

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA,)	
)	
Plaintiff)	CV-92-2879 (TFH/AK)
)	
v.)	CORRECTED MEMORANDUM OF
)	POINTS AND AUTHORITIES
BECKER CPA REVIEW, LTD.,)	IN SUPPORT OF
)	UNITED STATES' MOTION FOR
Defendant)	PARTIAL SUMMARY JUDGMENT
_____)	

Defendant Becker CPA Review, Ltd. ("Becker company"), which operates a preparation course for the certified public accountant ("CPA") examination, has violated title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181-89, by failing to provide appropriate auxiliary aids and services for people with hearing impairments. Although the Becker company changed its policies and practices in December 1992 in response to this litigation, the policies as modified continue to violate the ADA.

The United States has moved for partial summary judgment on the issue of liability. Undisputed facts establish that the Becker company has engaged in a pattern or practice of discrimination on the basis of disability and, in particular, that it has discriminated against Rod Jex, an individual with a hearing impairment. Therefore, the United States is entitled to

a declaration that the Becker company violated the ADA, an injunction, civil penalties, and damages for Mr. Jex.¹

The Becker company's policies and practices demonstrate a pattern or practice of discrimination prohibited by the ADA. 42 U.S.C. § 12188(b)(1)(B)(i). Companies like the Becker company must provide auxiliary aids and services that are appropriate for effective communication. 42 U.S.C. § 12182(b)(2)(A)(iii). In fact, the ADA has an entirely separate section requiring entities, like the Becker company, that offer courses related to licensing and credentialing, to provide appropriate auxiliary aids and services. 42 U.S.C. § 12189.

The Becker company is an industry leader in CPA preparatory courses. The Becker course is structured to be classroom-intensive, with taped lectures, live instruction, problem-solving exercises facilitated through projected transparencies, and generous interaction among students and instructors. In order to understand and participate in the Becker course, students with hearing impairments who regularly use sign language in educational or professional settings need sign language interpreters in class. Others may need other types of accommodations.

Prior to this litigation, the Becker company refused to provide sign language interpreters and other appropriate

¹ The Court should hold further hearings regarding the amount of civil penalties, relief for all aggrieved persons, and other relief that may be appropriate.

auxiliary aids and services. During this litigation the company has generally provided interpreters on demand, but it has no lawful written policy that will guide the company's future actions. The company has several contradictory policies, all of which are arbitrarily administered. The company's failure adequately to modify its policy violates a specific prohibition of the ADA, 42 U.S.C. § 12182(b)(2)(A)(ii). The Becker company also violated the ADA's requirements that people with disabilities be given equal opportunities to participate in and benefit from its services. 42 U.S.C. §§ 12182(b)(1)(A)(i) and (ii). Defendant's conduct also violates several sections of the title III regulation, 28 C.F.R. pt. 36 (1992).

This case is quite simple. The ADA requires that the Becker company provide appropriate auxiliary aids and services. The company consistently has failed to meet this obligation. At least one person, Rod Jex, was injured as a result of these failures.

I. Facts

The record in this case amply establishes that the Becker company's past and present policies, as well as its actions with respect to Rod Jex, violated the ADA.²

² All facts referred to in this memorandum are set forth at length in the accompanying Rule 108(h) Statement of Undisputed Material Facts ("Facts"). These facts are found in the Defendant's Answer to Complaint ("Answer"), depositions ("Depo."), Defendant's Answers to Interrogatories ("Interrogatory"), witness declarations ("Dec."), and other documents as noted.

A. Some people need sign language interpreters for effective access to the Becker course.

1. Interactive aural communication in class is an important aspect of the Becker course.

The CPA examination is one of the most difficult professional tests given in this country. A CPA license is considered to be a valuable and prestigious career asset for an accountant, enabling the accountant to perform certain tasks and investing the accountant with the mantle of a "professional." Facts ¶¶ 2, 4 (Becker Depo.). A CPA license is an essential requirement for partnership in major accounting firms. Facts ¶ 5 (Bendick Depo.).

The Becker company is an industry leader. More than one third of the students passing the CPA exam each year are Becker course graduates. Its course is offered in more than 120 cities to 10,000 people each year. Facts ¶¶ 7, 8.

The Becker course has been offered in the D.C. metropolitan area in sessions of various lengths and intensities. Each weeknight class lasts approximately four hours, while Saturday classes are eight hours long. The sessions in each city involve the same audiotapes, transparencies, outlines, and homework. Potential customers are offered the opportunity to attend approximately two weeks of introductory classes at no obligation. Facts ¶ 9. The accounting information covered in the Becker course is exceedingly difficult and voluminous. Facts ¶ 11 (Baisey Depo.).

Promotional materials for the Becker course tout it as "one of the most sophisticated learning programs available" in the world. Students are expected to learn almost all the course material in class. They are not expected to prepare for each class ahead of time or to do extensive homework. Company materials emphasize that "you work hard, but you work hard in class." Facts ¶¶ 14-15.

In most Becker classes, instructors, who are either lawyers or CPA's, distribute handouts and play tape recorded lectures. Instructors interrupt on cue from the 'J-notes'³ or to support, reinforce, or illustrate a point through personal knowledge. Instructors sometimes direct the students to work through sample exam questions displayed by overhead projectors. Instructors may reject any or all of the teaching materials provided by the Becker company. The company acknowledges that it does not control how the instructors teach their classes. Facts ¶¶ 16-25.

One of the strengths of the Becker course is its interactive aural communication. Students learn new material and obtain reinforcement under the guidance of knowledgeable instructors. Instructors lead discussions about sample exam questions, supervise students' written work, answer questions, and illustrate complicated accounting concepts with real-life

³ The 'J-notes' include a transcript of the taped lecture, a number of suggested verbal comments for instructors to make, and copies of handouts. Also included are instructions on time limits for breaks and indications of when instructors are to put a particular transparency on the screen. Facts ¶ 17 (Interrogatory).

stories. Facts ¶¶ 18-22. Mr. Becker characterizes his system as one that "has more interaction than any other system." Facts ¶ 12 (Becker Depo.). The company emphasizes that the "live instructor adds energy, personal support and clarification where needed. Educational research has proven this to be the most effective combination, and we've been doing it for 30 years now." Facts ¶ 23. Students' experiences confirm that there are many interruptions to the recorded lectures. Facts ¶¶ 22, 58-59.

2. Appropriate auxiliary aids and services in this setting may include interpreters, assistive listening devices, student assistants, and transcripts of audio tapes.

Individuals with hearing impairments⁴ rely on a variety of aids and services, depending on the severity of their impairment and their level of experience with various aids and services. Some communicate with sign language, others do not. Facts ¶ 26 (Kaplan Dec.).

Some people with hearing impairments never master sign language. People who use sign language do so to facilitate communication both in conveying and receiving messages. When the communication is with a person who does not know how to sign, sign language interpreters are often necessary. An interpreter "signs" the hearing person's words to the person with a hearing impairment by using specific gestures, body movements, and other

⁴ "Individuals with hearing impairments" is the statutory term, 42 U.S.C. § 12102(1)(A), used in this memorandum to include people who are deaf (i.e., have profound hearing loss), as well as those who have a lesser degree of hearing loss (sometimes referred to as "hard of hearing").

visual cues. The interpreter also voices the signed communication. Facts ¶¶ 27-29 (Kaplan Dec.).

