At least one federal court has recognized this difference. Howe v. Hull, No. 3:92CV7658, 1994 UL 682944, at *9 (N.D. Ohio May 25, 1994) (same with respect to title III.)[38]

The appropriate standard, then, is that provided in the statute -- discrimination "on the basis of disability," 42 U.S.C. § 12182(a) & (b)(1). There can be no material dispute that defendant's denial of his services was based on Ms. Kovacs' deafness. Defendant refused to treat Susan Kovacs on the day of her scheduled appointment because of a perception about her ability to communicate, a perception based only on her deafness, and one which was obviously flawed where communication was proceeding through written notes. Defendant's conditioning of Ms. Kovacs' future treatment on bringing someone "who can talk" is similarly based on her disability. Again, there is no dispute that these were the only reasons offered to Ms. Kovacs for the denial of services.

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[38] Defendant correctly represents that the court in Mayberry v. Von Valtier, 843 F. Supp. at 1166, used the "solely" standard. In that respect the opinion is wrong. The court in Mayberry did not specifically address the issue, but simply lifted it from case law under section 504. To that degree, it should not be considered authoritative. This court should look to the plain language of the statute and the legislative history of the ADA.

Plaintiff vigorously disputes defendant's representation that Ms. Kovacs' experience with his office was "fleeting" and "brief."[39] The facts that are undisputed, however, regarding Ms. Kovacs' visit to Dr. Kawakami's office establish that services were discriminatorily denied. Regular office procedures for handling new patients were not followed for Ms. Kovacs. No forms were provided for her to fill out; no health history or insurance information was requested. Although Ms. Kovacs' note indicated she had been referred by Providence Hospital, she was not asked whether x-rays had been taken there. None of the notes written to her advised her that she couldn't be treated because the office didn't have her test results and x-rays -- rather she was told that inability to communicate was the reason for excluding her. Importantly, for future visits, she was not told to return with her test results and x-rays; rather she was advised to come with a family member who could talk.

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[39] Plaintiff offers to prove that prior to her appointment, Ms. Kovacs and others acting on her behalf made extensive efforts to contact Dr. Kawakami's office: Ms. Kovacs called through the relay service to schedule an appointment; she contacted Providence Hospital which, in turn, contacted defendant's office to schedule an interpreter; she even had to go to the law center in order to try to get an interpreter for her appointment; and Susan Shimko from the National Center for Law and Deafness contacted Dr. Kawakami's office on her behalf. Defendant imputes obstructionist motives to Ms. Shimko regarding the fact that she did not have personal medical information about Ms. Kovacs when she was calling only in an attempt to secure an interpreter for Ms. Kovacs.

2. Defendant Violated and Continues to Violate the ADA by Failing to Communicate with Ms. Kovacs During her Appointment, and by Shifting His Burden to Provide Auxiliary Aids for Future Appointments onto Plaintiff

A second basis for finding liability under the ADA is defendant's failure to meet his affirmative obligation to provide appropriate auxiliary aids or services. The ADA defines discrimination to include:

> a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids or services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden[.]

42 U.S.C. § 12182(b)(2)(A)(iii) (emphasis added); see also 28 C.F.R. §§ 36.303(a),(b),(c), and (f) (auxiliary aids must be "appropriate," meaning that they must provide "effective communication").

On the day of Ms. Kovacs' appointment, defendant took no steps whatsoever to ensure that Ms. Kovacs was not excluded or denied services. Defendant's argument that it was necessary for him to exclude Ms. Kovacs in light of the affirmative obligations placed on entities to provide auxiliary aids turns the ADA on its head. To the contrary, he contravened both the letter and the intent of this provision by expressly denying her services because of perceived communication barriers. With respect to

future treatment, Dr. Kawakami shifts his burden to provide auxiliary aids and services and to ensure effective communication onto Ms. Kovacs.

