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## How The Americans with Disabilities Act of 1990 Continues to Fail the Deaf and Hard Of Hearing

Maria Nowak

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# HOW THE AMERICANS WITH DISABILITIES ACT OF 1990 CONTINUES TO FAIL THE DEAF AND HARD OF HEARING

Maria Nowak<sup>†</sup>

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## I. INTRODUCTION

Over 30 years have gone by since President George H.W. Bush signed the Americans with Disabilities Act (ADA) of 1990.<sup>1</sup> Since its passage, many Americans might find it difficult to imagine a world in which an individual with a disability is still denied equal access to day-to-day activities, opportunities, information, leisure activities, and communication. What might be even more difficult for people to imagine is a world where said person is also ineligible to be granted relief under the ADA. This, unfortunately, is the reality individuals in the Deaf and hard of hearing community continue to face today.

This Paper seeks to address the flaws of the ADA and its inability to ensure equal access to communication and information for Deaf and hard of hearing people. This Paper argues that the ADA is an ineffective legal basis to provide adequate relief in instances where those individuals face discrimination. Finally, it suggests amendments to the ADA to improve equal access to communication and information and ensure a greater number of potential plaintiffs are awarded redress.

Section II of this Paper will begin by providing information about the Deaf and hard of hearing community. It will examine hearing loss in the United States, Deaf culture and Deaf identity, Deaf history in a hearing<sup>2</sup> world, and Deaf oppression. Next, Section II will discuss American Sign Language (ASL) and address the differences between ASL and English. Section II will also include a brief discussion about other methods of communication Deaf and hard of hearing people use to communicate with one another and with hearing people.

Section III of this Article will then discuss the ADA. It will examine the history of the ADA and the benefits the ADA has provided to the Deaf

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<sup>2</sup>U.S. Dep't of Just.: C.R. Div., *Introduction to the ADA*, ADA.GOV, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) [<https://perma.cc/Q7TR-QBX4>].

<sup>3</sup>In this Paper, the author uses the term "hearing" when referring to individuals who do not suffer from hearing loss. This term was coined by Deaf and hard of hearing people to refer to individuals considered to be outside of the "deaf world." Charlie Swinbourne, *The 10 Annoying Habits of Hearing People*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/the-10-annoying-habits-of\\_b\\_3618327](https://www.huffpost.com/entry/the-10-annoying-habits-of_b_3618327) [<https://perma.cc/92WQ-ANXM>].

and hard of hearing community. After reviewing the benefits, this Paper will provide numerous examples that show how the ADA continuously fails, even today, to ensure Deaf and hard of hearing people have equal access to communication and information.

This Paper argues that the ADA has proven inadequate at preventing disability-based discrimination, reprimanding this discriminatory behavior, and providing the Deaf and hard of hearing community with adequate relief. The remedies suggested by this Paper focus on changes to the ADA necessary to combat the discrimination experienced by Deaf and hard of hearing people.

## II. DEAF CULTURE, DEAF HISTORY, AND AMERICAN SIGN LANGUAGE

Hearing loss is not a characteristic apparent to the naked eye. People with some degree of hearing loss will typically look no different from their “fully-hearing” peers. However, in the United States, approximately two to three out of every 1,000 children are born with some degree of hearing loss in either one or both of their ears.<sup>3</sup> Furthermore, around 37.5 million Americans age eighteen or older report having hearing trouble.<sup>4</sup> Thus, although it does not always appear so, deafness and hearing loss are certainly prevalent in the lives of Americans.

### *A. Deaf Culture and Deaf Identity*

The varying degrees of hearing loss typically occur on a spectrum, and not everyone who falls somewhere on that spectrum identifies as “deaf,” “Deaf,” or “hard of hearing.” When using the term “deaf” with a lowercase “d,” this refers solely to the medical diagnosis of a person’s inability to hear and not that individual’s identity as a Deaf person.<sup>5</sup> “Deaf” with a capital “D” refers to the social and cultural identity of a person in the Deaf and hard of hearing community.<sup>6</sup> Some people who experience hearing loss do not identify as an individual in the Deaf and hard of hearing community.<sup>7</sup> For example, someone who is deaf and not Deaf has typically assimilated into hearing culture and does not view their deafness as making them part

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<sup>3</sup> *Quick Statistics About Hearing*, NAT’L INST. ON DEAFNESS & OTHER COMM’N DISORDERS (Dec. 15, 2016), <https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing> [<https://perma.cc/3WDM-X4ZX>].

<sup>4</sup> *Id.*

<sup>5</sup> *Community and Culture - Frequently Asked Questions*, NAT’L ASS’N FOR THE DEAF, <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/> [<https://perma.cc/M266-UBJU>].

<sup>6</sup> *Id.* (“Deaf” refers “to a particular group of deaf people who share a common language . . . (ASL) . . . and a culture”).

<sup>7</sup> *Id.* How individuals choose to identify themselves is a personal decision. “It’s all about choices, comfort level, mode of communication, and acceptance.” *Id.*

of the Deaf community.<sup>8</sup> Those who choose to identify as “Deaf” are typically proud of their deafness and Deaf culture.<sup>9</sup> Many Deaf people choose not to view their inability to hear negatively. In fact, many Deaf individuals refuse to see their deafness as a disability at all. The word “disabled” seems to imply they are considered “lesser than” their hearing peers simply because they communicate differently—which is not how many Deaf and hard of hearing people view themselves.<sup>10</sup>

Due to a lack of understanding about Deaf culture and Deaf pride, many hearing people are under the assumption that Deaf people want to be assimilated into the hearing world.<sup>11</sup> However, this conjecture is inaccurate.<sup>12</sup> In fact, because of the hardships they have faced, some Deaf people feel they “claim[ed] the right to ‘personal diversity’ which is ‘something to be cherished rather than fixed and erased.’”<sup>13</sup> The obstacles, oppression, and discrimination they face cannot take away the pride the Deaf and hard of hearing community feels about deafness and their culture.

### *B. History of “Curing” Deafness*

Discrimination against and oppression of the Deaf and hard of hearing community is not new. Throughout history, Deaf and hard of hearing people faced communication barriers and other obstacles simply for being deaf. Before there was any medical understanding of deafness, hearing people often referred to Deaf individuals as “dumb,” “deaf mute,” and “hearing impaired,” all of which are terms considered to be offensive to many individuals in the Deaf and hard of hearing community.<sup>14</sup>

Because hearing people did not understand what deafness was, they sought various ways to “cure” it. Some methods used to cure deafness included putting almond oil in the ear or ears of the deaf person, dropping a solution of “peach pits fried in hog lard” into the ear canal, having the deaf person put a twig in their ear (to be kept there at all times until their hearing was restored), and stimulating the nerves in a deaf person’s ears with a

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<sup>8</sup> Bonnie P. Tucker, *The Americans with Disabilities Act: Social Contract or Special Privilege: The ADA and Deaf Culture Contrasting Precepts, Conflicting Results*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 31 (1997).

<sup>9</sup> *Id.* (“Deaf people like being deaf, want to be deaf, and are proud of their deafness.”).

<sup>10</sup> Debbie Clason, *The Importance of Deaf Culture*, HEALTHY HEARING (Dec. 24, 2019), <https://www.healthyhearing.com/report/52285-The-importance-of-deaf-culture> [https://perma.cc/JXN7-SV3G].

<sup>11</sup> Allegra Ringo, *Understanding Deafness: Not Everyone Wants to be ‘Fixed’*, ATLANTIC (Aug. 9, 2013), <https://www.theatlantic.com/health/archive/2013/08/understanding-deafness-not-everyone-wants-to-be-fixed/278527/> [https://perma.cc/WP83-JGXC].

<sup>12</sup> *Id.*

<sup>13</sup> Tucker, *supra* note 8, at 31.

<sup>14</sup> NAT’L ASS’N FOR THE DEAF, *supra* note 5.

“vibrating contraption.”<sup>15</sup> One particularly dangerous treatment involved doctors “induc[ing] blistering in the ear by putting plaster into the ears. When the painful blisters popped and pus oozed from the ear, it was believed that toxins were draining . . . and hearing loss would be cured.”<sup>16</sup>

Other purported remedies placed deaf people in life-threatening situations.<sup>17</sup> For example, some deaf people were told to climb to a high altitude and then jump down from above because hearing people believed deafness could be reversed during the fall.<sup>18</sup> To that same effect, many doctors believed that flying to an altitude of 12,000 to 14,000 feet in an airplane and then having the airplane conduct a sharp nose dive would cure hearing loss.<sup>19</sup> While this technique sometimes resulted in the death of innocent Deaf people, their friends, and the pilots, these “deaf flights,” not surprisingly, did nothing to cure deafness.<sup>20</sup>

Although there no longer seems to be a push to cure deafness using the extreme methods mentioned above, the notion that deafness is something that needs to be “cured” is still held by many. Now, in place of the extreme methods, modern technology is used as a cure. For example, in 2014, around 71,000 Americans and 219,000 people worldwide received cochlear implants.<sup>21</sup> While some deaf people choose to undergo surgery for a cochlear implant, many deaf individuals do not have a choice.<sup>22</sup> This is typically because approximately ninety percent of deaf babies are born into hearing families.<sup>23</sup> Without having knowledge about or immediate access to the Deaf and hard of hearing community, many hearing parents to deaf children opt to have their child implanted with a cochlear implant<sup>24</sup> if their child is a suitable candidate.<sup>25</sup> To many people in the Deaf community, this medical advancement is seemingly the newest modern-day version of a “cure” for deafness. As mentioned above, many deaf people do not identify

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<sup>15</sup> *Hearing Cures of the Past*, MY HEARING CTRS. (Mar. 28, 2020), <https://myhearingcenters.com/blog/hearing-loss-cures-of-the-past/> [https://perma.cc/79L7-PDU9].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Greg Daugherty, *Doctors Once Prescribed Terrifying Plane Flights to “Cure” Deafness*, SMITHSONIAN MAG. (Sept. 26, 2017), <https://www.smithsonianmag.com/history/doctors-once-prescribed-terrifying-plane-flights-cure-deafness-180965027/> [https://perma.cc/4EJ7-DRNM].

<sup>20</sup> *Id.*

<sup>21</sup> *Science Capsule-Cochlear Implants*, NAT’L INST. ON DEAFNESS & OTHER COMMUN DISORDERS (July 2, 2014), <https://www.nidcd.nih.gov/about/strategic-plan/2012-2016/science-capsule-cochlear-implants> [https://perma.cc/L8GC-EMBM].

<sup>22</sup> See Clason, *supra* note 10.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Sara Novic, *A Clearer Message on Cochlear Implants*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/opinion/deaf-cochlear-implants-sign-language.html> [https://perma.cc/Y4LG-QGQW] (noting “not all deaf people are eligible for an implant”).

as Deaf, and thus, sometimes seek ways to become more assimilated to hearing culture.<sup>26</sup> However, many Deaf individuals are proud of Deafness and Deaf culture and do not think there is any need for anyone with hearing loss to be “fixed.”<sup>27</sup> As such, the implementation of cochlear implants has become a hot-topic debate within the Deaf and hard of hearing community and within the medical community.

Today, the medical community still seems to be largely in support of curing deafness. For instance, many doctors continue to urge their deaf or hard of hearing patients to invest in a cochlear implant, usually due to a belief held by medical doctors who think “being deaf is a physical abnormality that should be cured.”<sup>28</sup> However, encouraging the use of a cochlear implant can be misleading because the implants do not, in fact, cure deafness.<sup>29</sup> A cochlear implant’s purpose is instead merely to permit the wearer to “process audio and information more clearly.”<sup>30</sup>

This is not to argue that those who have a cochlear implant or those planning on obtaining a cochlear implant are uninformed, made the wrong decision, or do not benefit from this medical device. Instead, this is simply to note that cochlear implants appear to be the newest medical advancement that aims at fixing and attempting to cure deafness despite their inability to do so, which is one reason why this topic is so heavily debated in the Deaf and hard of hearing community.<sup>31</sup>

Thus, while it appears the medieval methods of “curing” deafness are no longer prevalent in modern medicine, the cochlear implant debate between the Deaf and hard of hearing community and the medical community shows that the mindset of deafness being something that needs to be “cured” has not disappeared. Therefore, the oppression and discrimination many individuals in the Deaf and hard of hearing community face continues today, despite increased knowledge about deafness and Deaf culture.

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<sup>26</sup> See Tucker, *supra* note 8, at 31.

<sup>27</sup> *Id.*

<sup>28</sup> Caroline Praderio, *Why Some People Turned Down a ‘Medical Miracle’ and Decided to Stay Deaf*, INSIDER (Jan. 3, 2017), <https://www.insider.com/why-deaf-people-turn-down-cochlear-implants-2016-12> [https://perma.cc/73AL-9VRL].

<sup>29</sup> Additionally, not everyone who is Deaf or hard of hearing is a suitable candidate to receive cochlear implants. Novic, *supra* note 25.

<sup>30</sup> *Cochlear Implants Pros and Cons: What You Need to Know*, HEARING SOL. (Feb. 25, 2019), <https://www.thehearingssolution.com/hearing-blog/cochlear-implant-pros-and-cons-what-you-need-to-know> [https://perma.cc/EV4P-KLUR]. Cochlear implants do not “fully restore hearing. They can only improve your ability to receive and process audio information . . . there are no guarantees.” *Id.*

<sup>31</sup> See Amelia Cooper, *Hear Me Out: Hearing Each Other for the First Time: The Implications of the Cochlear Implant Activation*, MO. MED. (Dec. 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6913847/> [https://perma.cc/743G-3DPF].

*C. American Sign Language and Other Methods of Communication*

Many individuals in the Deaf and hard of hearing community communicate using ASL.<sup>32</sup> Although Deaf and hard of hearing people certainly use other methods of communication, ASL is an extremely important part of Deaf culture.<sup>33</sup> It has been said that Deaf individuals value ASL in a way that is “almost unimaginable” to hearing people.<sup>34</sup>

“ASL is a complete, complex language consisting of signs made by the hands, facial expressions and body language.”<sup>35</sup> Similar to spoken languages, ASL has its own grammar, syntax, accents, rhythm, and rules for pronunciation.<sup>36</sup> Even though ASL is used mainly in the United States, its rules, grammar, and vocabulary are distinguishable from English, and it is even considered to be its own language.<sup>37</sup> Thus, just because a Deaf or hard of hearing person is fluent in ASL does not mean they are also fluent in reading and writing English.

That said, not all deaf people use ASL to communicate.<sup>38</sup> A considerable number of deaf individuals never learn to sign because they grow up in a home where ASL is not the first language.<sup>39</sup> Other forms of communication typically used by Deaf people include cued speech, lip-reading, gesturing, tactile communication, oral and audio speech, technology, writing notes, visual aids,<sup>40</sup> and many others.

While there are many ways to communicate with someone who is deaf or from the Deaf and hard of hearing community, the most appropriate method of communication is whatever the individual is most comfortable using.<sup>41</sup>

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<sup>32</sup> Michael A. Schwartz, *Deaf Patients, Doctors, and the Law: Compelling a Conversation About Communication*, 35 FLA. ST. U. L. REV. 947, 948 (2008) (“Up to two million Deaf people in the United States use sign language to communicate.”).