Oral interpreters are helpful to some people with strong lipreading skills. Oral interpreters assist by standing in front of persons with hearing impairments and mouthing, in a clear and distinct manner, the words spoken by other individuals. Oral interpreters repeat phrases as necessary so that messages are fully conveyed. Individuals using oral interpreters typically may use their voices. Facts ¶¶ 30-31 (Kaplan Dec.).

People with lesser degrees of hearing loss may use other types of assistance. Some may be unable to hear, but able to speak, due to extensive speech therapy in childhood or development of spoken language before their hearing loss. See Facts ¶ 88 (Bergman Dec.). Amplification or assistive listening technologies may aid some people. Written communication, notetakers or student assistants, transcripts, or computerized communication tools may help others. Even for people with some hearing, though, interpreters may be necessary to translate others' spoken words. In all cases, one key to effective communication is recognition of the person's communication needs. Facts ¶¶ 26, 33 (Kaplan Dec.).

3. Some people need sign language interpreters for meaningful access to the Becker course.

When a person with a hearing impairment communicates face-to-face with one other person and the communication is not lengthy or complex, he or she may communicate effectively by

speaking and lipreading. Deriving any benefits from lipreading becomes impossible, however, when the speaker is not close to and directly in front of the person with a hearing impairment. In classroom settings, where instructors may turn their heads toward other students or toward visual aids such as projected transparencies, lipreading becomes more difficult and may become impossible. In interactive environments with many speakers, even experienced lipreaders can become easily confused. Facts ¶¶ 32, 34 (Kaplan Dec.).

Many people with hearing impairments can generally derive effective communication of aurally delivered messages only through sign language. Sign language interpreters are most necessary when communication is complex. Particularly given the complicated and technical nature of the accounting concepts taught in the Becker course, each word spoken by lecturers can be essential to giving students full comprehension of the accounting material. If people with hearing impairments do not use their voices, they may desire interpreters or other appropriate auxiliary aids or services in order to ask questions. Facts ¶¶ 27-29 (Kaplan Dec.).

Without appropriate auxiliary aids and services, students with hearing impairments cannot engage in most class interaction. Non-interactive classes are less effective for students with hearing impairments than are interactive classes such as the ones generally provided to Becker students. Students generally learn

a great deal more through discussion than they do by reading alone. They comprehend much less when their questions are not answered immediately. Students with hearing impairments must wait until breaks when some of their questions may be answered in a cursory fashion. There is little benefit to having live, knowledgeable instructors unless students' questions can be asked in context and in a timely manner. The interactive nature of the Becker course, its length, and the difficulty of the subject matter combine to make it impossible for most people who use sign language to realize effective communication of the course contents without the aid of sign language interpreters. Facts ¶¶ 35-41, 95.

B. Throughout 1992, the Becker company had a policy to provide only limited auxiliary aids, not including interpreters.

The ADA's prohibitions of discrimination became effective as to the Becker company on January 26, 1992. Facts ¶ 6. Throughout 1992, the company's policies and practices denied sign language interpreters to deaf persons and failed adequately to accommodate others with hearing impairments. On August 19, 1992, the Becker company issued a memorandum concerning accommodations to be provided to students with hearing impairments. Despite the company's stated acknowledgment of its duty under the ADA to understand each student's "disability and special needs," and to accommodate each individual according to his or her disability, the policy articulated in the memorandum suggested that the company would provide only limited types of auxiliary aids and

services: earphones to the tape recorder, the 'J-notes,' a seat next to the instructor, and discussions with the instructor at breaks.⁵ Interpreters were not mentioned as a possible accommodation. Facts ¶ 41.

In fact, as detailed below, the Becker company had an unwritten policy against the provision of interpreters. Becker representatives' actions and statements and the experiences of various students bear out the reality that the headphones, 'J-notes,' and transparencies were the only types of "accommodations" ever provided prior to this suit, regardless of individual students' needs. Facts ¶ 54. Numerous requests for other types of assistance were denied. Facts ¶¶ 42, 50, 52-54, 67, 68, 69, 70. Instructors rarely wrote out in-class discussions for students with hearing impairments. Facts ¶¶ 40, 72, 89, 101, 111. In more than thirty years of operation, the Becker company never provided a sign language interpreter to any

⁵ While the written policy does not expressly preclude sign language interpreters, it makes available only three alternatives:

1. A student who is hard of hearing can sit next to the instructor and use an extra set of earphones to the recorder.

2. A student who is deaf should sit next to the instructor and be given the instructor preview set of J-notes. The instructor is directed to monitor the student and point out in the J-notes what is being said on the tape.

3. The instructor should take note of any significant additional material being discussed that is not in the J-Notes and discuss it with the student at a break[.]

Facts ¶ 41.

student until this litigation. Facts ¶¶ 44, 76, 71.

Several Becker company employees have articulated their conclusion that it was the company's policy during this time to deny all students' requests for sign language interpreters. For example, one Becker employee, Renatta Dittmer, carefully researched her company's position on sign language interpreters and discussed it with her supervisor, Susan Eby, before stating that the Becker company does not provide interpreters. Facts ¶ 52.

Consistent with this policy, the Becker company repeatedly refused throughout the summer and early winter of 1992 to provide at least one deaf individual, Rod Jex, with a sign language interpreter for the Becker course. Although Mr. Jex repeatedly told Becker company personnel why he felt that sign language interpreters were necessary to provide him with effective communication, his efforts were fruitless. Facts ¶¶ 45-50, 53.

Mr. Jex has worked as an accountant and intends to become a CPA. In order to prepare for the November 1992 CPA examination, Mr. Jex wished to attend the Becker course in the Washington, D.C., area during the summer of 1992. Mr. Jex has severe to profound hearing loss. His lipreading skills are above average and he is able to lipread with limited comprehension in one-on-one conversations. Nonetheless, even under the most favorable circumstances, he often has to ask a speaker to repeat portions

of a conversation. His disability impairs his participation in discussions or lectures that are offered in group settings unless the communications are conveyed through sign language. In college, before he learned sign language, Mr. Jex used oral interpreters for his classes. He now regularly depends on sign language at work and in continuing education classes. Facts ¶¶ 46-49.

In May 1992, Mr. Jex first asked the Becker company to provide him with a sign language interpreter so that he could participate in all of the live verbal interaction offered in the Becker course. Facts ¶ 45. A Becker company interviewer told him that "Our City Coordinator tells me that Becker does not supply interpreters." Facts ¶ 52. Mr. Jex's repeated attempts to secure an interpreter in May and June were met with similar refusals. Facts ¶ 50.

Even after the National Center for Law and the Deaf ("NCLD")⁶ informed local representatives of the Becker company of its obligations under title III of the ADA and its implementing regulation, and after the request was evaluated by decision makers at company headquarters, the Becker company refused to provide Mr. Jex with a sign language interpreter. As provided by company policy, however, Becker company personnel promised to

⁶ NCLD is now the "National Center for Law and Deafness."

provide Mr. Jex with the 'J-notes' and copies of overhead transparencies for his use during each class. Facts ¶¶ 53-54.

In July 1992, Mr. Jex attended the first six complimentary classes of the summer Becker course. He kept detailed notes of the frequency and length of instructor interruptions to the tape and the number of student questions of which he was aware.⁷ Mr. Jex had substantial problems using the 'J-notes' to learn the substance of the lectures. The accommodations provided by the Becker company left him frustrated and confused, with little comprehension of the course material. Facts ¶¶ 56-61.

Mr. Jex had problems concentrating because he found himself so busy trying to keep up with the taped lecture. He had to read at a rate much faster than his normal reading rate. Facts ¶¶ 61-62.

