UNITED STATES DISTRICT COURT
NORTHEN DISTRICT OF NEW YORK

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NAVELLA CONSTANCE AND
VERNAL CONSTANCE,

Plaintiffs,

-against-

STATE UNIVERSITY OF NEW YORK
HEALTH SCIENCE CENTER,

Defendant.

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MEMORANDUM

98-cv-1440
(FJS)(GJD)

**UNITED STATES' MEMORANDUM OF LAW**
**AS INTERVENOR AND *AMICUS CURIAE***
**IN RESPONSE TO**
**DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

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## PRELIMINARY STATEMENT

The United States moves to intervene as of right in this action to address the constitutionality of Title II of the Americans with Disabilities Act ("ADA"),[1] and Section 504 of the Rehabilitation Act ("Rehabilitation Act"),[2] and moves simultaneously for leave to address as *amicus curiae* the proper construction of these Acts. Plaintiffs Navella and Vernal Constance, who are deaf and use sign language for communication, brought this action for declaratory and injunctive relief, and compensatory damages to remedy alleged violations of Title II and Section 504. The Constances allege that a New York state agency did not secure qualified interpreting services for effective communication with plaintiffs -- despite a hospital interpreter policy and plaintiffs' repeated requests.[3] Defendant in its motion for judgment on the pleadings[4] argues: 1) neither the ADA nor the Rehabilitation Act waived the State's Eleventh Amendment immunity to suit; 2) the Constances lack standing; and 3) plaintiffs fail to sufficiently plead discriminatory intent to justify an award of damages.

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[1] 42 U.S.C. §§ 12131-34.

[2] 29 U.S.C. § 794.

[3] For a complete statement of the factual background, the United States respectfully refers the Court to plaintiffs' statement of facts contained in the complaint and pleadings, which are adopted herein by reference.

[4] On January 13, 1999, the Attorney General of the State of New York filed a memorandum of law in support of a motion for judgment on the pleadings on behalf of defendant. (This memorandum is cited herein as "Def. Mem. __.")

The United States, as intervenor, demonstrates that Congress effectively abrogated states' Eleventh Amendment immunity under the ADA and the Rehabilitation Act, and that the state's acceptance of Federal funds effectively waived Eleventh Amendment immunity from Section 504 claims. Also, the United States, as *amicus curiae*, urges the Court to rule that both plaintiffs have standing to seek declaratory and injunctive relief; and that, assuming *arguendo*, that discriminatory intent is a prerequisite for a claim for compensatory damages, plaintiffs' complaint sufficiently alleges such intent.

## ARGUMENT

### I. THE ADA AND THE REHABILITATION ACT WERE ENACTED PURSUANT TO THE FOURTEENTH AMENDMENT, AND VALIDLY ABROGATED STATES' SOVEREIGN IMMUNITY FROM DISABILITY DISCRIMINATION CLAIMS

As defendant acknowledges, Congress unequivocally expressed its intent to abrogate states' immunity in both 42 U.S.C § 12202 (Title II)[5] and 42 U.S.C. § 2000d-7 (Section 504).[6] Def. Mem. at 22. As defendant also notes, this Court, in a related ADA title I challenge, has already upheld the ADA's abrogation of the state's sovereign immunity. See Muller v. Costello, 977 F. Supp. 299 (N.D.N.Y. 1998), appeal docketed, No. 98-7729 (2d Cir. June 26, 1998). Def. Mem. at 22-23. Defendant, however, contends that the ADA and the Rehabilitation Act are unconstitutional because Congress did not

[5]"Section 12202 of Title 42 provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."

[6]Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 . . .."

exercise proper constitutional authority when it passed the ADA pursuant to the Commerce Clause of the Constitution, citing Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). Id. at 22.

For the reasons explained below, the Eleventh Amendment is no bar to such actions because the abrogations in the ADA and the Rehabilitation Act are constitutional exercises of Congress' power under Section 5 of the Fourteenth Amendment. In Seminole Tribe, the Supreme Court reiterated that Congress can abrogate a State's sovereign immunity if Congress,: (1) has "unequivocally expressed its intent to abrogate the immunity"; and (2)"has acted pursuant to a valid exercise of power." 517 U.S. at 55 (citations, quotations, and brackets omitted). See Cooper v. New York State Office of Mental Health, 162 F. 3d 770, 773 (2d Cir.1998)(validating that the Age Discrimination in Employment Act (ADEA) is within enforcement power under Section 5). As stated earlier, defendant concedes that Section 12202 and Section 2000d-7 satisfy the first requirement.