The ADA clearly places the obligation for the choice of auxiliary aid, and the responsibility for effective communication, on the public accommodation. Id., see 28 C.F.R pt, 36, App. B at 607-9; see also, Title III Technical Assistance Manual at 27. In this case, defendant apparently determined that a sign language interpreter (or a family member with knowledge of sign language) was required. Defendant explained, "we cannot take you because we cannot communicate with you," "we cannot communicate with you because we do not know sign language" and "you have to bring your family who can talk." Yet, no one at defendant's office suggested that an appointment be rescheduled at a time when an interpreter would be present. Instead, the doctor shifted his burden to provide appropriate auxiliary aids or services onto Ms. Kovacs by conditioning future treatment on the attendance of a family member who could speak. See, supra, n.4.

Defendant argues that he was not provided with an opportunity to consult with Ms. Kovacs in order to determine which auxiliary aid or service to provide, but he could easily

have consulted with her on the day of her appointment.[40] From the note exchange it is apparent that Ms. Kovacs was trying to initiate a consultation with Mrs. Kawakami to explain a doctor's obligations under the ADA. Her note to Mrs. Kawakami says, "First of all I have the information you may need for deaf patients." Defendant trivializes the ADA information, but it is important to note that using written materials like those Ms. Kovacs attempted to present to defendant is the way that Ms. Kovacs can communicate her needs to hearing people who do not know sign language. It is undisputed that Mrs. Kawakami did not look at the information until it was left for her by Ms. Kovacs upon departing. Moreover, this was Ms. Kovacs' third attempt to provide defendant with information about the ADA and his obligations under the law. See supra n.4.

Finally, defendant argues that, because he did not know prior to her appointment that Ms. Kovacs needed an interpreter, he did not have sufficient time to arrange for interpreter services on that day. The lack of sufficient advance notice in order to secure an interpreter may well pose "significant

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[40] The Department's regulation and commentary strongly encourage public accommodations to consult with individuals with disabilities about their needs for the obvious reason the individual is in the best position to assess what is necessary. Contrary to defendant's interpretation, consultation is not an entitlement of public accommodations. In any event, Ms. Kovacs attempted to consult with the doctor's office.

difficulty" and constitute an undue administrative burden. The law is very clear, however, that a public accommodation's obligation does not end if the entity can demonstrate that providing a particular aid or service would constitute an undue burden. Rather, the public accommodation must provide an alternative, if one exists, that will ensure "to the maximum extent possible" that the individual receives the entity's services. 28 C.F.R. s 36.303 (f) (Alternatives) (emphasis added). In this case, there was a viable alternative to the doctor's decision to deny Ms. Kovacs his services, and that was to communicate with her by writing notes. See Dep. of Mrs. Kawakami at 58-60 (admitting that communication was proceeding effectively through written notes).

3. Defendant Violated and Continues to Violate the ADA by Placing Discriminatory Eligibility Requirements on the Receipt of His Services

The ADA also prohibits discrimination against people with disabilities in the form of "eligibility criteria that screen out or tend to screen out" people with disabilities:

> from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered[.]

42 U.S.C. § 12182(b)(2)(A)(i); see 28 C.F.R. § 36.301(a).

Defendant conditioned plaintiff's treatment on "communication" that was oral, first by presuming that he could not communicate with Ms. Kovacs and secondly, by requiring her to bring a family member. Defendant's argument that this condition was meant to be a helpful suggestion[41] and was not a criterion for future treatment is undercut by the context of the communication at issue and the text of the note itself. Mrs. Kawakami, after speaking with Dr. Kawakami, wrote: "The doctor said you have to bring your family who can talk." This requirement was coupled with an earlier note refusing to honor her appointment, and defendant's actual refusal to honor her appointment (without such a family member).

The commentary to the regulation points out that an eligibility criterion can be shown to be "necessary" only if it is "based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities." 28 C.F.R. Pt. 36, App. B at 605 (1994). It is a generalization to assume that all individuals who are deaf communicate through sign

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[41] Defendant argues that the requirement that Ms. Kovacs bring a family member to subsequent appointments was intended to be helpful. Proof of intent is not necessary to establish a violation of the ADA, as it was not under § 504 of the Rehabilitation Act of 1973. See Alexander v. Choate, 469 U.S. 287, 297 (1985) where the Court noted that many covered acts "would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design."