After he tried three classes without an interpreter, Mr. Jex's wife, Connie Spanton-Jex, who is a sign language interpreter, interpreted an entire four-hour class at his request. As a result, Mr. Jex's comprehension of the material increased greatly; he understood everything the instructor said

⁷ In the first class, instructor Jim Baisey stopped the tape and added his own words or 'J-note' interjects at least 43 times, and there were 2 questions from students. Mr. Baisey also spoke to the class for 30 minutes at the end of the tape. Mr. Jex had no way of knowing what he said; he presumed that Mr. Baisey spent the time summarizing the tape and discussing the homework. Mr. Jex also recorded that the instructor occasionally advanced the tape, skipping portions of it and leaving Mr. Jex to try to find his place in the transcript. On at least one such occasion, the instructor stopped the tape and Mr. Jex believes he was able to lip-read him saying, "The tape is wrong . . ." Mr. Jex was not able to understand the instructor's interpretation of the correct information.

as well as the students' questions. He found that many of the live deviations from the taped lecture and the 'J-notes' were valuable insights that clarified the tape's contents. Facts ¶¶ 63-65.

On July 25, 1992, Mrs. Spanton-Jex interpreted only the live communication.⁸ While the tape played, she indicated to Mr. Jex where the class was in relation to the transcript. Mr. Jex found that with her help he did not get lost. With an interpreter, he was able to ask a question during class for the first time.⁹ Facts ¶ 66.

Without an interpreter, Mr. Jex could not participate in the summer 1992 class, but he did persist in his attempts eventually to take the class and the CPA exam. In fall of 1992, Mr. Jex repeatedly requested that the Becker company provide him with a qualified sign language interpreter for the winter course, which began in January 1993. Again, each of Mr. Jex's requests was refused. Facts ¶ 68.

In November 1992, attorneys for NCLD filed a complaint with the Department of Justice alleging that the Becker company had

⁸ In this class, there were 68 instructor deviations and 16 class questions. Facts ¶ 66.

⁹ At no time did anyone from the Becker company inquire as to whether the 'J-notes' adequately communicated the course contents to Mr. Jex. Even when he brought his own interpreter, neither the instructors nor any other Becker company personnel questioned him about his reasons for needing an interpreter. Facts ¶ 67.

violated the ADA by refusing to provide Mr. Jex with a qualified sign language interpreter. With impending litigation, in late December 1992, the company decided, for the very first time in its history, to provide a sign language interpreter. Facts ¶¶ 76-77. They did so for Mr. Jex beginning in January 1993. Facts ¶ 71.

Mr. Jex's 1992 experiences were not unique. Another deaf student in the D.C. area, Mark Summers, informed local Becker representatives that he was deaf, and inquired about the company's provision of auxiliary aids and services for persons with disabilities. He attended the Becker course throughout the summer of 1992. After attending a few weeks of classes, Mr. Summers requested a tuition reduction because of his inability to participate in the class questions and answers. Facts ¶ 70, 72-3. Except on one occasion when Mr. Summers happened to attend the same class for which Mr. Jex had brought his wife to interpret, Mr. Summers had to rely exclusively on the 'J-notes,' overhead transparencies, and the willingness of instructors to communicate to him through written notes. Facts ¶ 69. Like Mr. Jex, Mr. Summers found that these methods did not provide adequate communication. Months later, after this litigation was filed, when Mr. Summers took the repeat course offered by the Becker company, the company eventually acceded to Mr. Summers' request for an interpreter. Facts ¶¶ 74, 76.

Sheila Palm¹⁰ is currently attending the Becker course in Des Plaines, Illinois, and intends to take the CPA exam in November. She has a profound hearing loss in one ear, and a fifty percent loss of hearing in the other. She uses a hearing aid, communicates through sign language, lipreading, and speech. She informed the Becker staff that she used a sign language interpreter in college, and informed them that she needed a sign language interpreter to fully participate in the Becker course. She expressed a concern that without the assistance of a sign language interpreter, she would not be able to interact with the other students. She was not informed that the class would extensively use an audiotape, and she was not offered the use of a sign language interpreter. Instead, she brought her own interpreter, paid for by the State of Illinois Department of Rehabilitation. Becker staff suggested that she use the 'J-notes,' but she declined to do so.

Mr. Jex and Mr. Summers have met with limited success on the CPA exam. Both plan to take at least parts of the exam again in November 1993. Facts ¶ 75.

¹⁰ Pursuant to Magistrate Judge Kay's Order of October 1, 1993, Defendant provided the government with contact information for some students who had attended the Becker course. The United States has diligently attempted to interview the students whose identifying information has just been provided.

Ms. Palm is one of these students. Due to the extremely short deadline, Ms. Palm has been unable to sign her declaration in time for it to be filed by September 8, 1993. The United States will supplement the record with her sworn declaration as soon as possible. The facts on which this paragraph is based

C. The Becker company as failed to institute a policy of providing interpreters and other auxiliary aids and services when necessary.

After the United States filed this action, the Becker company instituted a temporary unwritten policy that it has stated will remain in effect only while this suit is pending. Facts ¶ 76 (Becker Depo.). Under this policy, students with hearing impairments may get sign language interpreters on demand. For purposes of this discussion, this temporary policy is called the "interim litigation policy."

Since the United States filed suit, the Becker company's written and unwritten policies and practices have undergone a series of modifications. Despite these modifications, the company still does not have a lawful policy to be implemented after the conclusion of this suit. While it is difficult to discern the proposed "official policy" from month to month, it is clear that none ensures that individualized assessments will be conducted or that interpreters will be provided when necessary. Facts ¶¶ 79-84.

Despite the interim litigation policy of providing an interpreter on demand, headquarters sent a contrary written policy to Becker company interviewers on March 26, 1993. It directed interviewers to say, in response to inquiries about sign language interpreters, that, "[I]n appropriate circumstances and where reasonable, we will provide an interpreter on a case-by-

have been reviewed by Ms. Palm and are true to the best of counsel's knowledge.

case basis." Further clarification would be provided only after a student had made a request in writing. Facts ¶ 72.

Additional burdens were imposed by a policy issued in July 1993. A student seeking an interpreter was required to first try the 'J-notes' and other traditional aids; it was then incumbent on the student to prove to the satisfaction of the company why those aids did not provide effective communication, and that there was no other way the course could be modified to work for the student. Under the terms of this policy, a student would qualify for a sign language interpreter only after he or she attended two classes. The company consistently refused to conduct any individualized assessments. The Becker company's denial of a student's request for sign language interpreters was automatic and unchangeable prior to the first two classes. At least one student who took the class under these circumstances found it to be extremely frustrating and discouraging. Facts ¶¶ 79-80, 102-10.

In September 1993, Mr. Becker changed the policies once again during the course of his deposition. Asked to analyze the various policies, Mr. Becker recognized the conflicts, and modified the policies yet again. Facts ¶ 81 (Becker Depo.). At one point during his deposition, he said he had thought that if students had experienced accommodations "similar" to the 'J-notes' and found the accommodation to be ineffective, they would be given sign language interpreters without having to try the 'J-

notes' for two class periods. Facts ¶ 82. Clarification of this policy on October 4, 1993, however, points out that a student must have had practically identical accommodations in a practically identical type of course. This "very similar" experience would include assistance from: (a) verbatim transcripts; (b) interject notes; (c) handouts; (d) student assistants; and (e) availability of the instructors at any time. The majority of the course material must be review of college level accounting courses, information previously learned by the Student. Facts ¶¶ 84-86.

