No. 19-

IN THE

Supreme Court of the United States

KALEIDA HEALTH,

Petitioner,

v.

KATHLEEN BIONDO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A claimant may assert a claim for monetary damages under the Rehabilitation Act if there was intentional discrimination. Barnes v. Gorman, 536 U.S. 181 (2002). However, neither this Court nor Congress have set clear parameters for claiming such damages. Over the years Circuit Courts adopted varying standards. Both the Second and Eleventh Circuits have interpreted this Court's standard in Gebser v. Lago Vista Independent School District to apply to the Rehabilitation Act. However, as of this year and specifically stemming from this case, the Second and Eleventh Circuit split an already fragmented Rehabilitation Act standard regarding the definition of "official."

The questions presented are:

1. Whether the Gebser standard, requiring an official decision from an entity to impose monetary damages, applies to the Rehabilitation Act.

2. Whether the Second Circuit erroneously defined "official" under that standard.

PARTIES TO THE PROCEEDING

Petitioner is Kaleida Health, a defendant in the district court and defendant-respondent in the court of appeals.

Respondent is Kathleen Biondo, a plaintiff in the district court and a plaintiff-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner states as follows:

Petitioner Kaleida Health has no parent corporation and no publicly held company owns 10 percent or more of its stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this Petition:

Kathleen Biondo v. Kaleida Health d/b/a Buffalo General Medical Center, No. 15-cv-362, United States District Court for the Western District of New York. Judgment entered April 10, 2018.

Kathleen Biondo v. Kaleida Health d/b/a/ Buffalo General Medical Center, No. 18-1375, United States Court of Appeals for the Second Circuit. Judgment entered August 19, 2019.

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RULES

Petitioner Kaleida Health respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion is reported at 935 F.3d 68 and reproduced at 1a-17a. The district court's opinion is unreported at 2018 WL 1726533 and reproduced at 18a-34a.

JURISDICTION

The Second Circuit issued its opinion on August 19, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Rehabilitation Act, 29 U.S.C. §§ 794-794a, are reproduced at 41a-45a.

INTRODUCTION

Over 17 years ago, this Court decided that a claimant may assert a claim for monetary damages under Rehabilitation Act for intentional discrimination. *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). However, neither this Court nor Congress have set clear parameters for claiming such damages. *See id.* Without a framework from a higher authority, circuit courts have set their own parameters and created circuit splits for anything from the discriminatory standard, to who within an entity must be aware of the violation for compensatory damages to

apply. *Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262-63 (3d Cir. 2013).

Both the Second and Eleventh Circuits have interpreted this Court's standard in *Gebser v. Lago Vista Independent School District* to apply to the Rehabilitation Act. *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 349 (11th Cir. 2012); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009). However, as of this year and specifically stemming from this case, the Second and Eleventh Circuit split an already fragmented standard. While both adopt that an "official" may subject an entity to monetary damages, in this case, the Second Circuit expressly rejected the Eleventh Circuit's definition of "official." App. 15a. Instead, the Second Circuit adopted a definition so broad that it encompasses every employee, thereby essentially eviscerating the requirement that the decision be by an official.

Based on the reasons stated below, Kaleida Health urges this Court to establish uniform parameters for compensatory damages and clarify notice requirements under the Rehabilitation Act. Specifically, it asks this Court whether the *Gebser* standard, requiring an official decision from an entity to impose monetary damages, applies to the Rehabilitation Act. Additionally, it asks whether the Second Circuit erroneously defined "official" under that standard.

STATEMENT OF THE CASE

A. Factual Background

This action centers around Respondent Kathleen Biondo's September 2014 admission to Buffalo General Medical Center, a facility of Petitioner Kaleida Health. SA 40.[1] Ms. Biondo, who was born deaf, presented to Buffalo General Medical Center after she fainted and experienced dizziness associated chest pain. SA 68.

For the majority of Ms. Biondo's medical care and treatment prior to the hospital admission at issue, she communicated through both hand written notes and her husband, Andrew Biondo. SA 105 (60:12-19), SA 107 (65:1-9), SA 111 (88:7-23), SA 151.

