IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Michael S. Argenyi,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 8:09CV341
	)	
Creighton University,	)	
	)	
Defendant.	)	
	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517[1] to address arguments raised by Creighton University in its Partial Motion for Summary Judgment filed June 28, 2013. This litigation implicates the proper interpretation and application of Section 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. §§ 794 et seq., and the Justice Department's authority to coordinate the implementation and enforcement of Section 504 by federal agencies, Exec. Order No. 12,250, 28 C.F.R. pt. 41, App. A. The Court's decision concerning the test for deliberate indifference where, as here, a plaintiff seeks compensatory damages for discrimination under Section 504, will directly affect the United States' enforcement authority. The United States therefore has a strong interest in ensuring the proper interpretation of Section 504 in this matter.[2] In furtherance of that interest, the United States

[1] Pursuant to 28 U.S.C. § 517, the Attorney General may send any officer of the Department of Justice "to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

[2] The United States Departments of Justice and Education submitted a Brief as Amicus Curiae supporting Michael Argenyi before the United States Court of Appeals for the Eighth Circuit. *See* Brief for the United States as Amicus Curiae Supporting Appellant, *Argenyi v. Creighton Univ.*, No. 11-3336 (8th Cir. filed Jan. 26, 2012), *available at* www.justice.gov/crt/about/app/briefs/argenyibrief.pdf.

urges the Court to deny the motion because Creighton has failed to establish the absence of any genuine issue of material fact on the question of its deliberate indifference to Mr. Argenyi's rights.

I. STATEMENT OF FACTS[3]

In August 2008, Michael Argenyi applied to medical schools, including Creighton University School of Medicine. Medical School Applications, (Filing 185-1, Ex. A3). Mr. Argenyi explained in his personal statement, among other things, that he had a hearing impairment, and aspired to "someday develop health programs for hearing impaired communities." *Id.* As a part of the application process, Mr. Argenyi interviewed in person with Creighton representatives, (Filing 185-2, A4 at ¶ 5), and in early 2009, Creighton accepted Mr. Argenyi into its medical school.

During enrollment, Creighton sent Mr. Argenyi a form that required him to confirm he could meet its technical standards and that affirmatively asked if he required reasonable accommodation. (Filing 185-2, Ex. A5, at p. 2). In March 2009, six months before classes began, Mr. Argenyi completed the form and wrote to Creighton's Dean to explain that he had a hearing impairment, used cochlear implants, and would require accommodation during enrollment "similar to what [he had] used in the past, which has been primarily interpretation or

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[3] With the exception of some rulings *in limine*, Creighton's instant Motion and supporting Brief, Docket Nos. 259-60, arrive in an identical evidentiary posture as Creighton's first Motion for Summary Judgment and supporting documents filed July 18, 2011, Docket Nos. 183-185, as reviewed by the Eighth Circuit, *Argenyi v. Creighton Univ.*, 703 F.3d 441, 443 (8th Cir. 2012), and Mr. Argenyi's Partial Motion for Summary Judgment and supporting documents filed July 19, 2011, Docket Nos. 186-188. All references are to the Exhibits attached in support of those motions. Additionally, Creighton does not raise new evidentiary contentions for purposes of its instant Motion. Therefore, this Statement of Interest relies on the facts and evidence relied upon by the Eighth Circuit and the parties, subject to this Court's subsequent rulings *in limine*.

captioning services during lectures and teaching sessions." *Id.* at 1. Mr. Argenyi also submitted an audiogram report documenting his hearing disability. *Id.*

In April 2009, five months before classes began, Creighton's Dean responded by seeking more information about Mr. Argenyi's cochlear implant and the nature of his hearing disability; requesting a letter from a physician documenting his hearing disability; and noting that audio podcasts were available for all lectures. (Filing 185-2, Ex. A6). Mr. Argenyi's physician, Douglas Backous, submitted a letter to Creighton's Dean explaining that Mr. Argenyi would benefit from captioning in medical school, and that an FM system[4] might assist in rotations such as surgery. (Filing 185-2, Ex. A7). On April 24, 2009, Mr. Argenyi provided Creighton's Dean with more information concerning his communication abilities and specifically set out the auxiliary aids and services he believed he would require based on his understanding of the medical school curriculum: captioning[5] for lectures, a cued-speech or oral transliterator for labs (i.e., interpreters), and an FM system for small groups of perhaps eight or fewer individuals. (Filing 185-2, Ex. A8). Mr. Argenyi explained: "Because I cannot predict all my possible needs for every situation, I would like to begin this progressive conversation by just looking at the first year classes. As I foresee, I will not be depending on my interpreter to mediate clinical judgment in any form or function." *Id.*

[4] An FM system is an assistive listening device that uses a microphone that transmits sound to a listener's ear, hearing aid, or cochlear implant. The user must be able to perceive and understand sound projected by the FM system. If the user cannot discriminate between different sounds, then an FM system is useless. (Filing 188-2, Ex. A1, ¶¶ 17-21.)