D. The Becker company has discriminated against students with hearing impairments who do not use sign language as their primary method of communication.

The Becker company repeatedly failed to ensure the provision of auxiliary aids and services for people who have hearing impairments but do not rely on sign language interpreters, as illustrated by the experiences of the following four students. Facts ¶¶ 88-101, 111.

Tim Bergman attended the Becker course in Madison, Wisconsin, from June-October, 1992. He has a profound hearing loss, but due to extensive speech training as a child, uses lipreading as a primary means of receiving verbal communication. He found the 'J-notes' difficult to follow, confusing, and cumbersome. Mr. Bergman was unable to hear students' questions that were not repeated by instructors, and so could not benefit fully from instructors' explanations. He found that the

instructors often interjected their own experiences. Facts ¶¶ 88-89 (Bergman Dec.).

Deborah Mundell informed a Becker representative that she was an excellent lipreader and could speak well; she asked to be seated near the instructor in order to lipread effectively. She discovered at the first class that a large portion of the lectures were on audio tape, rendering her lipreading skills useless. The instructor was unaware that a person with a hearing impairment was in the class, had received no special instructions, often turned his back from her while speaking, and did not repeat students' questions for her. During the first class, she requested the notes (the 'J-notes') that she had seen him using, and he reluctantly acquiesced. After several classes, he refused to give them to her at all. Frustrated by her inability to follow the classes, and under a doctor's orders to eliminate stress, she dropped out of the 17-week course after 13 weeks. She received no refund. Facts ¶¶ 90-97 (Mundell Dec.).

Cynthia Rohlin attended the Becker course in Rochester, New York, in January 1992. Although deaf, she had extensive speech therapy as a child and relies primarily on lipreading. She asked to sit close to the instructor to increase her comprehension. Despite her request, no seat was available in the front of the room when she arrived. No one had told her of the extensive use of the taped lecture. She left that class and demanded a refund. Becker personnel persuaded her that her needs would be better

accommodated in Buffalo, New York, an hour away. The classes in Buffalo had not yet started, so she would not be behind her peers. She was given the 'J-notes' in Buffalo, but no student assistant helped her follow the transcript. She was able to lipread some instructors' answers, but she missed the students' questions, so the answers did not make sense. No one wrote out the questions or answers for her. Facts ¶ 98-101 (Rohlin Dec.).

George Kelly became deaf relatively late in life and wears hearing aids in both ears.¹¹ He can speak clearly. He knows some sign language. Mr. Kelly attended the Becker course in Roanoke, Virginia, in January-May, 1993. He was allowed to sit in the front row and was given a set of 'J-notes.' He used an FM transmitter and receiver system he brought to class that was hooked into the cassette recorder, enabling him to hear most of the taped lecture. He also lipread the instructor's statements to the class. He found the 'J-notes' very confusing. There were charts and other information on them that did not appear on the tape, and instructors would say things that were not on the tape. He repeatedly lost his place. At no time did a student assistant help him. Facts ¶ 111 (Kelly Dec.).

¹¹ Like Ms. Palm, Mr. Kelly is one of the students whose identifying information was given to the government in the same week that this memorandum had to be filed. The United States will supplement the record with his sworn declaration as soon as possible. He has reviewed this paragraph and it is accurate to the best of counsel's knowledge.

II. STANDARD FOR SUMMARY JUDGMENT

The undisputed facts demonstrate that the Becker company's policies, practices, and treatment of Mr. Jex violate title III of the ADA. The United States is, therefore, entitled to partial summary judgment as a matter of law. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

In making this motion for partial summary judgment, the United States has the initial burden of showing the absence of a genuine issue of material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Once the government has met its burden by presenting evidence which, if uncontroverted, would entitle the government to a directed verdict at trial, the burden then shifts to Defendant to set forth specific facts demonstrating that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). If the factual context makes Defendant's claim implausible, then Defendant must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

III. STATUTORY AND REGULATORY SCHEME

Title III of the ADA includes two broad provisions that apply to the Becker company: section 302, 42 U.S.C. § 12182, which prohibits discrimination by public accommodations, and section 309, 42 U.S.C. § 12189, which requires certain examiners and educators to offer their services in a place and manner accessible to persons with disabilities.

Section 302 contains a general rule of nondiscrimination and several specific prohibitions that define the contours of discrimination. 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.¹²

42 U.S.C. § 12182(a) (emphasis added). See also 28 C.F.R. § 36.201(a).¹³

¹² The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more . . . major life activit[y] . . ." 42 U.S.C. § 12102(2)(A). "Major life activities" includes hearing. 28 C.F.R. § 36.104.

¹³ Where, as here, Congress expressly delegates authority to an agency to issue legislative regulations, 42 U.S.C. § 12134(a), the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

Agencies are afforded substantial deference in interpreting their own regulations. The Supreme Court has announced, as recently as May 3, 1993, that "provided that an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Stinson v. United States, 113 S. Ct. 1913, 1919

Section 302(b)(2)(A)(iii) and the Department of Justice's implementing regulation, 28 C.F.R. § 36.303(c), specifically apply the mandate of "full and equal enjoyment" to people with hearing impairments by requiring public accommodations to take necessary steps to provide appropriate auxiliary aids and services to their customers with disabilities. Sections 302(b)(1)(A)(i) and (ii) require public accommodations to ensure that people with disabilities participate equally in and benefit equally from the goods and services they offer. Finally, section 302(b)(2)(A)(ii) seeks to ensure the "full and equal enjoyment" of goods and services to persons with disabilities by requiring companies reasonably to modify their policies, practices, or procedures.

Section 309 requires organizations like the Becker company that offer courses related to professional licensing to offer their courses in a manner accessible to people with disabilities. 42 U.S.C. § 12189. The Department's implementing regulation, 28 C.F.R. § 36.309(a), specifically applies this requirement to persons with hearing impairments by requiring these entities to provide appropriate auxiliary aids and services

(1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

IV. ARGUMENT

A. The Becker company's policies and practices of denying interpreters and other auxiliary aids and services violate section 302.¹⁴

1. The law places an affirmative obligation on public accommodations to take steps to ensure the provision of appropriate auxiliary aids and services.

The Becker company has violated section 302 by failing to take necessary steps to provide appropriate "auxiliary aids and services" to persons with disabilities. Section 302, in pertinent part, defines discrimination as:

[The] 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 and services[.]

42 U.S.C. § 12182(b)(2)(A)(iii) (emphasis added).¹⁵ The ADA defines "auxiliary aids" to include, among other things, "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing

¹⁴ As the specific violations set forth herein demonstrate, Defendant's policies and practices have prevented "full and equal enjoyment" of its service by people with hearing impairments in violation of the general rule of section 302(a), 42 U.S.C. § 12182(a). See also 28 C.F.R. § 36.201(a). Section 302(a) is not addressed in detail here, because a violation of any other provision of section 302 equates to a violation of the general rule.

¹⁵ Public accommodations are obligated to provide auxiliary aids and services except where they can demonstrate that to do so would pose an "undue burden," or would "fundamentally alter" the nature of the program. 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(c). The Becker company has admitted that it would not be an undue burden to provide Mr. Jex, or any other student, appropriate auxiliary aids and services including sign language interpreters. The defense of fundamental alteration is likewise unavailable to the company and has never been raised.

impairments; and . . . other similar services and actions." 42 U.S.C. § 12102(1) ("Auxiliary aids and services"). See also 28 C.F.R. § 36.303(b)(1).

