

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

)	
WILLIAM PIERCE,)	
Plaintiff,)	
)	
v.)	No. 13-cv-0134 (KBJ)
)	
)	ORAL ARGUMENT REQUESTED
)	
DISTRICT OF COLUMBIA,)	
Defendant.)	

**PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO CLAIMS I AND II OF THE COMPLAINT**

Plaintiff William Pierce hereby moves, pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h), for partial summary judgment on Claims I and II of the Complaint. In particular, Mr. Pierce requests that the Court enter judgment that Defendant violated Title II of the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act, that such violations were intentional, and that Plaintiff is therefore entitled to seek and receive compensatory damages in an amount to be determined at trial.

There are no genuine issues as to the material facts that demonstrate Defendant’s intentional violation of the ADA and the Rehabilitation Act. Mr. Pierce’s motion for partial summary judgment is supported by the accompanying Statement of Undisputed Facts and Memorandum.

Wherefore, Plaintiff respectfully requests that the Court enter partial summary judgment in Plaintiff’s favor on Claims I and II of the Complaint. Pursuant to LCvR 7(f), Plaintiff respectfully requests oral argument on its motion.

Respectfully submitted,

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November 17, 2014

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DISTRICT OF COLUMBIA,)	
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**STATEMENT OF UNDISPUTED MATERIAL FACTS
IN SUPPORT OF PLAINTIFF’S MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO CLAIMS I AND II OF THE COMPLAINT**

Plaintiff William Pierce (“Plaintiff” or “Mr. Pierce”) hereby submits this statement of the undisputed facts that support entry of partial summary judgment in Plaintiff’s favor on Claims I and II of the Complaint. Exhibits referenced below are attached to the Declaration of James E. Rocap, III In Support Of Plaintiff’s Motion For Partial Summary Judgment As To Claims I And II Of The Complaint.

Background on Mr. Pierce

1. Mr. Pierce is profoundly deaf. *See* Ex. 1, Oct. 10, 2013 Deposition of William Pierce at 12:13-17.
2. Mr. Pierce can make audible sounds, but cannot speak words. *See id.* at 13:21-14:4.
3. Mr. Pierce’s native language is American Sign Language (“ASL”). *See id.* at 15:20-16:20, 20:13-21:15; Ex. 2, Feb. 25, 2013 Deposition of William Pierce at 521:4-19. He relies on ASL to communicate. *See* Ex. 3, Expert Report of Professor Martina J. Bienvenu (Bienvenu Rep.) at 10.

4. ASL is a complex language that is not derived from English. It has its own syntax and grammar and utilizes signs made by hand motions, facial expressions, eye gazes, and body postures. *See id.* at 5.
5. Written English is a second language for Mr. Pierce. *See* Ex. 1, Oct. 10, 2013 Deposition of William Pierce at 15:20-16:20.
6. The vast majority of deaf people lack the ability to communicate effectively in written English. *See* Ex. 3, Bienvenu Rep. at 6-8.
7. Mr. Pierce's proficiency in reading and writing English is far below that of a hearing person. In 1986, his senior year at the Kansas School for the Deaf, Mr. Pierce took the Stanford-7 Achievement Test. His score indicated that his reading comprehension skills were below the level of a fifth grader, and language skills below the level of a fourth grader. *See* Ex. 1, Oct. 10, 2013 Deposition of William Pierce at 27:20-29:22; Ex. 4, Stanford-7 Achievement Test Score Report. Mr. Pierce briefly attended the National Technical Institute for the Deaf, but dropped out because he struggled in his classes. *See* Ex. 1, Oct. 10, 2013 Deposition of William Pierce at 32:21-35:2.
8. Mr. Pierce primarily communicates using ASL, which is the only way that he can effectively communicate with friends or family, even if they are not themselves fluent in ASL. *See* Ex. 1, Oct. 10, 2013 Deposition of William Pierce at 99:16-106:20; Ex. 3, Bienvenu Rep. at 10. As he is unable to use a traditional phone, Mr. Pierce uses a videophone to communicate with friends and family in ASL, with a remote interpreter when needed. *See* Ex. 1, Oct. 10, 2013 Deposition of William Pierce at 102:2-106:20.
9. For example, even though his partner at the time of his incarceration, David Holder, did not know ASL, *see* Ex. 1, Oct. 10, 2013 Deposition of William Pierce at 81:7-82:9, Mr.

Pierce only used text messages for short, simple communications and rarely used written notes because Mr. Holder's command of English was so much stronger than his own.

Mr. Pierce instead relied on a videophone and interpreter on a daily basis for communication, even while he and Mr. Holder lived in the same home. *See id.* at 119:11-121:20.

10. Most deaf individuals have very limited lip-reading ability. *See* Ex. 5, Expert Report of Richard Lorenzo Ray (Ray Rep.) at 4. Less than 30% of the sounds in English words are clearly visible on the mouth; as a result, many distinct spoken words and phrases look the same on the lips. In addition, the ability to lip read can be obstructed by external factors such as lighting or the speaker's facial structure. *See* Ex. 3, Bienvenu Rep. at 8.
11. Lip reading is not an effective form of communication for Mr. Pierce. He has difficulty understanding full sentences by lip reading. *See* Ex. 1, Oct. 10, 2013 Deposition of William Pierce at 12:18-13:20.
12. At a minimum, Mr. Pierce requires quality ASL interpretation in order to effectively communicate with others. *See* Ex. 3, Bienvenu Rep. at 10.

Background on the Correctional Treatment Facility, Corrections Corporation of America, and Unity Health Care

13. The Correctional Treatment Facility ("CTF") is a minimum and medium security facility in the District of Columbia operated by the Corrections Corporation of America ("CCA"), a private prison company. *See* Ex. 6, District of Columbia and CCA Operations and Management Agreement at 1; Answer ¶ 8, Mar. 20, 2013, ECF No. 8.
14. CCA operates CTF pursuant to a contract with the District of Columbia. Answer ¶ 8, Mar. 20, 2013, ECF No. 8. Pursuant to that contract, CCA is obligated to operate,

maintain, and manage the CTF in compliance with the Constitution and the laws of the United States. *See* Ex. 6, District of Columbia and CCA Operations and Management Agreement at 10.

15. Unity Health Care, Inc. (“Unity”) provides comprehensive health care services at the Central Detention Facility and CTF pursuant to its contract with the District of Columbia. *See* Ex. 7, District of Columbia and Unity Contract; Ex. 8, Addendum to District of Columbia and Unity Contract.
16. Pursuant to that contract, Unity is obligated to provide services in compliance with federal and District of Columbia law, as well as DOC Administrative Directives and Policy Statements. *See* Ex. 7, District of Columbia and Unity Contract § C.3(a).
17. The Department of Corrections (“DOC”) is an agency of the District of Columbia, the functions of which include overseeing the compliance of its contractors with the Americans with Disabilities Act. *See* Ex. 9, DOC Program Statement 3800.3 § 5(b).
18. The District of Columbia’s DOC receives federal financial assistance. *See* Ex. 10, General Ledger Reports; Ex. 11, Defendant District of Columbia’s Response to Plaintiff’s First Set of Requests for Production of Documents at 16-17.

The District of Columbia’s Lack of Oversight over CCA

19. The District of Columbia is supposed to monitor CCA’s compliance with the Americans with Disabilities Act as part of its evaluation of CCA’s compliance with its contract. *See* Ex. 12, Oct. 2, 2013 30(b)(6) Deposition of James Riddick at 15:7-16:1.
20. Oversight functions are meant to be performed by a Contract Monitor appointed by the District of Columbia. *See* Ex. 6, District of Columbia and CCA Operations and Management Agreement at 37.

21. The primary process for ensuring CCA's compliance with its contract with the District of Columbia is the presence of the Contract Monitor at the CTF. *See* Ex. 12, Oct. 2, 2013 30(b)(6) Deposition of James Riddick at 15:14-19:19.
22. The Contract Monitor does not consider or consult existing DOC, CCA, or CTF policies on a regular basis in determining CCA's compliance with the contract. He primarily relies on his "sense of what should occur in a prison" and "how they should run." *See id.* at 12:20-13:20, 24:8-26:9.
23. At the policy level, the Contract Monitor stated that he focuses mainly on "the fact that they have a policy that accommodates individuals with disabilities," even though the CCA policy lacks "a lot of the directives" in the DOC policy and is "not as in-depth." *See id.* at 27:20-30:5.
24. The Contract Monitor stated that he does not know CCA's process for updating CCA/CTF policies. *See id.* at 34:8-36:8.
25. The Contract Monitor typically addresses non-compliance issues that "flow[] to the surface" and are repeatedly brought to his attention by inmates and CCA staff. *See id.* at 18:14-19:19, 24:21-26:9.
26. The Contract Monitor reviews CCA's compliance with the ADA and DOC policies only when particular situations arise, as through inmate grievances, and are communicated to him. If an inmate complains of lack of access to a program or service, the actual investigation conducted is only to determine "if those services that they would have received at DOC are being provided at CTF in one form or another." *See id.* at 15:14-19:19; 31:13-32:8.

27. There are no regular reports prepared by CTF for the DOC or CCA's corporate office on accommodations provided to disabled inmates. *See* Ex. 13, Oct. 1, 2013 30(b)(6) Deposition of W. Fulton¹ at 69:9-22.
28. The DOC's Risk Manager also serves as its ADA Coordinator. *See* Ex. 14, Oct. 2, 2013 30(b)(6) Deposition of Craig Swaisgood at 6:1-7; 28:1-5.
29. The ADA Coordinator does not review CCA or CTF policies that apply to deaf or hard of hearing inmates. *See id.* at 32:19-33:7; Ex. 13, Oct. 1, 2013 30(b)(6) Deposition of W. Fulton at 36:2-37:1.
30. The ADA Coordinator did not regularly report on issues relating to deaf or hard of hearing inmates. *See* Ex. 14, Oct. 2, 2013 30(b)(6) Deposition of Craig Swaisgood at 31:8-32:17.
31. The District of Columbia Office of Disability Rights does not oversee, advise, implement, train, supervise, or monitor ADA compliance activities at or by the DOC. The same is true for facilities operated by CCA, such as the CTF. *See* Ex. 15, Defendants' Answers to Plaintiff's Third Set of Interrogatories at 3-6.
32. CCA is required to follow DOC policies. *See* Ex. 13, Oct. 1, 2013 30(b)(6) Deposition of W. Fulton at 32:1-11. This includes policies requiring CTF to provide auxiliary aids and services to individuals with disabilities for equal participation in services, programs, and activities and for effective communication. *See id.* at 38:21-40:9.

¹ Defendant has requested that the first names of CCA employees be redacted for security and confidentiality purposes.

33. CCA staff receives no training on DOC policies except for certain areas such as sexual misconduct, the Prison Rape Elimination Act, and disciplinary policies. *See id.* at 32:13-18.
34. At the time of Mr. Pierce's incarceration, CTF employees had not received any training related to working with deaf or hard of hearing inmates. *See* Ex. 16, Sept. 9, 2013 Deposition of B. Tutwiler at 25:10-16; Ex. 17, Sept. 10, 2013 Deposition of M. Allen at 14:22-15:8; Ex. 18, Sept. 10, 2013 Deposition of K. Kornegay at 22:20-23:1; Ex. 19, Sept. 11, 2013 Deposition of P. McNeal at 10:5-17; Ex. 20, Sept. 24, 2013 Deposition of M. Griffin at 13:2-4; Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 12:14-16.

The District of Columbia's Lack of Oversight over Unity's Provision of Health Services

35. Unity is required to comply with DOC policy and program statements relating to persons with disabilities. *See* Ex. 22, Oct. 11, 2013 30(b)(6) Deposition of Vali Zabiheian at 46:8-13.
36. Unity does not provide training on communication with or treatment of deaf or hard of hearing inmates. *See id.* at 58:20-59:18; Ex. 23, Ex. 23, Oct. 9, 2013 Deposition of C. Chapman, M.D. at 26:15-27:2; Ex. 24, Sept. 12, 2013 Deposition of Fidelis F. Doh, M.D. at 29:1-9.
37. Unity currently has a contract with Gallaudet to provide interpreter services. However, Unity was unable to state whether this contract existed during Mr. Pierce's incarceration, or whether a process was in place at that time for Unity employees to request an interpreter. Unity does not have a written policy that informs its employees that the

contract exists or that describes how to request an interpreter. *See* Ex. 22, Oct. 11, 2013 30(b)(6) Deposition of Vali Zabiheian at 56:9-58:12.

38. The Unity doctors who treated Mr. Pierce were unaware of the nature of Unity's access to and use of interpreter services at the time of Mr. Pierce's incarceration. *See* Ex. 23, Oct. 9, 2013 Deposition of C. Chapman, M.D. at 37:4-38:10; Ex. 24, Sept. 12, 2013 Deposition of Fidelis F. Doh, M.D. at 32:5-33:22.
39. Unity's contract specifically states that services are to be provided in compliance with DOC Program Statements 3800.3, entitled "ADA: Communications for Deaf and Hearing Impaired"² and 6000.1B, entitled "Medical Management." *See* Ex. 7, District of Columbia and Unity Contract § C.1.1.
40. DOC Program Statement 3800.3 states that "Written communication cannot be used as a substitute where the individual has expressed a preference for a sign language interpreter." *See* Ex. 9, DOC Program Statement 3800.3 § 12(a)(2).
41. DOC Program Statement 6000.1B was superseded several times, with 6000.1G in place at the time of Mr. Pierce's incarceration. It states that "Sign language interpreter services shall be made available to deaf and hearing-impaired individuals." *See* Ex. 25, DOC Program Statement 6000.1G § 2(f).
42. The Unity doctors who treated Mr. Pierce were unaware of this provision in DOC Program Statement 6000.1G. *See* Ex. 23, Oct. 9, 2013 Deposition of C. Chapman, M.D. at 31:11-32:7; Ex. 24, Sept. 12, 2013 Deposition of Fidelis F. Doh, M.D. at 35:7-36:11.