[5] Captioning includes real-time computer-aided transcription services, commonly referred to as "CART." *See, e.g.*, 28 C.F.R. § 36.303(b)(1). The technology and equipment is the same as that used by courtroom transcriptionists and in other live events, such as meetings, conferences, and news broadcasts. (Filing 188-3, Ex. A2 at p. 4.)

In May 2009, four months before classes began, Creighton requested more information (Filing No. 185-2, Ex. A10), and Mr. Argenyi provided additional support for his need for captioning and interpreters. (Filing No. 185-2, Ex. A11). Mr. Argenyi explained that, in the future, he may be able to rely on contextual clues, his cochlear implants, and modifications to his phone and stethoscope in the clinical setting, but because of the complexity of learning new material while in medical school and following communications, he would require captioning for large lectures, interpreters for labs, possibly an interpreter for medium group settings of more than eight people or in busy areas, and an FM system for smaller group settings of eight or fewer people. *Id.* Mr. Argenyi also explained that he had used these accommodations in similar settings while pursuing a nursing degree at Seattle University, the University of Washington, and four Washington state community colleges. *Id.* Mr. Argenyi invited Dr. Kavan to contact any of the universities he attended for more information concerning these auxiliary aids and services. *Id.*

Simultaneously, Dr. Backous and Mr. Argenyi's audiologist, Stacey Watson, submitted information confirming Mr. Argenyi's need for captioning in the classroom to actively participate and verify what is being said; interpreters in lab environments where mobility is necessary and where some sounds may not be visible for lip-reading alone; and an FM system for group settings where there is a clear sound signal, which would provide an improved signal to noise ratio and the ability to track fast-moving conversations. (Filing 188-6, Ex. A8). Nonetheless, in June 2009, Creighton denied Mr. Argenyi's requests for interpreters and captioning, instead providing an FM system, priority seating, audio podcasts, and a note taker for classroom lectures; and an FM system only for small groups and labs. (Filing 185-3, Ex. A14). Dr. Kavan explained that Creighton's Medical Education Management Team ("MEMT")

specifically met to evaluate Mr. Argenyi's requests and considered him to have only a mild hearing loss, and that its policies as set forth in its technical standards permit technological accommodation, but not the use of a third party to assist a student in meeting the technical standards. *Id.* Mr. Argenyi responded:

> I hope that the accommodations outlined in your letter will provide me with effective communication. I have to note that they are different from what I am used to, but I will give them a wholehearted try. Should they be inadequate, I will let you know immediately, and work with you and your office to devise an adequate solution.

(Filing 185-2, Ex. A11).

When Mr. Argenyi began classes, he found, despite his efforts, that the auxiliary aids and services provided were not effective. (Filing 188-2, Ex. A1; Filing 188-7, Ex. A12). On September 1, 2009, he renewed his request for captioning in the classroom because he was missing significant portions of lectures, explaining: "The FM system only amplifies the general noise level, as well as voices, essentially negating any potential value in amplification," and "I am also unable to follow conversations effectively any time classmates ask questions or there is a full class discussion." (Filing 188-7, Ex. A12.) Mr. Argenyi again renewed the request on September 21, 2009, reiterating what he had explained during a meeting shortly before classes began—that his hearing loss was not considered "mild" as Creighton representatives had characterized it, but "severe-to-profound." *Id.*

When Creighton again refused to provide captioning for lectures and interpreters for smaller settings, Mr. Argenyi borrowed funds to procure the auxiliary aids and services on a daily basis himself. (Filing 188-2, Ex. A1 at ¶ 24). Mr. Argenyi found that with captioning for lectures and interpreters for smaller settings, he had "full access to all of the medical school content, including classroom lectures and discussions, labs, and small group discussions, just as