The second inquiry under Seminole Tribe is whether "Congress has the power to abrogate unilaterally the States' immunity from suit." 517 U.S. at 59. Here, the Fourteenth Amendment provides that authority. Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. As the Supreme Court explained over a hundred years ago:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. (10 Otto) 339, 345-346 (1879). The ADA and Rehabilitation Act, which permit suits against States for disability discrimination, should be sustained under Section 5 as appropriate legislation to protect equal protection. The Supreme Court's test in Katzenbach v. Morgan, 384 U.S. 641 (1966) is commonly applied to determine whether legislation is appropriate under Section 5:

> [1] whether [the statute] may be regarded as an enactment to enforce the Equal Protection Clause, [2] whether it is "plainly adapted to that end" and [3] whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."

Morgan, 384 U.S. at 651 (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1919)). Each element of the Morgan test is satisfied here. As recently affirmed by the Supreme Court, the Fourteenth Amendment extends to all Fourteenth Amendment rights. City of Boerne v. Flores 117 S.Ct. 2157, 2164 (1997).

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court upheld the abrogation of States' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., as "appropriate" legislation under Section 5. It explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." Id. at 456. In Seminole Tribe, the Court reaffirmed the holding of Fitzpatrick. See 517 U.S. at 59, 65, 71 n.15. Thus, even after Seminole Tribe, "Congress has the power under

§ 5 of the Fourteenth Amendment to eliminate a state's Eleventh Amendment immunity in order to permit the enforcement against state defendants of rights guaranteed by the Fourteenth Amendment." Lipofsky v. Steingut, 86 F.3d 15, 17-18 (2d Cir.), cert. denied, 117 S. Ct. 401 (1996).

In Boerne, the Supreme Court confirmed that Congress has broad discretion to enact legislation to redress what it rationally perceived to be widespread constitutional injuries against individuals with disabilities. The Court explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. Id. at 2163, 2172. And it reaffirmed that Congress can prohibit activities that themselves were not unconstitutional in furtherance of its remedial scheme. Id. at 2163, 2167, 2169.

The Supreme Court stressed, however, that Congress' power had to be linked to constitutional injuries and that there must be a "congruence and proportionality" between the identified harms and the statutory remedy. Id. at 2164. The Court acknowledged that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." Ibid.

In enacting Title II, Congress reasonably concluded that "appropriate legislation" under Section 5 of the Fourteenth Amendment was necessary to remedy and deter unconstitutional discrimination against persons with disabilities. First, the legislative record

amply demonstrated pervasive, "society-wide discrimination" against persons with disabilities based on fear and stigma that infects both public and private services. See S. Rep. No. 116, 101st Cong., 1st Sess. 8-9 (1989) ("Senate Report"); 42 U.S.C. § 12101(a)(2) (discrimination a "serious and pervasive" problem).[7] After 14 congressional hearings, 63 field hearings, the submission of myriad reports by the Executive Branch and interested groups, and lengthy floor debates, Congress found that persons with disabilities have been subject to "a history of purposeful unequal treatment," 42 U.S.C. § 12101(a)(7), and that this discrimination "persists" in many areas, including "communication" and "public services," 42 U.S.C. § 12101(a)(3). Congress also found that this discrimination includes "outright intentional exclusion, . . . the discriminatory effects of . . . communication barriers, overprotective rules and policies, [and] segregation." 42 U.S.C. § 12101(a)(5). As a result of discrimination, Congress found, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6).

All but one of the circuits that have decided the issue have found that the ADA is a "congruent and proportional" response to the

[7]The committee reports accompanying the ADA demonstrate that Congress found considerable need to prevent discrimination against persons with disabilities by public entities, in particular. See Senate Report 7 (public schools), 12 (voting), 19, 44 (citing need to extend protection to state agencies that do not receive federal aid), 45 (school bus operations); House Report, Pt.2, at 30 (zoos, public schools); 37, 84 (public services, generally); id. Pt. 3, at 50 (jails).