² DOC Program Statement 3800.3 was effective from September 30, 2003 until July 16, 2013. *See* Ex. 14, Oct. 2, 2013 30(b)(6) Deposition of Craig Swaisgood at 9:19-10:3.

43. The DOC reviews Unity's policies to ensure that they are consistent with the applicable standards and DOC's Program Statements, and Unity reviews its own policies annually for compliance with the same standards. *See* Ex. 22, Oct. 11, 2013 30(b)(6) Deposition of Vali Zabiheian at 26:20-28:7.
44. Despite the presence of numerous specific provisions in DOC's program statements relating to deaf and hard of hearing inmates and their medical care, Unity's Special Needs Policy contains no provisions specific to deaf and hard of hearing inmates. *See* Ex. 9, DOC Program Statement 3800.3; Ex. 25, DOC Program Statement 6000.1G; Ex. 26, Unity Special Needs Patients Treatment Plan; Ex. 22, Oct. 11, 2013 30(b)(6) Deposition of Vali Zabiheian at 40:5-42:10.
45. The District of Columbia Office of Disability Rights does not oversee, advise, implement, train, supervise, or monitor ADA compliance activities at or by Unity. *See* Ex. 15, Defendants' Answers to Plaintiff's Third Set of Interrogatories at 6-7.

Overview of Mr. Pierce's Incarceration at CTF

46. On February 1, 2012, following his guilty plea, Mr. Pierce was sentenced to 60 days in jail and supervised probation for 18 months, for simple assault arising from a domestic dispute with his then-partner, David Holder. *See* Ex. 27, Plea Agreement; Ex. 28, Superior Court Order.
47. On or around February 1, 2012, Mr. Pierce was admitted to the Central Detention Facility. On February 2, 2012, he was transferred to the CTF. *See* Ex. 29, Inmate Transfer History Report; Ex. 30, Standard Inter-Institutional Transfer Order.

48. As a condition of probation, the court ordered Mr. Pierce to enter and complete a domestic violence intervention program, and to submit to mental health and substance abuse assessments every six months. *See* Ex. 28, Superior Court Order.
49. At CTF, CCA assigned Mr. Pierce to an anger management/substance abuse class. Mr. Pierce also signed up for a graphic design class. *See* Ex. 2, Feb. 25, 2013 Deposition of William Pierce at 425:14-427:5.
50. Mr. Pierce resided in three different units during his incarceration at CTF. He was initially placed in Medical 96. When he was assigned to protective custody, he was transferred to Medical 82. *See* Ex. 31, Feb. 24, 2013 Deposition of William Pierce at 214:10-20. Later, while still assigned to protective custody, Mr. Pierce was transferred into the Special Management Unit. *Id.* at 235:11-236:11.
51. Mr. Pierce was incarcerated at the CTF for 51 days. He was released on March 22, 2012. *See* Ex. 32, Pierce CCA chart.

Overview of Interpretive Services Readily Available to the District of Columbia

52. Qualified sign language interpreters provide real-time translations in ASL. Interpreters certified by the National Registry of Interpreters for the Deaf adhere to a code of professional conduct and are able to interpret effectively, accurately, and impartially using any necessary specialized vocabulary. *See* Ex. 5, Ray Rep. at 5.
53. Sign language interpreters who are not qualified often provide inaccurate interpretations. They may not have the requisite ASL skills or be able to keep up with their translation. As a result, the original message can get lost. *See* Ex. 3, Bienvenu Rep. at 8-9; Ex. 5, Ray Rep. at 5.

54. The District of Columbia has a contract for the provision of qualified ASL interpreters through its Office of Disability Rights. DOC contractors can obtain interpreters at the negotiated rates specified in this contract, either by contacting the DOC ADA Coordinator or by contacting the vendor directly. *See* Ex. 14, Oct. 2, 2013 30(b)(6) Deposition of Craig Swaisgood at 21:16-26:2.
55. Interpretive services are also readily available remotely, through the use of video remote interpreting (VRI). VRI uses high-speed Internet services to provide an off-site interpreter who can translate via video monitor. This enables deaf and hearing individuals in the same location to communicate. *See* Ex. 5, Ray Rep. at 8.
56. VRI has been widely available in the U.S. since at least the mid-2000s. It is commonly used in hospitals, doctors' offices, mental health care settings, police stations, and other instances where immediate access to an interpreter is necessary. Prisons can contract with a vendor such as Purple Communications VRI Services or ZVRS to enable VRI communications. *See id.* at 8-9.
57. In the area of telecommunications, videophones have been available at either no cost or modest cost since at least the mid-2000s. A videophone uses high-speed Internet to enable real-time video communication. It allows deaf individuals to communicate with one another in ASL. *See id.* at 6-7.
58. Videophones also enable communication between deaf and hearing individuals through the use of a video relay service (VRS). The deaf individual signs via video monitor to a remote sign language interpreter, and the interpreter communicates the deaf person's message to the hearing individual in spoken English and vice versa. *See id.* at 7.

59. VRS is free to all users and has been widely available since at least the mid-2000s. *See id.*

Defendant's Failure to Provide Interpretive Services for Mr. Pierce's Classes

60. Throughout his incarceration, Mr. Pierce made multiple requests for interpreters for his anger management/substance abuse classes and for his graphic arts class, starting on or about February 3, 2012. *See* Ex. 2, Feb. 25, 2013 Deposition of William Pierce at 427:7-428:1; Ex. 16, Sept. 9, 2013 Deposition of B. Tutwiler at 63:4-19; Ex. 17, Sept. 10, 2013 Deposition of M. Allen at 48:16-49:7; Ex. 19, Sept. 11, 2013 Deposition of P. McNeal at 30:20-33:16; Ex. 33, Feb. 27, 2012 Informal Resolution form; Ex. 34, Mar. 6, 2012 Memorandum from P. McNeal to W. Fulton; Ex. 35, CCA logbook entries; Ex. 36, Handwritten Notes between William Pierce and B. Tutwiler.
61. Mr. Pierce made multiple requests for an interpreter to Case Manager Tutwiler. On February 17, 2012, she noted that Mr. Pierce “continues to write request for an interpret [sic] for anger management and drug education.” *See* Ex. 35, CCA logbook entries; Ex. 36, Handwritten Notes between William Pierce and B. Tutwiler.
62. In a February 27, 2012 informal resolution form, Mr. Pierce states that he “wrote about 8 request forms” for an interpreter and that Case Manager Tutwiler told him to stop. *See* Ex. 33, Feb. 27, 2012 Informal Resolution form.
63. Mr. Pierce also told Facilities Grievance Coordinator Allen that he needed an interpreter. *See* Ex. 17, Sept. 10, 2013 Deposition of M. Allen at 48:16-49:7.
64. At the first group session Mr. Pierce attended, he became agitated and upset when he could not understand the lecture and left the session. After the session, he gestured for CCA Treatment Specialist McNeal, *see* Ex. 19, Sept. 11, 2013 Deposition of P. McNeal

at 8:10-18, to come down to his cell. Mr. Pierce wrote Mr. McNeal that he was frustrated because he could not understand the lecture and needed an interpreter. *See id.* at 30:20-33:16.

65. Lectures and class participation were key components of the anger management/substance abuse class. *See id.* at 21:13-22:8.
66. In order to complete the graphic arts class, students had to follow detailed written instructions with technical vocabulary and be able to ask the instructor questions. *See Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 520:7-522:14.*
67. CCA Treatment Specialist McNeal and Case Manager Tutwiler told Assistant Warden Fulton that Mr. Pierce had requested an interpreter. *See Ex. 16, Sept. 9, 2013 Deposition of B. Tutwiler at 63:4-19; Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 14:9-15:12, 28:1-29:2; Ex. 37, Feb. 28, 2012 Memorandum by P. McNeal to W. Fulton; Ex. 38, Sept. 23, 2013 Deposition of A. Points at 37:13-38:3.*
68. Mr. Pierce's then-partner, David Holder, also communicated with Assistant Warden Fulton about Mr. Pierce's need for an interpreter. Mr. Holder told Assistant Warden Fulton that Mr. Pierce was unable to participate in his classes. *See Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 6:15-7:22; Answer ¶ 22, Mar. 20, 2013, ECF No. 8.*
69. Assistant Warden Fulton spoke to a number of the staff that were in direct contact with Mr. Pierce because Fulton was not in direct contact with Mr. Pierce, "to heighten the staff's sensitivity, to make them aware of the fact that [Mr. Pierce] did have special needs and that we're going to do everything to the best of our ability to accommodate those needs." *See Ex. 13, Oct. 1, 2013 30(b)(6) Deposition of W. Fulton at 65:4-10.*

70. Assistant Warden Fulton understood that pursuant to DOC policies, a sign language interpreter needed to be qualified. *See id.* at 41:21-42:18.
71. Assistant Warden Fulton reached out to Gallaudet University, but was told that their interpreters would need to be paid. *See Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 8:9-9:6.*
72. Assistant Warden Fulton did not follow up with the Gallaudet service for Mr. Pierce because CCA would have to pay for the interpreters. Assistant Warden Fulton told the warden about the Gallaudet fee schedule, and the warden advised him to look for other options. *See id.* at 9:22-10:7; 44:18-45:5. There were no particular budget constraints in February or March 2012 that impacted the provision of interpreting services. *See Ex. 13, Oct. 1, 2013 30(b)(6) Deposition of W. Fulton at 77:12-80:9.*
73. Assistant Warden Fulton did not reach out to any interpreting services or agencies, or anyone else outside of CTF, CCA, and the DOC, in order to find interpreters to accommodate Mr. Pierce. *See Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 12:17-13:15.*
74. Assistant Warden Fulton explained to Rev. Napper, CCA's volunteer coordinator, that CCA's previous attempts to accommodate Mr. Pierce had been *unsuccessful* and that CCA continued to look for someone who could effectively sign for him during the classes so that he could get the benefit of group input, group conversation. *Id.* at 41:11-16.
75. Starting on March 12, 2012, Rev. Friedrich, a chaplain, interpreted for Mr. Pierce solely on a volunteer basis in his last three or four anger management/substance abuse classes. *See Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 431:2-435:12, 455:4-458:10;*

- Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 10:8-16; Ex. 39, Mar. 12, 2012 Memorandum from I. Johnson to W. Fulton attaching Inmate/Resident Grievance.
76. Assistant Warden Fulton was not told and did not seek to determine if Rev. Friedrich was a qualified interpreter. He simply assumed that since Rev. Friedrich knew ASL, and that he could interpret from English to ASL. *See* Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 41:17-42:20.
77. As a result of the delay in providing an interpreter, Mr. Pierce feels he learned nothing from the anger management/substance abuse program. He wanted to learn how to improve his behavior after his release from CTF, but it was too difficult for him to follow the communication in the classes. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 469:20-474:10.
78. CCA personnel provided Mr. Pierce with a “Certificate of Completion” for this class, after having denied him an interpreter for all but his last three or four classes. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 431:2-435:12; 455:4-458:10; Ex. 40, Certificate of Completion.
79. On March 20, 2012, a severely hard of hearing inmate, ██████████ attempted to sign for Mr. Pierce in one anger management/substance abuse class. ██████████ also was asked to sign for Mr. Pierce in approximately two or three graphic arts classes. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 435:13-445:15, 457:17-458:10; Ex. 34, Mar. 6, 2012 Memorandum from P. McNeal to W. Fulton.
80. ██████████ was not a certified interpreter and could not effectively interpret the written or oral statements made in the graphic design class. He signed in “words here and there scattered about,” rather than in complete sentences, so the thoughts expressed were

incomplete. Mr. Pierce had to repeatedly ask for clarification because he could not understand what [REDACTED] was signing to him. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 441:1-13.

81. It was also difficult for [REDACTED] to sufficiently interpret for Mr. Pierce because [REDACTED] [REDACTED] was a student in the class. [REDACTED] had missed some classes and was therefore working on a different step in the sequence of class assignments. *See id.* at 476:9-478:16. When working on class assignments with written instructions, Mr. Pierce needed a qualified interpreter in order to ask the teacher questions about the vocabulary used in the directions, but [REDACTED] also needed the teacher's assistance for his own work. *See id.* at 520:21-523:1.
82. [REDACTED] faulty interpretation caused Mr. Pierce to miss a considerable amount of the communication in the class. *See id.* at 439:11-20.
83. Mr. Pierce told CCA Treatment Specialist McNeal that [REDACTED] was not an effective interpreter, and CCA Treatment Specialist McNeal then informed Assistant Warden Fulton. *See* Ex. 13, Oct. 1, 2013 30(b)(6) Deposition of W. Fulton at 62:9-18; Ex. 19, Sept. 11, 2013 Deposition of P. McNeal at 67:9-68:7; Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 14:9-15:12.
84. As a result of the absence of a qualified interpreter, Mr. Pierce did not complete the graphic design lessons. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 524:8-13. Fewer than half of the listed tasks are marked as completed on his Progress Report. *See* Ex. 41, Graphic Arts Vocational Progress Report.

85. Apparently recognizing CTF's risk of non-compliance with the ADA, Mr. Fulton contacted General Counsel Marie Amano,³ seeking guidance in regards to accommodating hearing-impaired individuals. *See* Ex. 13, Oct. 1, 2013 30(b)(6) Deposition of W. Fulton at 73:16-74:2. Ms. Amano referred Assistant Warden Fulton to the ADA compliance monitor, who in turn provided Assistant Warden Fulton information pertaining to the Graham Agency, which provides certified sign language interpreters. *See id.* at 73:16-74:7.
86. However, CCA was not able to secure a contract with the Graham Agency for certified sign language interpreters until the end of Mr. Pierce's incarceration or soon after. *See id.* at 74:8-11.

