



DISABILITIES LAW PROGRAM

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MEMORANDUM

TO: U.S. House of Representatives Judiciary Subcommittee on Crime,
Terrorism, and Homeland Security

CC: ACLU National Prison Project and National Disability Rights Network

FROM: MaryBeth Musumeci, Deputy Legal Advocacy Director, Disabilities Law
Program, Community Legal Aid Society, Inc. *MBM*

DATE: April 18, 2008

RE: Prison Abuse Remedies Act, H.R. 4109

In response to the request from the National Disability Rights Network (NDRN) for written testimony regarding the need for the Prison Abuse Remedies Act (H.R. 4109) from a disability perspective, the Disabilities Law Program (DLP) offers the following comments. The DLP is the statewide protection and advocacy agency for people with disabilities in Delaware and a member of NDRN. While the DLP's comments focus on the modification of the exhaustion requirement, the DLP also supports the other provisions of the Prison Abuse Remedies Act.

I. Modifying the Exhaustion Requirement of the Prison Litigation Reform Act.

The Prison Litigation Reform Act (PLRA) prevents a prisoner from filing suit in federal court unless the prisoner has exhausted all administrative remedies and grievance procedures made available by the correctional facility. Failure to exhaust all remedies, and to do so in compliance with the correctional agencies' deadlines and procedural rules, results in the dismissal of prisoner lawsuits without recourse.

In Delaware, it is extremely difficult, if not impossible, for prisoners to comply with administrative procedures. The state prison grievance system has short deadlines and complicated procedures which prisoners must navigate without legal counsel, because the state prison system does not permit prisoners to be represented by legal counsel in the grievance process. Moreover, the grievance process itself is contained in a state policy memo which by state statute is kept confidential. Thus, prisoners do not even have access to the rules of the administrative grievance process with which the PLRA requires them to comply. Prisoners with disabilities are often ill-equipped to comply with the prison grievance system. In the DLP's experience in Delaware, even when prisoners do file grievances, they often do not receive a response.

Section 3 of the Prison Abuse Remedies Act preserves the PLRA's goal of promoting administrative resolution of disputes, while preventing the dismissal of meritorious claims purely for failure to exhaust. Section 3 provides that before filing suit, a prisoner must present his or her claim to prison officials. If a prisoner files a claim without first presenting to prison officials (and the court does not dismiss the claim as frivolous or malicious), the court must stay the case for up to 90 days and direct prison officials to consider the claim through administrative processes. Cases that are not resolved administratively during the 90 day period will then proceed in court, unless the court is notified by the parties that the case is resolved.

In the DLP's experience, the proposed modification of the PLRA's exhaustion requirement is a much needed remedy so that prisoners with disabilities can obtain meaningful relief for meritorious claims. Over the past several years, the DLP has

represented multiple prisoners who are deaf who require interpreter services to ensure effective communication and who have been held in state prisons without any access to interpreter services. Many people who are deaf are not fluent in written English. People who have been deafened at birth or a young age and educated at schools for the deaf typically consider their first language to be American Sign Language (ASL), not English. ASL does not directly correlate with English. It has a different syntax and grammatical structure and is akin to a foreign language as compared to English. There is no written component to ASL. This creates obvious barriers to compliance with the prison grievance system.

The healthcare context is one area in which the provision of interpreter services is crucial. The failure to provide interpreter services in the healthcare context for people who are deaf creates unacceptable and unnecessary risks. Misunderstandings can arise on behalf of the physician, who may misdiagnose problems when a deaf patient cannot communicate his symptoms and understand the physician's questions, and on behalf of the deaf patient, who may be unable to understand and comply with the physician's instructions. For example, the DLP is aware of a deaf client with minimal language skills who was denied a mental health screening because prison staff did not know how to communicate with him. Another client, who is profoundly deaf and communicates in ASL, was sentenced to months of a drug treatment program at a violation of probation center and work release center, during which no interpreter services were provided, with the result that, although he sat in treatment groups all day, he was unable to communicate or participate.