<sup>33</sup> Clason, *supra* note 10 (claiming the National Association of the Deaf (NAD) has referred to ASL as “the backbone of the American Deaf culture”).

<sup>34</sup> Michele LaVigne & McCay Vernon, *An Interpreter Isn’t Enough: Deafness, Language and Due Process*, 2003 WIS. L. REV. 843, 851 (2003).

<sup>35</sup> Clason, *supra* note 10.

<sup>36</sup> *Id.*

<sup>37</sup> John Miller, *The Difference Between ASL and English Signs*, SIGNING SAVVY (Sept. 7, 2010),

<https://www.signingsavvy.com/blog/45/The+difference+between+ASL+and+English+signs> [https://perma.cc/7P4E-KFBT].

<sup>38</sup> Susan Lacke, *Do All Deaf People Use Sign Language?*, ACCESSIBILITY.COM (Aug. 5, 2020), <https://www.accessibility.com/blog/do-all-deaf-people-use-sign-language> [https://perma.cc/48GP-XBHW].

<sup>39</sup> *Id.* (noting that 90–95% of deaf children are born to hearing parents).

<sup>40</sup> *Communicating with Deaf Individuals*, NAT’L DEAF CTR. (2019), <https://www.nationaldeafcenter.org/sites/default/files/Communicating%20with%20Deaf%20Individuals.pdf> [https://perma.cc/2GCG-73AL].

<sup>41</sup> *Id.* (stating that as a hearing person, it is important not to make judgments about how a Deaf or hard of hearing person communicates; instead, the hearing person should inquire

### III. BACKGROUND TO THE AMERICANS WITH DISABILITIES ACT

#### A. *The History of the ADA*

##### 1. *The Purpose Behind the ADA*

The ADA was signed by President George H.W. Bush on July 26, 1990.<sup>42</sup> The purpose for enacting the law was to put an end to inequality for disabled persons.<sup>43</sup> When a Harris poll found that individuals with disabilities in the United States had a considerably lower quality of life than their nondisabled peers (often because they were poorer, less educated, and afforded fewer opportunities to partake in various social activities), it became evident that Congress needed to address such inequalities.<sup>44</sup>

Before the ADA's passage, employers, public service government entities, places of public accommodations operated by private entities, and others had no obligation to refrain from discriminating against individuals with disabilities.<sup>45</sup> There was no federal law governing the discriminatory actions of the private sector against individuals with disabilities.<sup>46</sup> The ADA was passed to put an end to that kind of behavior. Specifically, the ADA was intended "to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring disabled persons into the economic and social mainstream of American life."<sup>47</sup>

For individuals and entities to properly adhere to the ADA requirements, they must change their daily routines and practices and shift their mindsets about individuals with disabilities. For instance, the ADA endeavored to help people realize that disability "is a socially constructed outcome, not an inherent condition or the inevitable result of a physical or mental impairment."<sup>48</sup> The ADA promoted the idea that abled persons needed to become more aware of their "usual ways of doing things" and

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as to what types of communication methods the Deaf or hard of hearing person is comfortable with).

<sup>42</sup> Elana N. Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143, 1146 (2011).

<sup>43</sup> *Id.*; see Miranda O. McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 44 (2000) ("The major theme that emerges from the ADA, when read as a whole, is that the economic dependence, social isolation, and segregation of people with disabilities must end.")

<sup>44</sup> JON SCHULTZ, BERNARD D. REAMS & PETER MCGOVERN, *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990*, PUBLIC LAW 101-336, vii (W.S. Hein & Co., Inc. 1992).

<sup>45</sup> Tucker, *supra* note 8, at 25.

<sup>46</sup> *Id.*

<sup>47</sup> SCHULTZ ET AL., *supra* note 44, at viii.

<sup>48</sup> McGowan, *supra* note 43, at 55.

make necessary adjustments to ensure that people with disabilities were not left out.<sup>49</sup> In that way, not only did the ADA seek to provide a remedy to individuals with disabilities who experienced discrimination, but it also aimed to protect individuals from experiencing discrimination in the first place.

## 2. *The Passage of the ADA*

Getting congressional approval to pass the ADA was difficult. Senators introduced multiple revised versions, and the changes brought concerns and opposition—it was difficult to appease everyone.<sup>50</sup> For instance, Senator Edward Kennedy believed injunctive relief was not an adequate remedy for recovery under the ADA because he feared it may lead to noncompliance.<sup>51</sup> However, senators sharing the same or similar concerns as Senator Kennedy acquiesced to the lack of monetary compensation in exchange for getting the ADA passed in its entirety.<sup>52</sup> In the end, “the final version of the ADA was ‘the result of extensive scrutiny, debate, and compromise involving Members of Congress, the administration, and the business and disability communities.’”<sup>53</sup>

## 3. *The Provisions of the ADA*

The final version of the ADA contains three main sections: Title I, concerning disability-based discrimination by employers; Title II, concerning government entities; and Title III, concerning public accommodations.<sup>54</sup>

Title I is considered to be “[a]t the heart of the promise of the ADA.”<sup>55</sup> This Title often receives the most attention from scholars and is easily the most litigated.<sup>56</sup> Under Title I, employers are prohibited from discriminating against individuals with disabilities when making hiring decisions or when setting the terms, conditions, and privileges for the hired individual.<sup>57</sup> The ADA mandates that qualified individuals are entitled to certain reasonable accommodations.<sup>58</sup> Some of the reasonable accommodations employers must adhere to may include:

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<sup>49</sup> *Id.*

<sup>50</sup> Dawson, *supra* note 42, at 1146–47.

<sup>51</sup> *Id.* at 1147 (noting the Senator said, “we have seen in the past that where we do not provide an adequate remedy we do not get compliance”).

<sup>52</sup> *Id.* at 1148.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> SCHULTZ ET AL., *supra* note 44, at viii.

<sup>58</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title I § 101(9) (codified at 42 U.S.C. § 12111 (2018)).

(a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and with other similar accommodations for individuals with disabilities.<sup>59</sup>

If an entity can prove that adhering to an individual's request for an accommodation would pose an undue hardship, it may escape liability if the individual were to bring an action against them.<sup>60</sup> When determining whether adhering to an accommodation would impose an "undue hardship,"<sup>61</sup> the ADA provides factors to be considered, including:

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.<sup>62</sup>

Additionally, in some jurisdictions, if the court determines that a specific accommodation may interfere with the essential duties of an employee's job, the employer is not required to make such an accommodation.<sup>63</sup> "Essential functions" are defined as "the fundamental job

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<sup>59</sup> *Id.*

<sup>60</sup> *See id.* Title I § 101 (10) (codified at 42 U.S.C.S. § 12112(b)(5)(A) (2018)).

<sup>61</sup> An "undue hardship" as defined by the ADA is "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)." *Id.* Title I § 101 (10)(A).

<sup>62</sup> *Id.* Title I § 101 (10)(B)(i)-(iv).

<sup>63</sup> *See, e.g., Hernandez v. Int'l Shoppes, LLC*, 100 F. Supp. 3d 232 (E.D.N.Y. 2015) ("While a reasonable accommodation may include adjustments such as the modification of physical facilities, work schedules or equipment or job restructuring, reasonable accommodation does not mean the elimination of any of the position's essential functions."); *Shannon v. N.Y.C. Transit Auth.*, 322 F.3d 95, 100 (2d Cir. 2003) ("A reasonable accommodation can never involve the elimination of an essential function of a job.").

duties of the employment position the individual with a disability holds or desires.”<sup>64</sup> However, employers are given the discretion to determine which functions are considered “essential” in a given job position.<sup>65</sup>

The purpose of Title II of the ADA is to ensure that state and local government entities provide *equitable* treatment for individuals with disabilities—equivalent to that which is provided to individuals without disabilities—with respect to the programs and services offered.<sup>66</sup> Under Title II, discrimination against individuals with disabilities is prohibited by state and local governments in public services, activities, or programs.<sup>67</sup> Furthermore, new requirements for trains, buses, limousines, taxis, and other providers of public transportation are described under this title.<sup>68</sup> As mentioned, Title II of the ADA focuses on ensuring *equivalent* results.<sup>69</sup> This wording is especially important because it can be true that providing equal treatment leads to unequal results for individuals with disabilities.<sup>70</sup>

Under Title III of the ADA, “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases . . . or operates a place of public accommodation.”<sup>71</sup> Title III affects private entities, including restaurants, libraries, retail stores, professional offices, recreational businesses, and other places of public accommodation.<sup>72</sup> The only relief available to plaintiffs who bring an individual claim under Title III is injunctive relief.<sup>73</sup> When a Title III action is brought by the Attorney General, plaintiffs can be provided injunctive relief and, potentially, compensatory damages.<sup>74</sup>

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<sup>64</sup> 29 C.F.R. § 1630.2 (n)(1).

<sup>65</sup> *See id.* § 1630.2 (n)(3)(i) (“Evidence of whether a particular function is essential includes, but is not limited to: [t]he employers judgment as to which functions are essential . . .”).

<sup>66</sup> Bonnie P. Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 354 (2001) [hereinafter *The ADA’s Revolving Door*] (emphasis added).

<sup>67</sup> SCHULTZ ET AL., *supra* note 44, at viii.

<sup>68</sup> *Id.*

<sup>69</sup> *The ADA’s Revolving Door*, *supra* note 66, at 354.

<sup>70</sup> *Id.*

<sup>71</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title III § 302(a) (codified at 42 U.S.C. § 12182 (2018)).

<sup>72</sup> SCHULTZ ET AL., *supra* note 44, at viii; *see* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title III § 301(7)(A)–(L) (codified at 42 U.S.C. § 12181 (2018)) (listing multiple entities that are considered places of public accommodation under Title III and stating that the “operations of such entities [must] affect commerce”).

<sup>73</sup> Michael S. Stein & Emily Teplin, *Rational Discrimination and Shared Compliance: Lessons from Title IV of the Americans with Disabilities Act*, 45 VAL. U. L. REV. 1095, 1115 (2011); *see* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title III § 308(2) (codified at 42 U.S.C. § 12188 (2018)).

<sup>74</sup> SCHULTZ ET AL., *supra* note 44, at viii.

### *B. The ADA and the Deaf and Hard of Hearing Community*

The Deaf and hard of hearing community fought hard for the passage of the ADA. Numerous individuals from the community testified before Congress to show their support.<sup>75</sup> Deaf community members even got involved in the negotiation process of crafting and shaping the requirements of the ADA to ensure its passage.<sup>76</sup> However, time has shown that the ADA is certainly not perfect. The Deaf and hard of hearing community continues to face discrimination in the form of unequal access to communication and information.<sup>77</sup> It appears that many people, businesses, and organizations are still not yet willing to “spend money or disrupt their lives to benefit someone or some group other than themselves.”<sup>78</sup>

Aside from its flaws, the ADA provides many benefits to the Deaf and hard of hearing community. Businesses, employers, government agencies, and places of public accommodation have been put on notice that discriminating against individuals with disabilities is unlawful.<sup>79</sup> After the passage of the ADA, it was no longer acceptable for people and places to refuse to serve, hire, or accommodate Deaf and hard of hearing individuals, which provided many more opportunities for people in the community.<sup>80</sup> Now, the ADA should allow people with disabilities to expect a reasonable accommodation if they feel one is necessary.<sup>81</sup>

While the ADA has admittedly opened the door to new opportunities for many Deaf and hard of hearing people, it is as if that door is merely ajar. The ADA was designed to prevent private entities from discriminating against people with disabilities. It serves to promote equal access and equal opportunities to people of all abilities. However, the ADA continues to fail at ensuring that Deaf and hard of hearing people have equal access to communication and information in day-to-day situations. Furthermore, when the Deaf and hard of hearing community is subjected to discrimination, the ADA fails to ensure these individuals will be granted adequate relief. Both of these issues will be discussed in turn.

## IV. THE DEAF COMMUNITY’S STRUGGLES FOR EQUAL ACCESS TO COMMUNICATION

This Section argues that although the passage of the ADA has provided numerous benefits to deaf people and the Deaf and hard of hearing

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<sup>75</sup> Tucker, *supra* note 8, at 27.

<sup>76</sup> *Id.*

<sup>77</sup> *See infra*, Section III.

<sup>78</sup> *The ADA’s Revolving Door*, *supra* note 66, at 337.

<sup>79</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title III § 302(2) (codified at 42 U.S.C. § 12188 (2018)).

<sup>80</sup> *Id.* §§ 101(9), 102(a), 302(a).

<sup>81</sup> *The ADA’s Revolving Door*, *supra* note 66, at 383.

community, the ADA has proven ineffective in ensuring deaf, Deaf, and hard of hearing people have equal access to communication. The passage and implementation of the ADA has not deterred businesses, employers, government entities, or places of public accommodations from allowing discriminatory behavior to happen. While this Section aims to describe a few settings where Deaf and hard of hearing individuals face barriers to equal communication and information, it is undoubtedly not exhaustive.

### A. Employment

Disability-based discrimination in the workplace is one of the most highly litigated issues under Title I of the ADA.<sup>82</sup> Under the ADA, employers cannot discriminate against individuals with disabilities when making decisions related to employment,<sup>83</sup> and employers must provide reasonable accommodations to the qualified individuals they employ.<sup>84</sup> Despite these provisions, Deaf and hard of hearing individuals continue to face discrimination at work.

According to one study conducted by the National Deaf Center on Postsecondary Outcomes, the employment rate of Deaf individuals between the ages of 25 to 64 was 53.3%, compared to their hearing counterparts at 75.8% employment.<sup>85</sup> Despite the increase in the number of Deaf individuals earning college degrees—which has increased fourfold since the 1970s—the number of Deaf individuals entering the workforce is declining.<sup>86</sup> This decline is said to be largely attributed to the discriminatory hiring policies and practices of companies.<sup>87</sup> For example, while asking for an ASL interpreter is an appropriate accommodation under the ADA, many Deaf job candidates have dealt with situations where their interviews were canceled or they were told the position they were applying for had been filled after they asked for an accommodation.<sup>88</sup>

<sup>82</sup> Dawson, *supra* note 42, at 1148.

<sup>83</sup> SCHULTZ ET AL., *supra* note 44, at viii.

<sup>84</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, Title III § 301(9) (codified at 42 U.S.C. § 12181 (2018)).

<sup>85</sup> *Employment Report Shows Strong Labor Market Passing by Deaf Americans*, NAT'L DEAF CTR. (Aug. 22, 2019), <https://www.nationaldeafcenter.org/news/employment-report-shows-strong-labor-market-passing-deaf-americans> [<https://perma.cc/WR9C-73H3>] (noting that the Deaf and hard of hearing community has struggled to increase their employment rates since the 2008 recession) (employment rates based on information from a 2017 study); *Unemployment in the Deaf Community: Barriers, Recommendations and Benefits of Hiring Deaf Employees*, DEAFJOBWIZARD.COM (July 23, 2019), <https://www.deafjobwizard.com/post/unemployment-in-the-deaf-community-barriers-recommendations-and-benefits-of-hiring-deaf-employees> [<https://perma.cc/AW52-ZTUV>] [hereinafter *Unemployment in the Deaf Community*].