Defendant's Failure to Provide Interpretive Services for Mr. Pierce's Medical Treatment

87. [REDACTED]
88. At his initial intake at the Central Detention Facility, Mr. Pierce wrote to the doctor that he needed an interpreter [REDACTED]
- [REDACTED] The doctor wrote back that they could use written communication. Mr. Pierce continued to write that he needed an interpreter, but the doctor did not ask that one be provided or use VRI to obtain interpretive services remotely. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 480:5-483:15.

³ Plaintiff believes that Assistant Warden Fulton was referring to DOC General Counsel, Maria Amato.

89. Instead, the intake doctor, Dr. Doh, turned his computer screen toward Mr. Pierce to show him the questions. Mr. Pierce wrote to Dr. Doh that he could not understand the vocabulary and medical jargon on the screen, but Dr. Doh wrote that he should not worry about it. *See id.* at 482:8-483:15.

90. Dr. Doh continued to point at words on the screen, ask questions verbally on the assumption that Mr. Pierce could read his lips, and write notes to Mr. Pierce. Mr. Pierce did not respond in writing to all of Dr. Doh's spoken questions. *See Ex. 24, Sept. 12, 2013 Deposition of Fidelis F. Doh, M.D. at 41:16-43:9.*

91. [REDACTED]

92. [REDACTED]

93. [REDACTED]

94. [REDACTED]

95. [REDACTED]

96. [REDACTED]

97. [REDACTED]

98. As with the initial intake, no ASL interpreter was present at any of Mr. Pierce's medical appointments. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 483:4-488:5; Ex. 24, Sept. 12, 2013 Deposition of Fidelis F. Doh, M.D. at 40:13-43:9; Ex. 42, Medical Records.

99. The medical personnel primarily attempted to communicate with Mr. Pierce through brief written notes. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 490:12-20; Ex. 24, Sept. 12, 2013 Deposition of Fidelis F. Doh, M.D. at 40:13-43:9; Ex. 31, Feb. 24, 2014 Deposition of William Pierce at 242:20-243:9; Ex. 42, Medical Records.

100. [REDACTED]

101. [REDACTED]

Defendant's Failure to Provide Interpretive Services for Mr. Pierce's Grievance Interviews

102. On February 23, 2012, Mr. Pierce was shoved to the floor by another inmate in the TV room and went to Case Manager Tutwiler. When she asked him by a written note if he would like to be placed in protective custody, Mr. Pierce wrote back "If necessary." *See* Ex. 16, Sept. 9, 2013 Deposition of B. Tutwiler at 79:16-80:14; Ex. 31, Feb. 24, 2014 Deposition of William Pierce at 195:17-207:18; Ex. 44, Feb. 23, 2012 Memorandum from A. Points to I. Johnston; Ex. 45, Feb. 27, 2012 Incident Statement.
103. Case Manager Tutwiler did not recall if she described to Mr. Pierce what protective custody was, or if he was aware that protective custody meant that he would be segregated from the general population, or why she believed it was necessary. *See* Ex. 16, Sept. 9, 2013 Deposition of B. Tutwiler at 79:16-81:9; 88:3-89:13.
104. As a result, Mr. Pierce did not understand what protective custody meant. *See* Ex. 46, Handwritten Notes between Mr. Pierce and M. Allen.
105. Mr. Pierce was taken to protective custody in Medical 82. Unit Manager Points went to Mr. Pierce's new cell and wrote a note to him that he needed to write on a form "I fear for my safety." Mr. Pierce was confused by the request and initially refused, but Ms. Points kept standing there and insisting that he write those words on the form. Finally, Mr. Pierce gave up and copied onto the form the words Unit Manager Points had written down. Ex. 31, Feb. 24, 2014 Deposition of William Pierce at 217:8-219:21; 236:21-237:16; Ex. 38, Sept. 23, 2013 Deposition of A. Points at 23:4-25:20; Ex. 48, Feb. 23, 2012 Protective Custody Request/Waiver Form.
106. The guard and correctional officers did not use an interpreter or VRI services to communicate with Mr. Pierce about what protective custody was, why it was used, how

long it would last and how to request release from protective custody. Ex. 16, Sept. 9, 2013 Deposition of B. Tutwiler at 79:16-81:9; Ex. 31, Feb. 24, 2014 Deposition of William Pierce at 195:17-207:18, 217:8-219:21, 236:21-237:16; Ex. 38, Sept. 23, 2013 Deposition of A. Points at 23:4-25:20; Ex. 44, Feb. 23, 2012 Memorandum from A. Points to I. Johnston; Ex. 45, Feb. 27, 2012 Incident Statement; Ex. 48, Feb. 23, 2012 Protective Custody Request/Waiver Form.

107. On February 27, 2012, Mr. Pierce notified Facilities Grievance Coordinator Allen in a note that he had not understood what protective custody meant and that his case manager should have discussed it with him. Allen responded in writing: "You should have read it before you signed it." Mr. Pierce responded in writing, "I had no choice because they told me to sign." *See* Ex. 46, Handwritten Notes between Mr. Pierce and M. Allen; Ex. 17, Sept. 10, 2013 Deposition of M. Allen at 19:16-22:20.
108. At some point, Mr. Pierce told Case Manager Griffin that he wanted to leave protective custody and return to the general population. Griffin passed Mr. Pierce's request on to the segregation staff. *See* Ex. 20, Sept. 24, 2013 Deposition of M. Griffin at 35:21-37:5; Ex. 35, CCA logbook entries at 2.
109. On March 1, 2012, upon reading Mr. Pierce's administrative segregation review, Assistant Warden Fulton learned that Mr. Pierce wanted to leave protective custody but had asked to have a lawyer present before signing a protective custody waiver. Fulton thought that this was unusual, but did not seek to understand why Mr. Pierce felt he needed a lawyer in order to sign the waiver. Instead, he advised the staff to review Mr. Pierce again in one week. *See* Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 22:12-24:13; Ex. 48, Mar. 1, 2012 Administrative Segregation Review.

110. On March 4, 2012, CCA officials moved Mr. Pierce to a cell in the Special Management Unit, still in segregation. *See* Ex. 18, Sept. 10, 2013 Deposition of K. Kornegay at 41:5-17; Ex. 49, Administrative Segregation Review.
111. SMU was much worse than the other units where Mr. Pierce had been housed. He was still on 23-hour lockdown, did not have a roommate, and could only see out from his cell through a window in the metal door. *See* Ex. 18, Sept. 10, 2013 Deposition of K. Kornegay at 18:9-20:30; Ex. 31, Feb. 24, 2014 Deposition of W. Pierce at 235:20-236:5.
112. Mr. Pierce was released from segregation on March 7, 2012. *See* Ex. 49, Administrative Segregation Review.
113. The inmate who shoved Mr. Pierce remained unrestricted. *See* Ex. 31, Feb. 24, 2014 Deposition of W. Pierce at 225:1-8.

Defendant's Failure to Provide Mr. Pierce Adequate Access to Telecommunications

114. During Mr. Pierce's incarceration at CTF when he was in Medical 96, hearing inmates had access to pay telephones seven days a week whenever they were not locked down in their cells. Hearing inmates did not need to request permission in advance to use the telephones during these hours, and calls could last up to 10 minutes. *See* Ex.51, CTF Policy 16-100, Inmate Access to Telephones; Answer ¶¶ 31-32, Mar. 20, 2013, ECF No. 8.
115. In order to place a call, CTF required Mr. Pierce to request an appointment in advance to use a teletypewriter ("TTY"). *See* Ex. 16, Sept. 9, 2013 Deposition of B. Tutwiler at 25:17-26:17, 44:9-45:20, 106:20-107:6; Ex.51, CTF Policy 16-100, Inmate Access to Telephones.

116. A TTY consists of a keyboard, display screen, and telephone. Both parties must have a TTY to have a direct (uninterpreted) conversation. Typed messages are sent over the telephone lines and appear on the screen of the other party. *See Ex. 5, Ray Rep. at 5-6.*
117. In a conversation between a deaf and hearing individual, the deaf party uses the TTY while the hearing party uses a standard phone. The parties communicate through the assistance of a third-party relay operator who types spoken words to be read by the deaf party and reads the typed responses to a hearing person. This makes communications slow and difficult. *See id.*
118. Two deaf individuals cannot communicate directly via TTY unless both parties have a TTY device and can type in English effectively. *See id.*
119. Since the TTY requires the deaf individual to type and read in English, it can only enable communication to the extent of the user's reading and writing skills. *See id.*
120. In addition, most TTYs can only transmit 25-30 words per minute. *See id.* at 6.
121. As a result, time limits for conversations using the TTY should be at least four times the limit for standard phone conversations in order to be equivalent. *See id.*
122. DOC policy required that deaf inmates be afforded no less than four times the amount of time for TTY calls as hearing inmates were allotted for voice phone calls. *See Ex. 9, DOC Program Statement 3800.3 § 14(e).*
123. CCA recognized that it needed to abide by the DOC policy regarding TTY time limits. *See Ex. 13, Oct. 1, 2013 30(b)(6) Deposition of W. Fulton at 44:2.14.*
124. The TTY was used with the telephone in Mr. Pierce's case manager's office. In order to use the device, his case manager or one other CTF employee had to be present. Case Manager Tutwiler's hours were typically Monday through Friday from 8:00 a.m. to 5:00

- p.m. *See* Ex. 16, Sept. 9, 2013 Deposition of B. Tutwiler at 25:17-26:17, 44:9-45:20, 106:20-107:6; Ex.51, CTF Policy 16-100, Inmate Access to Telephones.
125. Case Manager Tutwiler would consider Mr. Pierce's requests based on when she could be in her office to supervise the call. Her schedule depended on the inmates she needed to meet with each day and thus was not predictable in advance. *See* Ex. 16, Sept. 9, 2013 Deposition of B. Tutwiler at 40:17-41:19, 43:2-44:8.
126. Case Manager Tutwiler would limit Mr. Pierce to approximately 10 minutes for his phone calls. She would gesture to him to indicate when his time was up. *See* Ex. 31, Feb. 24, 2014 Deposition of William Pierce at 384:21-386:2.
127. During the time Mr. Pierce was in protective custody in Medical 82, hearing inmates in Medical 82 could use the phone during their recreation hour or ask to have a telephone brought to their cell at any time during the day by asking the officer on the unit. There were two such phones. *See* Ex. 20, Sept. 24, 2013 Deposition of M. Griffin at 19:4-23:9, 50:3-13.
128. Deaf and hard of hearing inmates in protective custody on Medical 82 had to request to use a TTY in Case Manager Griffin's office. Griffin would obtain the TTY from Assistant Warden Fulton and tell the inmate that he could not be on the phone for a long time. *See* Ex. 20, Sept. 24, 2013 Deposition of M. Griffin at 20:16-22:8.
129. Mr. Pierce's informal resolution form submitted on or around February 27, 2012 expressed his frustration with the TTY limitations. In his review of the form on March 6, 2012, Assistant Warden Fulton did not address this complaint. *See* Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 29:12-31:10; Ex. 33, Feb. 27, 2012 Informal Resolution.

130. During the time Mr. Pierce was in protective custody in the Special Management Unit, hearing inmates in the Special Management Unit could ask to have a telephone brought to their cell. This phone did not have TTY capability. *See* Ex. 18, Sept. 10, 2013 Deposition of K. Kornegay at 29:1-8, 33:11-21.
131. Deaf and hard of hearing inmates in protective custody in the Special Management Unit had to write a request to use a TTY in the segregation office and give it to an officer during the officer's once daily walk-through. Once a request was granted, the inmate would be brought to the office in handcuffs and would be permitted to use the TTY—with the handcuffs remaining on while the inmate typed. *See id.* at 29:9-30:13, 33:11-34:15.
132. Mr. Pierce submitted another informal resolution form on or around March 2, 2012 regarding the TTY limitations. Assistant Warden Fulton viewed this complaint as “just a matter of expressing his frustration” and did not address the TTY issue in his response. *See* Ex. 21, Oct. 1, 2013 Individual Deposition of W. Fulton at 32:6-33:13; Ex. 52, Mar. 2, 2012 Informal Resolution.

Defendant's Failure to Provide Mr. Pierce Adequate Access to Visual Notifications

133. DOC policy requires the CTF to provide access to visual emergency alarms as well as visual signals or bed vibrators to alert deaf inmates to both routine and emergency notifications. *See* Ex. 9, DOC Program Statement 3800.3 § 15.
134. CTF, however, failed to provide Mr. Pierce with access to a visual or tactile alarm in his cell for emergencies or other notifications throughout his incarceration. *See* Ex. 13, Oct. 1, 2013 30(b)(6) Deposition of W. Fulton at 44:16-22; Ex. 20, Sept. 24, 2013 Deposition

of M. Griffin at 28:9-19; Ex. 31, Feb. 24, 2014 Deposition of William Pierce at 366:20-367:7; Ex. 38, Sept. 23, 2013 Deposition of A. Points at 49:1-17.

135. As a result, Mr. Pierce could have missed important announcements and notifications, and been unaware of an emergency situation. For example, while at CTF, Mr. Pierce could not rely on a visual alarm to alert him to an emergency lockdown. If there was an emergency at night or if the door was closed, Mr. Pierce would not have been able to see an emergency visual alarm in the hallway. *See* Ex. 31, Feb. 24, 2014 Deposition of William Pierce at 366:5-369:6.