pervasive discrimination Congress discovered, and thus was "appropriate" Section 5 legislation. Compare Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir.), cert. denied, 118 S.Ct. 2340 (1998); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); Seaborn v. Florida, 143 F.3d 1405 (11th Cir.), cert. denied, 119 S. Ct. 1038 (1999); Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-1443 (11th Cir.), cert. granted on ADEA issue, cert. on ADA issue still pending, 119 S. Ct. 901, 902 (1999); Crawford v. Indiana Dept. of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); with Brown v. North Carolina Div. Of Motor Vehicles, 166 F.3d 698 704-705, 708 (4th Cir. 1999), petition for reh'g en banc filed (March 29, 1999) [finding that the ADA's abrogation was unconstitutional as applied to a specific regulatory provision (not at issue in this case) that prohibited imposing surcharges for parking placards required to park in accessible spaces, but expressly disclaiming the intent to opine about the ADA as a whole].[8]

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[8]The conclusions of Brown are plainly wrong for at least two reasons. First, the Fourth Circuit employed an improper standard in measuring the constitutionality of the ADA. The court demanded "support in the legislative record for the proposition that state surcharges for handicapped programs are motivated by animus toward the class." Id. at 707. This insistence ignored the presumption of constitutionality that attaches to all federal statutes "unless the lack of constitutional authority to pass an act in question is clearly demonstrated." United States v. Harris, 106 U.S. 629, 635 (1883); see also Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985). Second, the Fourth Circuit erred in demanding a record at all, much less at the level of specificity it demanded. "If evidence was required [in order for a statute to be constitutional], it must be supposed that it was before the legislature when the act was passed; and, if any special finding was required to warrant the passage of the act, it would seem that the passage of the act itself might be held to be equivalent to such a finding." United States v. Des Moines Nav. & Ry., 142 U.S. 510 (1892) (quoting Thomas M. Cooley, A Treatise on Constitutional Limitations (5th ed.)); see also FCC v.

(continued...)

The Second Circuit's post-Boerne decisions in Cooper v. New York State Office of Mental Health, 162 F.3d 770 (2d. Cir. 1998), petition for cert. filed (Mar. 23, 1999) (No. 98-1524), and Anderson v. State University of New York, 169 F.3d 117 (2d. Cr. 1999), demonstrate that it will join the majority of the circuits in upholding the ADA's constitutionality.

First, the Court specifically held that Congress' power to enforce the Equal Protection Clause extended to those classifications that are not subject to heightened scrutiny (such as age or disability). "Congress has the power to prohibit arbitrary age-based discrimination even though age is not a suspect classification." Cooper, 162 F.3d at 777. Second, in applying the Boerne "congruence and proportionality" test, the Court reaffirmed that statutes that exceed the protections of the Constitution are appropriate Section 5 legislation. See Anderson, 169 F.3d at 121 (Congress may prohibit practices that have discriminatory effects).[9]

A statute may be enacted pursuant to more than one congressional power. Counsel v. Dow, 849 F.2d 731, 736 (2d Cir.), cert. denied, 488 U.S. 955 (1988) (Handicapped Children's Protection Act enacted under Spending Clause and Fourteenth Amendment). Like the

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[8](...continued)
Beach Communications, Inc., 508 U.S. 307, 315 (1993) ("a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

[9]Besides Muller, another judge in the Northern District addressed the constitutionality of the ADA in Kilcullen v. New York State Department of Transportation, 33 F. Supp. 2d 133 (N.D.N.Y. 1999), appeal pending, No. 99-7209 (2d. Cir.) (invalidating the ADA's anti-discrimination employment as incongruent with the Equal Protection Clause).

ADA, Section 2000d-7 is also a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment to permit private suits against States for discriminating against individuals with disabilities in violation of federal law. Accord Clark, 123 F.3d at 1269-1271 (Section 504); Lesage v. Texas, 158 F.3d 213, 217-219 (5th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3469 (Jan. 11, 1999) (No. 98-1111) (Title VI); Doe v. University of Ill., 138 F.3d 653, 660 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (July 13, 1998) (No. 98-126) (Title IX); see also Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 n.2 (1987) (stating in dictum that "[the Rehabilitation Act] was passed pursuant to § 5 of the Fourteenth Amendment."); Franks v. Kentucky School for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998)(so holding as to Section 2000d-7's application to Title IX); Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997)(Title IX).