The Department of Justice's regulation includes several paragraphs articulating this requirement in detail. 28 C.F.R. §§ 36.303(a)-(f). Paragraph (c) requires public accommodations to provide appropriate aids and services "where necessary to ensure effective communication. . . ." (emphasis added).¹⁶ This emphasis on effective communication is consistent with the ADA's definition of auxiliary aids and services quoted above, 42 U.S.C. § 12102(1), as those methods that are "effective," and with the ADA's legislative history. Congress specifically identified the effectiveness of auxiliary aids or services chosen by public accommodations as a "critical determination" in the assessment of whether they have engaged in discrimination. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 59 (1990).

¹⁶ The ADA was substantially based on section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (as amended by Pub.L. 95-602, Title I, §§ 119, 112(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987). Congress drew title III's "auxiliary aids and services" language from section 504 regulations prohibiting discrimination against persons with disabilities in federally-conducted programs. See 28 C.F.R. § 39.160(a) (Dept. of Justice).

The "effective communication" language of section 36.303(c) derives directly from these same regulations. 28 C.F.R. pt. 36, App. B (Dept. of Justice's Analysis of the regulation, originally published as the preamble to the rule, 56 Fed. Reg. 35544, 35691 (1991), hereinafter "Analysis") at 593 (1992). In crafting section 36.303(c), the Department drew on section 504's regulations and case law in order to "give emphasis to the underlying obligation" that a public accommodation provide communication to its customers with disabilities that is as effective as the communication it provides to others.

Section 302 is a call to action: public accommodations are to "take such steps as may be necessary to ensure" access by providing appropriate auxiliary aids and services. 42 U.S.C. § 12182(b)(2)(A)(iii) (emphasis added). Covered entities should be prepared to offer a variety of auxiliary aids and services when necessary¹⁷ and to measure the effectiveness of specific auxiliary aids or services by the needs of the particular individual using them.¹⁸ Cf. 42 U.S.C. § 12188(b)(2)(C)(5) (factor in assessing civil penalties under title III is whether the entity "could have reasonably anticipated the need for an appropriate type of auxiliary aid or service needed to accommodate the unique needs of a particular individual with a disability" (emphasis added)).

The effectiveness of a particular auxiliary aid or service turns partially on the nature of the communication setting. Both

¹⁷ The regulation expands on the statute's examples of aids, 28 C.F.R. § 36.303(b)(1), but it does not provide an exhaustive list because the universe is large and continually expanding with new technology. 28 C.F.R. pt. 36, App. B at 593 (1992). Cf. Galloway v. Superior Ct. of the District of Columbia, 816 F. Supp. 12, 18 n.11 (D.D.C. 1993) (the Court notes that the possible auxiliary aids to accommodate a blind juror are "as limitless as a willing imagination can conceive").

¹⁸ In its analysis of section 302(b)(2)(A)(iii), the Committee on Labor and Human Resources stated that it "expects that the covered entity will consult with the individual with a disability before providing a particular auxiliary aid or service." S. Rep. No. 116, 101st Cong., 1st Sess. at 63 (1990). See also H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 107 (1990) (same). Consistent with congressional intent, the Department of Justice "strongly encourages" public accommodations to consult with their disabled customers when determining the appropriate means of communication. 28 C.F.R. pt. 36, App. B at 594 (1992).

the title III regulation and the legislative history of the ADA emphasize that the complexity and length of the communication at issue are relevant to a determination of effectiveness, and address contexts analogous to the Becker course. Congress explained that:

While the use of handwritten notes may be effective to a person who is deaf in the context of shopping, it may not be an effective means of communication in a training session for employees

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 59 (1990) (House Committee Report). See also 136 Cong. Rec. E1913, E1919 (May 22, 1990) (statement of Sen. Hoyer). The Department's Analysis is similarly instructive:

It is not difficult to imagine a wide range of communications involving areas such as health, legal matters, and finances that would be sufficiently lengthy or complex to require an interpreter for effective communication.

28 C.F.R. pt. 36, App. B at 594 (1992) (emphasis added). The Department also states:

In those situations requiring an interpreter, the public accommodations must secure the services of a qualified interpreter, unless an undue burden would result.

Id. Absent a showing of an undue burden, a public accommodation must provide sign language interpreters if that is the only way to provide particular customers with effective communication.

Under section 504,¹⁹ courts have routinely ordered the

¹⁹ See, supra, n.16. See 42 U.S.C. § 12201(a) (nothing in the ADA shall be construed to apply a lesser standard than the standards applied under section 504 and its regulations).

provision of sign language interpreters for persons with hearing impairments participating in educational programs. See, e.g., Jones v. Illinois Dept. of Rehab. Servs., 689 F.2d 724 (7th Cir. 1982) (State must provide interpreter services to deaf college student at State university); Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980) (State university must procure a qualified interpreter to assist a deaf graduate student), vacated and remanded on other grounds, 451 U.S. 390 (1981); Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977) (deaf graduate student had probable right to auxiliary aids such as interpreter provided by the university); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977) (deaf college student had probable right to financial assistance for auxiliary aids or services such as interpreter).

The Becker company, which offers a lengthy and complex course covering legal and financial matters to prepare students for a difficult exam, fell far short of meeting the ADA's requirements. In fact, the company failed to take even minimally adequate steps to provide appropriate auxiliary aids and services for students with hearing impairments.

2. The Becker company's blanket refusal to provide sign language interpreters violates section 302's auxiliary aids requirements.

The Becker company failed to ensure that its students with hearing impairments received effective communication of its course. The Becker company actually obstructed communication by

resisting the efforts of such students to obtain appropriate auxiliary aids or services. The company flatly refused to provide or even discuss providing sign language interpreters despite repeated requests by Mr. Jex and other students.²⁰ Students were in effect given a universe of only two aids from which to choose: amplification, or 'J-notes' and transparencies.

The Becker company did not take steps to ensure consideration of individual students' communication needs as required by the ADA. The record reflects no attempt by the company to ascertain and meet the particular needs of students with hearing impairments.²¹ The company's refusal to provide sign language interpreters precludes communication for people who communicate through sign language. All possibility for interaction and contemporaneous understanding of accounting concepts is foreclosed to profoundly deaf students who can

²⁰ The Becker company's failure to rely on or even consider the representations of students with hearing impairments marks a radical departure from its attitudes towards students in any other situation. The Becker company's general philosophy toward its students is one of accommodating the student and resolving any conflict in the favor of the student. If a student claims to have missed a class, a student may repeat it without proving his or her absence. If a student claims to have returned a book to the company, the company will acknowledge the return and will refund the book deposit even if it has no record reflecting that the student returned the book. Facts ¶ 43.

²¹ Neither has Defendant consulted with professionals who are familiar with the needs of persons with hearing impairments, in order to know which types of technologies are appropriate in the context of the Becker course. This is especially true in the area of assistive listening devices. Defendant has never consulted with anyone with even remote experience or expertise to provide devices that will enable persons who are hard of hearing to be able to benefit effectively from amplified sound.

neither hear the content of the course nor speak to ask questions. The complicated context of the Becker course is precisely the type of situation in which the law requires specialized auxiliary aids or services, as the regulation, cases, and legislative history cited above indicate. The Becker company's total refusal to provide interpreters contravenes the Department's guidance that a sign language interpreter may be the only effective means of communicating complex and lengthy material. See 28 C.F.R. pt. 36, App. B at 594, supra.