Defendant's Failure to Provide Mr. Pierce Adequate Access to Visitation

136. Mr. Pierce uses ASL to communicate with his mother, and remote ASL interpretive services to communicate with his then-partner, and is unable to communicate effectively with them in any other way on any non-simple matters. *See* Ex. 1, Oct. 10, 2013 Deposition of William Pierce at 20:13-18, 81:7-82:9, 119:11-121:20.
137. During the two weeks Mr. Pierce was in protective custody, he was brought into at least one visit from his partner and his mother in handcuffs. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 576:9-578:6; Ex. 53, Sept. 23, 2013 Deposition of David Holder at 46:22-47:14, 51:14-52:22; Answer ¶ 43, Mar. 20, 2013, ECF No. 8.
138. Mr. Pierce's mother had to explain the problem to corrections officers in order to have the handcuffs removed. *See* Ex. 2, Feb. 25, 2014 Deposition of William Pierce at 576:9-578:6; Ex. 53, Sept. 23, 2013 Deposition of David Holder at 46:22-47:14; 51:14-52:22.

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INTRODUCTION

In February and March 2012, William Pierce was incarcerated for 51 days following his guilty plea to simple assault, arising out of a domestic dispute with his then-partner, David Holder. Mr. Pierce is profoundly deaf and primarily communicates using American Sign Language (“ASL”). He was assigned to the District of Columbia Correctional Treatment Facility (“CTF”), operated by Corrections Corporation of America (“CCA”) under a contract with the District of Columbia Department of Corrections (“DOC”).

The denial of many individual freedoms is inherent in incarceration, but a fundamental tenet of the criminal justice system is that prisoners retain certain human and legal rights, including the right to communicate effectively – to comprehend information being conveyed by prison officials and to be understood by those officials in return. For profoundly deaf inmates such as Mr. Pierce, this right is secured by the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act. The failure to ensure communication for deaf inmates implicates other important rights, including nondiscriminatory access to medical treatment, inclusion in inmate programs that can lead to credits for early release, and effective participation in grievance interviews, among others.

Mr. Pierce was denied these basic human and legal rights throughout his incarceration. With only a few exceptions, Mr. Pierce was left to languish at CTF, unable to communicate effectively with doctors, corrections officers, fellow inmates, and friends and family outside of CTF. Because of his inability to communicate effectively – and despite his repeated requests for a qualified ASL interpreter – Mr. Pierce not only languished during his time at CTF, he suffered.

He suffered from a lack of meaningful communication in connection with such critical services as medical evaluation and treatment. This was bad enough and plainly a violation of the

law, [REDACTED]

[REDACTED] He suffered due to his inability to participate meaningfully in his graphic arts class and his anger management/substance abuse class without a qualified ASL interpreter. He suffered when he was placed in solitary confinement for fourteen days, following a decision by CTF officials that he had requested “protective custody” after a fellow inmate shoved him to the floor, despite the fact that Mr. Pierce and those officials could not and did not communicate effectively as to the need for or the very substantial negative consequences of placement into “protective custody.” He suffered because CTF discriminated against him by providing burdensome, limited access to an outdated teletypewriter (“TTY”) telephone to place calls to friends and family outside CTF, while similarly situated hearing inmates enjoyed virtually unlimited access to telephone service in which they could communicate freely and fully with their family and friends. He suffered from being anxious that he would miss an emergency alarm or important notification because there were no visual or tactile alarms in his cell that were necessary to provide him the same kind of meaningful access to the alarms that hearing inmates enjoyed. And in one final humiliation, he suffered when prison guards brought him – shackled – to at least one meeting with his mother, thereby preventing him from using his hands and arms to communicate with her in his native language, ASL, until she complained that he needed to be unshackled to communicate with her.

To obtain damages,¹ Mr. Pierce must show that the District of Columbia was “deliberately indifferent” to the fact that its actions resulted in violations of Mr. Pierce’s statutory rights. In this case, as set forth below in detail, there can be no dispute that the District

¹ The amount of compensatory damages to which Mr. Pierce is entitled is a factual matter, left for the jury to determine.

of Columbia acted with “deliberate indifference” in its failures to provide Mr. Pierce with even the most basic accommodations. Accordingly, the Court should enter partial summary judgment in favor of Mr. Pierce on Claims I and II.

STATEMENT OF FACTS

The undisputed material facts of this matter are described at length in the Statement of Undisputed Material Facts, which is incorporated here by reference. In the Argument section of this Memorandum, we address those facts in detail, within the context of the arguments and legal analysis set forth below.

ARGUMENT

I. Summary Judgment Legal Standard

Summary judgment is appropriate “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 a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-34 (1986). While the Court must view the evidence and draw inferences in the light most favorable to the nonmoving party, the Court can deny a motion for summary judgment only if sufficient evidence exists favoring the non-moving party which would allow a reasonable jury to return a verdict for that party. *Arrington v. United States*, 473 F.3d 329, 333 (D.C. Cir. 2006) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986)).

II. Title II of the ADA and Section 504 of the Rehabilitation Act

The purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” 42 U.S.C. § 12101(b)(1) (2012), and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” *Id.* § 12101(b)(2). Title II of the ADA provides that “no

qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. The elements of an ADA discrimination claim are: 1) that the plaintiff is a qualified individual with a disability; 2) that the public entity denied [him] the benefits of or prohibited [him] from participating in the entity’s services, programs or activities; and 3) that denial or prohibition was “by reason of” [his] disability. *Alston v. Dist. Of Columbia*, 561 F. Supp. 2d 29, 37 (D.D.C. 2008) (citing 42 U.S.C. § 12132).

Similarly, the Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.” 29 U.S.C. § 794(a) (2012).²

The legal standards under Section 504 of the Rehabilitation Act are parallel to that under the ADA. *See* 42 U.S.C. § 12133 (“The remedies, procedures, and rights” provided under § 504 “shall be the remedies, procedures, and rights [that Title II of the ADA] provides to any person alleging discrimination on the basis of disability.”); *Harrison v. Rubin*, 174 F.3d 249, 253, (D.C. Cir. 1999) (“Claims and defenses under the [ADA and the Rehabilitation Act] are virtually identical.”); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1260 n.2 (D.C. Cir. 2008) (“cases interpreting either [statute] are applicable and interchangeable”).

² The Rehabilitation Act’s coverage is narrower than the ADA’s because it applies only to programs receiving federal financial assistance. *Powell v. Nat’l Bd. of Med. Examiners*, 364 F.3d 79, 85, *op. corrected*, 511 F.3d 238 (2d Cir. 2004).

A. Implementing Regulations

Pursuant to Congressional and Executive mandate, decades ago the Department of Justice (“DOJ”) promulgated extensive regulations implementing both Title II and Section 504.³ The DOJ regulations prohibit public entities under Title II and Section 504 from denying qualified individuals with disabilities opportunities to participate in or benefit from programs or services, or from affording them opportunities that are not equal to the opportunities afforded to non-disabled individuals. *See* 28 C.F.R. § 35.130(b) (2014). They further provide that “[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” 28 C.F.R. § 35.150.

With regard to communication-related disabilities, public entities must “take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are *as effective as communications with others*.” 28 C.F.R. § 35.160(a)(1) (emphasis added). This includes provision of auxiliary aids and services in order to create “an *equal* opportunity to participate in, and enjoy the benefits of, a service, program, or activity.” *Id.* at § 35.160(b)(1)-(2) (emphasis added).

Public entities must make “reasonable accommodations” to enable people with disabilities to be able to participate in activities and receive services, such that they have “meaningful access.” *Alexander v. Choate*, 469 U.S. 287, 301 (1985); *accord McElwee v. Cnty.*

³ Congress expressly directed the Department of Justice to promulgate regulations implementing Title II of the ADA. *See* 42 U.S.C. § 12134(a). By Executive Order 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980), the President directed the Department of Justice to issue regulations governing § 504 of the Rehabilitation Act “for the consistent and effective implementation of various laws prohibiting discriminatory practices in Federal programs and programs receiving Federal financial assistance.” The regulations pursuant to Title II of the ADA are found at 28 C.F.R. Part 35, and the regulations under the Rehabilitation Act for recipients of federal funding are at 28 C.F.R. Part 42, Subpart G.

of Orange, 700 F.3d 635 at 640-41 (2d Cir. 2012) (defendant discriminates when it “fails to make a reasonable accommodation that would permit a qualified individual to have access to and take a meaningful part in public services”) (internal quotation marks and citation omitted). Such accommodation may require an entity to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).

Unless the DOJ regulations are “arbitrary, capricious, or manifestly contrary to the statute,” they should be given “controlling weight.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (“Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”). Indeed, all of the courts that have addressed the DOJ regulations have concluded that they are entitled to deference. *See, e.g., Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 179 (D.D.C. 2011) (finding that implementing regulations promulgated by the Department of Justice that further clarify public entities’ obligations under the ADA apply to the Court of Appeals as a public entity); *Kerr v. Heather Gardens Ass’n*, No. 09-00409, 2010 U.S. Dist. LEXIS 99020, 2010 WL 3791484, at *9 (D. Colo. Sept. 22, 2010) (“[T]he regulations directing that a public entity is liable under Title II for direct conduct as well as indirect conduct, achieved through contracting, licensing, or the like, is not arbitrary, capricious, or manifestly contrary to the statute. Therefore, the regulations are entitled to controlling weight.”) (citing *Chevron*, 467 U.S. at 844); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1065-67 (9th Cir. 2010) (analyzing statute and legislative history and holding that regulations “reflect the fairest reading of the statute”).

B. Compensatory Damages Standard

Proof of intentional discrimination is necessary before a plaintiff may recover compensatory damages under Title II and Section 504. *See* 42 U.S.C. § 12133 (2012); *see also Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012) (observing that failure to provide reasonable accommodation “by itself will not sustain a claim for compensatory damages; the [plaintiffs] must also show by a preponderance that the [defendant]’s failure to provide appropriate [reasonable accommodations] was the result of intentional discrimination”); *Meagley v. City of Little Rock*, 639 F.3d 384, 388 (8th Cir. 2011) (noting that every Court of Appeals to address the issue has held that a plaintiff may not recover compensatory damages under the ADA or the Rehabilitation Act without proof of discriminatory intent).

Although the D.C. Circuit has not addressed the appropriate standard for intentional discrimination, most Circuits have held that the “deliberate indifference” standard is appropriate, *see Liese*, 701 F.3d at 345-47. Deliberate indifference occurs when a “defendant knew that harm to a federally protected right was substantially likely and . . . failed to act on that likelihood.” *Id.* at 344 (quoting *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., Fla.*, 610 F.3d 588, 604 (11th Cir. 2010)); *see also Meagley*, 639 F.3d at 389 (noting that intent 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”) (quoting *Barber ex rel. Barber v. Colo. Dep’t of Revenue*, 562 F.3d 1222, 1228-29 (10th Cir. 2009)).

III. The Undisputed Evidence Demonstrates as a Matter of Law That Defendant Intentionally Subjected Mr. Pierce to Disability-Based Discrimination in Violation of Title II of the ADA and Section 504 of the Rehabilitation Act

A. Mr. Pierce is a Qualified Individual With a Disability Under Title II of the ADA and Section 504 of the Rehabilitation Act Because He is Profoundly Deaf

Under Title II and Section 504, an individual has a disability if he or she “[has] a physical or mental impairment that substantially limits one or more major life activities of such individual.” 42 U.S.C. § 12102(1)(A) (2012); 29 U.S.C. § 705(20) (2012). Hearing is a “major life activity,” and deafness is clearly established as a disability. 42 U.S.C. § 12102(2)(A) (hearing is a “major life activity” pursuant to the ADA); 29 U.S.C. § 705(20)(B) (definition of “individual with a disability” pursuant to the Rehabilitation Act includes those who have a disability pursuant to 42 U.S.C. § 12102); *see also Ball v. AMC Entm’t, Inc.*, 246 F. Supp. 2d 17, 20 (D.D.C. 2003) (deafness is a disability recognized by the ADA); *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995) (granting summary judgment to deaf prison inmates on ADA and Rehabilitation Act claims). Mr. Pierce is profoundly deaf, Statement of Undisputed Material Facts (“SUMF”) ¶ 1, which is a physical impairment that substantially limits his ability to communicate. Therefore, Mr. Pierce is a qualified individual with a disability within the meaning of the ADA and the Rehabilitation Act.

B. Defendant Is Subject to Title II and Section 504

The ADA defines a public entity as “any State or local government” or “any department, agency, special purpose district, or other instrumentality of the State or States or local government.” 42 U.S.C. § 12131(1). Defendant is a public entity within the meaning of 42 U.S.C. § 12131(1).

Therefore, Defendant, acting through the DOC, CCA, and Unity (at the CTF), is required by Title II and Section 504 to provide reasonable accommodations for people with disabilities.

The Supreme Court has instructed that a prisoner can state a claim under Title II if he is denied participation in an activity provided in state prison by reason of his disability. *Pennsylvania. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (finding that “[m]odern prisons provide inmates with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’ the prisoners (and any of which disabled prisoners could be ‘excluded from participation in’”). The DOC is an agency of the District of Columbia, the functions of which include overseeing the compliance of its contractors with the ADA and the Rehabilitation Act. SUMF ¶ 17. The CTF is a minimum and medium security facility in the District of Columbia operated by the CCA, a private prison company. SUMF ¶ 13. CCA operates the CTF pursuant to a contract with District of Columbia, which obligates the CCA to operate, maintain, and manage the CTF in compliance with the Constitution and the laws of the United States. SUMF ¶ 14. Unity Health Care, Inc. (“Unity”) provides comprehensive health care services at the Central Detention Facility and CTF pursuant to its contract with the District of Columbia. SUMF ¶ 15. Pursuant to that contract, Unity is obligated to provide services in compliance with federal and District of Columbia law, as well as DOC Administrative Directives and Policy Statements. SUMF ¶ 16.