## II. NEW YORK HAS WAIVED ITS SOVEREIGN IMMUNITY FROM SECTION 504 CLAIMS

The complaint alleges, but defendant denies, that SUNY HSC has accepted federal funds. Complaint at ¶ 9; Answer at ¶ 7. However, as explained below at p. 12, infra, for the purposes of addressing the challenge at the general stage of pleadings, we must accept as true all material allegations of the complaint. Thus, we should assume that defendant has accepted federal funds after the effective date of Section 2000d-7. Accordingly, by voluntarily choosing to receive Federal funds, New York waived any Eleventh Amendment immunity it may have had from being sued for disability discrimination under Section 504. See Clark, 123 F.3d at 1271; Beasley v. Alabama State Univ., 3

F. Supp.2d 1304, 1311-1315 (M.D. Ala. 1998); Litman v. George Mason Univ., 5 F. Supp.2d 366, 375-376 (E.D. Va. 1998). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983).

New York had clear notice that its actions here would subject it to possible suit in federal courts. Congress may condition the receipt of federal funds on a waiver of Eleventh Amendment immunity when, as here, the statute provides unequivocal notice to the States of this condition. See Seminole Tribe, 517 U.S. at 54; Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959); Close v. New York, 125 F.3d 31, 39 (2d Cir. 1997); In re 995 Fifth Ave. Assocs., 963 F.2d 503, 508-509 (2d Cir.), cert. denied, 506 U.S. 947 (1992); County of Monroe v. Florida, 678 F.2d 1124, 1133-1135 (2d Cir. 1982), cert. denied, 459 U.S. 1104 (1983). It is well-settled that a State may "by its participation in the program authorized by Congress . . . in effect consent[] to the abrogation of that immunity." Edelman v. Jordan, 415 U.S. 651, 672 (1974); see also Atascadero, 473 U.S. 234, 238 n.1 (1985) ("[a] State may effectuate a waiver of its constitutional immunity by . . . waiving its immunity to suit in the context of a particular federal program").

Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in Atascadero, by putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504. As the Ninth Circuit held in a

case involving Section 2000d-7's abrogation for Section 504 claims, Section 2000d-7 "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." Clark, 123 F.3d at 1271. In conclusion, the state waived its immunity from suit by accepting federal funds, and at the same time, Congress exercised its proper authority to abrogate state immunity from suits brought under the Rehabilitation Act.

## III. THIS CASE SHOULD NOT BE DISMISSED FOR LACK OF STANDING

To establish standing, a plaintiff must prove three elements: (1) "injury in fact" — an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical[;] (2) "a casual connection between the injury and the conduct complained of[;]" and (3) a likelihood, as opposed to mere speculation, "that the injury will be redressed by a favorable decision." United States v. Hays, 515 U.S. 737, 743 (1995), quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (citation and internal quotations omitted).

When standing is challenged on the basis of the pleadings, we "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." United States v. Vazquez, 145 F.3d 74, 81 (2d Cir. 1998)(quoting Warth v. Seldin, 422 U.S. 490, 501 (1975). And "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." Vazques, 145 F.3d at 81 (quoting Lujan, 504 U.S. at 561

(internal quotation marks and citation omitted)(alterations in original)). Furthermore, quoting Lujan, 504 U.S. at 561-562, the Second Circuit stated that

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress.

Vazques, 145 F.3d at 81.

Vernal Constance satisfies the requirements to establish standing. During his spouse's hospitalization, Mr. Constance repeatedly requested the hospital for the services of a qualified sign language interpreter, but was not provided with such services, and as a result, he was not informed by hospital staff about his spouse's diagnosis and treatment, nor was he able to participate in his spouse's care. In short, Mr. Constance was "personally denied equal treatment by the challenged discriminatory conduct." Hays, 515 U.S. at 744.

It is clear that the second and third elements of the tests -- causation and redressability -- are also met here. The allegations show that the hospital failed to provide the interpreters despite persistent demands by Mr. Constance. The violation of the ADA and Rehabilitation Act was caused by the hospital's failure to provide Mr. and Mrs. Constance effective communication in direct violation of an explicit statutory requirement. A favorable decision of this court would redress any past injuries and any future violation of the

statutes by awarding damages, or injunctive and declaratory relief that Mr. Constance is seeking. Complaint at ¶ 2.