In addition, as discussed in detail below under section B, the 'J-notes' and transparencies are an insufficient means of providing effective communication for many students in this context. Requiring a student with a hearing impairment to rely only on the set of instructors' notes defeats both aural and interactive learning in a classroom setting; these are the salient features of the course emphasized by the Becker company to distinguish it from its competitors' courses.

3. The Becker company discriminated against Mr. Jex by failing to provide him with appropriate auxiliary aids and services.

In the spring, summer, and fall of 1992, the Becker company repeatedly refused to provide Mr. Jex with a sign language interpreter.²² Mr. Jex's experiences illustrate the rigidity of the Becker company's refusal to provide sign language

²² See discussion, supra, at 11-13.

interpreters. As a result of the Becker company's discriminatory behavior, Mr. Jex was denied effective communication.

As a person who has a severe to profound hearing loss, Mr. Jex is an individual with a disability protected by the ADA. 42 U.S.c. §§ 12102(1) and (2). Mr. Jex relies upon sign language interpreters in educational and professional contexts.²³ Mr. Jex's initial claims to need a sign language interpreter for effective communication in an educational setting were later verified by his experience in the Becker course.

The 'J-note' method utterly failed to provide him with effective communication. Mr. Jex received only partial and confused communication of the course's content. He understood little of the transcripts' contents because he had to rush through them to keep up with the class. Additionally, he understood little of the verbal interaction that took place around him.

When Mr. Jex eventually resorted to bringing his own qualified sign language interpreter to class, he finally received effective communication of the course and was able to ask questions. The interpreter facilitated his communication both by signing and by helping him follow along in the transcript. He did not have to rush through the reading because he knew exactly

²³ See facts set out in section III. B., supra.

where the class was on the tape at all times. Mr. Jex's comprehension improved dramatically with this assistance.

4. The Becker company continues to fail to take steps to provide appropriate auxiliary aids as required by section 302, as shown by its "revised" policies.

The Becker company's most recently-articulated policy requires any student requesting auxiliary aids to try, instead, the 'J-notes' and other traditional aids; then the student must to prove to the satisfaction of the company why those aids did not and cannot provide effective communication, before the company will consider providing an interpreter. But the law does not permit shifting the public accommodation's legal duty onto the students. Rather the law places a clear duty on the public accommodation to "take steps to ensure" effective communication and to ensure that no substandard treatment results from ineffective or inappropriate aids or services. 42 U.S.C. § 12182(b)(2)(A)(iii). See also 28 C.F.R. pt. 36, App. B at 594.

The requirement that students try the 'J-notes' before they are provided with a sign language interpreter violates the auxiliary aids requirements of section 302 because, like the Becker company's former practices, it fails to provide for the particularized assessment required by law.²⁴ The Becker company

²⁴ The company's continued failure to examine the particular needs of its students is evident in its treatment of Ms. Mundell and Ms. Rohlin, both of whom informed the Becker company that they would lipread the course. Defendant failed to consider the fact that neither could possibly lipread the tape-recorded portions of its course.

continues to violate the law by forcing all students with hearing impairments -- regardless of the extent or nature of their disability -- to use the 'J-notes' or nothing. Finally, the "revised" Becker company policy fails in practice to ensure that no different or substandard treatment results from the provision of inappropriate aids and services. Complainants such as Theresa Kidwell illustrate that the policy results in frustration, not education. Facts ¶¶ 102-10 (Kidwell Dec.). In addition, because students must spend time trying the 'J-note' method, to the extent that the method is ineffective for them, they fall behind their peers.

The Becker company's most recent articulation of its policy -- coming just this week -- has effectively foreclosed any student from the opportunity to have an interpreter from the first day of class. For this opportunity, an individual must represent "that he or she has had a very similar experience" to a Becker course. This experience has been clearly defined to be (1) in a course the majority of which is review of material covered in college level accounting courses and previously learned by the student and (2) one in which the student had assistance from verbatim transcripts, interject notes, and handouts; student assistants; and availability of the instructor at any time. Facts ¶ 84 (Interrogatory). The first element requires that the student must already have taken an accounting review course. The second requires what, according to Mr. Becker

is an impossibility outside of the Becker course, as he believes that his company is unique: it is the only one in the world that will supply transcripts of the lecture in advance of the lecture, particularly a transcript with recommended instructor interjects. Facts ¶ 85 (Becker Depo.).

While the United States does not concede that the second element is an accurate description of accommodations provided by the Becker course, Mr. Becker thinks it is. The Becker company's approach is baffling. If there is no course like the Becker course, then there is no student who can meet this proof and receive interpreter services at the beginning of the course. This most recent hurdle may be the company's greatest procedural barrier yet to effective communication.

B. Defendant denies students with hearing impairments opportunities for equal participation in violation of section 302.

Section 302 requires public accommodations to provide opportunities for participation by people with disabilities that are equal to the opportunities afforded others. Section 302(b)(1)(A)(i) forbids public accommodations from denying persons with disabilities the opportunity to participate in or benefit from the company's services. 42 U.S.C. § 12182(b)(1)(A)(i); 28 C.F.R. § 36.202(a). Likewise, section 302(b)(1)(A)(ii) requires public accommodations to provide persons with hearing impairments, like Mr. Jex, with an equal opportunity to participate in or benefit from the company's

services. 42 U.S.C. § 12182(b)(1)(A)(ii); 28 C.F.R. § 36.202(b).

Like the requirement that people with hearing impairments receive appropriate auxiliary aids and services, these provisions seek to ensure that people with disabilities receive "full and equal enjoyment" of the goods and services offered by public accommodations.

Students with hearing impairments are entitled to participate equally in the Becker course. Equal participation means equal access to all the information conveyed in the classes, whether through pre-recorded lectures, scripted or original interjects, or live conversations between the students and instructors. Similarly, equal participation means that students with hearing impairments are entitled to ask questions and to have their questions answered in the classroom setting. Only by offering these students an opportunity to prepare for the CPA examination that is equal to the opportunity presented to other students can the Becker company comply with the law. See S. Rep. No. 116, 101st Cong., 1st Sess. at 60 (1990) ("'Full and equal enjoyment' does not encompass the notion that persons with disabilities must achieve the identical result or level of achievement of nondisabled persons, but does mean that persons with disabilities must be afforded equal opportunity to obtain the same result.") (emphasis added). See also H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 2 at 101 (1990); H.R. Rep. No. 485, 101st Cong. 2nd Sess., pt. 3 at 55 (1990).

Courts have recognized under section 504 that the failure to provide sign language interpreters forecloses from people with hearing impairments the opportunity for equal participation. In United States v. Board of Trustees for the Univ. of Alabama, 908 F.2d 740 (11th Cir. 1990), the University, in defending its practice of denying sign language interpreters to a student with a hearing impairment, took the position that it offered to all students the same opportunity to be educated and to earn a college degree, but that it did not guarantee each student equal results. Id. at 748. The court rejected the University's argument, stating that "in some instances the lack of an auxiliary aid effectively denies a handicapped student equal access to his or her opportunity to learn." Id. The court went on to state that a university offers benefits to its students, and that in the case of a deaf student "all access to the benefit . . . is eliminated when no sign language interpreter is present." Id. To underscore the lack of access, the court drew a parallel to the effect that all access to a course on the third floor of a building is eliminated when no elevators are provided for a student who uses a wheelchair. Id. Similarly, in Rothschild v. Grottenthaler, 907 F.2d 286, 293 (2d Cir. 1990), the court required a school district to provide the deaf parents of a hearing child with sign language interpreters for certain school functions, so that the parents' opportunity to participate

in their child's education would be equal to the opportunity offered hearing parents.