<sup>86</sup> *See id.* (noting a study from the 1970s where “more than 80% of Deaf people were part of the workforce . . . vs. 48% in 2014”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

One Deaf woman, Amanda Koller, shared her employment experiences.<sup>89</sup> Ms. Koller has a master's degree in public administration, and she is currently working towards her second master's in health care quality management.<sup>90</sup> Despite her impressive background, Ms. Koller applied for over 1,100 jobs throughout 2018 and 2019 and was not offered any full-time permanent positions.<sup>91</sup> She found that when she informed hiring managers she was deaf and preferred to interview in person so she could lip-read, she was either "ghosted"<sup>92</sup> or informed it was mandatory to do a phone screening.<sup>93</sup> When she attempted to conduct interviews over the phone, the technology she had to use often caused timing delays and was tedious, which lead to multiple employers hanging up on her.<sup>94</sup> Ms. Koller's story is one of many and illustrates that although the ADA technically prohibits employers from discriminating against people with disabilities when making hiring decisions, the ADA does not necessarily prevent these discriminatory behaviors and actions from persisting in today's society.

Getting hired can be just the first hurdle.<sup>95</sup> The places of employment at which Deaf and hard of hearing people are fortunate to get hired can still lack equal access to communication. For example, the ADA requires employers to make sure Deaf and hard of hearing employees have access to communication that is considered "effective."<sup>96</sup> However, employers do not need to provide a specific requested reasonable accommodation if it would impose an undue hardship (also described as undue burden) on the employer—meaning it would be too costly, too difficult to obtain, or the accommodation itself may have an effect on the business.<sup>97</sup> For example, in

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<sup>89</sup> Amanda Morris, *Deaf and Unemployed: 1,000+ Applications but Still No Full-Time Job*, NAT'L PUB. RADIO (Jan. 12, 2019), <https://www.npr.org/2019/01/12/662925592/deaf-and-unemployed-1-000-applications-but-still-no-full-time-job.f> [<https://perma.cc/3TLF-42F>].

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> The act of "ghosting" someone refers to a situation in which one person cuts off all contact with another person without any explanation or warning. Wendy R. Gould, *What Is Ghosting?*, VERYWELL MIND (Sept. 14, 2020), <https://www.verywellmind.com/what-is-ghosting-5071864> [<https://perma.cc/6GTD-8AJJ>] (noting that it is typically used in the context of dating and relationships).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Jamie Berke, *Handling Workplace Discrimination Against Deaf and HOH*, VERYWELL HEALTH (May 20, 2020), <https://www.verywellhealth.com/job-discrimination-against-deaf-and-hoh-1048713> [<https://perma.cc/BB25-GEJL>].

<sup>96</sup> *Discrimination and Reasonable Accommodation*, NAT'L ASS'N FOR THE DEAF, <https://www.nad.org/resources/employment-and-vocational-rehabilitation/discrimination-and-reasonable-accommodations/> [<https://perma.cc/DZU9-MFV9>].

<sup>97</sup> Betsy Johnson, *Americans with Disabilities Act: Guidance for Employers on Reasonable Accommodations and Undue Hardship*, LEXISNEXIS (Mar. 9, 2020), <https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/americans-with-disabilities-act-guidance-for-employers-on-reasonable-accommodations-and-undue-hardship> [<https://perma.cc/WJS8-LZYZ>].

*Searls v. Johns Hopkins Hospital*,<sup>98</sup> a case where a Deaf nursing student had her job offer from a hospital rescinded after they discovered she needed a full-time interpreter accommodation during her work day, the court held that even if the plaintiff was to establish a prima facie failure-to-accommodate claim, the defendant may still be able to avoid liability if they could establish a successful defense of “undue hardship.”<sup>99</sup>

Successfully establishing undue hardship is often difficult.<sup>100</sup> The United States Supreme Court explained in *US Airways, Inc. v. Barnett* that in order for a plaintiff to defeat a defendant’s motion for summary judgment, the plaintiff must first show “that an ‘accommodation’ seems reasonable on its face, i.e., ordinarily or in the run of things.”<sup>101</sup> The Court then stated that after a plaintiff has made this showing, the burden shifts to the employer to show case-specific circumstances which demonstrate that providing the specific accommodation would result in undue hardship.<sup>102</sup> Using a fact-specific analysis, some courts find a showing of undue hardship only if employers offer “proof of actual imposition or disruption.”<sup>103</sup>

While the bar to meet the undue hardship standard is high, the ADA still allows an employer to escape liability under these circumstances. In the instances where an employer *can* successfully show that providing a specific accommodation would result in an undue hardship, there will be unmet accommodation needs for people in the Deaf and hard of hearing community in workplace environments.<sup>104</sup> Say, for example, a Deaf or hard of hearing individual wishes to work for a small business owner whose business is hardly breaking even each month. If the owner of the business cannot afford to hire a full-time interpreter for the Deaf or hard of hearing individual, they may either (1) choose not to hire the individual (in violation of the ADA), or (2) argue (perhaps successfully) that they cannot afford to

<sup>98</sup> *Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427 (D. Md. 2016).

<sup>99</sup> *Id.* at 433–34. Ultimately, the court found the hospital’s showing unsuccessful, finding the defense’s arguments that (1) they did not have enough money in their budget for accommodations, and (2) the cost of accommodating the plaintiff’s request would be more than the cost to pay the plaintiff full-time were without merit. *Id.* at 438–39.

<sup>100</sup> *See* U.S. EEOC v. Placer ARC, 114 F. Supp. 3d 1048, 1058 (E.D. Cal. 2015) (stating “the bar for undue hardship is ‘high’”).

<sup>101</sup> *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (citing *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993), which held that a plaintiff need only show he seeks a “*method of accommodation* that is reasonable in the run of cases” (emphasis in original)).

<sup>102</sup> *Id.* at 402; *see also* *Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 741 (D. Md. 1996) (“[T]he employer’s undue hardship defense will have to have a strong factual basis and be free of speculation or generalization about the nature of the individual’s disability or the demands of a particular job.”).

<sup>103</sup> *Placer ARC*, 114 F. Supp. 3d at 1059 (citing *U.S. EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 5:10-CV-0391, 2013 WL 1435290, at \*41 (N.D. Cal. Apr. 9, 2013)).

<sup>104</sup> Cassandra Lempka, *Employees Who Are Deaf or Hard of Hearing: Perceptions of Workplace Accommodations*, 5 UNIV. N. COLO. MCNAIR SPECIAL ISSUE 1, 4 (2019), <https://digscholarship.unco.edu/cgi/viewcontent.cgi?article=1215&context=urj> [<https://perma.cc/E3VA-KNFC>].

accommodate the individual in this manner. If a court determines that the accommodation would impose an undue hardship on the employer, the Deaf or hard of hearing individual is left in a situation where they must choose between either working in an environment where they are unable to communicate with others using an accommodation most comfortable and effective to them or seeking alternative employment options. This means a successful undue hardship defense under the ADA allows for situations in which Deaf or hard of hearing individuals are not guaranteed equal access to effective communication at work.

Under the ADA, once the Deaf or hard of hearing employee requests an accommodation, the employer is under no obligation to provide the specific accommodation that was requested, so long as an alternative accommodation provided is considered “effective.”<sup>105</sup> In *U.S. EEOC v. USPS Supply Chain Solutions*, the Ninth Circuit held that as soon as an employee makes a request for an accommodation, the employer is obligated to engage with the employee in an “interactive process” to determine what might be an appropriate accommodation.<sup>106</sup> This interactive process requires “(1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee’s request; and (3) offering an accommodation that is reasonable and effective.”<sup>107</sup> If the employee asks for a different accommodation when the initial request fails, the employer is required to engage in this process again.<sup>108</sup> Here, the court reversed and remanded an initial grant of summary judgment to the defendant because the court determined there were genuine disputes of material fact as to whether the accommodations the defendant provided would be considered effective, and furthermore, whether the defendants were aware that the initial accommodations were ineffective.<sup>109</sup>

While the *USPS Supply Chain Solutions* ruling seems to favor the plaintiffs, neither the court nor the ADA provided much guidance on remand as to what standard should be used to determine “effectiveness” of communication. Furthermore, neither the ADA nor the court explained why it is reasonable in some instances to use a substitute accommodation that better suits the employer’s needs over the employee’s, particularly because the Deaf or hard of hearing employee is the person best situated to determine how they effectively communicate. Under the ADA as it stands today, employers are ultimately left with the ability to choose between certain accommodations, and they are not obligated to give primary

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<sup>105</sup> Johnson, *supra* note 97; see also *Bryant*, 923 F. Supp. at 741 (“The ADA does not require an employer to provide the *best* accommodation.” (emphasis in original)).

<sup>106</sup> U.S. EEOC v. USPS Supply Chain Sol., 620 F.3d 1103, 1110 (9th Cir. 2010).

<sup>107</sup> *Id.* at 1110–11.

<sup>108</sup> *Id.* at 1111.

<sup>109</sup> *Id.* at 1114.

consideration to the Deaf or hard of hearing employee's choice if a reasonable alternative accommodation is determined to provide effective communication.<sup>110</sup> The *USPS Supply Chain Solutions* court held, "[t]he reasonableness of an accommodation is ordinarily a question of fact."<sup>111</sup> Some courts find that an accommodation is considered reasonable if it enables the employee to perform the essential functions of the job or if the accommodation allows the employee to join in the equal privileges and benefits of the employment.<sup>112</sup> While this reasonableness test appears on its face to be straightforward, it allows for effective communication to be considered from the perspective of someone other than the qualified individual. It allows employers and courts to decide what effective communication in the workplace looks like and means.

*Noll v. International Business Machines Corp. (IBM)* illustrates this issue.<sup>113</sup> In *Noll*, a Deaf employee who worked as a software engineer brought an action against his employer, IBM, when IBM failed to accommodate his request for captioning and transcripts of all audio files stored in the corporate intranet that were otherwise available to the other 440,000 employees.<sup>114</sup> Throughout Noll's employment, Noll was provided various accommodations, such as Communication Access Realtime Translation (CART),<sup>115</sup> on-site and remote access to ASL interpreters, and video relay services.<sup>116</sup> Despite these accommodations, it was difficult for Noll to have easy access to communication and information located within the audio and video files stored on the corporate intranet site.<sup>117</sup> It often took days to upload captions onto videos upon Noll's request, the links provided to Noll for captioned videos were often broken, and attempting to use in-person interpreters while simultaneously watching a video was very difficult.<sup>118</sup>

In *Noll*, the issue before the court was whether the other accommodations provided by IBM were reasonable enough to provide Noll with "effective communication" under the ADA, despite the unavailability of captioned videos at all times.<sup>119</sup> The court stated, "A reasonable

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<sup>110</sup> See *Noll v. Int'l Bus. Mach. Corp.*, 787 F.3d 89, 98 (2d Cir. 2015) ("[T]he ADA imposes no liability for an employer's failure to explore alternative accommodations when the accommodations provided to the employee were plainly reasonable.").

<sup>111</sup> *USPS Supply Chain Sol.*, 620 F.3d at 1110.

<sup>112</sup> *Id.*; *Noll*, 787 F.3d at 94; see also *Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427, 435 (D. Md. 2016).

<sup>113</sup> *Noll*, 787 F.3d at 98.

<sup>114</sup> *Id.* at 92.

<sup>115</sup> CART is a service, typically used by deaf and hard of hearing individuals, that converts spoken language into text. *What is CART?*, CAL. CT. REPS. ASS'N, <https://www.calccra.org/what-is-cart> [https://perma.cc/EV8V-GABB].

<sup>116</sup> *Noll*, 787 F.3d at 92-93.

<sup>117</sup> *Id.* at 93.

<sup>118</sup> *Id.* at 93, 96.

<sup>119</sup> *Id.* at 92.

accommodation is one that ‘enables an individual with a disability who is qualified to perform the essential functions of that position . . . to enjoy equal benefits and privileges of employment.’”<sup>120</sup> Noll did not dispute that he was able to perform the essential functions of his work as a software engineer with the help of the other accommodations.<sup>121</sup> However, Noll argued that immediate access to the audio and video files on the IBM corporate intranet site were benefits and privileges of his employment, and, thus, IBM was in violation of the ADA for failing to accommodate his request.<sup>122</sup>

Ultimately, the court affirmed the lower court’s decision against Noll.<sup>123</sup> It affirmed that employers are not obligated to provide the exact accommodation requested by employees, so long as an alternative accommodation is effective.<sup>124</sup> However, the court took it a step further and added, “[i]n cases such as this, in which the employer has already taken . . . measures to accommodate the disability, the employer is entitled to summary judgment if . . . the accommodation is ‘plainly reasonable.’”<sup>125</sup> The court failed to explain what “plainly reasonable” or “effectiveness” meant in this context. Instead, the court explained that Noll had other accommodations available to him (ASL interpreters, transcripts, and certain videos with captions) that were determined to be reasonable in place of having immediate access to videos with captions.<sup>126</sup> When Noll tried to argue that the other accommodations did not provide effective communication under the circumstances, the court held, “The law requires an effective accommodation, not the one that is most effective for each employee.”<sup>127</sup> The court failed to see the lack of equal access to effective communication from Noll’s perspective: he often had to wait to receive videos with captions, he sometimes never received videos with captions he requested, or he had to struggle to watch an in-person interpreter and video at the same time.<sup>128</sup> While the other accommodations provided Noll equal access to communication and information so he could perform the essential functions of his job as a software engineer, they failed to be effective in providing him *equitable* access to the benefits and privileges of his

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<sup>120</sup> *Id.* at 94.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 98.

<sup>124</sup> *Id.* at 95 (quoting 29 C.F.R. § 1630 app., “[a]lthough the preference of the individual with a disability should be given primary consideration . . . the employer providing the accommodation has the *ultimate discretion* to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide” (emphasis added)).

<sup>125</sup> *Id.* at 94.

<sup>126</sup> *Id.* at 95.

<sup>127</sup> *Id.* at 96.

<sup>128</sup> *See id.* at 93, 96.

employment that his hearing peers were afforded.

Here, it appears the court used the reasonableness test to determine what effective communication looks like and means without considering “effectiveness” from the perspective of the plaintiff. If the ADA allows employers to have the final decision as to what type of accommodation provides effective communication, Deaf or hard of hearing employees may be stuck with an alternative accommodation that provides less than equitable access to effective communication.

Overall, Deaf and hard of hearing people often have difficulty finding employment.<sup>129</sup> Sometimes, it does not matter how qualified a Deaf or hard of hearing individual is for a position—there continues to be systemic communication barriers in many employment environments.<sup>130</sup>

Although the provisions of the ADA are designed to protect people with disabilities from discrimination in hiring and workplace environments,<sup>131</sup> it is evident that discriminatory practices and behaviors are still present today.<sup>132</sup> The ADA, as it stands today, does not *ensure* equal access to communication and information in employment settings for the Deaf and hard of hearing community, and this demands a change.