Federal regulations emphasize that correctional facilities operated by private entities under contract with a public entity fall within the responsibilities of that public entity. 28 C.F.R. § 35.152(a) (“This section applies to public entities that are responsible for the operation or management of adult and juvenile justice jails, detention and correctional facilities, and community correctional facilities, either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities.”); *see also Lee v. Corrs. Corp. of Am./Corr. Treatment Facility*, No. 14-cv-772 (ESH),

2014 WL 3766228, at *3 (D.D.C. Aug. 1, 2014) (finding that while a former CTF inmate could not sue CCA/CTF pursuant to Title II of the ADA, suit can properly be brought against a public entity that contracts with a private prison company).⁴ This is because only the government has the power to incarcerate. Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56220-21 (Sept. 15, 2010). Thus, “if a prison is occupied by State prisoners and is inaccessible, the State is responsible under Title II of the ADA. The same is true for a county or city jail.” *Id.* Based on the above regulations, the District of Columbia is responsible for ensuring ADA and Rehabilitation Act compliance by its contractors, including CCA and Unity.

Similarly, the District of Columbia and the DOC receive federal assistance within the meaning of the Rehabilitation Act. 29 U.S.C. § 794(a); SUMF ¶ 18. Federal regulations include “Grants and loans of Federal funds” in the definition of “Federal financial assistance.” 28 C.F.R. § 42.102(c). As a general matter, the Rehabilitation Act applies to prisoner claims. *Harris v. Thigpen*, 941 F.2d 1495, 1522 (11th Cir. 1991). The District of Columbia and its DOC receive federal grants that are used to fund programs at CTF, which are programs or activities within the meaning of the Rehabilitation Act. SUMF ¶ 18.

The District of Columbia is not excused from its obligations under Title II of the ADA and Section 504 of the Rehabilitation Act by contracting with CCA for the operation of CTF. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d. Cir. 2003) (holding that a state retains its Section 504 obligations when contracting with a private entity); *Hunter on behalf of A.H. v.*

⁴ DOC requires its contractors to comply with the ADA: “DOC shall ensure by contract or other arrangements that all services, programs, or activities provided or operated by contractors are in compliance with the Americans with Disabilities Act. Contracts with those entities that fail or refuse to comply with the ADA shall be subjected to formal termination proceedings.” D.C. Dep’t of Corr. *Program Statement* 3800.3 at § 5(b) (Sept. 30, 2003).

D.C., No. CV 12-1960 (GK), 2014 WL 4071333, at *7 (D.D.C. Aug. 18, 2014) (finding that the District of Columbia had an obligation to ensure that private contractors complied with Title II of the ADA and Section 504 of the Rehabilitation Act).

C. Defendant Violated Title II of the ADA and Section 504 of the Rehabilitation Act by Failing to Provide Mr. Pierce a Qualified ASL Interpreter, Either In Person or Through Video Remote Interpretive Services

As noted earlier, DOJ regulations mandate that auxiliary aids and services be provided in order to create “an *equal* opportunity to participate in, and enjoy the benefits of, a service, program, or activity.” 28 C.F.R. § 35.160(b)(1)-(2)(2013) (emphasis added). For inmates, such services and programs may include, but are not limited to, medical care, recreational activities, and rehabilitation and educational programs. *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). Almost twenty years ago, the United States District Court for the Southern District of New York found that failure to provide qualified interpreters or other assistance for deaf inmates in disciplinary proceedings, telephone calls, and medical and educational, vocational, and rehabilitative programs violated the ADA and Rehabilitation Act, even if the inmates were permitted to communicate in writing. *See Clarkson v. Coughlin*, 898 F. Supp. 1019, 1034-35 (S.D.N.Y. 1995).

Throughout his incarceration at CTF, Mr. Pierce made multiple written requests and filed three formal grievances seeking the services of a qualified ASL interpreter. SUMF ¶¶ 60-64, 88. Mr. Pierce’s then-partner, Mr. Holder, also made requests on behalf of Mr. Pierce for an interpreter. SUMF ¶ 68. CTF officials, however, refused to contract with or pay for readily available ASL interpretive services. CTF did not provide Mr. Pierce with a qualified ASL

interpreter, either on-site or remotely through Video Remote Interpreting (“VRI”) services.⁵ As a result, Mr. Pierce was denied meaningful access to such services, programs and activities because he was unable to communicate effectively with instructors, fellow inmates, nurses, doctors, and correctional officers.

1. Mr. Pierce Communicates Using ASL

Mr. Pierce is profoundly deaf and his native language is ASL. SUMF ¶¶ 1, 3. ASL is a complex language that is not derived from English. SUMF ¶ 4. ASL has its own syntax and grammar and utilizes signs made by hand motions, facial expressions, eye gazes, and body postures. *Id.* This means that, in order to be treated similarly to a hearing person, Mr. Pierce requires an ASL interpreter both for spoken words and for written documents containing anything other than very simple text. SUMF ¶ 12. Lip reading is not an effective form of communication for Mr. Pierce. SUMF ¶ 11. Less than 30% of the sounds in English words are clearly visible on the mouth, and the ability to lip read can be obstructed by external factors such as lighting or the speaker’s facial structure. SUMF ¶ 10.

Mr. Pierce can make audible sounds, but cannot speak words. SUMF ¶ 2. Written English is a second language for Mr. Pierce, as it is for many individuals who are born deaf. SUMF ¶¶ 5-6. His proficiency in reading and writing is not at the same level as it would be if he were a hearing person. SUMF ¶ 7. Mr. Pierce primarily communicates using ASL, relying on interpreters when communicating with friends or family who are not fluent in ASL rather than text messages or handwritten notes. SUMF ¶ 8. For example, even though his partner at the time of his incarceration, Mr. Holder, was not fluent in ASL, Mr. Pierce used text messages only

⁵ VRI services enable a deaf inmate to communicate with a hearing person (a corrections officer, for example) through the use of a video screen and an offsite interpreter. SUMF 55.

for short, simple communications and rarely used written notes because his ability to communicate in English was so weak. Mr. Pierce instead relied on a videophone⁶ and remote interpreter through the use of a video relay service⁷ on a daily basis for communication, even while he and Mr. Holder lived in the same home. SUMF ¶ 9. At a minimum, Mr. Pierce requires quality ASL interpretation in order to communicate effectively with others. SUMF ¶ 12.

2. Reasonable Accommodation Requires Granting Primary Consideration to a Deaf Inmate's Request for a Qualified Interpreter to Ensure Effective Communication

The ADA's definition of auxiliary aids and services includes "[q]ualified interpreters on-site or through video remote interpreting services." 28 C.F.R. § 35.104. The ADA also requires that a qualified interpreter be "able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary." *Id.* Notably, "[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give *primary consideration* to the requests of the individual with disabilities." *Id.* at § 35.160(b)(2) (emphasis added).

a. The DOC's Own Policies Require Granting Primary Consideration to a Deaf Inmate's Request for a Qualified Interpreter

More than a decade ago, the DOC promulgated policies that were intended to ensure compliance with the ADA. Indeed, those regulations expressly state that they are based on the authority of the ADA and the Rehabilitation Act. *See* Ex. 9, D.C. Dep't of Corr., *Program*

⁶ A videophone uses high-speed Internet to enable real-time video communication. It allows deaf individuals to communicate with one another in ASL. SUMF ¶ 57.

⁷ A video relay service uses a videophone to enable communication between deaf and hearing individuals. The deaf individual signs via video monitor to a remote sign language interpreter, and the interpreter communicates the deaf person's message to the hearing individual in spoken English and vice versa. SUMF ¶ 58.

Statement 3800.3 at § 7 (emphasis added).⁸ Thus, they provide a significant marker for what Defendant itself believes is minimally required for compliance under the ADA and the Rehabilitation Act.

For example, DOC's regulations provide that "[w]ritten communication cannot be used as a substitute where the individual has *expressed a preference for a sign language interpreter.*" *Id.* § at 12(a)(2) (emphasis added).⁹ If a particular type of aid or service is requested by the individual, DOC regulations require that the inmate's expressed preference receives "primary consideration": "DOC shall honor the [inmate's] expressed choice, unless it can show that another *equally effective* means of communication is available, or that use of the means chosen would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens." *Id.* at § 12(b)(2) (emphasis added). Qualified interpreters must be provided "when necessary for effective communication with, or effective participation in, DOC programs and activities by inmates and visitors who are deaf or hard of hearing." *Id.* at § 12(e)(1). The policy contains a non-exhaustive list of situations in which interpreters may be necessary, including regular medical appointments, treatment, educational classes, disciplinary and parole board hearings, grievance interviews, and several other circumstances. *Id.* at § 12(e)(3).

The DOC's policy also makes very clear that a "qualified interpreter" means an interpreter "who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary." *Id.* at § 12(e)(2). An individual "who has only rudimentary familiarity with sign language or finger spelling is not a 'qualified

⁸ All exhibits cited in this Memorandum are attached to the Declaration of James E. Rocap, III in Support of Plaintiff's Motion for Partial Summary Judgment as to Claims I and II of the Complaint.

⁹ This Directive was in effect when Mr. Pierce was incarcerated. SUMF ¶ 39.

interpreter” for communication with a deaf person. *Id.* at § 12(e)(2)(a). Further, “someone who is fluent in sign language but who does not possess the ability to process spoken communication into the proper signs or to observe someone else signing and change their signed or finger spelled communication into spoken words is not a qualified sign language interpreter.” *Id.* at § 12(e)(2)(b). Finally, an inmate who does not meet these guidelines is not a “qualified interpreter,” but even if he were, “inmate interpreters should not be used due to confidentiality, privacy, and security reasons.” *Id.* at § 12(e)(2)(e).

b. Policies in Other Jurisdictions Require Corrections Departments to Grant a Deaf Inmate’s Request for a Qualified Interpreter

Policies of correctional departments in other jurisdictions contain similar requirements to those of the DOC, and provide additional indicia of minimum requirements for ADA compliance. In Virginia, for example, qualified (certified) interpreters have been required at intake, for interpretation of written materials, all medical interventions, disciplinary hearings, transfer and classification processing, and transitional programming. *See Ex. 54, Minnis v. Johnson*, No. 1:10-cv-96 (E.D. Va. Nov. 9, 2010) (settlement agreement requiring interpreters and implementing new regulations). At the request of the deaf inmate, qualified interpreters are required for educational programming and “other communications that are complex or lengthy.” *Id.* Interpreters may be provided onsite or through VRI services. *Id.*

Oregon’s policy includes videophones as an auxiliary aid or service, in addition to qualified interpreters, TTYs, telecommunications devices for the deaf (“TDDs”), and other aids listed in the District of Columbia DOC policy. *See Ex. 55, Oregon Dep’t of Corr., Policy 40.2.11, Effective Communication for Deaf/Hearing Impaired Inmates*, at 1. The policy states that access to such aids is to be provided “in a manner consistent with state and federal nondiscrimination laws.” *Id.* at 4. And, Alabama’s policy provides that auxiliary aids and

services be offered “consistent with the Americans with Disabilities Act” and under its authority. *See Ex. 56, Alabama Dep’t of Corr., Administrative Regulation No. 705, Hearing Impaired Inmates*, at 1, 6 (Nov. 4, 2005). Among other requirements, the Alabama Department of Corrections personnel must inform the inmate of the availability of such aids if they believe the inmate would benefit, even if an inmate does not request them, and TTY calls may be four times as long as voice telephone calls. *Id.* at 4-5.

Similarly, the Armstrong Remedial Plan put into place by the Northern District of California with respect to the California Department of Corrections requires qualified interpreters “for all due process functions and medical consultations . . . when sign language is the inmate’s primary or only means of effective communication, unless the inmate waives the assistance of an interpreter, reasonable attempts to obtain one are not successful, and/or delay would pose a safety or security risk.” *See Ex. 59, Armstrong v. Davis Court-Ordered Remedial Plan § II(E)(2)(d) (2001), available at* <http://www.cdcr.ca.gov/OACC/docs/Armstrong-v-Davis-Remedial-Plan-1-3-01.pdf>. (last visited Nov. 17, 2014). “Medical consultations” include determination of medical history, diagnosis, and explanation of medications and treatment options, among other types of medical interactions. *Id.*

Another example is Colorado’s policy, which provides a list of circumstances under which sign language interpreters must be used – including administrative segregation hearings and “non-routine medical communications” regarding “serious medical needs” or providing “complicated or detailed information” – as well as situations in which an interpreter may be required, including educational and other programs. *See Ex. 57, Colorado Dep’t of Corr., Regulation No. 100-19, Communications with Offenders* (Mar. 1, 2012). The ADA is listed as

authority for the regulation, and the policy describes standards for reasonable accommodation pursuant to Titles I and II of the ADA. *Id.* at 2, 7.

3. Mr. Pierce Was Denied Meaningful Access to CTF Rehabilitation Classes Because Defendant Failed to Provide Him a Qualified ASL Interpreter

As a condition of probation, the court ordered Mr. Pierce to enter into and complete a domestic violence intervention program, and to submit to mental health and substance abuse assessments every six months. SUMF ¶ 48. CTF assigned Mr. Pierce to an anger management/substance abuse class, and Mr. Pierce also enrolled in a graphic arts class. SUMF ¶ 49.

Shortly after his arrival at CTF, Mr. Pierce began to request an interpreter. SUMF ¶ 60. On February 17, 2012, Case Manager Tutwiler noted that Mr. Pierce “continues to write request for an interpret [sic] for anger management and drug education.” SUMF ¶ 61. In a February 27, 2012 informal resolution form, Mr. Pierce states that he “wrote about 8 request forms” for an interpreter and that Ms. Tutwiler told him to stop. SUMF ¶ 62. Mr. Pierce also attempted to communicate to Facilities Grievance Coordinator Allen that he needed an interpreter. SUMF ¶ 63. And, at the first anger management/substance abuse group session that Mr. Pierce attended, he became agitated and upset when he could not understand the lecture and left the session. SUMF ¶ 64. After the session, he gestured for Mr. McNeal, the instructor, to come down to his cell and wrote to McNeal that he was frustrated because he could not understand the lecture and needed an interpreter. *Id.* Mr. Pierce’s then-partner, Mr. Holder, also made repeated requests on behalf of Mr. Pierce for an interpreter, explaining to Assistant Warden Fulton that Mr. Pierce was unable to participate in his classes. SUMF ¶ 68.