The DLP has represented a deaf client who has been held at multiple state prison facilities. The client's first language is ASL, and his ability to communicate in written English is extremely minimal. Despite numerous grievances filed at each facility over six months, this client was provided with interpreter services only once during this period of incarceration and only after considerable advocacy with the deputy attorney general for the state Department of Correction.

The failure to provide interpreter services in this context is of particular concern, since without ever meeting with this client with an interpreter, prison medical staff somehow diagnosed him with a mental health condition and began medicating him daily. The client did not know the name of the medication or the reason that he was taking it. Some days, he received two pills, and some days, he received one pill, and without an interpreter, he had no way to ask questions or effectively communicate with prison medical personnel. He also complained that the medication was making him dizzy and disoriented. Despite these serious concerns, which were brought to the state Department of Correction's attention through the inmate grievance process and through direct advocacy with the deputy attorney general for the Department, six weeks elapsed during which this client was being medicated and experiencing side effects before he was provided with an interpreter for a doctor's appointment.

In all of the cases described above, the PRLA's administrative exhaustion requirement adversely affected people with disabilities – because they were unable to successfully navigate the grievance system and because the prison often did not respond accordingly. The PRLA's exhaustion requirement also adversely affected the ability of

DLP attorneys to protect these clients because the PRLA's exhaustion requirement hindered the DLP's ability to address dangerous conditions and practices that put people with disabilities at risk.

II. The Legal Basis for Interpreter Services in the Healthcare Context for People Who are Deaf in State Prison Facilities.

The claim for interpreter services to ensure effective communication in the prison context is well-supported by the law. The Americans with Disabilities Act (ADA) requires that state prisons ensure effective communication with people who are deaf.¹ Specifically, public entities, such as state prisons, must "take appropriate steps to ensure that communications with [people] with disabilities are as effective as communication with others."² The ADA also requires that public entities "shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity."³ Auxiliary aids and services under the ADA

¹ Title II of the ADA prohibits public entities (state and local government) from discriminating against persons with disabilities. See 28 CFR § 35.130. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subject to discrimination by any [public] entity." 42 U.S.C. § 12132. The United States Supreme Court has held that Title II of the ADA applies to state prisons. See *Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998).

² 28 CFR § 35.160 (a).

³ 28 CFR § 35.160 (b) (1). Public entities may not impose surcharges on individuals with disabilities in order to cover the costs of accommodations. 28 C.F.R. § 35.130 (f).

include “qualified interpreters.”⁴ “In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.”⁵

The U.S. Department of Justice’s comments to the Title II regulations note that

[a]lthough in some circumstances a notepad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.⁶

The U.S. Department of Justice, in its comments to the ADA Title III regulations, asserts that “[i]t is not difficult to imagine a wide range of communications involving areas such as *health*, legal matters, and finances that would be sufficiently lengthy or complex to require an interpreter for effective

⁴ 28 CFR § 35.104.

⁵ 28 CFR § 35.160 (c). Under the ADA,

[w]hen an auxiliary aid or service is required, the public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must give primary consideration to the choice expressed by the individual. ‘Primary consideration’ means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens.

ADA Title II Technical Assistance Manual, § II-7.1100.

⁶ 28 CFR Pt. 35, App. A, 56 FR 35696 (July 26, 1991).

communication.”⁷ The U.S. Department of Justice recognizes that qualified interpreters are necessary to ensure effective communication or avoid discrimination against people who are deaf in the prison context, including *inter alia*, for medical and psychological assessments and treatment.⁸

For the above reasons, the DLP supports the amendments to the PRLA proposed in the Prison Abuse Remedies Act. Thank you for your consideration of the DLP’s comments.

⁷ 56 Fed. Reg. at 35567 (emphasis added).

⁸ See Settlement Agreement between the United States of America and the Wood County Sheriff’s Department, Bowling Green, Ohio, DOJ Complaint No. 204-57-100 (June 5, 1997) at page 3, item # 4.