Ms. Biondo's attending physician for the entirety of her hospital stay was Dr. Octavia Balan, an internal medicine doctor with Buffalo Medical Group. Coincidentally, Buffalo Medical Group was also Ms. Biondo's primary care provider at that time. *See* SA 153. Just as Ms. Biondo communicated with those at Buffalo Medical Group on numerous office visits, she communicated with Dr. Balan using both her husband as an interpreter and by written notes. SA 60, SA 75, SA 111 (88:7-23), SA 148-153.

It is undisputed that Ms. Biondo was not provided the services of an ALS interpreter during her September 2014 admission to Buffalo General Medical Center.

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1. "A" refers to the Appendix submitted to the Second Circuit. "SA" refers to the Supplemental Appendix submitted to the Second Circuit. "App" refers to the Appendix of this Petition.

However, neither Ms. Biondo nor Mr. Biondo ever advised the hospital staff that note writing was insufficient for her to understand them. SA 126 (225:3-11), SA 142-143 (138:21–139:5). Ms. Biondo admitted that she is not sure whether she ever indicated to anyone at the hospital that having her husband translate was insufficient mode of communication. SA 127 (229:4-9). Furthermore, Ms. Biondo never testified she requested an interpreter from her doctors or a supervisor. Rather, she requested an interpreter only from hospital staff, including unnamed nurses. A 61-62 ¶¶ 36-41, A 63 ¶ 51, A 213 (120:15-23), A 214 (121:5-12), A 216 (123:19-23), A 232 (205:17-23).

Kaleida Health maintains a written policy regarding the use of interpreters, translators and TTY devices. Pursuant to this policy, an interpreter must be provided when the patient is unable to speak, read or write the English language at a level that permits him or her to interact effectively with health care providers to ensure effective communication. SA 163-167.

B. Procedural History

Ms. Biondo commenced this action against Kaleida Health on April 24, 2015 when she filed a complaint in the District Court for the Western District of New York. Ms. Biondo alleges she was discriminated against by Kaleida Health based on her disability. A 16-17 at ¶4. She seeks compensatory damages pursuant to the Rehabilitation Act, New York Human Rights Law, and the City of Buffalo Antidiscrimination Law; and costs and attorneys' fees pursuant to the Americans with Disabilities Act, the Rehabilitation Act, and the City of Buffalo Antidiscrimination Law. A 31-32. The District

Court had jurisdiction over the federal law claims pursuant to 28 U.S.C. § 1331 and state law claims pursuant to 28 U.S.C. § 1367. Ms. Biondo abandoned her injunctive relief claims on appeal.

Kaleida Health does not dispute that it is subject to the non-discrimination provisions of the foregoing statutes and regulations, or that Ms. Biondo is a qualified person with a disability. However, it disputes it violated the terms or conditions of the same in its dealings with her during the hospital admission which is the subject of her action. In specific regard to this Petition, Kaleida Health disputes that it can be held liable for monetary damages under the Rehabilitation Act.

Following the close of discovery, Kaleida Health moved for summary judgment and the dismissal of Ms. Biondo's Complaint. SA at 7-12, SA 14-26. Relative to Ms. Biondo's claim for monetary damages under the Rehabilitation Act, the district court found that both Mr. and Ms. Biondo testified they asked a few unnamed nurses for an interpreter, but provided no evidence that these nurses were officials. App. 30a. According to the court, the only arguable "policymaker" or "official" with whom Ms. Biondo had contact with while a patient at the hospital was Nurse Manager Jennifer DiPasquale. *Id.* However, the court found that Ms. Biondo specifically told DiPasquale that it was acceptable to communicate through written notes. *Id.* Additionally, Ms. Biondo's meical records stated her preferred method of communication was written English and did not indicate she requested an interpreter. *Id.*

The court determined that Kaleida Health's actions were, at most, negligence or bureaucratic inaction. *Id.* at 31a. There was no evidence of an official's knowing failure to provide Ms. Biondo with a necessary auxiliary aid, and therefore, Kaleida Health could not be held liable for monetary damages under the Rehabilitation Act. *Id.* The district court granted Kaleida's motion as to Ms. Biondo's federal claims, and declined to exercise supplemental jurisdiction over her state and local law claims. *Id.* at 34a.