### *B. Medical Settings*

Despite the passage of the ADA, hospitals and other medical settings continue to deny equal access to communication to many Deaf and hard of hearing individuals. The vast majority of doctors and nurses are ill-prepared to work with someone who is from the Deaf or hard of hearing community whose first method of communication is ASL. Most hospital and medical personnel do not know ASL and “know very little about Deafness, Deaf Culture, and the myriad ways in which Deaf people communicate.”<sup>133</sup> When medical personnel are culturally and linguistically uninformed, it is incredibly difficult for them to communicate with individuals appropriately and effectively in this community.

Not only is unequal access to communication unfair, it can have disastrous results. Deaf people often have limited access to clear and accurate health information, preventing them from making “informed health care decision[s] for themselves and their families.”<sup>134</sup> Even Deaf or hard of hearing people who typically do not struggle to communicate with hearing peers in other environments find it difficult to concentrate and

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<sup>129</sup> See *Employment Report Shows Strong Labor Market Passing by Deaf Americans*, NAT’L DEAF CTR. (Aug. 22, 2019), <https://www.nationaldeafcenter.org/news/employment-report-shows-strong-labor-market-passing-deaf-americans> [<https://perma.cc/5BDM-5LNT>].

<sup>130</sup> See *Unemployment in the Deaf Community*, *supra* note 85.

<sup>131</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, Title III § 102(a) (codified at 42 U.S.C. § 12112 (2018)).

<sup>132</sup> See *Morris*, *supra* note 89; *Noll*, 787 F.3d at 98.

<sup>133</sup> *Schwartz*, *supra* note 32, at 952–53.

<sup>134</sup> *Id.* at 953.

effectively communicate in such high-stress environments—such as hospitals and emergency room settings.<sup>135</sup>

Although the ADA's reach extends into medical settings, case law provides numerous examples of stories from Deaf and hard of hearing people who have encountered situations with medical providers who denied them an interpreter or other auxiliary aid necessary for facilitating communication.<sup>136</sup> When these individuals are unable to recover under the ADA, it is typically because the Department of Justice interprets "effective communication" in a way that requires healthcare providers to provide an accommodation that allows for "effective communication," but gives the provider discretion to decide what accommodation will achieve that level of communication.<sup>137</sup> The ADA does not require providers to consult the Deaf or hard of hearing patient as to their choice of accommodation, nor does it require them to give primary consideration to that patient's choice.<sup>138</sup> The ADA maintains that so long as "effective communication" is achieved, the means necessary to get there are irrelevant.<sup>139</sup> Again, it appears that even in medical settings, the ADA allows individuals other than those protected under the statute to determine what effective communication looks like and means.

Although the ADA can fail to guarantee effective communication to Deaf and hard of hearing individuals, the fight against disability discrimination in medical settings is now additionally protected by the Affordable Care Act (ACA), passed on March 23, 2010.<sup>140</sup> In particular, Section 1557 of the ACA—the "nondiscrimination provision"—has been considered the "new civil rights paradigm for the healthcare industry."<sup>141</sup> Under this provision, the law prohibits healthcare providers from discriminating against individuals based on race, color, sex, age, national origin, or disability in health programs or activities that receive federal government funding.<sup>142</sup> Section 1557 goes as far as to say that primary consideration should be given to the patient's preferred aid for

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<sup>135</sup> *Id.* at 955.

<sup>136</sup> Joel Teitelbaum, Lara Cartwright-Smith & Sara Rosenbaum, *Translating Rights into Access: Language Access and the Affordable Care Act*, 38 AM. J.L. MED., 348, 360–61 (2012).

<sup>137</sup> *Id.* at 361.

<sup>138</sup> *See id.*

<sup>139</sup> *See id.*

<sup>140</sup> *Section 1557: Frequently Asked Questions*, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html> [<https://perma.cc/57PG-WTY7>].

<sup>141</sup> *Deaf Individuals Sue Health System for Discrimination Under Section 1557 of the ACA*, JDSUPRA (Mar. 27, 2017), <https://www.jdsupra.com/legalnews/deaf-individuals-sue-health-system-for-15142/> [<https://perma.cc/YV2G-EURN>].

<sup>142</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 1557 (2010) (codified as amended at 42 U.S.C. § 18116(a) (2020)).

communication.<sup>143</sup>

The ACA sought to introduce a new legal structure focusing on equitable access to quality healthcare.<sup>144</sup> Over time, the implementation of this provision worked toward eliminating potential communication barriers between healthcare providers and patients.<sup>145</sup> Having the ability to effectively communicate with a physician has many benefits including: the ability to better understand one's condition; the likelihood of having to endure fewer emergency visits due to misdiagnosis or improper prognosis; the substantially smaller number of adverse health outcomes; and overall better health status.<sup>146</sup>

Despite the efforts of the ADA and ACA to prevent disability discrimination in medical settings, Deaf and hard of hearing individuals continue to face barriers that prevent them from having equal access to communication. One man, John Jebian, shared a situation where he went to the hospital experiencing chest pains and was met with communication barriers throughout the visit.<sup>147</sup> Jebian requested an ASL interpreter upon arrival to the hospital, but was instead met with a video screen and an internet link to a remote interpreter.<sup>148</sup> He recalled that while he sat there panicking because he believed he was suffering a heart attack, the nurse struggled to set up the equipment.<sup>149</sup> When the video remote interpreting (VRI) service failed to work, Jebian was forced to write notes back and forth with his providers.<sup>150</sup> Jebian brought an action against the hospital for multiple incidents similar to the one above.<sup>151</sup> The Eleventh Circuit found there was enough evidence to determine Jebian was denied effective communication, despite the lower court's ruling, which dismissed the case.<sup>152</sup> While this outcome was a win for the Deaf and hard of hearing community, not everyone who experiences this type of discrimination goes as far as to bring a lawsuit afterward, and not everyone who wants to bring a lawsuit is able to, which all allows for this type of behavior to go unchecked and unpunished. Additionally, a "win" in a lawsuit does not take away Deaf and hard of hearing peoples' fear of future discrimination in hospital settings if effective communication is not guaranteed upon arrival.<sup>153</sup>

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<sup>143</sup> *See id.*

<sup>144</sup> Teitelbaum et al., *supra* note 136, at 349.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 350.

<sup>147</sup> Leila Miller, *I Was Panicked: Deaf Patients Struggle to Get Interpreters in Medical Emergencies*, STAT (May 22, 2017), <https://www.statnews.com/2017/05/22/deaf-patients-interpreters/> [<https://perma.cc/YC95-HBB7>].

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*; *see also* Silva v. Baptist Health S. Fla., Inc., 856 F.3d 824 (11th Cir. 2017).

<sup>153</sup> Miller, *supra* note 147 ("I'm terrified to go to the hospital in these situations," [said Jebian,] . . . referring to other visits where he had similar experiences.").

It can be difficult for hospitals to provide in-person interpreters and other auxiliary aids on-demand in most situations involving Deaf and hard of hearing patients.<sup>154</sup> However, the risk of not being able to provide effective communication in emergency situations seems to outweigh a hospital's preference to use the most convenient aid upon arrival. Another woman shared her experience, stating that when she called a hospital ahead of time to inform providers that she needed an in-person interpreter, she was told she had to wait to request one until she arrived at the hospital.<sup>155</sup> Upon arrival, the hospital told the woman they were searching for an available interpreter, so she would need to use the VRI instead.<sup>156</sup> The nurse was unsure of how to set up the VRI technology, and the Deaf patient was forced to set it up herself.<sup>157</sup> When the VRI continued to freeze during the appointment, the woman had to resort to attempted lip-reading.<sup>158</sup> This woman stated that normally she can read lips; however, because she was experiencing heart palpitations, she was unable to focus on anything else.<sup>159</sup> Another man, Rusty Thompson, shared that when he goes to the hospital several times a year to treat his vertigo, he is usually provided an ASL interpreter.<sup>160</sup> However, he faced several emergency situations where he had to work with the VRI instead of being provided an ASL interpreter.<sup>161</sup> From these experiences, he recalls, "[t]he room is spinning ... [and h]aving to focus on a VRI screen, on a little person right there, doesn't help me at all."<sup>162</sup>

Without equal access to effective and accurate communication and information, Deaf people are at risk for misdiagnoses and inadequate care in medical settings. The ADA requires hospitals to provide auxiliary aids to Deaf and hard of hearing individuals to facilitate effective communication; however, when determining effective communication, much deference is given to the *hospital* to decide which accommodation will provide effective communication. Luckily, the ACA requires hospitals to consider the patient's primary consideration for an accommodation. While the ADA and the ACA require hospitals and medical providers to provide these accommodations, the stories told by numerous Deaf and hard of hearing individuals show that medical settings continue failing to facilitate effective communication at all times and at a moment's notice. When someone's life is at stake, equity demands a change that *requires* and *ensures* equal access to effective and accurate communication.

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *See id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

### C. Education

It is practically undisputed that a good education is important. Education can decrease poverty, promote health, and provide economic growth.<sup>163</sup> People with an education have access to better jobs, higher earnings, resources for good health, reduced stress, access to more social networks, and an opportunity to develop better social and psychological skills.<sup>164</sup> Lacking an education, or something comparable to a “good” education, can have detrimental effects on a person’s future.<sup>165</sup> Unfortunately, some Deaf and hard of hearing individuals are denied equal access to communication in educational settings—which stands as an obstacle to achieving quality education.

In comparison to their hearing peers, deaf people achieve lower levels of education.<sup>166</sup> Surveys have found that, in the United States, a majority of students who are Deaf or hard of hearing read at a third or fourth grade level upon high school graduation.<sup>167</sup> This is typically because, even with the addition of different hearing assistive technologies in mainstream school settings, Deaf and hard of hearing children lack the access to spoken language that their hearing peers have.<sup>168</sup> When ASL is a Deaf or hard of hearing student’s first language, learning any subject in school can be extraordinarily difficult if the student does not have access to an interpreter or a teacher who uses ASL to teach because they have to translate everything first.<sup>169</sup> Thus, it is imperative to provide Deaf and hard of hearing students

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<sup>163</sup> Hannah Cleveland, *The Positive Effects of Education*, Borgen Mag. (Aug. 11, 2014), <https://www.borgenmagazine.com/positive-effects-education/> [https://perma.cc/PMB3-KHDK].

<sup>164</sup> *Why Education Matters to Health: Exploring the Causes*, CTR. SOC’Y & HEALTH (Feb. 13, 2015), <https://societyhealth.vcu.edu/work/the-projects/why-education-matters-to-health-exploring-the-causes.html> [https://perma.cc/7TZY-6S2A].

<sup>165</sup> Srihita Adabala, *5 Consequences of Not Having Access to Education*, Borgen Project (Jan. 11, 2020), <https://borgenproject.org/5-consequences-of-not-having-access-to-education/> [https://perma.cc/BE5T-HH2K] (stating how not having access to education can lead to a lack of an opportunity for expression, unemployment, poverty, exploitation, and difficulty raising children).

<sup>166</sup> Carrie Lou Garberoglio, Stephanie Cawthon & Adam Sales, *Deaf People and Educational Attainment in the United States: 2017*, NAT’L DEAF CTR.: POSTSECONDARY OUTCOMES (2017), [https://www.nationaldeafcenter.org/sites/default/files/DeafPeopleandEducational\\_Attainme nt\\_white\\_paper.pdf](https://www.nationaldeafcenter.org/sites/default/files/DeafPeopleandEducational_Attainme nt_white_paper.pdf) [https://perma.cc/2MLG-YLWW].

<sup>167</sup> Christina Payne-Tsoupros, *Lessons from the LEAD-K Campaign for Language Equality for Deaf and Hard of Hearing Children*, 51 LOY. U. CHI. L.J. 107, 110 (2019).

<sup>168</sup> *Id.* at 111.

<sup>169</sup> *See A New Reason for Why the Deaf May Have Trouble Reading*, LEARNING ENG. (Apr. 21, 2011), <https://learningenglish.voanews.com/a/a-new-reason-for-why-the-deaf-may-have-trouble-reading-119728279/115194.html> [https://perma.cc/9WZV-7QU7] (noting the reason many deaf people have trouble reading English is because “they’re actually learning a new language”); *see also* Anna-Miria Mühlke, *The Right to Language and Linguistic*

with the correct assistive aid for effective communication. Otherwise, those students will likely have difficulty understanding and processing information and subsequently doing well in school. Without auxiliary aids or an interpreter, the student lacks equal access to communication.

Under the Individuals with Disabilities Education Act (IDEA), a free, appropriate, public education must be available to children with disabilities, and it must ensure the individuals have access to special education classes and related services.<sup>170</sup> The education available to qualified<sup>171</sup> children must be tailored to their individual needs.<sup>172</sup> Deafness is a disability that is covered under the IDEA.<sup>173</sup> However, to be eligible under the IDEA, a child must have a disability *and* need special education to make progress in school.<sup>174</sup> Typically, public schools are required to comply with both the IDEA and the ADA.<sup>175</sup> However, there are some situations in which the school must provide a Deaf or hard of hearing student services that are different from services required by the IDEA.<sup>176</sup>

An example of this was seen in *K.M. ex rel. Bright v. Tustin Unified School District*, two cases consolidated upon each plaintiff's claim that the school districts' denial of CART services violated the IDEA and Title II of the ADA.<sup>177</sup> In *K.M. ex rel. Bright*, the court held, "[t]he failure of an IDEA claim does not automatically foreclose a Title II claim grounded in the Title II effective communications regulation."<sup>178</sup> Although the IDEA and ADA can work together, compliance with an IDEA requirement does not necessarily preclude an ADA claim when the ADA requirements are sufficiently different and more stringent than what is required under the

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*Development: Deafness from a Human Rights Perspective*, 40 VA. J. INT'L L. 705, 718 (2000) (teaching Deaf students using spoken language instead of ASL "is similar to learning a new language while getting all the instructions necessary to understand it in this new language").

<sup>170</sup> *About IDEA*, U.S. DEP'T OF EDUC., <https://sites.ed.gov/idea/about-idea/> [https://perma.cc/665B-45NN].

<sup>171</sup> In order to be considered "qualified" under the IDEA, a "child must have a disability that falls under one of the 13 categories" covered by the IDEA. Andrew M.I. Lee, *Individuals with Disabilities Education Act (IDEA): What You Need to Know*, UNDERSTOOD, <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childrens-rights/individuals-with-disabilities-education-act-idea-what-you-need-to-know> [https://perma.cc/7V54-48SM]. It is also required under the IDEA that the child "have a disability and, as a result of that disability . . . need special education to make progress in school." *Id.*

<sup>172</sup> *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1095 (9th Cir. 2013).

<sup>173</sup> Lee, *supra* note 171.

<sup>174</sup> *Id.* Many Deaf individuals have a different disability in addition to experiencing hearing loss. See Garberoglio et al., *supra* note 166.

<sup>175</sup> *K.M. ex rel. Bright*, 725 F.3d at 1097.

<sup>176</sup> *Id.* at 1100.

<sup>177</sup> *Id.* at 1092.

<sup>178</sup> *Id.* at 1102.