1. Mr. Constance Has Standing To Sue Even If He Is Not A Patient

Title II's enforcement provision provides a cause of action in federal court for "any person alleging discrimination on the basis of disability."[10] Similarly, Section 504 provides a cause of action to "any person aggrieved" by the discrimination of person on the basis of his or her disability.[11] 29 U.S.C. § 794(a)(2). The Second Circuit found that "the use of such broad language in the enforcement provisions of the statutes evinces a congressional intention to define standing to bring a private action under 504 as broadly as is permitted by Article III of the Constitution." Innovative Health Systems, Inc. et al. v. City of White Plains, et al., 117 F.3d 37 (2d Cir. 1997).

As the Department's commentary to its regulation makes clear, "'[t]he 'essential eligibility requirements for participation in some activities covered under this part may be minimal." 28 C.F.R. pt. 35, app. A. at 472. See Rothschild v. Grottenthaler, 907 F.2d 286, 290 (2d Cir. 1990) (deaf parents are qualified to have interpreters in activities at hearing child's school); Raines v. Florida, 983 F. Supp. 1362, 1372 (N.D. Fla. 1997); Niece v. Fitzner, 922 F. Supp. 1208, 1218 (E.D. Mich. 1996) (cause of action under ADA for deaf fiancé of prison inmate); Aikins v. Mt. Helena Hosp., 843 F. Supp. 1329, 1337 (N.D

[10] 42 U.S.C. § 12133.

Cal. 1994) (supporting a claim against the hospital on behalf of the deaf wife of a patient at the hospital). Cf. Department of Justice, The Americans with Disabilities Act Title II Technical Assistance Manual § II-7.1000 (Supp. 1994)(Attachment)(the obligation to ensure effective communication is not limited to those who have a "direct interest" in the program at issue; example is courtroom spectators).

Both Vernal Constance and his wife are qualified individuals with a disability who are guaranteed the protections of federal laws against discrimination on the basis of disability. Both the ADA and Rehabilitation Act protect "qualified individuals with disabilities" from discrimination on the basis of disability.[12] Mr. Constance, who along with his wife who is deaf, is undeniably a "qualified" individual with a disability. He was at the hospital to participate in various hospital programs and services, including the provision of medical treatment for his spouse; to provide assistance and information that would aid the hospital in the delivery of services to his wife; to learn from the hospital about the nature of her condition and to participate in decisions about her treatment; to learn about her prognosis and the type of care or assistance she may require in order to recover fully; and to encourage and assist her in her care and treatment.

In addition, Vernal Constance is a person associated with a person with a disability and thus Mr. Constance is separately protected under the ADA provision prohibiting discrimination on the

[12]42 U.S.C. § 12132; 29 U.S.C. § 794, respectively.

basis of association with persons with disabilities. 28 C.F.R. § 35.130(g); TA Manual § II-3.9000 ("A State . . . government may not discriminate against individuals . . . because of their known relationship or association with persons who have disabilities.").

2. Both Plaintiffs Have Standing to Seek Injunctive and Declaratory Relief

Defendant argues that plaintiffs have no standing to seek injunctive and declaratory relief because there is "no extant case or controversy," because, defendant asserts, Ms. Constance has no further need for defendant's services, and defendant claims that its hospital regulations already provide for interpreter services for effective communication with persons who are deaf. Def. Mem. at 9-11.[13]

In seeking injunctive or declaratory relief, plaintiffs must demonstrate a likelihood of imminent future injury. See City of Los Angeles v. Lyons, 461 U.S. 95, 105-106 (1983). 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); see also Foundation on Economic Trends v. Lyng, 943 F.2d 79, 82 (D.C. Cir. 1991).

The facts in the instant case show that plaintiffs are threatened with an injury that is "real and immediate," and impending. It is

[13]While defendant's arguments as to the second issue of standing addressed only to Mrs. Constance, we assert that both plaintiffs have standing to bring claims for injunctive and declaratory relief.

almost certain that plaintiffs will again require the services of the SUNY HSC as one of those hospitals nearest from their home, and as the only Level One Trauma Center for an eleven-county region of Central New York. Any emergency would necessarily require plaintiffs to return to SUNY HSC.

Defendant states that there is no likelihood that SUNY HSC will again fail to provide interpreter services to plaintiffs, citing its existing "regulations in place to protect the interests of deaf individuals." Def. Mem. at 11. Defendant concludes that plaintiffs' claims may be moot, and that it is unnecessary for the Court to order SUNY HSC to establish regulations which already exist, or to order SUNY HSC to abide by pre-existing regulations." Id. at 12. The fact that defendant ignored or violated its own regulation to provide interpreter services for Mr. and Mrs. Constance clearly shows that the hospital has not implemented and enforced that regulation.