[he] had . . . at Seattle University." *Id.* ¶ 25. During the spring semester of his first year, Mr. Argenyi shared with Creighton the results of testing of the FM system's benefit for Mr. Argenyi by Dr. Britt Thedinger, who found that the FM system actually reduced Mr. Argenyi's ability to discriminate between sounds. (Filing 188-7, Ex. A14, A15). With captioning and interpreters in place, Mr. Argenyi successfully completed his first year of medical school, but Creighton again in the second year refused to provide captioning for lectures and interpreters for smaller settings. (Filing 188-2, Ex. A1 at ¶¶ 28-29). Although Creighton's MEMT determined, after it received Dr. Thedinger's report concerning the FM system, that it would provide interpreters in the lecture setting (though conditioned on not providing interpreters in the clinical setting), Mr. Argenyi found interpreters in the lecture setting ineffective. *See* Filing 185-3, Ex. 28. Mr. Argenyi found that—in a lecture hall that includes 126 students engaged in discussion to his side and behind; which frequently included new and complex terminology; and in which, frequently if not most of the time, the lights are dimmed for audio/visual presentations—he could not use his abilities to lip-read. (Filing 192-4, Ex. A3 at ¶¶ 29-30). For example, during one lecture in Mr. Argenyi's first year of medical school, new medical terms included: "peripheral neuropothy," "spinocerebellar degeneration," "deficiency of lysosomal hexosaminidase," "adrenoleukodystrophy," "adrenomyleoneuropathy," and "neuronal ceriod lipofuscinosis." *Id.*

Days prior to the start of the second-year clinic, Creighton informed Mr. Argenyi that it would not allow him to use interpreters in the clinic, even if he paid for them himself. *Id.* ¶ 32. As in the classroom, Mr. Argenyi tried the clinic without interpreters, but he found that he could not follow the group conversations between patients, patients' family members, the supervising physician, specialists, and medical residents. *Id.* ¶ 33. He struggled to understand what was

being said over the paging system, struggled to understand patients and emotional family members when left alone to interview them, and was unable to decipher drug names and other important patient communication. *Id*. On one consult with parents of an infant, he could not understand why the infant was hospitalized, and, in another, struggled to understand a patient and physician during a pap smear. *Id* ¶ 34.

On the few occasions when Creighton permitted Mr. Argenyi to have interpreters in the clinic, he found he was able to participate and communicate with patients without continually asking them to repeat information or guessing what the patient was saying. *Id.* ¶ 37. He was able to fully observe residents, physicians, and specialists and how they communicated with patients and family members, and began to learn how to obtain patient histories and informed consent, assess symptoms, answer patient questions, and quiet patient fears. *Id.*

Mr. Argenyi received a passing grade in the "pass/fail" clinic, but missed out on important hands-on experiences observing, practicing, and developing skills in how to interact with patients and how to think his way through a diagnosis. *Id.* ¶ 42. Mr. Argenyi incurred debts of more than $53,000.00 for his first year and $61,000.00 for his second year in procuring his own auxiliary aids and services, subject to a five-percent interest rate that strained family relationships. *Id.* ¶¶ 43-44. Because the third and fourth years of medical school are oriented around the clinical experience, Mr. Argenyi was forced to take a leave of absence from Creighton pending the outcome of this litigation, and will not graduate with his peers. *Id.* ¶ 48.

On June 28, 2013, Creighton moved for partial summary judgment on Mr. Argenyi's damages claim, requesting, *inter alia*, that this Court adopt a heightened interpretation of the "deliberate indifference" test as applied in a District of Minnesota case from 2008. *See* Filing 259 at pp. 4-14. Creighton further claims that, regardless of the test, there are no genuine issues

of material fact as to whether Creighton acted with deliberate indifference and asks the Court to dismiss Mr. Argenyi's damages claim. *Id.* As set forth below, the interpretation that Creighton proposes is contrary to the body of law developed by the Eighth, Ninth, Tenth, and Eleventh U.S. Circuit Courts of Appeals. Further, under either interpretation, a genuine issue of material fact exists concerning Creighton's deliberate indifference to Mr. Argenyi's rights, precluding summary judgment on the question of damages.