IDEA.<sup>179</sup> The IDEA states, “[n]othing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the . . . Americans with Disabilities Act of 1990 . . . .”<sup>180</sup> Additionally, in *CG v. Pennsylvania Department of Education*, the Third Circuit affirmed the notion that an accused party is not immune from liability under the ADA or the Rehabilitation Act of 1973 (RA) simply because they were found to have complied with the IDEA.<sup>181</sup> In *Pollack v. Regional School Unit 75*, the First Circuit held that, although it agreed with the plaintiff’s argument about the right to a free public education being distinguishable from the right to an accommodation under the ADA, the argument failed to consider the legal notion of issue preclusion.<sup>182</sup> Thus, some jurisdictions hold that a proper showing of compliance under the IDEA may bar a plaintiff’s claims under the ADA because of issue preclusion.

Throughout the United States’ history of educating Deaf and hard of hearing students, the two main methods used were sign-based approaches and spoken-language-based approaches.<sup>183</sup> Today, there are a variety of different methods used to aid in the teaching of Deaf and hard of hearing students.<sup>184</sup> Some of the different methods include: “ASL/English Bilingualism, Cued Speech, Listening and Spoken Language, Signed English/Pidgin Signed English, Sign Supported Speech, and Simultaneous Communication.”<sup>185</sup> Similar to the notion that each Deaf and hard of hearing person communicates using various methods, Deaf and hard of hearing students need various auxiliary tools to facilitate learning.<sup>186</sup>

Although there might be a variety of different methods and aids available and widely accepted, sometimes schools still fail to accommodate the requests of Deaf or hard of hearing students when it comes to their needs for equal access to effective communication. The case *Argenyi v. Creighton University* demonstrates this shortcoming.<sup>187</sup> In *Argenyi*, Creighton University denied, for two years, Mr. Argenyi’s requests for accommodations to assist with effective communication.<sup>188</sup> Mr. Argenyi, a

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<sup>179</sup> *Id.* at 1100.

<sup>180</sup> 20 U.S.C. § 1415(l) (2018).

<sup>181</sup> *CG v. Pennsylvania Dep’t of Educ.*, 734 F.3d 229, 232 (3d Cir. 2013).

<sup>182</sup> *Pollack v. Reg’l Sch. Unit 75*, 886 F.3d 75, 84–85 (1st Cir. 2018) (“This argument . . . overlooks the fact that issue preclusion applies not only to determinations of law, such as whether the IDEA or the ADA has been violated, but also to determinations of fact made in resolving issues of law.”).

<sup>183</sup> Payne-Tsoupros, *supra* note 167, at 116.

<sup>184</sup> *Id.* at 121.

<sup>185</sup> *Id.* at 121–22.

<sup>186</sup> Ann Logsdon, *How Are Deaf Children Supported in School?*, VERYWELL FAMILY (May 29, 2020), <https://www.verywellfamily.com/deafness-what-is-deafness-2162025> [<https://perma.cc/SK62-KVX2>].

<sup>187</sup> 703 F.3d 441 (8th Cir. 2013).

<sup>188</sup> *Id.* at 443.

hard of hearing medical student, requested what he considered necessary and reasonable accommodations that would enable him to follow lectures, communicate with patients, and participate in labs during medical school.<sup>189</sup> When his requests were continually denied, Mr. Argenyi brought an action under Title III of ADA.<sup>190</sup>

When Mr. Argenyi applied to Creighton, he indicated that he was hard of hearing and would require accommodations similar to what he used during his undergraduate (CART and cued speech interpreting).<sup>191</sup> When Mr. Argenyi sent Creighton an updated accommodation request to include CART, a cued speech interpreter, and an FM system,<sup>192</sup> Creighton denied his request.<sup>193</sup> Instead, Creighton informed Mr. Argenyi that he would only be provided an FM system and an enhanced notetaking service.<sup>194</sup> When Creighton refused to provide Mr. Argenyi with any other accommodations in his first year of medical school, Mr. Argenyi had to borrow money to pay for CART and interpreting services by himself, costing him approximately \$53,000 in loans.<sup>195</sup> During his second year, Mr. Argenyi was again forced to spend an additional \$61,000 in loans to pay for CART services after Creighton denied his requests and provided him inadequate accommodations.<sup>196</sup>

In *Argenyi*, the court had to determine whether Creighton discriminated against Mr. Argenyi by failing to provide him with necessary auxiliary aids during his first year of medical school and by refusing to let Mr. Argenyi use the services of a translator for his clinic in his second year.<sup>197</sup> The court noted that under Title III of the ADA, places of public accommodation (such as Creighton) are prohibited “from discriminating against individuals with disabilities ‘in the full and equal enjoyment’ of the ‘privileges, advantages, or accommodations’ they offer.”<sup>198</sup> Additionally, places of public accommodation are required to offer qualified individuals necessary auxiliary aids to ensure effective communication.<sup>199</sup> The court further noted that individuals with disabilities *should be consulted* as to what type of auxiliary aid they require for effective communication.<sup>200</sup> However,

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 444.

<sup>192</sup> An FM system is an assisted listening device that uses “radio signals to transmit amplified sounds directly to [a] hearing aid.” *Auditory Processing & Assistive Listening*, HEUSER HEARING INST., <https://thehearinginstitute.org/hearing-clinic/audiology-services/auditory-processing-assistive-listening/> [https://perma.cc/V6ZM-WN4Y].

<sup>193</sup> *Argenyi*, 703 F.3d at 444.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 444–45.

<sup>196</sup> *Id.* at 445.

<sup>197</sup> *Id.* at 447.

<sup>198</sup> *Id.* at 448 (quoting 42 U.S.C. § 12182(a) (2018)).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* (emphasis added).

the court did not go so far as to state that places of public accommodation are then required to provide the requested accommodations (so long as the requests do not appear to be frivolous).<sup>201</sup> Instead, the court held that while CART and interpreters are examples of appropriate aids, and although the ADA is broad in scope, places of public accommodation are not required to accommodate all requested auxiliary aids and services made by people with disabilities.<sup>202</sup>

The court explained that “the ADA guarantees the disabled more than mere access to public facilities; it guarantees them ‘full and equal enjoyment.’”<sup>203</sup> Under this standard, the ADA requires places of public accommodation, like Creighton, to do more than just accept Mr. Argenyi as a student and allow him to be in the same room as other students during classes. The ADA requires Mr. Argenyi to be entitled to the same full and equal enjoyment of the classes and facilities as his hearing peers. Here, the court found there was “a genuine issue of material fact as to whether Creighton denied Mr. Argenyi an equal opportunity to gain the same benefit from medical school as his nondisabled peers by refusing to provide his requested accommodations.”<sup>204</sup> The court determined the record supported the argument that a reasonable factfinder could conclude Mr. Argenyi was not provided the same opportunity as his “nondisabled” classmates to access the benefits and privileges of medical school.<sup>205</sup>

*Argenyi* illustrates the type of discrimination Deaf and hard of hearing students face in educational settings when they are denied equal access to communication and information. *Argenyi* also stands for the notion that “meaningful access” to places of public accommodation is required by the ADA.<sup>206</sup> Where the court in *Argenyi* goes wrong is that it does not go far enough. In *Noll*, the court went so far as to say that employers were entitled to summary judgment on a showing that an *alternative* accommodation was “plainly reasonable.”<sup>207</sup> Here, the Court rejected the “plainly reasonable” standard as applied to Mr. Argenyi’s accommodation. Instead, the court notes that on remand, Creighton is permitted to present evidence that Mr.

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<sup>201</sup> See 28 C.F.R. § 36.303 (stating that Congress expects places of public accommodation typically to consult with individuals with disabilities when deciding which auxiliary aid will allow for effective communication). *But see* *Mayberry v. Von Valtier*, 843 F. Supp. 1160, 1164 (E.D. Mich. 1994) (noting that although places of public accommodations should consult with qualified individuals, Congress does not require these places to “mandate primary consideration of their expressed choice.”).

<sup>202</sup> *Argenyi*, 703 F.3d at 448.

<sup>203</sup> *Id.* at 449 (quoting *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012)).

<sup>204</sup> *Id.* at 451.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 449; see Section II.A.3 (arguing that equal treatment does not always create equitable results for individuals with disabilities).

<sup>207</sup> *Noll v. Int’l Bus. Machs. Corp.*, 787 F.3d 89, 94 (2d Cir. 2015).

Argenyi's requests posed an undue burden on the University.<sup>208</sup> Thus, although the ADA holds schools to a higher standard requiring qualified individuals to be provided "meaningful access," the ADA still allows the defendant an avenue to escape liability. In situations where an individual's education, and thus, his future, is on the line, more protection is needed to ensure equal access to effective communication.

It is evident that the ADA was not designed in a way that *ensures* Deaf and hard of hearing students have equal access to effective communication in schools. If the ADA allows schools to escape liability if they can prove they would be burdened, Deaf or hard of hearing students risk dealing with an accommodation that provides them with less than adequate communication. Thus, the negative risks associated with ineffective communication in schools—compromising a student's future career and life—demand change.

#### *D. Entertainment and Leisure Activities*

One area of life where many hearing people do not recognize blatant discrimination and unequal access to communication is with everyday leisure and entertainment activities. Many Deaf and hard of hearing individuals do not get to enjoy the everyday leisure activities that their hearing peers are privileged to enjoy at any time.<sup>209</sup> As a general rule, Title III of the ADA provides, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>210</sup> Despite this provision, Deaf and hard of hearing individuals certainly do not get the "full and equal enjoyment" of various public accommodations because places of public accommodation continue to discriminate by making access to communication unavailable.

For example, going to see a movie in theaters is a popular pastime for

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<sup>208</sup> *Id.* at 51 n.3.

<sup>209</sup> See, e.g., Tori Smith Ekstrand, *Should Netflix Be Accessible to the Deaf?*, ATLANTIC (Apr. 16, 2015), <https://www.theatlantic.com/technology/archive/2015/04/does-the-ada-apply-to-online-spaces-too/390654/> [<https://perma.cc/4JQE-97KM>] (noting that Deaf and hard of hearing individuals often have a difficult time having access to closed captioned videos on the internet and other streaming services); Chris Fuhrmeister, *Deaf Customer Sues Taco Bell for Discrimination*, EATER (July 13, 2016), <https://www.eater.com/2016/7/13/12180574/taco-bell-deaf-discrimination-lawsuit> [<https://perma.cc/AFJ6-PGRK>] (sharing an example of the type of discrimination Deaf and hard of hearing people face when trying to communicate their food orders at drive-thru windows).

<sup>210</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 355, Title III § 302(a) (codified at 42 U.S.C. § 12182(a) (2018)).

many Americans.<sup>211</sup> This experience is typically enjoyable for the everyday moviegoer. However, this activity is hardly accessible to individuals in the Deaf and hard of hearing community. Most theaters refuse to show movies with captions, and some refuse to install caption technology altogether.<sup>212</sup> Furthermore, some movie theater owners believe that equal access to their services means deaf people are able to “enter the theater, purchase a ticket, and sit down.”<sup>213</sup> This is not to say that Deaf or hard of hearing people cannot go to the movies and still have an enjoyable time without sound; this is simply to articulate that Deaf and hard of hearing people do not get the same moviegoing experience as hearing people do—because movie theaters will not accommodate equal access to communication and the ADA has not required them to do so. For instance, in *Arizona ex rel. Goddard v. Harkins Amusement Enterprises*,<sup>214</sup> the Ninth Circuit affirmed that, as a matter of law, movie theaters are not mandated by the ADA to provide open captioning.<sup>215</sup> The court noted that the plaintiffs, who were denied captioning and other services at a movie theater, might be able to prevail on remand for their requests of closed captioning.<sup>216</sup> However, the court noted that the movie theater might escape liability if it availed itself of a number of defenses, including undue hardship or claiming that the accommodation would fundamentally alter the nature of the services it provided.<sup>217</sup>

This type of situation appears in other areas of entertainment and leisure activities, too. One woman reported her experience with discrimination when she requested an ASL interpreter for her mother’s consultation at the gym from which she recently purchased a membership.<sup>218</sup> The gym informed the woman they would not provide an interpreter for her mother.<sup>219</sup> Despite her efforts to inform the gym that they were required *by law* to comply with her request, the gym still refused.<sup>220</sup> It is stories like this that illustrate the weaknesses of the ADA. This type of discrimination is commonplace; it sometimes appears as though the ADA has little deterrent effect on places of public accommodation to prevent this type of discrimination from happening. It seems as though Senator Kennedy and others who shared his concerns were right about enforcing the ADA—without the threat of expensive litigation, these discriminatory practices are

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<sup>211</sup> Faye Kuo, *Open and Closed: Captioning Technology as a Means to Equality*, 23 J. MARSHALL J. COMPUTER & INFO. L. 159, 159 (2004).

<sup>212</sup> *Id.* at 160.

<sup>213</sup> *Id.* at 159–60.

<sup>214</sup> 603 F.3d 666 (9th Cir. 2010).

<sup>215</sup> *Id.* at 673.

<sup>216</sup> *Id.* at 669, 675.

<sup>217</sup> *Id.* at 675.

<sup>218</sup> Daniel Krieger, *Deaf and Hard of Hearing Fight to Be Heard*, N.Y. TIMES (Mar. 25, 2016), <https://www.nytimes.com/2016/03/27/nyregion/deaf-and-hard-of-hearing-fight-to-be-heard.html> [https://perma.cc/P7K8-QNJK].

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (emphasis added).

likely to continue.<sup>221</sup>

While these are only a few examples of entertainment and leisure activities during which Deaf and hard of hearing people experience unequal access to communication, the unfortunate truth is that this discriminatory behavior can be seen in many places of public accommodation. Thus, changes to the ADA are necessary to prevent this type of discrimination from continuing, and to guarantee equal access to communication.

### *E. Emergency Situations*

Similar to how misinformation and missed information can be very dangerous in medical settings, it is also dangerous when Deaf and hard of hearing individuals lack access to communication and information in national or state emergency situations. In these emergency situations, many Deaf and hard of hearing people are faced with a lack of access to information that is imperative to their health, safety, and well-being—stemming from a lack of equal access to communication and information on various broadcast mediums.

In 2017, Hurricane Irma posed a significant threat to Florida residents, and community leaders failed to get accurate safety information to Deaf and hard of hearing individuals.<sup>222</sup> During a televised briefing from the Manatee County Emergency Operations Center, a man was seen on camera next to the speakers making gestures and fingerspelling.<sup>223</sup> However, it became very clear, very quickly, that this man was not qualified as a certified ASL interpreter to relay this message to the Deaf and hard of hearing community.<sup>224</sup> His “signs” did not correspond to what the speaker was saying, his fingerspelling was off, and he made numerous gestures that were not ASL signs at all.<sup>225</sup> Furthermore, he wore a bright yellow tee-shirt, distracting viewers and making it difficult to watch his hands, fingers, and facial expressions.<sup>226</sup> The combination of poor signing and visually distracting apparel made it sometimes impossible to understand the communication.<sup>227</sup> Without access to the emergency evacuation and guideline information, Deaf and hard of hearing individuals who lived in the area were left without access to information imperative during an

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<sup>221</sup> See Dawson, *supra* note 42, at 1146–47; see also Section.II.A (discussing how the senators feared that injunctive relief would not be enough to effectively deter discriminatory behavior against people with disabilities).