Despite these requests for an interpreter, CTF officials failed to make reasonable accommodations for Mr. Pierce by providing a qualified interpreter for these classes. Indeed, it

is clear that CTF was completely unprepared for the need to accommodate a deaf inmate. For example, CTF officials should have had procedures in place for immediate access to outside ASL interpretive services, either on-site or through VRI. Instead, in response to Mr. Holder's requests, CTF officials belatedly attempted to find an interpreter from Gallaudet University for Mr. Pierce. SUMF ¶ 71. When a CTF official reached out to Gallaudet, however, he learned that the Gallaudet interpreters would need to be paid. *Id.* He explained Gallaudet's fee schedule to the warden, and the warden advised the official to look for other ways to accommodate Mr. Pierce. SUMF ¶ 72. There were no budget constraints during Mr. Pierce's incarceration that would have impacted the provision of a paid interpreter, but based on Gallaudet's fee schedule, CTF chose not to use those services for Mr. Pierce. *Id.* Nor did CTF officials reach out to any other interpreting services or agencies, or anyone else outside of CTF, CCA, and the DOC to obtain an interpreter for Mr. Pierce. SUMF ¶ 73.

Graphic Arts Classes. Instead, for Mr. Pierce's participation in the graphic arts classes, CTF asked another inmate to "volunteer" to sign for Mr. Pierce in approximately two or three of those classes. SUMF ¶ 79. This was in direct violation of the DOC's own express regulations, which prohibit the use of inmates for such purposes. D.C. Dep't of Corrs. Directive 3800.3 § 12(e)(2)(e). Worse yet, in this case the volunteer inmate – who was severely hard of hearing himself – was not a qualified interpreter and could not interpret effectively and accurately the written or oral statements made in Mr. Pierce's classes. As Mr. Pierce testified, "I had to keep asking for clarification because I couldn't understand what he was saying. It was not a complete sentence. It was just words here and there scattered about. It wasn't anything complete. It wasn't a complete thought. I could not understand him clearly." SUMF ¶ 80. The "volunteer"

inmate was also a student in the class, and therefore needed to focus on his own assignments rather than on interpreting for Mr. Pierce. SUMF ¶ 81.

Anger Management/Substance Abuse Classes. Mr. Pierce was unable to participate meaningfully in virtually all of his anger management/substance abuse classes. Near the end of his incarceration, and after a majority of Mr. Pierce's classes had been completed, CTF imposed on a volunteer chaplain – Rev. Friedrich – to volunteer on a *pro bono* basis to provide interpretive services for Mr. Pierce in his last three or four anger management/substance abuse classes. SUMF ¶ 75. Remarkably, Assistant Warden Fulton, who made these arrangements, did not even know whether Rev. Friedrich was a qualified interpreter within the meaning of the DOC regulations and the ADA. SUMF ¶ 76.

Without a qualified interpreter in any of his graphic arts classes, and without an interpreter in all but his last three or four anger management/substance abuse classes,¹⁰ Mr. Pierce was clearly denied meaningful access to these programs and was unable to derive any of the benefits from them. SUMF ¶¶ 77, 84. Understanding lectures and being able to participate were obviously essential to the anger management/substance abuse class, SUMF ¶ 65, but Mr. Pierce was unable to do either without an interpreter.¹¹ Mr. Pierce was also unable to complete the majority of the lessons for his graphic arts class, as he needed the assistance of a qualified interpreter to understand detailed, technical written instructions and seek clarification from the instructor. SUMF ¶ 66, 81-82.

¹⁰ The same hard of hearing inmate that attempted to interpret for Mr. Pierce's graphics arts classes also attempted to interpret for one of Mr. Pierce's anger management/substance abuse classes. SUMF ¶ 79.

¹¹ CCA personnel provided Mr. Pierce with a "Certificate of Completion" for this class, SUMF ¶ 75, after having denied him an effective interpreter for most classes, and without ever communicating effectively with Mr. Pierce to determine whether he understood what had been taught.

Defendant's contractor Unity Health Care failed to provide a qualified ASL interpreter (either on-site or through VRI services) for Mr. Pierce's initial intake and subsequent medical appointments and interventions. SUMF ¶¶ 88-89, 97-98, 101.

Instead, medical personnel simply assumed they were effectively communicating with Mr. Pierce through the exchange of written notes and gestures. For example, at Mr. Pierce's initial intake, he repeatedly requested an interpreter [REDACTED] [REDACTED] SUMF ¶¶ 88-89. But, instead of providing Mr. Pierce an interpreter, Dr. Doh chose to assume that Mr. Pierce could read lips and communicate through written notes, even though Mr. Pierce did not respond in writing to all of Dr. Doh's verbal questions. SUMF ¶ 90. In other instances, Dr. Doh simply turned his computer screen toward Mr. Pierce to show him the questions. SUMF ¶ 89. Even though Mr. Pierce showed that he had difficulty understanding the medical jargon on the screen, Dr. Doh never provided him an interpreter. *Id.* A similarly situated hearing person would have been able to discuss these matters freely and fully with the medical providers. Mr. Pierce was deprived of that opportunity.

While the failure to provide an ASL interpreter by itself is a clear violation of the ADA, not to mention the DOC's own policies, this failure led to significant consequences. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A similarly situated hearing person would have been able to discuss these matters freely and fully with the medical providers. Mr. Pierce was deprived of that opportunity.

[REDACTED]

[REDACTED] No similarly situated hearing inmate would have been denied the opportunity to discuss such vital information. Mr. Pierce was deprived of that opportunity.

In sum, unlike any similarly situated hearing inmate, Mr. Pierce was denied “an *equal* opportunity to participate in, and enjoy the benefits of,” 28 C.F.R. § 35.160(b)(1)-(2) (emphasis added), medical care – one of the most important areas where communications must be accurate and complete – because Defendant failed to make reasonable accommodations for him by providing him access to a qualified ASL interpreter, either on-site or through VRI. Despite Mr.

¹² [REDACTED]

Pierce's repeated requests for an interpreter, medical personnel at CTF failed to give "*primary consideration*," *Id.* at § 35.160(b)(2) (emphasis added), to his requests and instead assumed that he could effectively communicate in writing. Such an assumption is not only a direct violation of Title II and Section 504, it also violates DOC's own policies – a reflection of Defendant's view of what is required for ADA and Rehabilitation Act compliance in this area – which state that "[w]ritten communication cannot be used as a substitute where the individual has *expressed a preference for a sign language interpreter*." *See* Ex. 9, D.C. Dep't of Corr. *Program Statement* 3800.3 at § 12(a)(2) (emphasis added). Mr. Pierce's inability to fully participate in his medical appointments and interventions, and receive the full benefits therefrom, resulted solely from his hearing disability and Defendant's failure to reasonably accommodate that disability through the services of a qualified ASL interpreter, either on-site or through VRI.

5. Mr. Pierce Was Denied Meaningful Access to CTF's Grievance Process Because Defendant Failed to Provide Him a Qualified ASL Interpreter, Either On-Site or Through VRI Services

On February 23, 2012, Mr. Pierce was shoved to the floor by another inmate in the TV room. SUMF ¶ 102. He complained to Case Manager Tutwiler, *id.*, but without the benefit of either an on-site ASL interpreter or VRI, he was unable to communicate effectively. Case Manager Tutwiler assumed that Mr. Pierce wanted to be placed in protective custody, even though Tutwiler cannot recall describing to Mr. Pierce what protective custody meant and did not know if he was aware that protective custody meant that he would be segregated from the general population. SUMF ¶ 103.

In the absence of a qualified interpreter, either on-site or through VRI, Unit Manager Points insisted that Mr. Pierce state in writing that he feared for his safety, a written statement he made only because CTF officials insisted that he had to make that statement to be placed in "protective custody." SUMF ¶ 105. Mr. Pierce was then placed in "protective custody" – 23

hours per day of solitary confinement – for fourteen days. SUMF ¶¶ 105, 112. Because of the lack of an interpreter, Mr. Pierce did not understand that protective custody meant solitary confinement, that it would last for at least seven days, that it was voluntary, or that there were procedures by which he could promptly end protective custody status. SUMF ¶ 103-104.

During his stay in “protective custody,” Mr. Pierce notified the Facilities Grievance Coordinator, Unit Manager Allen, that he had not understood what protective custody meant and that his case manager should have discussed it with him. Allen responded in writing: “You should have read it before you signed it.” Mr. Pierce responded “I had no choice because they told me to sign.” SUMF ¶ 107.

At some point, Mr. Pierce told Case Manager Griffin that he wanted to leave protective custody and return to the general population. Griffin passed Mr. Pierce’s request on to the segregation staff. SUMF ¶ 108. Thereafter, on March 1, 2012, upon reading Mr. Pierce’s administrative segregation review, Assistant Warden Fulton learned that Mr. Pierce wanted to leave protective custody but that Mr. Pierce had asked to have a lawyer present before signing the waiver. Fulton thought that this was unusual, but did not seek to understand why Mr. Pierce would not sign the form despite wanting to leave protective custody. SUMF ¶ 109. Instead, he advised the staff to maintain Mr. Pierce’s protective custody status and review that status in one week. *Id.* Thereafter, CTF officials moved Mr. Pierce to a different solitary cell, this time in the “Special Management Unit.” SUMF ¶¶ 110-111. Mr. Pierce was not released from “SMU” until March 7, 2012. SUMF ¶ 112.

No similarly situated hearing inmate would have been denied the opportunity to discuss, fully and effectively, all ramifications of agreeing to be placed in “protective custody.” Mr. Pierce never had that opportunity, because CTF officials chose to deny him an ASL interpreter,

either on-site or through VRI. Accordingly, Mr. Pierce was denied “an equal opportunity to participate in, and enjoy the benefits of” his grievance interviews. 28 C.F.R. § 35.160(b)(1)-(2). In and of itself, that is a clear violation of the ADA. In Mr. Pierce’s case, it had the additional consequence of suffering through solitary confinement for fourteen days. All of this was due to discrimination based on his deafness, and all was in complete disregard of the requirements of Title II and Section 504.

D. Defendant Violated Title II of the ADA and Section 504 of the Rehabilitation Act by Denying Mr. Pierce Meaningful Access to Telecommunications Services

Pursuant to Title II and Section 504, DOC was also required to provide Mr. Pierce with meaningful access to telecommunications, to the same extent it was provided to hearing inmates. *See Clarkson*, 898 F. Supp. at 1046 (holding that the New York Department of Correctional Services violated the ADA and Rehabilitation Act by failing to provide access to telecommunication devices for the deaf). DOJ regulations provide that “[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an *equal opportunity* to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.” 28 C.F.R. § 35.160(b)(1) (emphasis added). The definition of auxiliary aids includes: “telecommunications devices for deaf persons (TDD’s), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.” *Id.* at § 35.104(1). The DOJ has further clarified the meaning of this policy stating that TDD’s must be available to inmates with disabilities *under the same terms and conditions* as telephone privileges are offered to all inmates, and information indicating the availability of the TDD should be provided. *See Ex. 58*, U.S. Dep’t of Justice, “*Commonly Asked Questions About the Americans With Disabilities Act and Law Enforcement*,”

available at http://www.usdoj.gov/crt/ada/q&a_law.htm (last visited Nov. 17, 2014) (emphasis added).

Here again, Defendant had promulgated regulations that expressed its own view as to the minimal requirements for Title II and Section 504 compliance. For example, DOC's Directive on "Communications for Deaf and Hearing Impaired" states, "[i]n light of the fact that telephone calls placed via a TTY unit take three to five times longer than telephone calls placed using standard voice telephone equipment, DOC shall not impose on TTY calls a time limit of *less than four times* the time allowed for voice telephone calls." *See* Ex. 9, D.C. Dep't of Corr. *Program Statement* 3800.3 at § 14(e) (emphasis added).

Access to a telephone is extremely important for inmates at correctional facilities because it fosters ties with family, friends, and the community, which are fundamental to an inmate's rehabilitation. Access to a telephone was especially important to Mr. Pierce due to his inability to communicate effectively with others during his incarceration. In the outside world, Mr. Pierce uses a videophone because he is unable to use a traditional phone. SUMF ¶ 8. Although videophones have been widely available in the United States at either no cost or modest cost since at least the mid-2000s (*See* Ex. 5, Expert Report of Richard Lorenzo Ray, May 26, 2014 at 6-7), and have been required in Virginia prisons since 2010, the CTF did not have videophones available for deaf inmates. Instead CTF provided TTY devices to deaf and hearing impaired inmates. A TTY is an outmoded electronic device for people with hearing and speech disabilities to communicate via telephone, using typing.¹³

¹³ A TTY consists of a keyboard, display screen, and telephone. Both parties must have a TTY to have a direct conversation. Typed messages are sent over the telephone lines and appear on the screen of the other party. If one party does not have a TTY, relay services are provided by telephone companies. Users can then communicate through the assistance of a third-party relay operator who types spoken words to be read by the deaf party and reads the typed responses to a hearing person. This makes communications even slower and more difficult. Two deaf

During Mr. Pierce's incarceration at CTF when he was in the "Medical 96" unit,¹⁴ hearing inmates in that same unit had access to telephones seven days a week whenever they were not locked down in their cells. SUMF ¶ 114. Hearing inmates did not need to request permission in advance to use the telephones during these hours. *Id.* Call times were limited to 10 minutes. *Id.* In order for Mr. Pierce to place a call, however, CTF required him to request an appointment in advance to use the TTY, which was available only in the case manager's office. SUMF ¶¶ 115, 124. In order to use the device, his case manager or one other CTF employee had to be present. SUMF ¶ 121. His case manager's hours were typically Monday through Friday from 8:00 a.m. to 5:00 p.m. *Id.* Case Manager Tutwiler would consider Mr. Pierce's requests based on when she could be in her office to supervise the call. SUMF ¶ 125. Her schedule depended on the inmates she needed to meet with each day, and thus was not predictable in advance. *Id.* Case Manager Tutwiler limited Mr. Pierce's calls to approximately 10 minutes, gesturing to him when the time was up. SUMF ¶ 126.