II. THE REHABILITATION ACT OF 1973

Congress enacted the Rehabilitation Act forty years ago as a comprehensive federal program to "empower individuals with disabilities to maximize . . . independence, and inclusion and integration into society, through . . . the guarantee of equal opportunity." 29 U.S.C. § 701(b)(1)(F).[6] To effectuate these purposes, Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

Section 504 seeks "not only to curb 'conduct fueled by discriminatory animus,' but also to right 'the result of apathetic attitudes rather than affirmative animus.'" *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152 (10th Cir. 1999) (quoting *Alexander v. Choate*, 469 U.S. 287, 296 (1985)); *see also* 28 C.F.R. § 41.51(b)(3) (Justice Department's Section 504

[6] Congress found that "disability is a natural part of the human experience and in no way diminishes the right of individuals to . . . contribute to society; pursue meaningful careers; and enjoy full inclusion and integration in the . . . economic . . . and educational mainstream of American society." 29 U.S.C. § 701(a)(3). Nonetheless, Congress found that "individuals with disabilities continually encounter various forms of discrimination in such critical areas as . . . education." 29 U.S.C. § 701(a)(5).

coordination regulation prohibiting criteria or methods of administration that have the purpose *or effect* of discriminating). And as the Eighth Circuit observed in this case: "[T]he Rehabilitation Act requires entities receiving federal funding to furnish auxiliary aids which 'afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement' as others." *Argenyi*, 703 F.3d at 448 (quoting 45 C.F.R. § 84.4(b)(2)).

It is well-settled that Section 504 claimants can seek "any appropriate relief," including equitable remedies and compensatory damages. *See Miener v. Missouri*, 673 F.2d 969, 978 (8th Cir. 1982), *cert. denied*, 459 U.S. 909 (1982); *see also Rodgers v. Magnet Cove Pub. Schs.*, 34 F.3d 642, 643-44 (8th Cir. 1994) ("[O]nce a right of action is created, 'we presume availability of *all* appropriate remedies unless Congress has expressly indicated otherwise. This principle has deep roots in our jurisprudence.'") (emphasis in original) (quoting *Franklin v. Gwinnet Cnty Pub Schs.*, 503 U.S. 60, 66 (1992)).

III. ANALYSIS

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate if the moving party establishes that there are no genuine issues of material fact and that, as a matter of law, the moving party is entitled to judgment. Fed. R. Civ. P. 56; *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The party bearing the burden of proof must submit "sufficient probative evidence that would permit a finding in their favor of more than mere speculation, conjecture, or fantasy." *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (internal quotation marks omitted).

A. The Eighth Circuit Requires a Showing of Deliberate Indifference for Section 504 Claims for Compensatory Damages.

In 2011, the Eighth Circuit held that a plaintiff can obtain compensatory damages under Section 504 where the defendant acted with "deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011). Despite this clear and recent directive from the Eighth Circuit, and Creighton's acknowledgment of its applicability to this case, Creighton asks this Court to follow an earlier case from the District of Minnesota that imposes a far more stringent test whereby, to establish deliberate indifference, a plaintiff must demonstrate that a violation of a federal right was a "plainly obvious consequence" of the defendant's actions. *See* Filing 259 at pp. 10-14; *A.P. v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 538 F. Supp. 2d 1125, 1147 (D. Minn. 2008). Creighton also misapplies academic deference principles in a further attempt to shield itself from damages. *See* Filing 259 at pp. 10-14.

The "plainly obvious" test articulated in *A.P.* and advanced here by Creighton requires a plaintiff, after a finding of liability, to show not only that a violation of a federal right was a plainly obvious consequence of the defendant's actions, but also that it was plainly obvious that a defendant's affirmative defenses of fundamental alteration and undue burden would fail. This approach, which is irreconcilable with the Eighth Circuit's holding in *Meagley*, creates a burden shifting framework for determining deliberate indifference that appears to conflate the elements that must be proved during liability with those that must be shown for a remedy. This approach is at odds both with *Meagley* and conflicts with the statutory and regulatory construction of Section 504.

The evidence in this case presents genuine issues of material fact as to whether Creighton acted with deliberate indifference in failing to provide Mr. Argenyi with needed auxiliary aids and services during medical school. The United States respectfully requests that this Court apply the standard for deliberate indifference as articulated by the Eighth Circuit in *Meagley*, and deny Creighton's motion.

B. The Eighth Circuit's *Meagley* Decision Establishes a Clear Test for Deliberate Indifference.

The Eighth Circuit in *Meagley v. City of Little Rock* found that a Section 504 plaintiff must show "deliberate indifference" to obtain compensatory damages. *Meagley*, 639 F.3d at 389. Adopting the reasoning of the Tenth Circuit, the *Meagley* Court explained:

> The deliberate indifference standard, unlike some tests for intentional discrimination, "does not require a showing of personal ill will or animosity towards the disabled person," but rather can be "inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights."