Most Becker students receive a level of service designed to help them best prepare for the CPA examination. Students who have hearing impairments, but who do not have appropriate auxiliary aids or services such as sign language interpreters, do not. Most Becker students may engage in extensive class interaction. Students with hearing impairments cannot. Most Becker students can have their questions answered as they arise in the context of the presented material. Students with hearing impairments must wait until the next break or after class; even then their questions may not be answered. Most Becker students receive the benefit of hearing about the practical experiences of their instructors, and receive personal, individualized assistance during class. Without the aid of interpreters or other appropriate auxiliary aids or services, students with hearing impairments are excluded from this exchange.

The Becker company's refusal to provide Mr. Jex with a sign language interpreter denied him the opportunity to participate in the services, privileges, and advantages of the Becker course. Without an interpreter, Mr. Jex was deprived of one of the essential ways in which other students participate in the course. Although the correct answers and explanations of wrong answers of in-class problems are projected onto a screen during class, it was Mr. Jex's experience that instructors often elaborated on

these explanations. Lacking direct, immediate access to these verbal explanations, Mr. Jex was largely denied instructor feedback and affirmation. Without a sign language interpreter, he could not ask questions or have access to instructors' answers during the lectures. As demonstrated above, having to wait to ask his questions during breaks or after class deprived him of the meaningful context of the questions and rendered what might have been an illuminating exchange of information an exercise in frustration.

When Mr. Jex was relegated to using the 'J-notes' and transparencies, he was effectively reading a book alone in another room, not taking a class. He was denied any meaningful opportunity to participate actively in the classes. In this respect, the 'J-note' method of accommodation parallels, to some degree, the experiences of hearing students who are making up missed classes. A student sits alone in the make-up room, listening to the taped lecture and referring to the transparencies and handouts. The company limits make-up classes to 20 per cent of the total classes, because of the acknowledged inadequacies of this method of learning: a student on his or her own without having people around and with no outside stimulus tends to become bored and unfocused, and to skip materials and problems. Facts ¶ 87 (Becker Depo.). Even in Mr. Becker's view, then, merely listening to or, for a person with a hearing impairment, reading his taped lectures is not an effective

substitute for the live classes.

In fact, the 'J-note' method of accommodation is akin to requiring students with hearing impairments to settle for a different educational product altogether. See 42 U.S.C. § 12182(b)(1)(A)(iii). It requires some individuals to participate in separate or different programs and denies them the opportunity to choose otherwise. See 42 U.S.C. § 12182(b)(1)(C). Other students do not receive 'J-notes.' Other students are provided with the highly interactive learning environment that the Becker press release claims results from substantial research into the most effective methods of education. Indeed, the features that the Becker company claims distinguish its course -- intensive learning in class, no advance preparation, problem-solving, support, and individualized attention -- are absent from the 'J-note' accommodation. Thus, even had the 'J-notes' provided Mr. Jex with an effective road map of the course, which they did not, they would remain inadequate as a substitute for the dynamic, interactive learning environment that the Becker company offers to other CPA candidates.

C. The Becker company has failed to make reasonable modifications to its policies, practices, and procedures in violation of section 302.

Section 302 prohibits public accommodations from failing to make reasonable modifications to its policies and practices in order to afford people with disabilities with equal access to its services. 42 U.S.C. § 12182(b)(2)(A)(ii). See 28 C.F.R. §

36.302(a). Policy modifications must be made unless the entity can demonstrate that making them would fundamentally alter the nature of the services provided. Id. This section, like the specific prohibition against failing to provide auxiliary aids and services, is a practical mandate designed to further the goal of full and equal enjoyment. See 28 C.F.R. pt. 36, App. B at 591 (1992).

Here the law basically requires policies and practices that offer a broad range of categories of auxiliary aids and services, in order to afford to students with hearing impairments the services and advantages offered to others. None of the modifications suggested here would even appear to result in a fundamental alteration of the course. To the contrary, Becker's continuing policies impose a fundamentally altered class experience on people with hearing impairments.

It is reasonable to require the Becker company to institute a policy in which it recognizes that the nature of its course requires auxiliary aids and services that may include, in appropriate circumstances, sign language interpreters.

It is reasonable to require the Becker company to institute a procedure for making individualized assessments of its students with hearing impairments to determine which auxiliary aids and services would provide them with effective communication. It is reasonable to require the Becker company to provide adequate training to the limited number of personnel who are responsible

for making these individualized assessments. It is reasonable to expect the company to disseminate an adequately revised policy to all company personnel who come into contact with students. It is reasonable to require the company to provide sign language interpreters and other appropriate auxiliary aids and services to students who need them for effective communication.

Since the initiation of this suit, the company has provided sign language interpreters for several students with hearing impairments, including, but not limited to, Mr. Jex, Mr. Summers, and Ms. Kidwell. The company has never presented any factors preventing it from similarly supplying sign language interpreters in the future.

D. The Becker company has failed to comply with section 309's specific requirements for examinations and courses.

Section 309 of the ADA requires that:

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities . . .
. . .

42 U.S.C. § 12189. See also 28 C.F.R. § 36.309(a).

Recognizing the significance of access to educational opportunities and professional development, Congress enacted a separate section of the ADA covering entities that are educators or examiners; this section covers all such entities, whether or not they are also subject to other provisions of title II or title III. 42 U.S.C. § 12189. See also 28 C.F.R. pt. 36, App. B

at 602 (1992) (reiterating congressional intent that "persons with disabilities are not foreclosed from educational, professional, or trade opportunities because an examination or course is conducted in an inaccessible site or without needed modifications"). The Department's analysis noted "the importance of ensuring that key gateways to education and employment are open to individuals with disabilities." Id.

The regulation specifically requires that covered courses provide appropriate auxiliary aids and services:

A private entity that offers a course covered by this section shall provide appropriate auxiliary aids and services for persons with impaired sensory, manual, or speaking skills, unless the private entity can demonstrate that offering a particular auxiliary aid or service would fundamentally alter the course or would result in an undue burden. . . .

28 C.F.R. § 36.309(c)(3).

The Becker company's discriminatory practices, policies, and conduct towards Mr. Jex, that were fully set forth above, also violate section 309 and its implementing regulation. The substance of the violation is identical to the Defendant's violation of section 302. Its effects and social import are especially damaging in the context of professional education.

V. PATTERN OR PRACTICE OF DISCRIMINATION

Suit by the United States under title III is authorized where there is a "pattern or practice of discrimination" or where discrimination against people with disabilities "raises an issue

of general public importance."²⁵ 42 U.S.C. §§ 12188(b)(1)(a)(i) and (ii). See also 28 C.F.R § 36.503. A "pattern or practice" of discrimination depends on a showing of more than "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977), cited in, Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876 (1984). A "pattern or practice" of discrimination is established by showing that discrimination is a company's "regular rather than the unusual practice." Id.

The Becker company has engaged in a pattern and practice of discrimination by repeatedly denying students' requests for appropriate auxiliary aids and services including sign language interpreters, pursuant to both written and unwritten policy. Even without the testimony of other witnesses, this pattern or practice of discrimination is evident from the company's repeated refusals in 1992 to provide Mr. Jex with a sign language interpreter.