Similarly, when Mr. Pierce was in "protective custody" in the "Medical 82" unit,¹⁵ hearing inmates in that unit could ask to have a telephone brought to their cell during the day by asking the officer on the unit. SUMF ¶ 127. Deaf and hard of hearing inmates such as Mr. Pierce, however, had to request to use a TTY in Case Manager Griffin's office. SUMF ¶ 128. Griffin would obtain the TTY from Assistant Warden Fulton and tell the inmate that he could not be on the phone for a long time. *Id.*

individuals cannot communicate via TTY unless both parties have a TTY device and can type in English effectively. SUMF ¶¶ 113-115.

¹⁴ "Medical 96" was an area within CTF in which the "general population" of inmates assigned to CTF resided.

¹⁵ "Medical 82" was a unit within CTF in which persons with more significant medical treatment needs were placed. This was the first location to which Mr. Pierce was moved for his "protective custody."

When Mr. Pierce was moved to the Special Management Unit (albeit still as part of his “protective custody” status), hearing inmates in that unit could ask to have a telephone brought to their cell. SUMF ¶ 130. In contrast, deaf inmates in the SMU had to write a request to use a TTY in the segregation office and give it to an officer during the officer’s once daily walk-through. SUMF ¶ 131. Once granted, the inmate would be brought to the office in handcuffs and would be permitted to use the TTY, still in handcuffs. *Id.*

Mr. Pierce complained to a CTF official regarding his lack of meaningful access to telecommunication services on at least two occasions. Mr. Pierce’s informal resolution form submitted on or about February 27, 2012 expressed his frustration with the TTY limitations. SUMF ¶ 129. In his review of the form on March 6, 2012 (after Mr. Pierce had been transferred to the SMU), Assistant Warden Fulton did not address this complaint. *Id.* On or about March 2, 2012, Mr. Pierce again submitted an informal resolution form complaining about the TTY limitations. This time Fulton viewed his complaint as “just a matter of expressing his frustration” and did not address the TTY limitation in his response. SUMF ¶ 132.

The different, discriminatory treatment that Mr. Pierce suffered in connection with telecommunications services was stark, unjustified, and a clear violation of Title II and Section 504.

E. Defendant Violated Title II of the ADA and Section 504 of the Rehabilitation Act by Denying Mr. Pierce Meaningful Access to CTF Notifications

DOC policy requires the CTF to provide access to visual emergency alarms as well as visual signals or bed vibrators to alert deaf inmates to both routine and emergency notifications. *See Ex. 9, D.C. Dep’t of Corr. Program Statement 3800.3 at § 15; SUMF ¶ 133; see also Clarkson, 898 F. Supp. at 1047 (finding inadequate assistive communications under the ADA and Rehabilitation Act where units housing deaf inmates lacked visual fire alarms).* CTF,

however – in violation of these regulations, Title II and Section 504 – failed to provide Mr. Pierce with access to a visual or tactile alarm in his cell for emergencies or other notifications. SUMF ¶ 134.

Mr. Pierce was necessarily anxious and worried about missing important announcements and notifications, and about the possibility of remaining unaware of an emergency situation. . For example, no visual alarm would alert him to an emergency lockdown, and if a fire or other emergency occurred when his door was closed or at night, Mr. Pierce worried that he would not have been able to see a visual alarm outside his cell. SUMF ¶ 134. Accordingly, Defendant denied Mr. Pierce the benefit of access to emergency and routine notifications in violation of Title II and Section 504. The denial of this benefit resulted from Mr. Pierce’s hearing disability, which prevented him from hearing CTF notifications.

F. Defendant Violated Title II of the ADA and Section 504 of the Rehabilitation Act by Denying Mr. Pierce Meaningful Access to Visitation

Access to visitation is extremely important for inmates at correctional facilities because it fosters family and community ties that are fundamental to an inmate’s rehabilitation. Access to visitation was especially important for Mr. Pierce to enable him to have contact with his partner after the domestic altercation that resulted in his incarceration, and because of his inability to communicate with other people at CTF during his incarceration. Mr. Pierce uses ASL to communicate with his mother, and remote ASL interpretive services to communicate with his then-partner, and is unable to communicate effectively with them in any other way on any non-simple matters. SUMF ¶ 136. However, Mr. Pierce was subjected to the humiliation and indignity of being handcuffed during at least one visit from his partner and his mother. SUMF ¶ 137. Mr. Pierce’s mother had to explain the problem to corrections officers in order to have the handcuffs removed. SUMF ¶ 138.

G. Mr. Pierce is Entitled to Compensatory Damages Due to Defendant's Deliberate Indifference to the Requirements of Title II of the ADA and Section 504 of the Rehabilitation Act

Although the D.C. Circuit has not addressed the appropriate standard for intentional discrimination under Title II and Section 504, case law from other Circuits has held that the “deliberate indifference” standard is appropriate. *See Liese*, 701 F.3d at 345-47. For example, in *Proctor v. Prince George's Hospital Center*, the court held that compensatory damages were available to a deaf plaintiff who brought Title II and Section 504 claims against a hospital for its failure to provide ASL interpreters. 32 F. Supp. 2d 820 (D. Md. 1998). The court in *Proctor* adopted the explanation provided by then-District Judge Sonia Sotomayor in *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094, 1151 (S.D.N.Y. 1997), *aff'd in part, vac'd in part on other grounds*, 156 F.3d 321 (2d Cir. 1998), *vac'd on other grounds*, 527 U.S. 1031 (1999):

[T]he question of intent in accommodations cases does not require that plaintiff show that defendants harbored an animus towards her or those disabled such as she. Rather, intentional discrimination is shown by an intentional, or willful, violation of the Act itself. With this understood, it becomes clear, that while defendants may have had the best of intentions, and while they may have believed themselves to be within the confines of the law, they nevertheless intentionally violated the ADA and the Rehabilitation Act by willfully withholding from plaintiff the reasonable accommodations to which she was entitled under the law. They had notice of the potential risk of their decision, and clearly refused the accommodation knowingly.

Proctor, 32 F. Supp. 2d at 829 (quoting *Bartlett*).

The *Proctor* Court then endorsed the proposition that “the level of proof necessary for finding intentional discrimination under [the] Rehabilitation Act means a deliberate indifference to a strong likelihood that a violation of federal rights would result.” *Id.* at 829 n.6 (citation omitted). The court observed that it is “not enough merely to believe that one’s actions do not constitute a violation of the law if such a belief represents a ‘miscalculation.’” *Id.* at 829 (citation

omitted). Where the hospital was “on notice that its failure to provide an accommodation [might] violate the Rehabilitation Act and intentionally opt[ed] to provide a lesser accommodation” by relying “on methods of communication other than a sign language interpreter on numerous occasions,” the hospital was liable for compensatory damages. *Id.*

In the parallel Title IX context, the Supreme Court has held that deliberate indifference is present when, “[a]n official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). And, in the context of claims under Section 1983 and the Eighth Amendment, the D.C. Circuit has held deliberate indifference can be established by showing that the government failed to respond to a need (for example, training of employees) despite the risk that not addressing the need will result in constitutional violations. *Daskalea v. Dist. of Columbia*, 227 F.3d 433, 441 (D.C. Cir. 2000). Thus, in the D.C. Circuit, under Section 1983 and the Eighth Amendment, deliberate indifference is determined by analyzing whether the municipality knew or should have known of the risk of constitutional violations, an objective standard. *Baker v. Dist. of Columbia*, 326 F.3d 1302, 1307 (D.C. Cir. 2003).

On numerous occasions Defendant – by its own inaction and through the action and inaction of the DOC and its contractors, CCA and Unity – acted with deliberate indifference towards the requirements of Title II and Section 504 in connection with Mr. Pierce’s incarceration at CTF. Despite the fact that DOC, CCA, and Unity were fully aware of such requirements, they repeatedly failed to accommodate Mr. Pierce’s hearing disability in multiple settings, as has already been described above in detail.

1. The DOC, CCA, and Unity Were Fully Aware of the Requirements of Title II of the ADA and Section 504 of the Rehabilitation Act

The existence of DOC policies and the terms of DOC's contracts with CCA and Unity regarding compliance with Title II and Section 504, demonstrate that DOC was on notice that failure to accommodate Mr. Pierce's hearing disability would violate those laws. *See Adams v. Montgomery Coll. (Rockville)*, 834 F. Supp. 2d 386, 394 (D. Md. 2011) (being aware of disability and notice of risks demonstrated through handbook enough to show deliberate indifference); *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 383 (D. Md. 2011) (holding plaintiff's allegations that detention center personnel refused to accommodate her stated a claim of deliberate indifference under the ADA because defendant police officers were aware of deaf plaintiff's disability, and because the sheriff's office policy calling for reasonable accommodation for deaf detainees put them on notice of potential liability). Indeed, the DOC policy regarding deaf and hard of hearing inmates lists Title II of the ADA and Section 504 of the Rehabilitation Act as authority. *See Ex. 9, D.C. Dep't of Corr. Program Statement 3800.3 at § 7.*

In turn, the undisputed record establishes that CCA was fully aware of its responsibility to be in compliance with the ADA and the Rehabilitation Act, the DOC policies and its contract with the District of Columbia. SUMF ¶¶ 14, 32. Pursuant to its contract with the District of Columbia, CCA is obligated to operate, maintain, and manage the CTF in compliance with the Constitution and the laws of the United States. SUMF ¶ 14. "DOC shall ensure by contract or other arrangements that all services, programs, or activities provided or operated by contractors are in compliance with the Americans with Disabilities Act. Contracts with those entities that fail or refuse to comply with the ADA shall be subjected to formal termination proceedings." *See Ex. 9, D.C. Dep't of Corr. Program Statement 3800.3 at § 5(a).*

Further, under its contract, CCA is required to manage and operate CTF in accordance with DOC policies relating to deaf and hard of hearing individuals that are intended to ensure compliance with the ADA. SUMF ¶ 32. Such DOC policies include, among others, the following:

- furnishing at CTF appropriate auxiliaries and service where necessary to afford an individual with a disability an equal opportunity to participate in services, programs or, activities conducted at CTF, SUMF ¶ 32;
- providing at CTF auxiliary aids and services to ensure effective communication with inmates, SUMF ¶ 32;
- providing at CTF access to visual emergency alarms as well as visual signals or bed vibrators to alert deaf inmates to both routine and emergency notifications, SUMF ¶ 133;
- that “[w]ritten communication cannot be used as a substitute where the individual has *expressed a preference for a sign language interpreter.*” See Ex. 9, D.C. Dep’t of Corr. *Program Statement* 3800.3 at § 12(a)(2) (2003) (emphasis added);
- that if a particular type of aid or service is requested, that expressed preference receives primary consideration: “DOC shall honor the [inmate’s] expressed choice, unless it can show that another *equally effective* means of communication is available, or that use of the means chosen would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens.” See Ex. 9, D.C. Dep’t of Corr. *Program Statement* 3800.3, at § 12(b)(2) (emphasis added); and
- that an individual “who has only rudimentary familiarity with sign language or finger spelling is not a ‘qualified interpreter’” for communication with a deaf person. *Id.* at § 12(e)(2)(a).

Similarly, Unity provides comprehensive health care services at the CTF pursuant to its contract with the District of Columbia. SUMF ¶ 15. Pursuant to that contract, Unity is obligated to provide services in compliance with federal and District of Columbia law, as well as DOC Administrative Directives and Policy Statements. SUMF ¶ 16. The Unity contract specifically states that services are to be provided in compliance with DOC Program Statements 3800.3, entitled “ADA: Communications for Deaf and Hearing Impaired” and 6000.1B, entitled

“Medical Management.” SUMF ¶ 39. And DOC Program Statement 3800.3 states that “Written communication cannot be used as a substitute where the individual has expressed a preference for a sign language interpreter.” SUMF ¶ 40.

The undisputed record establishes that DOC – as well as CCA and Unity – was fully aware of its responsibility to be in compliance with Title II and Section 504. Therefore, there can be no doubt that DOC had notice that failure to accommodate Mr. Pierce’s hearing disability would violate those laws.

2. The DOC Failed to Monitor its Private Contractors’ Compliance With the Title II of the ADA and Section 504 of the Rehabilitation Act

The District of Columbia retained its obligations under Title II and Section 504 when it contracted with CCA to operate CTF and with Unity to provide medical services at CTF. *Hunter on behalf of A.H. v. D.C.*, No. CV 12-1960 (GK), 2014 WL 4071333, at *7 (D.D.C. Aug. 18, 2014) (finding that the District of Columbia had an obligation to ensure that private contractors complied with Title II of the ADA and Section 504 of the Rehabilitation Act); *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d. Cir. 2003) (holding that a state retains its Section 504 obligations when contracting with a private entity). Despite being on notice of the need to comply with Title II and Section 504, the undisputed record demonstrates that DOC failed to monitor CCA’s compliance with such laws at CTF. *See Parker v. Dist. of Columbia*, 850 F.2d 708, 716 (D.C. Cir. 1988) (finding that in claims under Section 1983 a plaintiff can establish deliberate indifference by a municipality upon showing “systemic and grossly inadequate training, discipline, and supervision”).

a. The DOC Failed to Monitor CCA’s Compliance With Title II of the ADA and Section 504 of the Rehabilitation Act

The primary process for ensuring CCA’s compliance with its contract with the District of Columbia – which obligates CCA to comply with the ADA and Rehabilitation Act – is the

presence of the Contract Monitor at the CTF, Mr. Riddick, who is appointed by the District of Columbia. SUMF ¶¶ 20-21. Mr. Riddick, however, reviews CCA's compliance with the ADA and DOC policies only when particular situations arise, as through inmate grievances, and are communicated to him. SUMF ¶ 26. If an inmate complains of lack of access to a program or service, the actual investigation conducted is only to determine "if those services that they would have received at DOC are being provided at CTF in one form or another." *Id.* Mr. Riddick does not consider or consult existing DOC, CCA, or CTF policies on a regular basis in determining CCA's compliance with its contract with the District of Columbia. SUMF ¶ 22.