639 F.3d at 389 (quoting *Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009)).

In *Meagley*, the plaintiff, who had difficulty walking, rented an electric scooter from a public zoo, and while visiting one of the exhibits, tipped over on a bridge because the slope exceeded the maximum permitted under the applicable architectural standard. *Meagley*, 639 F.3d at 386-87. The plaintiff sought compensatory damages under title II of the ADA and the Rehabilitation Act. *Id.* at 387. The Eighth Circuit affirmed the District Court's dismissal of the damages claim, finding that the plaintiff could not prove that the zoo had notice that the slope of the bridge was out of compliance, and that, in the absence of such a finding, the plaintiff could

not show that the zoo acted with deliberate indifference to the strong likelihood that the slope was in violation of her rights. *Id.* at 389-90.

Similarly, in the Tenth Circuit case, *Barber*, on which the Eighth Circuit relied in *Meagley*, the court set forth a two-part test to determine deliberate indifference for Section 504 damages claims: (1) knowledge that a harm to a federally protected right is substantially likely, and (2) a failure to act upon that . . . likelihood." *Barber*, 562 F.3d at 1229. The Tenth Circuit adopted this application of the deliberate indifference test from the Ninth Circuit, in *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001) ("Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood."). *See Barber*, 562 F.3d at 1229. As to the first element, the *Duvall* court, explained that "[w]hen the plaintiff has alerted the . . . entity to his need for accommodation (or where the accommodation is obvious, or is required by statute or regulation), the . . . entity is on notice that an accommodation is required." *Id.* To meet the second element of the deliberate indifference test, "a failure to act must be the result of conduct that is more than negligent, and involves an element of deliberateness." *Id.* at 1140.

In *Duvall*, an individual with a hearing disability filed suit against Kitsap County and members of the superior court for failing to provide auxiliary aids and services during court proceedings involving the dissolution of his marriage. *Duvall*, 562 F.3d at 1129-30. Duvall communicated primarily through writing because he did not use sign language, and relied on lip-reading, hearing aids, and visual cues in one-on-one conversations. *Id.* In group conversations, Duvall had extreme difficulty following the conversation because he could not focus on a single speaker to study facial expressions, body language, and lip movement; could not control the pace of the conversation; or necessarily seek a pause from the participants. *Id.* During court

proceedings with extensive oral testimony, Duvall could not follow the proceedings and requested captioning. *Id.* At the trial, Duvall was not provided captioning; instead, he was provided an assistive listening system and the ability to move around the courtroom to better see speakers, but he found that he could not follow the discussions and ultimately gave up. *Id.* at 1131-32. Duvall similarly requested, but was not provided, captioning during a post-trial hearing. *Id.* at 1132. The Ninth Circuit reversed the District Court's grant of summary judgment on damages, finding a triable issue that Duvall had made requests, that they were ignored or denied, and that a jury could find that the court's representatives acted with deliberate indifference. *Id.* at 1139-41.

In 2012, the Eleventh Circuit followed suit in *Liese v. Indian River County Hospital District.*, 701 F.3d 334, 344 (11th Cir. 2012). While this case post-dates the Eighth Circuit's *Meagley* decision, its application of the deliberate indifference test is wholly consistent with *Meagley*, and, like *Duvall*, is particularly instructive to the facts in this case. *Liese*, 701 F.3d at 342-44. *Liese* involved a hospital that allegedly refused a married couple's repeated requests for interpreters during an emergency room visit for chest pain and dizziness and, ultimately, surgery to remove a gallbladder. *Liese*, 701 F.3d at 336, 338-40. The Lieses brought suit under Section 504, and the Eleventh Circuit reversed the grant of summary judgment on the issue of compensatory damages, finding the evidence supported knowledge of the requests and a continued failure to provide interpreters. *Id.* at 336.

As the above discussion shows, *Meagley's* formulation of deliberate indifference, premised on and consistent with the test in other federal circuits, provides ample guidance to this

Court on whether there are genuine issues of material fact as to whether compensatory damages are warranted.[7]

C. Creighton's Proposed Substitution of a "Plainly Obvious" Test to Demonstrate Deliberate Indifference is Inconsistent with *Meagley*.