VI. REQUESTED RELIEF

The United States has established that it is entitled to the following relief, as authorized by section 308, 42 U.S.C. § 12188.

²⁵ Courts generally refuse to review the Attorney General's determination of general public importance. United States v. Northside Realty Assocs., Inc., 474 F.2d 1164, 1168 (5th Cir. 1973), cert. denied, 424 U.S. 977 (1976); United States v. University Oaks Civic Club, 653 F. Supp. 1469, 1474 (S.D. Tex.

A. Declaratory relief.

The Court should declare that the discriminatory policies and practices of the Becker company violate title III of the ADA, 42 U.S.C. § 12181-89, and its implementing regulation, 28 C.F.R. pt. 36 (1992). The Court is authorized by statute to grant "any equitable relief" that it considers appropriate. 42 U.S.C. § 12188(b)(2)(A); see 28 C.F.R. § 36.504(a)(1).

It is appropriate for this Court to declare that the Becker company's policy and practices violate the ADA. The public interest in resolving uncertainties of the obligations of public accommodations under the ADA is substantial. See Bituminous Coal Operators' Assn., Inc. v. International Union, United Mine Wrkrs., 585 F.2d 586, 596-97 (3d Cir. 1978). Because of the Becker company's unique status as an industry leader in the crucial area of test preparatory courses, other companies will look to the outcome of this case when assessing how to meet their legal obligations under the ADA.

B. Injunctive relief.

The Court should enjoin the Becker company from discriminating against people with hearing impairments. Specifically, the company should be required to provide sign language interpreters on request, if the student requesting the interpreter shows (1) that he or she has used sign language interpreters in other educational or business settings or (2)

1987) (citations omitted).

that, although he or she has not used interpreters in other classes or business settings, an interpreter is required for effective communication in the Becker course. The latter showing would be appropriate, for example, if a student learned sign language after the last classes he or she took, or if the student can show that he or she did not receive effective communication in an educational or business setting due to lack of an interpreter. The same policy should be followed as to requests for other auxiliary aids.

Despite the Becker company's possible protests that it has substantially modified its policies, the government's need for appropriate injunctive relief is not moot. Mootness does not result when a defendant voluntarily agrees to refrain from a practice, but is free to resume it at any time. Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) (citations omitted). Even if Defendant's alleged policy modifications during litigation were legally adequate, which they were not, these modifications would not render the case moot. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). If the Becker company has indeed modified its policies, the modifications are merely temporary without any concomitant commitment to modify its policies on a permanent basis. Therefore, injunctive relief is appropriate.

C. Damages.

The United States asks the Court to order that Mr. Jex is entitled to monetary damages in an amount to be determined at future proceedings. Section 308(b)(2)(B) specifically authorizes the court to award "monetary damages to persons aggrieved" when requested by the Attorney General. 42 U.S.C. § 12188. See also 28 C.F.R. § 36.504(a)(2). Monetary damages include compensatory and incidental damages, as well as damages resulting from pain and suffering. See 28 C.F.R. pt. 36, App. B at 626 (1992).

The United States has proven that the Becker company discriminated against Mr. Jex. This discrimination caused Mr. Jex hardship for which he is entitled to compensation. Mr. Jex suffered economic loss, frustration and humiliation, and pain and suffering. At a later proceeding, the government will provide evidence regarding the amount of these compensatory damages, damages resulting from pain and suffering, and incidental damages.

D. Civil penalties.

Finally, the Court should order the Becker company to pay civil penalties to vindicate the public interest as authorized by 42 U.S.C. § 12188(b)(2)(C). Once the Court determines that civil penalties are appropriate, it may determine the appropriate amount of the penalties at a later proceeding.

A defendant's good faith effort to comply with the ADA is a factor to consider when evaluating the amount of civil penalties

to impose. 42 U.S.C. § 12188(b)(2)(C)(5). See also 28 C.F.R. § 36.504(a)(3). The statute specifically provides that in assessing good faith, the court shall consider "whether the entity could reasonably have anticipated the need for an appropriate type of auxiliary aids needed to accommodate the unique needs of a particular individual with a disability." Id. Here the defendant has failed not only to anticipate such needs, it has refused to consider the student's statements of their needs. In the instant case, the Becker company was repeatedly informed by Mr. Jex and others of their need for sign language interpreters. The Becker company had actual and repeated notice of the unique needs of particular students with hearing impairments who wanted to participate fully in its program. Congress anticipated just such a situation in addressing the assessment of civil penalties. See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 128 (1990) ("Of course, once an individual has identified and requested a specific auxiliary aid, the public accommodation cannot subsequently claim that the aid could not have been reasonably anticipated.") Civil penalties are necessary in this case to vindicate the public interest.

Congress intended that the amount of civil penalties assessed against a covered entity be partially determined by the financial status of the offending entity. See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 68 (1990) (listing "the financial circumstances of the violator" among the factors to consider in

setting the amount of the penalties). Therefore, once the Court has declared that civil penalties are appropriate, the Court should re-open discovery for this limited purpose as contemplated by Magistrate Judge Kay's Order of August 23, 1993, directing Defendant to respond to Interrogatories Nos. 10, 11, and 12 of the United States' First Set of Interrogatories, and allowing the United States to depose Mr. Becker regarding the financial circumstances of the Becker company and its corporate general partner.²⁶

²⁶ Although in that Order, Judge Kay summarily denied the United States' Motion to Compel Financial Information, the fact that the denial was without prejudice implies that Judge Kay adopted Defendant's argument that the United States' right to the financial information sought in Interrogatories 10, 11, and 12 of the United States' First Set of Interrogatories should be postponed until after the Court made a determination regarding the appropriateness of civil penalties. Facts ¶ ____ (Becker Depo.). Likewise, at Mr. Becker's deposition, defense counsel cited Magistrate Judge Kay's Order and repeatedly instructed the witness not to answer any questions regarding the financial status of the company or its corporate general partner. Facts ¶ ____ (Becker Depo.).

VII. CONCLUSION

This Court should grant partial summary judgment in favor of the United States, declare that the Becker company has violated title III of the ADA, and enjoin the Becker company from refusing to provide appropriate auxiliary aids. The Court should set firm hearing and trial dates so the parties may expeditiously resolve all remaining matters, including monetary damages for aggrieved individuals such as Rod Jex, civil penalties, and other relief that may be appropriate.

Respectfully submitted,

JOHN L. WODATCH
Chief, Public Access Section
D.C. Bar No. 344523

L. IRENE BOWEN
Deputy Chief, Public Access Section
D.C. Bar No. 925610

V. COLLEEN MILLER
MARC DUBIN
MARY LOU MOBLEY
Attorneys²⁷
Public Access Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
Tel: (202) 307-0663

²⁷ Kate Nicholson, a member of the Public Access Section who has not yet been admitted to the bar, made significant contributions to this memorandum.

CERTIFICATE OF SERVICE

I, the undersigned attorney for the United States of America, do hereby certify that as of October 12, 1993, I will have personally caused to be served upon the person listed below, by hand delivery, a true and correct copy of the foregoing Corrected Memorandum of Points and Authorities In Support of United States' Motion for Partial Summary Judgment:

BURTON FISHMAN
Weinberg & Green
100 South Charles Street
Baltimore, Maryland 21201-2773

(Attorney for the Defendant)

SO CERTIFIED this 11th day of October, 1993.

MARY LOU MOBLEY
Trial Attorney
U.S. Department of Justice
Civil Rights Division
Public Access Section
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 307-0663