Instead, Mr. Riddick primarily relies on his "sense of what should occur in a prison" and "how they should run." *Id.* CCA does not prepare any regular reports for the DOC or CCA's corporate office on accommodations provided to disabled inmates. SUMF ¶ 27. Rather, Mr. Riddick typically addresses non-compliance issues that "flow[] to the surface" and are repeatedly brought to his attention by inmates and CCA staff. SUMF ¶ 25. Even the DOC ADA Coordinator does not review CCA or CTF policies applicable to deaf or hard of hearing inmates. SUMF ¶ 29. Nor does the ADA Coordinator regularly report on issues relating to deaf or hearing-impaired inmates. SUMF ¶ 30.

In fact, the DOC admits that the CCA policy regarding inmates with disabilities does not contain all of the directives in the DOC policy and is "not as in-depth." SUMF ¶ 23. At the policy level, Mr. Riddick focuses mainly on "the fact that they have a policy that accommodates individuals with disabilities," even though the CCA policy lacks "a lot of the directives" in the DOC policy. SUMF ¶ 23. And, Mr. Riddick does not know the process for updating CCA/CTF policies. SUMF ¶ 24.

Moreover, CCA staff is not trained on DOC policies, except for certain areas such as sexual misconduct, the Prison Rape Elimination Act, and disciplinary policies. SUMF ¶ 33. Indeed, at the time of Mr. Pierce's incarceration, CTF employees had not received any training related to working with deaf or hard of hearing inmates. SUMF ¶ 34. Accordingly, even though DOC was on notice of its need to comply with Title II and Section 504, the undisputed record demonstrates that DOC failed to monitor CCA's compliance with such laws at CTF.

b. The DOC Failed to Monitor Unity's Compliance With the Title II of the ADA and Section 504 of the Rehabilitation Act

Unity is required to comply with DOC policy and program statements relating to persons with disabilities. SUMF ¶ 35. The DOC reviews Unity's policies to ensure that they are consistent with the applicable standards and DOC's Program Statements. SUMF ¶ 43. Unity's contract specifically states that services are to be provided in compliance with DOC Program Statements 3800.3, entitled "ADA: Communications for Deaf and Hearing Impaired" and 6000.1B, entitled "Medical Management." SUMF ¶ 39. DOC Program Statement 3800.3 states that "Written communication cannot be used as a substitute where the individual has expressed a preference for a sign language interpreter." SUMF ¶ 40. DOC Program Statement 6000.1B was superseded several times, with 6000.1G in place at the time of Mr. Pierce's incarceration. SUMF ¶ 41. It states that "Sign language interpreter services shall be made available to deaf and hearing-impaired individuals." SUMF ¶ 41.

Despite the presence of numerous specific provisions in DOC's program statements relating to deaf and hearing-impaired inmates and their medical care – and DOC's review of Unity's policies – Unity's Special Needs Policy contains no provisions specific to deaf and hard of hearing inmates. SUMF ¶ 44.

Moreover, Unity does not provide training on communication with or treatment of deaf or hard of hearing inmates. SUMF ¶ 36. Unity currently has a contract with Gallaudet to provide interpreter services. But Unity was unable to state whether this contract existed during Mr. Pierce's incarceration, or whether a process was in place at that time for Unity employees to request an interpreter. SUMF ¶ 37. It is clear, however, that Unity does not have a written policy that informs its employees that the contract exists and describes how to request an interpreter, *id.*, and that the Unity doctors who treated Mr. Pierce were unaware of the nature of Unity's access to and use of interpreter services at the time of Mr. Pierce's incarceration. SUMF ¶ 38. The Unity doctors who treated Mr. Pierce were also unaware of DOC Program Statement 6000.1G, which requires that "[s]ign language interpreter services shall be made available to deaf and hearing-impaired individuals." SUMF ¶¶ 41-42.

Thus, despite that fact that the DOC had notice of the need for compliance in this area, the undisputed record demonstrates that DOC failed to monitor Unity's compliance with Title II and Section 504.

3. The DOC, CCA, and Unity Willfully Withheld the Reasonable Accommodations to Which Mr. Pierce Was Entitled Under Title II of the ADA and Section 504 of the Rehabilitation Act

The undisputed facts establish that on numerous occasions the DOC had notice of the potential risk of refusing to reasonably accommodate Mr. Pierce's hearing disability, but clearly "refused the accommodation knowingly." *Proctor*, 32 F. Supp. 2d at 829 (quoting *Bartlett* 970 F. Supp. 1094 (S.D.N.Y. 1997)). As initial matter, the undisputed facts demonstrate that Mr. Pierce made repeated requests for a qualified ASL interpreter in multiple settings. SUMF ¶¶ 60-64, 8-89. Indeed, from the beginning of his incarceration – at his initial intake – Mr. Pierce wrote to the doctor that he needed an interpreter [REDACTED]

Id. The doctor wrote back

that they could use written communication. *Id.* Although Mr. Pierce continued to write that he needed an interpreter, the doctor did not ask that one be provided and continued to conduct the intake without an interpreter. *Id.*

Mr. Pierce continued to request an interpreter throughout his incarceration at CTF, but one was not provided. For example, Mr. Pierce made multiple requests for an interpreter to Case Manager Tutwiler. SUMF ¶ 61. On February 17, 2012, she noted that Mr. Pierce “continues to write request for an interpret [sic] for anger management and drug education.” *Id.* Mr. Pierce filed an informal resolution, in which he stated that he “wrote about 8 request forms” for an interpreter and that Ms. Tutwiler told him to stop. SUMF ¶ 62. Even Mr. Fulton, the Assistant Warden at CTF, was notified by CTF officials several times that Mr. Pierce had requested an interpreter. SUMF ¶¶ 67-68.

Recognizing the need to accommodate Mr. Pierce’s hearing impairment, Mr. Fulton testified: “I spoke to a number of the staff that were in direct contact with [Mr. Pierce] because I was not in direct contact with him, to heighten their sensitivity, to make them aware of the fact that the individual did have special needs and, you know, we’re going to do everything to the best of our ability to go ahead and accommodate those needs.” SUMF ¶ 69. Yet, despite Mr. Pierce’s numerous requests for a qualified interpreter, the undisputed facts demonstrate that CCA acted with deliberate indifference to the likelihood that Mr. Pierce’s rights would be violated under Title II and Section 504 by failing to provide him a qualified interpreter in multiple settings.

To begin, it is undisputed CCA (and therefore Defendant) was on notice that Mr. Pierce needed a qualified interpreter for his CTF classes and knew that DOC policies – and Title II and Section 504 – require that sign language interpreters must be qualified. SUMF ¶ 70. Mr.

Pierce's then-partner, Mr. Holder, even reached out to Assistant Warden Fulton about Mr. Pierce's need for an interpreter, telling him that Mr. Pierce was unable to participate in his classes without one. SUMF ¶ 68.

It is remarkable, of course, that Mr. Fulton was not in a position to simply pick up the phone and order the necessary interpretive services for Mr. Pierce. He failed to take advantage of a contract that the District of Columbia has for the provision of qualified interpreters through its Office of Disability Rights. D.C. agencies and contractors can piggyback on this contract in order to obtain interpreters at the negotiated rates, either by contacting the ADA Coordinator or by contacting the vendor directly. SUMF ¶ 54. And, there were no budget constraints around February or March 2012 that impacted the provision of interpreting services. SUMF ¶ 72.

Instead, Assistant Warden Fulton spent his time seeking volunteers to provide free interpretive services, without knowing whether they were qualified interpreters. He declined to obtain interpretive services from Gallaudet when he found out that their interpreters would need to be paid. SUMF ¶ 71. Mr. Fulton explained to Rev. Napper, CCA's volunteer coordinator, that CCA's previous attempts to accommodate Mr. Pierce had been *unsuccessful* and that CCA continued to look for someone who could "effectively sign for him during the classes so that he could get the benefit of group input, group conversation." *Id.* As noted above, Rev. Friedrich ultimately agreed to provide Mr. Pierce interpretative services on a *pro bono* basis, but was only able to do so for the last three or four of Mr. Pierce's anger management/substance abuse classes. SUMF ¶ 75.

Mr. Fulton also contacted General Counsel Marie Amano,¹⁶ seeking guidance in regards to accommodating hearing-impaired individuals. SUMF ¶ 85. Ms. Amano referred Mr. Fulton to CCA's ADA compliance monitor, who in turn provided Mr. Fulton information pertaining to the Graham Agency, which provides certified sign language interpreters. *Id.* Once again, however, Mr. Fulton's anemic efforts to accommodate Mr. Pierce fell short, because CCA was not able to secure a contract with the Graham Agency for certified sign language interpreters until "the end of Mr. Pierce's incarceration or soon after." SUMF ¶ 85.

Defendant, acting through CCA, also acted with deliberate indifference to the likelihood that Mr. Pierce's rights would be violated under Title II and Section 504 – as well as DOC's own policies – by failing to provide him meaningful access to telecommunication services. The DOJ has made clear that "TDD's must be available to inmates with disabilities *under the same terms and conditions* as telephone privileges are offered to all inmates." *See* Ex. 58, U.S. Dep't of Justice, "*Commonly Asked Questions About the Americans With Disabilities Act and Law Enforcement*," available at: http://www.usdoj.gov/crt/ada/q&a_law.htm (last visited Nov. 17, 2014) (emphasis added). And, the DOC has promulgated regulations that express its own view of the minimal requirements for Title II and Section 504 compliance: DOC's Directive on "Communications for Deaf and Hearing Impaired" states, "[i]n light of the fact that telephone calls placed via a TTY unit take three to five times longer than telephone calls placed using standard voice telephone equipment, DOC shall not impose on TTY calls a time limit of *less than four times* the time allowed for voice telephone calls." *See* Ex. 9, D.C. Dep't of Corr. *Program Statement* 3800.3 at § 14(e) (emphasis added).

¹⁶ Plaintiff believes that Assistant Warden Fulton was referring to DOC General Counsel, Maria Amato.

Despite being fully aware of these obligations, SUMF ¶ 123, Defendant (through CCA) repeatedly limited Mr. Pierce's TTY calls. SUMF ¶ 126. Mr. Pierce complained to CCA regarding the TTY limitations by submitting an informal resolution form on or around February 27, 2012. In his review of the form on March 6, 2012, however, Assistant Warden Fulton failed to address this complaint. SUMF ¶ 129.

The undisputed facts further demonstrate that Defendant acted with deliberate indifference to the likelihood that Mr. Pierce's rights would be violated under Title II and Section 504 by willfully failing to provide Mr. Pierce with access to visual notifications. Defendant's contractor CCA failed to provide visual alarms in rooms where deaf inmates reside or work alone to ensure that they will always be alerted when an emergency alarm is activated as required under DOC policies, despite being aware of its requirement to do so. *See* Ex. 9, D.C. Dep't of Corr., *Program Statement* 3800.3 at §§ 15(c)-(d). SUMF ¶¶ 133-34.

Moreover, the undisputed facts demonstrate that Defendant, through CCA, acted with deliberate indifference to the likelihood that Mr. Pierce's rights would be violated under Title II and Section 504 by failing to provide Mr. Pierce with meaningful access to visitation. As explained above, Mr. Pierce uses ASL to communicate with his mother (and remote interpretive services with his then-partner). SUMF ¶ 136. During the two weeks Mr. Pierce was in solitary confinement, however, he was brought into at least one visit from his then-partner and his mother in handcuffs. SUMF ¶ 137. The handcuffs made it impossible for Mr. Pierce to communicate. Mr. Pierce's mother had to explain the problem to corrections officers in order to have the handcuffs removed. SUMF ¶ 138.

Finally, the undisputed evidence demonstrates that Defendant, through its contractor Unity, acted with deliberate indifference to the likelihood that Mr. Pierce's rights would be

violated under Title II and Section 504 – and DOC’s own policies – and willfully failed to provide Mr. Pierce with meaningful access to medical care. As explained above, despite repeated requests at his initial intake interview, Mr. Pierce was denied an interpreter, either on-site or through VRI services. Mr. Pierce was unable to effectively communicate with Dr. Doh at his intake [REDACTED] SUMF ¶¶ 88-90. And, Unity failed to provide a sign language interpreter at any of Mr. Pierce’s subsequent medical appointments and interventions, continuing its denial of meaningful access to medical care. SUMF ¶ 98.

In sum, the undisputed facts demonstrate that the Defendant had abundant notice of its legal obligations in dealing with profoundly deaf persons such as Mr. Pierce. The undisputed facts also show that Defendant, through its own inaction and the actions and inactions of its contractors, deliberately chose to ignore those obligations. As then-Judge Sotomayor explained:

[I]ntentional discrimination is shown by an intentional, or willful, violation of the Act itself. . . . [D]efendants . . . intentionally violated the ADA and the Rehabilitation Act by willfully withholding from plaintiff the reasonable accommodations to which she was entitled under the law. They had notice of the potential risk of their decision, and clearly refused the accommodation knowingly.

Bartlett, 970 F. Supp. at 1151. That was sufficient to make the defendants in *Bartlett* liable for compensatory damages, *id.*, and it is sufficient here.

CONCLUSION

For the foregoing reasons, the Court should enter judgment for Plaintiff as to liability on Claims I and II of his Complaint, with the amount of compensatory damages for those Claims to be determined at trial.

Respectfully submitted,

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November 17, 2014