Despite *Meagley*'s plain application to this case, and Creighton's acknowledgment of its applicability, Creighton asks this Court to apply a far more stringent test for compensatory damages based on a 2008 district court case, *A.P. v. Anoka-Hennepin Independent School District No. 11*, 538 F. Supp. 2d 1125 (D. Minn. 2008). *See* Filing 259 at pp. 5-10. The United States urges this Court to reject Creighton's proposal, as *A.P.* is inconsistent with the Eighth Circuit's subsequent decision in *Meagley*. Moreover, the *A.P.* test impermissibly shifts the defendant's burden to prove affirmative defenses of undue burden and fundamental alteration to the plaintiff, and conflates questions of liability and remedies.[8]

The *A.P.* Court, in the absence (at that time) of Eighth Circuit guidance on this issue, set out the following deliberate indifference test:

> [A] plaintiff must show: (1) that the plaintiff requested the accommodation; (2) that it was "plainly obvious that the accommodation was reasonable and necessary;" and (3) if the defendant has raised the undue-burden/fundamental-alteration defense, that it was "plainly obvious" when the plaintiff requested the accommodation that granting it would *not* have created an undue burden on the defendant and would *not* have fundamentally altered its program.

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[7] The United States takes no position on whether this is the appropriate standard for compensatory damages in all cases brought under Section 504, but agrees that it is the appropriate standard in this case. This Statement of Interest does not address the standards that the Justice Department and other federal agencies use in resolving administrative complaints or the regulations each agency enforces, or the standards applicable in any other cause of action subject to a deliberate indifference standard outside of the facts of this case.

[8] Notably, *Meagley* was decided three years after *A.P.*, but did not cite to, adopt from, or rely upon *A.P.* or its proposed test. Instead, *Meagley* relied upon the Ninth and Tenth Circuits in *Duvall* and *Barber*. *See supra* discussion pages 11-13.

538 F. Supp. 2d at 1147 (emphasis in original). *A.P.* further explained: "If the defendant could have reasonably believed that the undue-burden/fundamental-alteration defense would succeed, then the defendant will not be liable for compensatory damages." *Id.*

A.P.'s "plainly obvious consequence" test is irreconcilable with *Meagley*, which explained that intentional discrimination can be "inferred from a defendant's deliberate indifference to the *strong likelihood* that pursuit of its questioned policies will *likely* result in a violation of federally protected rights." *Meagley*, 639 F.3d at 389 (emphasis added) (internal quotation marks omitted) (quoting *Barber*, 562 F.3d at 1228-29). *Meagley* thus requires a strong probability, whereas *A.P.* would suggest the violation was absolutely and easily discovered, seen, or understood.

An additional inconsistency between *A.P.'s* formulation of deliberate indifference and that in *Meagley* is that, in *A.P.*, the court shifts the burden of proof to the plaintiff to establish that it was "plainly obvious" that defendant's affirmative defenses of undue burden and fundamental alteration would fail. *A.P.*, 538 F. Supp. 2d at 1147. This analysis conflicts with the statutory and regulatory construction of Section 504, and its purpose to remedy "harms resulting from action that discriminate[s] by effect as well as by design." *See Alexander v. Choate*, 469 U.S. 287, 297 (1985).

As the Eighth Circuit explained:

> To prevail on a Rehabilitation Act claim under this section, a plaintiff must establish that she (1) is a qualified individual with a disability; (2) was denied the benefits of a program or activity of an . . . entity receiving federal funds; and (3) was discriminated against based on her disability. A defendant to such a claim is entitled to assert as an affirmative defense that a requested accommodation would constitute an undue burden. "Accommodations are not reasonable if they impose 'undue financial and administrative burdens' or if they require a 'fundamental alteration in the nature of [the] program.'"

Timothy H. v. Cedar Rapids Cmty. Sch. Dist., 178 F.3d 968, 971 (8th Cir. 1999) (internal citations and quotation marks omitted) (quoting *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994) (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287 n.17, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987))). Under *A.P.'s* test, however, a plaintiff would be required to disprove the defendant's affirmative defenses, an approach that conflicts with Eighth Circuit precedent holding that the defendant bears the burden of proof on undue burden and fundamental alteration. *Timothy H.*, 178 F.3d at 971.

Beyond this, the test in *A.P.* eliminates the availability of compensatory damages "[i]f the defendant *could have* reasonably believed" the defense would succeed, suggesting that a disability-discrimination defendant need only claim that it believed the existence of an undue burden or fundamental alteration. *A.P.*, 538 F. Supp. 2d at 1147 (emphasis added). In other words, a plaintiff would have to show that the defendant could not have reasonably believed undue burden or fundamental alteration would succeed. Such an approach is akin to requiring the plaintiff to show that the defendant was acting with animosity or ill will, which has been explicitly rejected by the Eighth Circuit and other courts. *See Meagley*, 639 F.3d at 389 ("The deliberate indifference standard, unlike some tests for intentional discrimination, 'does not require a showing of personal ill will or animosity toward the disabled person.'") (quoting *Barber*, 562 F.3d at 1228-29); *see also Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994).