Ms. Biondo appealed the district court's decision to dismiss her monetary damages claim under the Rehabilitation Act. *Id.* at 2a. On August 19, 2019, the Second Circuit vacated the district court's order granting summary judgment under the Rehabilitation Act, concluding that there are issues of material fact. *Id.* at 3a.

In specific regard to the availability of monetary damages, the Second Circuit found that the record supported an inference that hospital staff had actual knowledge of the potential discrimination and contained evidence doctors and nurses had the authority to call for an interpreter. *Id.* at 13a-14a. Therefore, according to the Second Circuit, there was an issue of fact whether these staff members could be considered officials and meet the requisite standard for monetary damages under the Rehabilitation Act. *Id.* at 3a.

In reaching its decision, the Second Circuit explored clarifying the definition of "official" or "policymaker" in the context of the Rehabilitation Act. *See Id.* at 15a-16a. Specifically, the Second Circuit declined to adopt the Eleventh Circuit's definition of "official" as someone who enjoys substantial supervisory authority, and wrote that

such a definition is "unspecific, and unhelpful in the setting of a large, ramified institution . . . ." *Id.* at 15a.

The Second Circuit decided that for future cases involving the Rehabilitation Act, determining who is a hospital "official" or "policymaker" will vary with the decision to be made and the individual with discretion to decide. *Id.* at 16a. However, the Second Circuit provided no additional guidance on how to apply this broad standard. Additionally, the Second Circuit explained in a footnote that a policymaker, who instituted a policy that does not empower staff members to cure violations of the Rehabilitation Act, could also subject the hospital to monetary damages. *Id.* The policymaker need not interact with the patient to impose liability on a hospital. *Id.*

The Second Circuit did not address the claims under the Americans with Disabilities Act, New York Human Rights Law, and City of Buffalo Antidiscrimination Law. Kaleida Health does not concede liability under these authorities, but does not submit an argument on Petition to this Court, as the question presented is in regard to the Rehabilitation Act.

REASONS FOR GRANTING THE PETITION

I. Circuit Court Split Exists as to the Requisite Standard for Compensatory Damages under the Rehabilitation Act

Section 504 of the Rehabilitation Act provides that no disabled individual "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination

under any program or activity receiving Federal financial assistance." *Id.* at 41a.

To establish a *prima facie* showing of violation of the Rehabilitation Act, a plaintiff must show that she is a disabled person as defined in the Rehabilitation Act; otherwise qualified to participate in the offered activity or to enjoy its benefits; was excluded from participation or enjoyment solely because of her disability; and the entity that denied participation or enjoyment is a program that receives federal financial assistance. *Loeffler*, 582 F.3d at 275.

This Court and the majority of circuit courts have ruled that a claimant who brings a cause of action under Section 504 of the Rehabilitation Act may seek compensatory damages if the individual establishes intentional discrimination. *Barnes*, 536 U.S. at 187; *Miraglia v. Bd. of Supervisors*, 901 F.3d 565, 574 (5th Cir. 2018); *Lacy v. Cook Cty.,* 897 F.3d 847, 862-63 (7th Cir. 2018); *Havens v. Colorado Dep't of Corrs.*, 897 F.3d 1250, 1263 (10th Cir. 2018); *Durrell*, 729 F.3d 248, 263 (3d Cir. 2013); *Liese,* 701 F.3d at 342; *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *Loeffler*, 582 F.3d at 275; *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003); *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001); *Pandazides v. Virginia Bd. Of Educ.*, 13 F.3d 823, 830 (4th Cir. 1994).

However, circuit courts are split on the requisite proof to establish intentional discrimination under the Rehabilitation Act. At least one circuit court has implied that a claimant must prove discriminatory animus. *Nieves-Marquez*, 353 F.3d at 126-27. Yet, the majority

of circuit courts require proof of deliberate indifference. *E.g., Havens*, 897 F.3d at 1263-264. Within the circuit courts that a deliberate indifference standard, proof of intentional discrimination does not require a showing of personal animosity or ill will. *E.g., Loeffler*, 582 F.3d at 275 (quoting *Bartlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321, 331 (2d Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999)). Intentional discrimination may be inferred when a defendant was deliberately indifferent to the strong or substantial likelihood that a violation of federally protected rights will result. *E.g., Havens*, 897 F.3d at 1264.