Moreover, the record shows that SUNY HSC has continued its failure to provide interpreter services in similar incidents. First, the New York State Department of Health cited deficiencies in the Hospital's interpreter services not only in this case, but also in two prior cases in 1994. See Attachment 1 to Plaintiff's Complaint. Second, even after being cited for these deficiencies, SUNY HSC still continued its failure to provide interpreter services more than two years after plaintiffs' experiences when the hospital failed to provide interpreters for another deaf patient, Joan Emerick, who repeatedly requested services during her four-day hospitalization in August 1998. See Attachment 3 to Plaintiff's Complaint. The record

clearly demonstrates that SUNY HSC likely will ignore or violate its interpreter regulations again if plaintiffs were to return to SUNY HSC.

Defendant relies heavily on Aikins v. St. Helena Hosp., 843 F. Supp. 1329 (N.D. Cal. 1994). In Aikins, 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, Aikins was granted leave to amend her complaint and the court then reinstated her ADA claim against the hospital, based on additional allegations that Ms. Aikins 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. Aikins v. St. Helena Hosp., No. C 93-3933-FMS, 1994 WL 794759, at *3 (N.D. Cal. April 4, 1994). Courts have also found standing in other disability rights cases involving circumstances less immediate than those presented in Constances' case. See, supra, n.18.

In this case, SUNY HSC is the only Level One Trauma Center for the region of Central New York, where plaintiffs reside. In addition to geographic proximity, plaintiffs' 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 plaintiffs, themselves.

Another district court case upon which defendant relies is clearly distinguishable from the present case. In Schroedel v. New York Univ. Med. Ctr., 885 F. Supp. 594, 599 (S.D.N.Y. 1995), the district court concluded that plaintiff lacked standing to sue because the defendant-hospital was not the nearest medical center to plaintiff's residence and the plaintiff failed to allege that she regularly used the hospital's services. In this case, however, plaintiffs alleged that they would regularly use the services of SUNY HSC as the Region's only Level One Trauma Center, and that SUNY HSC is one of the nearest hospitals to Mr. and Mrs. Constance's residence.

Earlier Supreme Court cases on which defendant relies are also inapposite. In Lyons, supra, 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. Id. 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, plaintiffs are not violating a law; they are seeking to exercise their statutory right to accessible health care. Moreover, the injury in Lyons depended on the unauthorized conduct of all police officers in Los Angeles. Mr. and Mrs. Constance's threat of future injury depends upon one defendant: a defendant who has harmed them in the past and who has evinced its standing practice to discriminate against them in the future. Id. at 102 (past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury.)

## IV. PLAINTIFFS HAVE CLAIMS FOR DAMAGES UNDER TITLE II AND SECTION 504

It is settled in the Second Circuit that compensatory damages are available to victims of discrimination under title II and § 504. Bartlett v. New York State Board of Bar Examiners, 156 F.3d 321, 330-331 (2d Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3528 (U.S. Feb. 8, 1999)(No. 98-1285). "The law is well settled that intentional violations of title VI, and thus the ADA and Rehabilitation Act, can call for the award of money damages. See Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74 (1992)." Id.[14]

In Bartlett, a woman with a learning disability sued the Board of Law Examiners for failing to provide her with requested

[14]The remedies available for violations of title II of the ADA are coextensive with those available under § 504. Title II affords plaintiffs the "remedies, procedures, and rights" set forth in 29 U.S.C. § 794a (which governs the relief available under § 504). 42 U.S.C. § 12133. In turn, 29 U.S.C. § 794(a)(2) gives § 504 plaintiffs the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964," 42 U.S.C. § 2000d et seq. (title VI).

accommodations. The Board had repeatedly denied her request for accommodations based on use of a diagnostic test that the Court found to be an inaccurate indicator of the plaintiff's learning disability. Id. at 331. The Court found that by repeatedly using a test that was inaccurate the defendants had exercised sufficient intent for an award of damages to be appropriate under the ADA and Rehabilitation Act. The Court found that "intentional discrimination may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy....[or] custom" Id. at 331 citing Ferguson v. City of Phoenix, 931 F. Supp. 688, 697 (D. Ariz. 1996); Canton v. Harris, 489 U.S. 378, 385 (1989).[15] The "deliberate indifference" standard "does not require personal animosity or ill will." Bartlett at 331. That standard is satisfied in this case where the hospital denied the requests for sign language interpreters despite its claims that a policy to provide sign language interpreters was in existence. The denial was thus either a customary failure to provide interpreters notwithstanding a policy to provide them, which satisfies the deliberate indifference standard under