<sup>222</sup> Christina Caron, *Sign Language Interpreter Warned of ‘Pizza’ and ‘Bear Monster’ at Irma Briefing*, N.Y. TIMES (Sept. 17, 2017), <https://www.nytimes.com/2017/09/17/us/sign-language-interpreter-irma.html> [<https://perma.cc/76N2-TRW2>].

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

emergency.<sup>228</sup> While it may have seemed like there was an attempt to provide Deaf and hard of hearing people access to this information, it was clear there was no real thought put into it.

An even more recent example of the Deaf and hard of hearing community experiencing a lack of access to communication and information during an emergency was during the COVID-19 pandemic, when Deaf and hard of hearing community members struggled to access critical information. For example, it took several months after the pandemic spread to the United States before an ASL interpreter was provided for any White House briefings concerning the state of the nation.<sup>229</sup> This “win” for the Deaf and hard of hearing community only occurred after a federal district court ordered this to be addressed.<sup>230</sup> Moreover, this injunction did not go into effect until October 1, 2020<sup>231</sup>—nearly ten months after the first COVID-19 case was reported in the United States.<sup>232</sup> At one point, officials believed closed captions on television screens would be enough “access” to relay this critical information to Deaf and hard of hearing people.<sup>233</sup> To rebut this, one ASL interpreter reminded the public, “ASL is a language completely separate and distinct from English.”<sup>234</sup> Therefore, it was not enough to spread this information solely using English to communicate; it also needed to be communicated in ASL. Furthermore, closed captions often are inaccurate or unreliable to relay the precise information broadcasted.<sup>235</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> *Historic Win: White House Ordered to Provide Sign Language Interpreters for COVID-19 Briefings*, NAT’L ASS’N FOR THE DEAF (Sept. 23, 2020), <https://www.nad.org/2020/09/23/historic-win-white-house-ordered-to-provide-sign-language-interpreters-for-covid-19-briefings/> [<https://perma.cc/NE7K-QP6U>] [hereinafter *Historic Win: White House*]; see Nat’l Ass’n of the Deaf v. Trump, No. CV 20-2107 (JEB), 2020 WL 5411171 (D.D.C. Sept. 9, 2020); *c.f.* LaChase v. Trump Admin., No. 1:20-CV-23048, 2020 WL 4429255, at \*1 (S.D. Fla. July 31, 2020) (holding that a *pro se* plaintiff, who brought claims against the Trump administration for failing to provide an ASL interpreter during national news announcements in violation of the ADA, was not entitled to relief because “neither Title II nor Title III [of the ADA] apply to the federal government.”).

<sup>230</sup> *Historic Win: White House*, *supra* note 229.

<sup>231</sup> *Id.*

<sup>232</sup> Michelle L. Holshue, Chas DeBolt, Scott Lindquist, Kathy Lofy, John Wiesman, Hollianne Bruce, Christopher Spitters, Keith Ericson, Sara Wilkerson, Ahmet Tural, George Diaz & Amanda Cohn, *First Case of 2019 Novel Coronavirus in the United States*, NEW ENG. J. MED. (Mar. 5, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMoa2001191> [<https://perma.cc/4EAM-5B4H>].

<sup>233</sup> Caroline Patrickis, *Closed Captions vs. ASL Interpreters: Why the Latter is a COVID-19 Lifeline for the Deaf*, WJLA (May 5, 2020), <https://wjla.com/news/local/deaf-community-faces-extreme-lack-of-access-during-covid-19-pandemic> [<https://perma.cc/2NJA-6CK2>].

<sup>234</sup> *Id.*

<sup>235</sup> Liora Engel-Smith, *COVID-19 Accentuates Barriers for the Deaf and Hard of Hearing*, N.C. HEALTH NEWS (Apr. 1, 2020), <https://www.northcarolinahealthnews.org/2020/04/01/covid-19-deaf>

Deaf and hard of hearing people often lack equal access to communication in emergency situations. This is incredibly inappropriate and dangerous. The ADA has proven ineffective in requiring government agencies, news reports, and other various broadcasting platforms to provide equal access to communication and information to all citizens. Because of how dangerous this can be to the Deaf and hard of hearing community, it requires a change.

## V. HOW THE ADA FAILS TO GRANT ADEQUATE RELIEF TO THE DEAF AND HARD OF HEARING COMMUNITY

This Paper identified numerous situations in the everyday life of a Deaf or hard of hearing individual where the ADA has proven ineffective in ensuring equal access to effective communication and information. This Section aims to identify specifically how the ADA serves as an ineffective legal basis for a deaf or hard of hearing person to claim and be granted adequate relief for damages when they are denied equal access to communication.

### *A. The Standing Requirement Bars Numerous Potential Plaintiffs Seeking Injunctive Relief, and the ADA Provides No Support*

Many potential Deaf and hard of hearing plaintiffs are barred from recovering adequate injunctive relief under the ADA because they cannot meet the standing requirement under Article III of the United States Constitution.<sup>236</sup> Because the ADA does not help individuals with disabilities overcome this judicial hurdle, their claims are barred, and this leads to the underenforcement of the ADA. Under Article III of the United States Constitution, “Federal courts are constrained to hear only ‘cases’ or ‘controversies,’ and standing to sue . . . is an aspect of the case or controversy requirement.”<sup>237</sup> Standing looks at whether “a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.”<sup>238</sup>

For a plaintiff to demonstrate they have standing, they must prove injury-in-fact, causation, and redressability.<sup>239</sup> To make a showing of injury-in-fact, the court looks at the type of harm inflicted and future injury.<sup>240</sup> Furthermore, the standing requirement mandates the plaintiff demonstrate

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[<https://perma.cc/SHL8-ZNFH>] (stating closed captions are essentially useless if they are not written by a trained expert, which they typically are not).

<sup>236</sup> Michael A. Schwartz, *Limits on Injunctive Relief Under the ADA: Rethinking the Standing Rule for Deaf Patients in the Medical Setting*, 11 J. HEALTH CARE L. & POL’Y 163, 187 (2008) [hereinafter *Limits on Injunctive Relief*].

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)).

<sup>239</sup> *Id.*; *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>240</sup> *Limits on Injunctive Relief*, *supra* note 236, at 187; *Lujan*, 504 U.S. at 562-63.

they have suffered an “actual or imminent” rather than “conjectural” or “hypothetical” injury.<sup>241</sup> An “[a]bstract injury is not enough. The plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct.”<sup>242</sup> Under this prong, when a Deaf or hard of hearing person brings a claim against a place of public accommodation for a real injury but cannot show they are likely to suffer a repeat of the same injury, the court is likely to bar this individual’s claim.<sup>243</sup> The case *Ervine v. Desert View Regional Medical Center Holdings, LLC*<sup>244</sup> illustrates this dilemma.

In *Ervine*, the plaintiff brought an action against Desert View and Dr. Tannoury under Title III of the ADA.<sup>245</sup> Mr. Ervine asserted that his experiences with the defendants violated Title III of the ADA when he and his wife (a patient) were denied access to effective communication on several occasions.<sup>246</sup> On review, neither Desert View nor Dr. Tannoury argued that Mr. Ervine lacked standing to bring his claim.<sup>247</sup> However, the court stated that the standing requirement is “not subject to waiver,” and the court took it upon itself to analyze whether Mr. Ervine did, in fact, have standing for his challenge.<sup>248</sup> The court required Mr. Ervine to demonstrate injury-in-fact, causation, and redressability—but the court also held that he needed to establish “a sufficient likelihood that he will be wronged again in a similar way.”<sup>249</sup> It was not enough that Mr. Ervine demonstrated he suffered an actual injury. He also had to show he was likely to suffer, and in immediate danger of suffering, the repeated injury.<sup>250</sup>

The court ruled Mr. Ervine lacked standing to bring his claim.<sup>251</sup> It found that Mr. Ervine failed to demonstrate he was likely to suffer or was in immediate danger of suffering from the repeated injury.<sup>252</sup> The court made clear Mr. Ervine’s claim for injunctive relief did not lack standing because

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<sup>241</sup> *Limits on Injunctive Relief*, *supra* note 236, at 188; *Lujan*, 504 U.S. at 560.

<sup>242</sup> *Limits on Injunctive Relief*, *supra* note 236, at 189.

<sup>243</sup> See *Chapman v. Pier 1 Imps. (U.S.), Inc.*, 631 F.3d 939, 959 (9th Cir. 2011) (stating that in order for the ADA to be consistent with the Constitution, a plaintiff bringing a claim under Title III must show an intent to return to the “non-compliant ADA” facility to satisfy the “actual or imminent” injury requirement).

<sup>244</sup> 753 F.3d 862 (9th Cir. 2014).

<sup>245</sup> *Id.* at 866.

<sup>246</sup> *Id.* at 865.

<sup>247</sup> *Id.* at 866.

<sup>248</sup> *Id.* (quoting *United States v. Hays*, 515 U.S. 737, 742 (1995)).

<sup>249</sup> *Id.* at 867 (quoting *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004)).

<sup>250</sup> *Id.* (stating that under the ADA, a “plaintiff establishes such a real and immediate threat if ‘he intends to return to a noncompliant place of public accommodation where he will likely suffer repeated injury,’” and that an ADA plaintiff can establish this threat “if he ‘is currently deterred from visiting that accommodation by accessibility barriers’”).

<sup>251</sup> *Id.* at 871.

<sup>252</sup> See *id.* at 867–68 (holding that Mr. Ervine did not express an intent to return, thus failing to establish an imminent “prospect of future injury.”).

he was not a patient at Desert View nor of Dr. Tannoury.<sup>253</sup> Rather, he did not assert a real and immediate threat that Desert View or Dr. Tannoury would deny him effective communication as a patient or a companion to another patient at a later time.<sup>254</sup>

This standing requirement acts as a barrier to numerous potential plaintiffs in a variety of settings. In *Giterman v. Pocono Medical Center*, the court ruled that a Deaf patient whose request for an in-person interpreter was never fulfilled and who was instead required to use a non-functioning VRI machine lacked standing to bring a claim under Title III of the ADA against the hospital.<sup>255</sup> The court in *Giterman* stated that a plaintiff can show she has standing by using “one of two methods: the intent to return method or the deterrent effect doctrine.”<sup>256</sup> A plaintiff using the intent to return method must show:

(1) [T]hat the defendant engaged in past discriminatory conduct that violated the ADA; (2) it is reasonable to infer from allegations in the complaint that the discriminatory conduct will continue, and (3) it is reasonable to infer based on past patronage, proximity of the public accommodation to the plaintiff’s home, business, or personal connections to the area, that the plaintiff intends to return to the public accommodation in the future.<sup>257</sup>

If a plaintiff wishes to use the deterrent effect doctrine, she must show she “suffered an actual and imminent injury sufficient to confer standing where the plaintiff was ‘deterred from patronizing a public accommodation because of a defendant’s failure to comply with the ADA.’”<sup>258</sup> The court held that the plaintiff in *Giterman* lacked standing because she failed to show she definitively had plans to return to the hospital for treatment (the court made notice that plaintiff had not returned to the hospital since the incident in 2014), the hospital added additional computers in an effort to improve VRI connection, and the plaintiff ultimately failed to show she was likely to suffer a future repeat injury by the defendant.<sup>259</sup>

In *Brother v. Tiger Partner, LLC*, the court held that a Deaf hotel patron was unable to satisfy the standing requirement because he lived over 280 miles from the hotel, meaning he lacked a “continuing connection” to the property, and there were other hotels at which the plaintiff could have stayed.<sup>260</sup> In the case *Updike v. Multnomah County*, the court determined

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<sup>253</sup> *Id.* at 868.

<sup>254</sup> *Id.* (quoting *Hollinger v. Reading Health System*, 2016 WL 3762987, at \*10 (E.D. Pa. July 14, 2016)).

<sup>255</sup> 361 F. Supp. 3d 392, 397, 407 (M.D. Pa. 2019).

<sup>256</sup> *Id.* at 405.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 405–06 (quoting *Hollinger*, 2016 WL 3762987, at \*10).

<sup>259</sup> *Id.* at 407.

<sup>260</sup> 331 F. Supp. 2d 1368, 1373 (M.D. Fla. 2004).

that a Deaf plaintiff who was denied access to an ASL interpreter, a computer, video relay, a teletypewriter (TTY),<sup>261</sup> and pen and paper after being arrested by police lacked standing to bring a claim for injunctive relief against the state and the county.<sup>262</sup> The court explained the plaintiff failed to show the state and county's wrongful behavior was likely to reoccur, and furthermore, because the plaintiff himself was unlikely to be wronged by the defendant again.<sup>263</sup> Holding that evidence of past wrongs can be used as evidence to support the argument that there is a real or immediate threat of injury, the court clarified that "past wrongs do not in themselves amount to a real and immediate threat of injury."<sup>264</sup>

As *Ervine* and the other cases above illustrate, the standing requirement prevents potential Deaf and hard of hearing plaintiffs from bringing a successful action under Title III of the ADA. Unfortunately, the requirement demands plaintiffs prove they are likely to suffer, and are in immediate danger of suffering, a repeated injury.<sup>265</sup> Similar to the argument Mr. Ervine tried to make in *Ervine*, a Deaf or hard of hearing person who has experienced discrimination from a place of public accommodation is much less likely to want to return, knowing they risk facing discrimination again.<sup>266</sup> If an individual is *required* to prove they will return to a place they know discriminates against themselves and other Deaf or hard of hearing people to show they will suffer a repeated injury, the individual is put in a position to choose between facing discrimination repeatedly to obtain injunctive relief, forcing a change, or finding an alternative place of public accommodation where they do not have to face discriminatory practices or behavior, thus losing the opportunity to find relief under the ADA. In *Giterman*, the court said "[b]ecause the only remedy for a private ADA Title III violation is injunctive relief, courts look beyond the alleged past violation and consider the possibility of future violations."<sup>267</sup> From the outset, it does not appear that courts are actually considering the possibility of future violations. If courts are looking at the prospect of future repeated injuries only from the perspective of the individual who brought the claim forward, courts are missing potential Deaf and hard of hearing victims who may be subjected to the same discriminatory practices and behaviors if injunctive

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<sup>261</sup> A TTY is a device that assists deaf or hard of hearing people when they are using telephones for communication. *TTY and TTY Relay Services*, NAT'L ASS'N FOR THE DEAF, <https://www.nad.org/resources/technology/telephone-and-relay-services/tty-and-tty-relay-services/> [https://perma.cc/52GP-M9C4]. For a deeper discussion about how TTYs work, see *id.*

<sup>262</sup> 870 F.3d 939, 945, 948 (9th Cir. 2017).

<sup>263</sup> *Id.* at 948.

<sup>264</sup> *Id.*

<sup>265</sup> *Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 867 (9th Cir. 2014); see also *Chapman v. Pier 1 Imps. (U.S.), Inc.*, 631 F.3d 939, 959 (9th Cir. 2011).

<sup>266</sup> See *Ervine*, 753 F.3d at 867 (noting that Mr. Ervine tried to argue that because he is aware of the bars to effective communication at Desert View, he is deterred from returning).