Circuit courts that have adopted the deliberate indifference standard are split on what qualifies as deliberate indifference and who must be deliberately indifferent for compensatory damages to be available. Some circuits require that at the time of the incident, the defendant have knowledge that a federally protected right is likely to be violated and deliberately fail to act despite such knowledge. *Lacy*, 897 F.3d at 862; *Durrell*, 729 F.3d at 265; *Meagley,* 639 F.3d at 389; *Duvall*, 260 F.3d at 1139. Other circuits provide who within a defendant entity must have knowledge and fail to act. *Liese,* 701 F.3d at 349; *Loeffler*, 582 F.3d at 276; *see Havens*, 897 F.3d at 1266. Put simply, there is no consistent standard for intentional discrimination under the Rehabilitation Act.

Kaleida Health submits that the appropriate standard derives from *Gebser v. Lago Vista Independent School District*. 524 U.S. at 290-91. *Gebser* is referenced multiple times in *Barnes*, and has been interpreted by both the Second and Eleventh Circuit as the appropriate foundation to determine monetary damages under the Rehabilitation

Act. *Barnes*, 536 U.S. at 186, 187; *Liese,* 701 F.3d at 349; *Loeffler*, 582 F.3d at 275-76.

Gebser is an interpretation of § 1682 of Title IX of the Education Amendments of 1972, highly synonymous to the Rehabilitation Act. Section 1682 provides that federal funding should not be disturbed due to a violation of the statute until the "appropriate person" is made aware of the violation and is given an opportunity to correct non-compliance. 20 U.S.C. § 1682. In passing the Rehabilitation Act, a year after Title IX, Congress incorporated the remedies, procedures, and rights set forth in Title IV of the Civil Rights Act of 1964. App. 41a. Section 1682 of Title IX and Section 2000d-1 of Title IV are identical, except for a reference to each respective law. *Compare* 20 U.S.C. § 1682 *with* 42 U.S.C. § 2000d-1. Therefore, it is appropriate for the Court's interpretation of this section of Title IX in *Gebser* to apply to Section IV of the Civil Rights Act and by reference to such, the Rehabilitation Act.

For the reasons set forth below, the Eleventh Circuit's interpretation of *Gebser* should be adopted by this Court, as it is the most consistent with the *Gebser* standard. *See Liese*, 701 F.3d at 349-50.

II. The Circuit Split Between the Second Circuit and Eleventh Circuit's Interpretation of *Gebser* Imposes Contrasting Definitions of "Official"

To explain "deliberate indifference," the Second Circuit applied this Court's interpretation of deliberate indifference in *Gebser v. Lago Vista Independent School District*. *Loeffler*, 582 F.3d at 275-76 (citing *Gebser*, 524 U.S. at 290-91). While the Second Circuit qualified such

an application in *Loeffler*, it expressly applied the *Gebser* definition to the Rehabilitation Act in this case. App. 11a. *Gebser* provides that the appropriate person to rectify discrimination is "an official who at a minimum [1] has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf [2] has actual knowledge of discrimination in the recipient's programs and [3] fails adequately to respond." *Gebser*, 524 U.S. at 290. Additionally, the Second Circuit requires indifference that reflects a deliberate choice, not just negligence or bureaucratic inaction. *Loeffler*, 582 F.3d at 276 (quoting *Reynolds v. Guiliani*, 506 F.3d 183, 193 (2d Cir. 2007)).

The Eleventh Circuit has also adopted the *Gebser* standard for monetary claims under the Rehabilitation Act. *Liese,* 701 F.3d at 349. However, unlike the Second Circuit, the Eleventh Circuit explained the meaning of "official." It wrote, "*Gebser* did not define an official to be a person who has knowledge of a violation and the authority to correct it; rather, *Gebser* stated that, for liability to attach, there must be (1) 'an official' who, (2) 'at a minimum,' has the requisite knowledge and authority." *Id.* (quoting *Gebser,* 524 U.S. at 290). This two-step inquiry, first into who is an official, then second, if he or she has knowledge and authority to correct discrimination, is contrary to the Second Circuit's interpretation of *Gebser*. The Second Circuit determines who is an official based on his or her knowledge and authority. *See* App. 11a.