language in the first place; many deaf individuals do not even know sign language. More importantly, many deaf individuals are capable of communicating in a variety of ways. Defendant's perception of the limits of Ms. Kovacs' communicative abilities were based in speculation and\or stereotype and were not borne out in fact, where communication was in fact proceeding through written notes.[42]

Requiring plaintiff to bring a family member in order to obtain treatment is a discriminatory criterion. The commentary to the regulation explains that 28 C.F.R. § 36.301 prohibits "policies that unnecessarily impose requirements of burdens on individuals with disabilities that are not placed on others." 28 C.F.R. pt. 36, App. B at 605 (1994). Indeed, the example provided in the commentary is precisely what the defendant did in

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[42] Defendant also argues that Dr. Kawakami's refusal to treat Ms. Kovacs was "necessary," citing 28 C.F.R. § 36.301(a). See Def. Opp. at 6-8, & 27, in his challenge to the ADA's general prohibitions (see discussion at part A, supra). But the "necessity defense" actually relates to the imposition of discriminatory eligibility criteria, 42 U.S.C. § 12182(b)(2)(A)(i). Defendant's attempt to import the "necessity defense" to apply against the ADA's general prohibitions regarding participation and unequal treatment, 42 U.S.C. §§ 12182(b)(1)(A)(i) & (ii) is error. Specific prohibitions, including their limitations, control over the general only in instances of apparent conflict. See S.Rep. No. 116, 101st Cong., 1st Sess., at 61 (1989) ("The Committee wishes to emphasize that the specific provisions contained in title III. . . control over the more general provisions. . . to the extent there is any apparent conflict"); see also H.Rep. No. 485(II), 101st Cong., 2d Sess, at 103, 104). Here, there is no such conflict.

this case: "public accommodations cannot require that an individual with a disability be accompanied by an attendant." Id. Defendant's requirement that Ms. Kovacs bring a family member as a condition on her future treatment was presented as the doctor's criterion. Defendant's perception that Ms. Kovacs' family was necessary for communication is not based on "actual risks" but on a paternalistic stereotype that views individuals with disabilities as dependents; specifically, as dependents on hearing people.

4. Defendant Violated and Continues to Violate the ADA by Failing to Make Reasonable and Necessary Modifications to Policies, Practices and Procedures

The final, independent basis on which this court should find defendant in violation of the ADA is the requirement that public accommodations "make reasonable modifications in policies, practices and procedures:"

> when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations; . . .

42 U.S.C. § 12182(b)(2)(A)(ii); see also 28 C.F.R. § 36.302(a).

It is undisputed that defendant has no policies or procedures for the treatment of deaf patients. It is also undisputed that defendant has not instructed his staff about their obligations under the ADA or made any modifications in

office protocol in order to afford his services to deaf patients. The necessity of modifying current practices to permit deaf individuals to enjoy the services of the office is evident in defendant's treatment of Ms. Kovacs. Indeed, it is certainly reasonable to require that defendant modify his practices so as to treat deaf people as defendant treats all other patients in his routine protocol. Moreover, it is reasonable for the office to establish procedures for providing qualified interpreters, where necessary, and using methods of communication, such as writing notes, as alternatives to verbal communication.

IV. CONCLUSION

For the foregoing reasons, the Court should find that the plaintiff has standing to assert her claim and that she is entitled to summary judgment as a matter of law.

The plaintiff seeks injunctive and declaratory relief. The nature of injunctive relief requested by plaintiff is specifically contemplated by the statute:

> Where appropriate, injunctive relief shall . . . include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

42 U.S.C. § 12188(a)(2).

Declaratory relief is especially appropriate in this case because of the relative youth of the ADA and concomitant uncertainty of the legal obligations, the unavailability of monetary relief, and the public interest in vindicating the

rights of individuals with disabilities under this important civil rights law. See Bituminous Coal Operators Ass'n., Inc. v. Int'l. Union, United Mine Workers of Am., 585 F.2d 586, 596-97 (3rd Cir. 1978). See also DeLong v. Brumbaugh, 703 F. Supp. 399, at 405 (W.D. Pa. 1989) (on the public importance of vindicating plaintiff's rights under the Rehabilitation Act).

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