<sup>267</sup> *Giterman v. Pocono Med. Ctr.*, 361 F. Supp. 3d 392, 405 (M.D. Pa. 2019).

relief is not granted. Simply because one individual is not in danger of being injured again in the same manner does not mean no individual will be similarly injured again in the near future.

The ADA does not provide individuals with disabilities support to overcome the hurdle of the standing requirement. The purpose of the ADA is to prevent employers, businesses, government agencies, and places of public accommodation from discriminating against people with disabilities; however, without the ADA's help to overcome this constitutional requirement, many potential plaintiffs are barred from bringing a claim before even being given a chance to plead their case. Furthermore, when potential plaintiffs are barred from bringing their claims, the ADA goes underenforced when businesses and places of public accommodation are not required to change discriminatory practices and policies.

### *B. Injunctive Relief as a Remedy Leads to Underenforcement*

Title III of the ADA is said to be a provision that is “particularly underenforced” because the only relief provided to those who *do* decide to bring a claim is injunctive relief.<sup>268</sup> Because plaintiffs are entitled only to injunctive relief, the possibility of litigation for businesses and places of public accommodation can hardly be considered a threat.<sup>269</sup> Places of public accommodation may refuse to change certain discriminatory practices or policies if the only thing they have to fear is a plaintiff—willing to take the place of public accommodation to court—who can only be awarded injunctive relief. The only potential liability these businesses and places of public accommodation face under Title III is an injunction to comply with the ADA; the ADA does not force them to pay the plaintiff damages.<sup>270</sup> If it is cheaper to continue discriminatory practices and policies than to implement changes, places of public accommodation may choose to keep discriminating.

When a Deaf or hard of hearing individual is subject to discrimination and their only form of recovery is injunctive relief, it may not seem worthwhile to make this a legal matter. Litigation is costly, time-consuming, and not always effective.<sup>271</sup> If the wronged individual will not be adequately compensated, the thought of going through the arduous judicial process might prevent individuals from coming forward.

This flaw of the ADA seems to reflect the fear that Senator Kennedy

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<sup>268</sup> Stein & Teplin, *supra* note 73, at 1115 (emphasis added).

<sup>269</sup> *See id.*

<sup>270</sup> *Id.*

<sup>271</sup> *See* Craig C. Martin, *Avoiding the Inefficiency of Litigation*, COMM. PRETRIAL PRAC. & DISCOVERY (2007), [https://jenner.com/system/assets/publications/2105/original/PP\\_D\\_Martin\\_Spring07.pdf?1315481513](https://jenner.com/system/assets/publications/2105/original/PP_D_Martin_Spring07.pdf?1315481513), [<https://perma.cc/84D7-HR7U>].

and others had at the time of drafting and negotiating the ADA.<sup>272</sup> If businesses and places of public accommodation do not fear litigation, they are hardly deterred from changing their discriminatory behaviors, policies, or practices. As such, the ADA should be amended to prevent these wrongful practices and policies, removing the burden from the wronged individual who can only see a change and be provided relief if they bring their action to court. Without a threat of litigation and the potential for serious damages, the ADA will continue to go unenforced.

*C. Injunctive Relief is Inadequate Relief for Plaintiffs, Considering the Severity of the Offense*

Under Title III of the ADA, there are “two mechanisms for enforcement.”<sup>273</sup> First, a private plaintiff can seek an injunction to bar the place of public accommodation from ongoing discrimination based on disability.<sup>274</sup> If there is only one reported incident of discrimination, this individual will not be granted injunctive relief unless they can establish the discrimination is either continuing or ongoing.<sup>275</sup> An individual private plaintiff cannot receive compensatory damages; only injunctive relief is available.<sup>276</sup> Under the second mechanism, the United States Attorney General is authorized, when there is determined to be reasonable cause, to prosecute violations of the ADA.<sup>277</sup> This second mechanism differs from the first because the Attorney General is authorized to “seek injunctive relief for past discriminatory conduct, monetary damages for aggrieved persons, and civil penalties against the defendant of up to \$50,000 for a first violation and up to \$100,000 for a subsequent violation.”<sup>278</sup>

Thus, under Title III of the ADA, a Deaf or hard of hearing person acting alone cannot seek anything but injunctive relief when they encounter discriminatory behaviors that deny them equal access to communication. It is only when their claim is supported and taken over by the Attorney General that they could hope to be awarded something more.<sup>279</sup> However,

<sup>272</sup> Dawson, *supra* note 42, at 1147.

<sup>273</sup> *Limits on Injunctive Relief*, *supra* note 236, at 185.

<sup>274</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title III § 308(a)(2) (codified at 42 U.S.C. § 12188(a)(2) (2018)); *Limits on Injunctive Relief*, *supra* note 236, at 185–86.

<sup>275</sup> *Limits on Injunctive Relief*, *supra* note 236, at 186.

<sup>276</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title III § 308(a)(2) (codified at 42 U.S.C. § 12188(a)(2) (2018)); *Limits on Injunctive Relief*, *supra* note 236, at 186.

<sup>277</sup> *Limits on Injunctive Relief*, *supra* note 236, at 186; 42 U.S.C. § 12188(b)(i) (2018).

<sup>278</sup> *Limits on Injunctive Relief*, *supra* note 236, at 186; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title III § 308(a)(2) (codified at 42 U.S.C. § 12188(b)(2)(C) (2018)).

<sup>279</sup> Or, perhaps, the plaintiff could hope to be awarded compensatory damages under an alternative legal basis. See *King v. Our Lady of the Lake Hosp., Inc.*, 455 F. Supp. 3d 249,

the Attorney General may only sue on behalf of Deaf or hard of hearing plaintiffs who experienced discrimination in specific circumstances. The Attorney General may only bring a claim “against (i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or (ii) any person or group of persons [that] has been discriminated against under this subchapter and such discrimination raises an issue of general public importance.”<sup>280</sup> Many discriminatory experiences Deaf or hard of hearing individuals face, even those which were described in Part II of this Paper, may never become one of the specific circumstances where the Attorney General can sue on their behalf, thereby limiting their ability to recover real compensatory damages. No matter how disturbing or severe the circumstances of a plaintiff’s claim brought under Title III of the ADA may be, that plaintiff is limited solely to injunctive relief, unless the Attorney General is involved.<sup>281</sup>

One case that illustrates this issue is *King v. Our Lady of the Lake Hospital, Inc.*<sup>282</sup> In *King*, the plaintiff was a 72-year-old Deaf woman who primarily communicated using ASL and required the assistance of an ASL interpreter to understand complicated medical terminology.<sup>283</sup> During Ms. King’s five-day stay at the hospital, the hospital only provided her with an interpreter during her pre-operative meeting with the surgeon and upon her discharge.<sup>284</sup> During the times without an interpreter, the hospital forced Ms. King to communicate with the hospital staff by attempting to read lips and passing notes.<sup>285</sup>

After Ms. King was discharged from her surgery, she returned to the hospital shortly thereafter because her heart was racing.<sup>286</sup> Ms. King pleaded with the hospital to provide her an ASL interpreter, but the hospital only provided an interpreter to her once a day—again, forcing her to communicate with others through lip-reading and passing notes.<sup>287</sup> Once again, Ms. King was discharged from the hospital, and once again, she was forced to return because she had difficulty breathing.<sup>288</sup> During this third stay, the hospital provided Ms. King with VRI during triage, but again

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261 (M.D. La. 2020) (where the plaintiff was denied compensatory damages under the ADA but may be able to seek nominal damages on remand).

<sup>280</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12188, 104 Stat 327, Title III § 308(a)(2) (codified at 42 U.S.C. § 12188(b)(1)(B) (2018)); *Limits on Injunctive Relief*, *supra* note 236, at 207.

<sup>281</sup> *Limits on Injunctive Relief*, *supra* note 236, at 186.

<sup>282</sup> *King v. Our Lady of the Lake Hosp., Inc.*, 455 F. Supp. 3d 249, 251 (M.D. La. Apr. 17, 2020).

<sup>283</sup> *Id.* at 252.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 253

denied her request for consistent ASL interpretation services.<sup>289</sup> Ms. King recalled this experience making her feel “frustrated[,] confused, anxious, isolated, and afraid.”<sup>290</sup>

In her claim, Ms. King sought damages from the hospital for the emotional injuries she incurred, and she sought an injunction against the hospital, seeking the court to require it to “implement certain policies and procedures for treating deaf patients.”<sup>291</sup> The court relied on the Fifth Circuit decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*<sup>292</sup> to quickly bar Ms. King’s claim for damages under a theory of emotional distress, noting that the Fifth Circuit determined that claims brought under the ADA or RA do not allow plaintiffs to recover emotional distress damages as a remedy.<sup>293</sup> Without damages from an emotional distress claim, Ms. King hoped to be awarded at least nominal damages under the circumstances of an RA/ACA case.<sup>294</sup>

*King* provides an example where a Deaf plaintiff was subjected to ongoing discrimination from the defendant during a series of high-stress, dangerous, and life-changing circumstances. At the outset, she was immediately barred from recovering compensatory damages under the ADA.<sup>295</sup> While the court did note that she might be able to recover nominal damages, it would be under an alternative legal theory and not the ADA.<sup>296</sup> Thus, despite the disturbing facts of this case, the ADA allows no relief for this woman other than the possibility of injunctive relief after she “car[ri]es] her burden at trial.”<sup>297</sup> Cases brought under the ADA with similar disturbing facts illustrate the need for the ADA to provide greater and more appropriate relief to Deaf or hard of hearing plaintiffs if the ADA does not offer greater protections to prevent this type of behavior.

Furthermore, if something more than injunctive relief were afforded to plaintiffs under the ADA, then it is likely that more victims would come forward, pursue a cause of action, be granted injunctive relief, and thus, prevent discriminatory practices and policies from harming other potential victims. Potentially, this would lead to more places of public accommodation implementing and following policies that comply with the purpose and requirements of the ADA.

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673 (5th Cir. 2020).

<sup>293</sup> *King*, 455 F. Supp. 3d at 253.

<sup>294</sup> *Id.* at 254.

<sup>295</sup> *Id.* at 253.

<sup>296</sup> *Id.* at 254.

<sup>297</sup> *Id.* at 261 (denying the defendant’s request for judgement on the plaintiff’s second claim (injunctive relief under Title III of the ADA) and noting that the burden falls on the plaintiff to demonstrate her entitlement to injunctive relief).

## VI. REMEDIES

If the purpose behind the ADA is to prevent discrimination against people with disabilities in places of employment, by government entities, and in places of public accommodation run by private entities, then the ADA should do just that. What this Paper has demonstrated is that the Deaf and hard of hearing community continues to face discrimination due to a lack of equal access to communication and information. The lack of adequate relief awarded to plaintiffs who bring an action under the ADA fails to prevent employers, government entities, and places of public accommodation from discriminating against this community. And furthermore, the failure to grant and provide adequate relief to victims under the ADA prevents victims from bringing causes of action, leading to the underenforcement of the ADA. This Section proposes what amendments the ADA needs to better ensure effective communication and access to information for Deaf and hard of hearing persons. Furthermore, this Section provides potential solutions aimed at granting a greater number of Deaf and hard of hearing individuals relief under the ADA.

### *A. Amendments to the ADA to Better Ensure Access to Communication and Information*

#### *1. Regularly Require Deaf and Hard of Hearing Cultural Competency Training*

One of the purposes behind the enactment of the ADA was “to bring disabled persons into the economic and social mainstream of American life.”<sup>298</sup> It is reasonable to suggest that when individuals are culturally unaware of deafness and Deaf culture, it becomes more difficult to bring this community “into the economic and social mainstream of American life.”<sup>299</sup> The first suggestion offered by this Paper is for an amendment to the ADA that requires businesses, employers, government entities, and places of public accommodation to regularly deliver and require employees to attend Deaf and hard of hearing cultural competency trainings.

To put this suggestion into perspective, when a hearing person understands why some Deaf people choose to communicate using ASL rather than lip-reading and voicing, that hearing person is much less likely to become frustrated when they encounter a Deaf person who refuses to attempt to read lips or talk out loud. Furthermore, a Deaf or hard of hearing person who is not met with hostility, frustration, agitation, or awkwardness when interacting with hearing people is more likely to return to the business, place of employment, or place of public accommodation—thus promoting the integration of Deaf and hard of hearing individuals into the economic

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<sup>298</sup> SCHULTZ ET AL., *supra* note 44, at viii.

<sup>299</sup> *Id.*

and social mainstream of American life.<sup>300</sup>

Deaf people are often very proud of their deafness.<sup>301</sup> Therefore, trainings should focus on learning about deafness, Deaf culture, ASL, and other communication methods.<sup>302</sup> It should be an opportunity for learning, asking questions, and making hearing people more comfortable in situations where they may interact with someone from the Deaf and hard of hearing community. The hope is to eliminate stereotypes and misconceptions held by hearing people about Deaf people and deafness.<sup>303</sup>

Thus, this Paper suggests that under the ADA, mandatory disability training should be required for all employees of businesses, government entities, and places of public accommodations. In addition to general disability training, the ADA should require diversity trainings that include information about ASL and Deaf culture. With access to more information about Deaf and hard of hearing people, the hope is that hearing people will be less likely to deliberately or even unconsciously discriminate against this community. Having training about Deaf culture and access to communication holds these businesses, employers, and places of accommodation to a higher standard for their actions. Without the ADA's implementation of an education requirement, learning about ASL, Deaf and hard of hearing communication needs, and Deaf culture becomes a choice—and right now, it appears many employers, businesses, government entities, and places of public accommodation are choosing to be ignorant of this information and about this community.

## 2. *Have a Plan for Situations Involving Deaf or Hard of Hearing People*

The second recommendation this Paper offers is an amendment to the ADA that requires places of public accommodation, government entities, and places of employment to have a plan for situations where hearing individuals have to communicate with Deaf or hard of hearing people. It is important to first ensure that hearing individuals learn and become aware of deafness, Deaf culture, and communication methods used by Deaf and hard of hearing people, but it is equally important to encourage people to put that knowledge into practice.

One small way these named places could prepare for encounters with Deaf and hard of hearing people (and ensure that access to communication is provided) is by knowing how to appropriately communicate with a Deaf or hard of hearing person. While hiring someone who knows ASL might

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<sup>300</sup> *Id.*

<sup>301</sup> See Tucker, *supra* note 8, at 31.

<sup>302</sup> *Unemployment in the Deaf Community*, *supra* note 85.

<sup>303</sup> *Id.*

be ideal for many members of the Deaf and hard of hearing community,<sup>304</sup> there are other appropriate ways to communicate when ASL is not an immediate option or when the deaf person does not use ASL to communicate. For instance, a few things for these named places to be aware of include speaking in a normal speaking pattern and with a normal tone of voice, looking directly at the person while communicating, being clear and concise, using gestures when appropriate or necessary, and writing things down.<sup>305</sup> Again, it is important to communicate with the Deaf individual in a way most comfortable for them.

In practice, this might mean employers, businesses, or places of public accommodation keep a notepad nearby in case someone needs to exchange notes with a Deaf or hard of hearing person, know the name of interpreting agencies and how to hire an interpreter for future accommodations, be ready to ask questions when appropriate and necessary, and remember to put biases and stereotypes away.