D. Genuine Issues of Material Fact Exist as to Whether Creighton Acted with Deliberate Indifference When It Failed to Provide Mr. Argenyi with Needed Auxiliary Aids and Services.

Applying the Eighth Circuit Standard in this case, Creighton's pending motion should be denied. The record is replete with evidence documenting Mr. Argenyi's request for auxiliary aids and services, his repeated attempts to explain why the aids and services provided were ineffective, and Creighton's continued refusal to provide effective alternatives. Creighton representatives knew that Mr. Argenyi had a hearing impairment before they admitted him. (Filing 185-1, Ex. A3; Filing 185-2, Ex. A4). On four occasions before classes had even begun, Mr. Argenyi requested captioning and interpreter services. He also provided an audiogram, provided documentation from his physician and audiologist, and explained when and why he would need accommodations. He explained his need for these accommodations, which he based on his then-existing understanding of the medical school curriculum and on what had been effective for him in his undergraduate studies and while in grade school. *See supra* discussion pages 2-8; Filing 185-2, Exs. A5-A8, A10-A11; Filing 185-3, Exs. A14, A28; Filing 188-2, Ex. A1; Filing 188-4, Ex. A3; Filing 188—6, Ex. A8; Filing 188-7, Exs. A12, A14, A15.

When Creighton denied Mr. Argenyi's request for captioning and interpreters for his first year of medical school, and instead provided only an FM system, priority seating, access to audio podcasts, and lecture notes, Mr. Argenyi said he would nonetheless "give them a wholehearted try." (Filing 185-2, Ex. A11). A few weeks into his first year of medical school, Mr. Argenyi pleaded with Creighton's Dean that he was falling behind and missing significant portions of lectures, and that the FM system and other auxiliary aids and services Creighton authorized were ineffective for him. (Filing 188-7, Ex. A12.) Then, when Creighton refused again, Mr. Argenyi

obtained financing and procured his own captioning and interpreter services at significant cost to him personally. (Filing 188-2, Ex. A1 at ¶¶ 22-24).

In the spring semester of his first year, Mr. Argenyi was evaluated by another physician who found, consistent with what Mr. Argenyi had explained to Creighton, that the FM system actually diminished his sound discrimination ability, and Mr. Argenyi shared this information with Creighton. (Filing 188-7, Ex. A14, A15). Creighton's MEMT then authorized Creighton to provide interpreters for the lecture setting, notwithstanding Mr. Argenyi's expressed concerns that interpreters might not be effective in a large lecture setting because of the complexity and similarity of many of the medical terms of art, the dimmed lights in the lecture hall, and more than 100 other students asking questions from all around him. (Filing 185-3, Ex. A28; Filing 192-4, Ex. A3 at ¶¶ 29-30). In the clinical setting, when Creighton would not even permit Mr. Argenyi to procure his own interpreters, Mr. Argenyi again pleaded with Creighton that he was not able to communicate effectively with patients – even to the extreme of trying to conduct a pap smear without an interpreter. (Filing 192-4, Ex. A3). The Eighth Circuit found similarly: "At this stage the record supports Argenyi's claim that he was unable to follow lectures and classroom dialogue or successfully communicate with clinical patients." *Argenyi*, 703 F.3d at 451.

Mr. Argenyi repeatedly put Creighton's Dean and other representatives, *including its general counsel*, and other members of the MEMT, on notice that he required captioning for lectures, and interpreters for the clinical setting. Mr. Argenyi repeatedly explained that he was unable to follow lectures and classroom dialogue, and to successfully communicate with clinical patients. Mr. Argenyi informed Creighton representatives that he was missing components of the medical education because of ineffective auxiliary aids and services, and Creighton

continually rejected Mr. Argenyi's requests. At minimum, there are genuine issues of material fact as to whether Creighton acted with deliberate indifference to Mr. Argenyi's federally protected rights when he continually pleaded that he was unable to follow lectures and classroom dialogue or successfully communicate with patients.

And although this Court should reject *A.P.* as the appropriate formulation of deliberate indifference, summary judgment would be inappropriate in this case even if a "plainly obvious" test were applied. There is no dispute that Mr. Argenyi repeatedly requested captioning and interpreters and that he repeatedly put Creighton on notice that the auxiliary aids and services provided did not result in effective communication. There is at minimum, based on Mr. Argenyi's own testimony and the reports of his doctors, a genuine issue of material fact that he needed captioning and interpreters, and that such auxiliary aids and services, specifically identified by applicable regulations as available, were reasonable.