[15]See also Naiman v. New York Univ., No.95 CIV. 6469 (LMM), 1997 WL 229970 (S.D.N.Y. May 13, 1997)("Naiman's allegation that he requested a qualified interpreter . . . sufficiently alleges intent."); Love v. McBride, 896 F. Supp. 808, 810 (N.D. Ind. 1995) (finding plaintiff's request to accommodate an important factor in establishing that discrimination was intentional), aff'd sub nom., Love v. Westville Correctional Ctr., 103 F.3d 558 (7th Cir. 1996). Pandazides v. Virginia Board of Ed., 13 F.3d 823, 829-832 (4th Cir. 1994); W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995); Rodgers v. Magnet Cove Public Schools, 34 F.3d 642, 644 (8th Cir. 1994); Waldrop v. Southern Co. Services, 24 F.3d 152, 157 (11th Cir. 1994); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1106-1111 (9th Cir. 1987); Saylor v. Ridge, 989 F. Supp. 680, 690-91 (E.D. Pa. 1998).

Bartlett, or an intentional denial of interpreter services was intentional. In either case, damages are appropriate.

The Supreme Court recently addressed the issue of the availability of compensatory damages under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (Title IX) in Gebser v. Lago Vista Ind. School Dist., 524 U.S. 274, 118 S. Ct. 1989 (1998).[16] In Gebser, a high school student brought suit against a school district under Title IX, claiming that she had been sexually harassed by one of the school district's teachers. The Supreme Court ruled that the school district was not liable for damages under Title IX for actions about which it had no knowledge. In an opinion by Justice O'Connor, the Court found that in cases that do not involve the official policy of a recipient entity, damages would be available only if the entity had notice of, and was deliberately indifferent to, discrimination. 118 S. Ct. at 1999 ("an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on recipients' behalf has actual knowledge of the discrimination . . and fails adequately to respond.").

Gebser does not govern in this case because Gebser involved unauthorized conduct by a low-level employee and in this case an agent of the hospital who was authorized to act denied interpreter services. The hospital is liable for that act of discrimination.

[16]Because Title IX borrows the remedial scheme of Title VI of the Civil Rights Act of 1964, the same remedial scheme incorporated into the Rehabilitation Act and Title II, decisions regarding damages interpreting one of the statutes often are used by courts to apply to all three.

Even if Gebser does apply, under the Gebser and Bartlett standards, intent may be inferred when a defendant has acted with "deliberate indifference" to the strong likelihood that a violation of a federally protected right will result from the challenged conduct. Id.; Bartlett, 156 F.3d at 331. Here, plaintiffs in their complaint have alleged that defendant knew of plaintiffs' disability and the need for qualified sign language interpreter services in order to effectively communicate at the hospital. Defendant has established a policy requiring the provision of sign language interpreting services in hospital situations involving persons who are deaf; however, despite the hospital policy and plaintiffs' repeated requests for such interpreter services, the hospital did not secure such services. Complaint at ¶¶ 11-27. By failing to provide interpreter services after being put on notice that such services were both appropriate and necessary in the circumstance, the hospital failed to respond, and showed, at a minimum, "deliberate disregard" for the rights of Mr. and Mrs. Constance to effective communication guaranteed by the ADA and the Rehabilitation Act.

Finally, in Proctor v. Prince George's Hospital Center, 1998 WL 931111 (D. Md. 1998), the District Court for the District of Maryland looked at this same issue and arrived at a similar conclusion. In Proctor, a county hospital failed to provide a patient who was deaf a sign language interpreter to explain the effects of and to answer questions regarding his medical treatment. The hospital argued that damages should not be available because the discrimination was "'the result of thoughtlessness and indifference' rather than because of any

intent to deny Plaintiff's rights." Id. at 9. The Court disagreed. "[I]ntentional discrimination is shown by an intentional, or willful violation of the Act itself. . . [even if the defendants] believed themselves to be within the confines of the law," id. at 10 (quoting Bartlett v. New York State Board of Law Examiners, 970 F. Supp. at 1151)).

**CONCLUSION**

For the foregoing reasons, defendant's motion for judgment in the pleadings should be denied in its entirety.

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