In places where it is absolutely critical to have access to all forms of reasonable accommodations (e.g., in hospitals or during local or national emergency briefings), then the named places should have a plan in place to know how to immediately accommodate the needs of this community. It is too dangerous to be unprepared and uneducated when an individual's or a community's health and safety are on the line.

Under the ADA as it stands today, there is no guidance for how these named places can ensure their operations and practices prevent discrimination against people with disabilities. Instead, businesses, employers, government entities, and places of public accommodation may not even realize their practices are discriminatory or have discriminatory effects if they are not forced to consciously think of how to avoid discriminating against Deaf and hard of hearing people. If the ADA were to require these places to have a plan already in place for how to interact and communicate with the Deaf and hard of hearing community, it would become harder to passively discriminate and easier to see what practices may need to be adjusted to ensure equal access to communication.

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<sup>304</sup> In the United States, ASL is the third most studied language in colleges and universities. Christopher Rim, *How ASL Is Conquering the Ivy League*, FORBES (Jan. 25, 2019, 12:21 PM), <https://www.forbes.com/sites/christopherrim/2019/01/25/how-asl-is-conquering-the-ivy-league/?sh=178f8ff17ec7>, [https://perma.cc/K99J-VM4L].

<sup>305</sup> Casey Ring, *12 Tips for Communicating with a Deaf Person*, CLEVELAND HEARING & SPEECH CTR. (Nov. 8, 2018), <https://blog.chsc.org/blog/12-tips-for-communicating-with-a-deaf-person>, [https://perma.cc/KXC8-FQPB].

*B. Proposed Changes Ensure a Greater Number of Deaf and Hard of Hearing Individuals Can Recover Under the ADA*

*1. Make an Exception to the Standing Requirement*

As mentioned previously, many potential Deaf and hard of hearing plaintiffs are barred from bringing an action at the very outset of the legal process.<sup>306</sup> This Paper noted that Deaf and hard of hearing persons often fail to make a sufficient showing that they have met the standing requirements under Article III of the United States Constitution.<sup>307</sup> Typically, this is because the injury suffered by potential plaintiffs already happened, and it is not always easy to prove they are in danger of being subjected to a repeated injury.<sup>308</sup> Due to this barrier, potential Deaf or hard of hearing plaintiffs may not be provided relief for single instances of discrimination, no matter how disturbing the situation was. Moreover, the inability of one community member to bring a lawsuit forward after facing an incident of discrimination allows for similar future instances of discrimination to occur to other community members.

This barrier fails to consider why a Deaf or hard of hearing person might not be subjected to this threat again—perhaps because they looked elsewhere for employment, found a different store across town that would accommodate their communication needs, asked a hearing peer to go in their place, or other reasons. Instead, the “imminence” piece of the standing requirement only considers the situation at face value.

When considering why the ADA was enacted, to put an end to discrimination against people with disabilities,<sup>309</sup> and why many Deaf or hard of hearing people might choose not to be subjected to the repeated injury, it is evident that more support provided to qualified individuals is necessary to overcome the standing requirements.<sup>310</sup> What *would* be more appropriate in these situations would be for a proposed provision of the ADA to allow the proof of actual previous injury to be enough when a court must determine whether or not the Deaf or hard of hearing plaintiff has standing.<sup>311</sup> However, because the standing requirement is a Constitutional

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<sup>306</sup> *Limits on Injunctive Relief*, *supra* note 236, at 187.

<sup>307</sup> *See, e.g.*, *Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 867 (9th Cir. 2014).

<sup>308</sup> *Id.*

<sup>309</sup> *Dawson*, *supra* note 42, at 1146.

<sup>310</sup> According to the ADA, “[t]he term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title I § 101(9) (codified at 42 U.S.C. § 12111 (2018)).

<sup>311</sup> *Limits on Injunctive Relief*, *supra* note 236, at 203 (“A plaintiff with a disability bringing an action to compel accessibility should not be required to demonstrate the imminence of a future injury because he or she has an actual and present injury.”).

requirement, this type of provision to the ADA is not possible.<sup>312</sup>

In the alternative, an amendment to the ADA that makes an exception to the third-party standing requirements is both permissible and necessary.<sup>313</sup> Allowing third-party standing is an exception to the requirement that plaintiffs bringing a claim must assert a right and interest that is their own and not “those of a third party.”<sup>314</sup> Although third-party standing is already an exception to the standing requirement, it does not come without limitations. A party seeking to bring a claim on a third person’s behalf under this exception must show: “the litigant and third party share a ‘close relationship,’ the litigant is also injured, and the third party is hindered from bringing the suit on [their] own behalf.”<sup>315</sup> Because third parties seeking relief on other individual’s behalf may not be able to overcome *these* requirements, an amendment to the ADA should prevent this prospective barrier. If the ADA does not add a provision that supports and helps Deaf and hard of hearing plaintiffs overcome the standing requirement, potential plaintiffs from this community will continue to be barred from bringing their claims, and community members will not be protected from future instances of discrimination.

This type of provision is necessary because if courts and Congress continue to require a showing of a likelihood of future personal injury, courts should instead have to consider the idea that discrimination against one Deaf or hard of hearing person could be repeated against other members of the community, even if not against that specific person.<sup>316</sup> Therefore, an amendment to the ADA should entitle third-party Deaf or hard of hearing community members to bring a suit on behalf of the community to ensure other individuals will not face the same discrimination. Congress should adjust the prudential requirements and make it easier for Deaf or hard of hearing individuals to bring claims on behalf of the community.

Other efforts courts have used to try and assist plaintiffs in overcoming the “imminence” barrier have proven unsuccessful thus far. For instance, in *Chapman v. Pier 1 Imps. (U.S.), Inc.*, the Ninth Circuit explained that an individual can overcome the “actual or imminent” requirement by showing that they are deterred from returning to a non-ADA compliant facility due

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<sup>312</sup> Brandon D. Smith, *Lujan v. Defenders of Wildlife: A Slash-And-Burn Expedition Through the Law of Environmental Standing*, 28 U.S.F. L. REV. 859, 865 (1994) (noting that Congress does not have the power to override constitutional requirements).

<sup>313</sup> *Id.* (stating that third-party standing, a prudential and not constitutional requirement, can be overridden by Congress); see also Bradford Mank, *Prudential Standing Doctrine: Abolished or Waiting for a Comeback?*; *Lexmark International v. Static Control Components, Inc.*, 18 U. PA. J. CONST. L. 213, 221 (2015).

<sup>314</sup> Smith, *supra* note 312, at 872.

<sup>315</sup> Tracy Flint, *A New Brand of Representational Standing*, 70 U. CHI. L. REV. 1037 (2003).

<sup>316</sup> *Limits on Injunctive Relief*, *supra* note 236, at 202 (quoting Professor Adam Milani: “every other person with the same disability will also encounter that barrier”).

to a barrier that “adversely affects his ability to participate in the facility.”<sup>317</sup> However, this “exception” still requires the plaintiff to show that they are or would have been likely to return to the non-ADA compliant facility.<sup>318</sup> If a court determines that a plaintiff will not be subjected to the repeated injury, dismisses the plaintiff’s claim, and does nothing to address the discriminatory behavior the plaintiff was subjected to, this enables continued discriminatory practices against all community members.

Additionally, where there is evidence that the defendant is unwilling to change their policies or practices, some courts are willing to grant standing to Deaf or hard of hearing plaintiffs who faced past discriminatory practices.<sup>319</sup> However, this is clearly not always the case.<sup>320</sup> Therefore, the ADA should be amended to add a provision that provides an exception to the third-party standing. Ensuring members of this community can bring a suit on behalf of the community as a whole allows a greater number of Deaf and hard of hearing individuals to be provided relief after instances of discrimination. It further prevents instances of discrimination as well.

## 2. *The ADA Should Provide an “Undue Hardship” Factor Analysis for Plaintiffs*

Under the ADA, courts are provided a set of factors to consider when determining whether a reasonable accommodation poses an “undue hardship” on the employer or place of public accommodation if they are required to adhere to the requested accommodation.<sup>321</sup> However, the ADA does not provide any factors or analysis for courts to consider to determine what kind of “undue hardship” the individual with the disability must face if they are denied a reasonable accommodation from his or her employer, a business, or a place of public accommodation. In fact, there is no balancing test under the ADA for courts to determine whose burden is heavier under the circumstances. Instead, the only hardship considered is that of the employer, business, or place of public accommodation—not the individual who is intended to be protected by the ADA.

Without considering the burden Deaf and hard of hearing plaintiffs face when their accommodations are not met, the court fails to assess the entirety of the situation. The court only considers how the business, government entity, place of public accommodation, or employer may be hurt by adhering to the request. An amendment to the ADA that requires courts to consider the hardship imposed on both the employer, government

<sup>317</sup> 631 F.3d 939, 958–59 (9th Cir. 2011); *see also* Giterman v. Pocono Med. Ctr., 361 F. Supp. 3d 392, 405–06 (M.D. Pa. 2019) (explaining the deterrent effect doctrine).

<sup>318</sup> *Chapman*, 631 F.3d at 959; *Giterman*, 361 F. Supp. 3d at 406.

<sup>319</sup> *Limits on Injunctive Relief*, *supra* note 236, at 197.

<sup>320</sup> *See* *Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 868 (9th Cir. 2014).

<sup>321</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327, Title I § 101 (codified at 42 U.S.C. § 12111(10)(B) (2018)).

entity, or place of public accommodation and the burden imposed on the Deaf or hard of hearing plaintiff would help resolve the imbalance. This provision would then require the court to weigh those two hardships and make a fair determination of which party has shown their burden is heavier. The consideration behind this suggestion is for courts to get a better understanding of the difficulties Deaf or hard of hearing people continue to face when they are denied access to their preferred method of communication, and must either live with the ineffective substitute, leave, or pay for accommodations themselves. If courts have a better understanding of the difficulties and burdens Deaf and hard of hearing individuals face in these situations, from the plaintiff's perspective, it is likely a greater number of Deaf and hard of hearing plaintiffs will prevail and be granted relief under the ADA.

*Argenyi v. Creighton University* perfectly illustrates this situation.<sup>322</sup> As mentioned earlier, the plaintiff, Mr. Argenyi, had to borrow approximately \$114,000 in loans during his first two years of medical school, specifically put toward paying for his accommodations, when the school denied or inadequately substituted his requests for said accommodations.<sup>323</sup> Clearly, the school's failure to accommodate Mr. Argenyi's requests posed an enormous financial burden on him.<sup>324</sup> While the court did consider the total amount Mr. Argenyi spent on accommodations, that was not a factor considered as part of the court's analysis as to whether there was sufficient evidence for a jury to determine if the school's accommodations were reasonable.<sup>325</sup> Furthermore, the court indicated (in a footnote) that the school would be permitted to submit evidence on remand that would determine whether adhering to Mr. Argenyi's request would impose an undue burden on the university—thereby specifically making a note that the defendant could present evidence that would allow it to escape liability on remand.<sup>326</sup> The court did *not* make a specific footnote to indicate that Mr. Argenyi would also be able to present evidence on remand that he faced an undue burden when his requests were denied nor that his burden must be weighed against the defendants. This is simply because that type of analysis does not exist for plaintiffs who bring a claim under the ADA.

*Argenyi* demonstrates the need for the ADA to require courts to consider the burden placed on individuals whose requests for reasonable accommodations are denied when those individuals bring a claim for relief under the ADA. Without any consideration of what kinds of hardships Deaf and hard of hearing plaintiffs face when they are denied a request for accommodations at school, work, a hospital, or elsewhere, the court fails to

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<sup>322</sup> 703 F.3d 441 (8th Cir. 2013).

<sup>323</sup> *Id.* at 445.

<sup>324</sup> *See id.*

<sup>325</sup> *Id.* at 447.

<sup>326</sup> *Id.*

consider the case at more than face value for the plaintiff. For example, if a Deaf or hard of hearing person was denied an interpreter at work, had to quit their job, and then struggled to find a new place of employment that would comply with their needs or found a job that paid significantly less than their previous employer, this type of burden should be weighed against the employer's burden under the ADA. It is not enough that the court only considers whether the request was reasonable and then whether the employer or place of public accommodation was burdened;<sup>327</sup> the court must consider the entire situation from both parties' perspectives and situations.

Thus, a greater number of Deaf or hard of hearing individuals will prevail and be granted relief when bringing an action under the ADA if the court must also consider the burden plaintiffs face when their accommodations are not met. This suggestion is fair and does not take away from an employer, business, or place of accommodation's ability to evade liability if it presents a sufficient defense of undue hardship.

## VII. CONCLUSION

In conclusion, the ADA is ineffective at ensuring Deaf and hard of hearing individuals have equal access to communication in various everyday life situations and environments. While the ADA provides many benefits to this community and seeks to federally protect this "discrete and insular minority,"<sup>328</sup> this Paper argues that the ADA does not provide enough protection.

Deaf and hard of hearing people still face barriers of unequal access to communication in employment situations, medical settings, educational settings, in leisure and entertainment activities, and in emergency situations. In many of these situations and environments, a lack of access to equal communication and information can be potentially dangerous or life-threatening and can lead to disastrous results. In other situations, unequal access to communication and information provides for everyday nuisances, a lack of access to the full enjoyment of certain activities, and a lack of opportunity to interact with people from all communities.

This Paper further showed the ineffectiveness of the ADA to provide Deaf and hard of hearing individuals adequate relief in instances where they face discrimination. The ADA does not offer legal support to individuals at the outset of the judicial process, and thus, prevents many individuals from bringing a successful claim. Furthermore, the ADA's lack of a deterrent effect on employers, businesses, and places of public accommodation often leads to a lack of enforcement of the ADA and, thus, a lack of relief granted to victims of disability discrimination.

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<sup>327</sup> This was the type of analysis seen in many of the aforementioned cases throughout this paper, for example *Scarl's* and *Argenyi*. See Section IV.C.

<sup>328</sup> See Dawson, *supra* note 42, at 1146.

Finally, this Paper offered various suggestions for amendments to the ADA. The ADA needs to require more from employers, businesses, government entities, and places of public accommodation to ensure they provide access to effective communication. No longer can these named places be ignorant about deafness, Deaf culture, and Deaf communication needs. Moreover, these places should be prepared for interactions with Deaf and hard of hearing individuals to prevent discrimination and unequal access to communication. Next, this Paper suggests amendments to the ADA that would allow for a greater number of individuals to be granted relief. An amendment to the ADA that broadens the third-party standing exception for protected individuals and an amendment that creates an undue burden analysis courts must use when determining the reasonableness of accommodations and considering whose burden is heavier in light of the entire situation of both parties would allow for a greater number of potential plaintiffs to recover from instances of discrimination.

The ADA is an excellent start in the fight against disability discrimination. It has provided many opportunities and benefits to the Deaf and hard of hearing community. Now, thirty years have gone by, and it is time to take more action. Deaf and hard of hearing individuals deserve to have their culture recognized and admired and to have their language preserved and respected. Their ability or inability to hear should not be thought of as “less than” or seen as something that needs to be “fixed.” They deserve to be afforded the same access to communication as everyone else. Thus, changes to the ADA are necessary to ensure more protections are afforded to the Deaf and hard of hearing community.