E. Creighton's Attempt to Rely on "Academic Deference" to Negate Mr. Argenyi's Damages Claim is Wholly Without Merit.

Finally, the United States urges the Court to reject Creighton's argument that, where Mr. Argenyi establishes liability, i.e., that Creighton failed to provide effective communication to Mr. Argenyi in violation of Section 504, the university cannot be found deliberatively indifferent because the violations at issue involved discriminatory decisions by academic faculty. (Filing 259 at p. 12). Creighton's argument reflects a fundamental misunderstanding of Section 504's effective communication obligations, which, in this case, mandate that, absent fundamental alteration or undue burden, Creighton provide auxiliary aids and services that would afford Mr. Argenyi an equal opportunity to access and benefit from the content of the medical curriculum through lectures, clinics, and small group courses. While deference to genuinely

academic decisions may be appropriate where a university asserts a fundamental alteration defense, e.g., would the provision of an interpreter to Mr. Argenyi during his clinical training fundamentally alter the nature of the academic training being offered in Creighton's medical program, it does not follow that every decision made or informed by an academic is entitled to deference, and the determination of whether and how much deference is due to any particular person, opinion, or decision is a fact-specific one. *See, e.g., Regents of the Univ. of Mich. v. Ewing,* 474 U.S. 214, 225 (1985) (recognizing that "genuinely academic decisions" are entitled to respect).

On this point, Creighton's reliance on *Amir v. St. Louis University*, 184 F.3d 1017, 1028 (8th Cir. 1999), for its deference argument is misplaced. *Amir* is materially different from the evidence here in that Amir sought to dictate where he could take his courses, who could supervise him, and what grade the university would give him. *Amir*, 184 F.3d at 1028-29. Mr. Argenyi has not sought any analogous accommodations and wants to fully participate in all aspects of Creighton's curriculum. And while the Eighth Circuit has explained that "it would fundamentally alter the nature of a graduate program to require the admission of a disabled student who cannot, with reasonable accommodations, otherwise meet the academic standards of the program," *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076 (8th Cir. 2006), Creighton cites no evidence in the instant Motion that the auxiliary aids and services requested would somehow fundamentally alter the legitimate academic standards of its curriculum.

Moreover, although *Amir* and Mershon discussed deference in finding that the requested accommodations were not reasonable, the Court grounded its reasonableness determinations on the fact that the requested accommodations would have substantially modified the defendant's academic program, or would have altered its academic policies or decisions on purely academic

matters, such as grade determinations. *See Mershon*, 442 F.3d at 1078; *Amir*, 184 F.3d at 1028-1029. Courts defer to academic decisions because they "are particularly ill-equipped to evaluate academic performance." *Zukle* v. *Regents of the Univ. of Cal.*, 166 F.3d 1041, 1049 (9th Cir. 1999) (deferring to medical school's "academic decision to require students to complete courses once they have begun" and refusal to allow plaintiff with a learning disability to finish a clinical clerkship at a later date). Measuring Mr. Argenyi's ability to understand spoken language in the classroom and clinical settings requires expertise in hearing assessments, and Creighton's opinion about that ability is not an academic determination entitled to deference. To the contrary, courts and juries routinely consider expert testimony and make determinations based on competing expert evidence.

A liability finding in this case would mean that Creighton failed to provide auxiliary aids and services to which Mr. Argenyi had a civil right under Section 504 *and* that Creighton failed to demonstrate that providing such aids or services resulted in an undue burden or a fundamental alteration. Once such a liability finding is made, Creighton cannot then use the same incorrect or discriminatory faculty opinions, generalizations, and stereotypes about individuals with hearing disabilities to immunize the university from a deliberate indifference determination. In short, simply because illegal conduct is informed by the inaccurate or discriminatory opinions of university faculty, it does not follow that no reasonable juror could find that Creighton acted with deliberate indifference to the strong likelihood that its continued failure to provide Mr. Argenyi with auxiliary aids and services would violate his rights under Section 504. Indeed, a reasonable juror could handily find that Creighton's decision to continue to deny Mr. Argenyi needed auxiliary aids or services based on a faculty opinion that he would be "better prepared" as a

physician if he trained without an interpreter constitutes and reflects deliberate indifference under Section 504.

CONCLUSION

For the reasons stated here, the United States requests this Court to deny Creighton's Partial Motion for Summary Judgment.

Respectfully submitted, this 12th day of July 2013.

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