The Eleventh Circuit further elaborated that based on the natural reading of *Gebser*, an official is one "whose actions can fairly be said to represent the action of the organization" and who "enjoys substantial supervisory

authority within an organization's chain of command so that, when dealing with the complainant, the official had complete discretion at a 'key decision point' in the administrative process." *Liese,* 701 F.3d at 350 (citing *Doe v. School Bd. of Broward Cty.*, 604 F.3d 1248, 1256-57 (11th Cir. 2010); *see also Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1135 (11th Cir. 2019). Put in a more systematic formula to compare the Second and Eleventh Circuit interpretations of *Gebser*:

- Second Circuit
  - Knowledge + authority = official
  - Official = monetary damages
- Eleventh Circuit
  - Substantial supervisory authority = official
  - Official + knowledge + authority = monetary damages

Compare App. 12a *with Liese*, 701 F.3d at 349-50.

In the case below, the Second Circuit explicitly refused to adopt the Eleventh Circuit's definition of "official" as someone who enjoys "substantial supervisory authority", writing that such a definition is "unspecific, and unhelpful in the setting of a large, ramified institution where many patients and visitors do not interact with a supervisor, or know how to identify one, much less how to find one." App. 15a. In rejecting the definition, the Second Circuit cited *Sunderland v. Bethseda Hospital, Inc.*, an unreported decision that held nurses could exercise supervisory authority. *Sunderland v. Bethseda Hosp., Inc.*, 686 F. App'x 807, 816 (11th Cir. 2017). However, in its recent *Silberman* decision, the Eleventh Circuit clarified the authority of nurses, reiterating the standard from *Liese* that nurses are not officials. *Silberman*, 927 F.3d at 1135.

Additionally, as opposed to the Eleventh Circuit's definition that an official is someone who "ha[s] *complete* discretion at a 'key point' in the administrative process", the Second Circuit decided that an official is "someone who has *some* discretion at a key point in the administrative process." *Compare* App. 16a *with Liese*, 701 F.3d at 350 (emphasis added).

The Second Circuit's analysis does not provide clarification on this issue, as anyone in an entity has some discretion at a key point in the administrative process. For example, a maintenance person could have discretion to decide the order in which to respond to complaints. If the maintenance person decides to fix a broken light before a detached shower handrail and someone falls in the shower because they do not have a handrail, the maintenance person could be considered an official. Practically, it is hard to believe that this maintenance person should be considered an official because they decided to repair the light instead of the handrail.

The Second Circuit also opined that "given the hierarchy of a hospital, the key decision point will vary with the decision to be made, and the official or policymaker with discretion to make the decision will vary accordingly." App. 16a. However, this broad language does not augment the Second Circuit's original interpretation of the *Gebser* standard. It simply provides the practical result of applying its interpretation: there is no way to anticipate who will subject a hospital to liability, as it could be anyone in the hospital, given the circumstance.

After its decision in this case, the definition of an official in the Second Circuit is someone who has the

authority to correct the alleged discrimination, has actual knowledge of the discrimination, and fails to adequately to respond. *Id.* at 12a (providing that the individual must simply be "someone at the hospital."). This individual must also have "some discretion at a key point in the administrative process" such that their "indifference reflect[s] a 'deliberate choice among various alternatives" and [is] not inferred from mere 'negligent or bureaucratic inaction." *Id.* (quoting *Loeffler*, 582 F.3d at 276).

III. The Second Circuit's Standard is Contrary to the Plain Meaning of *Gebser*

In the *Gebser* opinion, this Court wrote that its central concern is that the "receiving entity of federal funds has notice that it will be liable for a monetary award." *Gesber*, 524 U.S. at 287. Therefore, the decision to not remedy the violation must be an official one by the receiving entity. Otherwise, the receiving entity would be liable for damages not for its own official decision, but instead for its employees' independent actions. *Id.* at 290-91.

Under the plain language of *Gebser*, "an appropriate person" needs notice. *Id.* at 290. The "'appropriate person' is, at a minimum, an official of the recipient entity with authority to take corrective action." *Id.* Therefore, the individual must firstly be an official, then secondly, have authority to take corrective action. *Contra* Second Circuit Decision. To read these requirements otherwise would impose monetary liability on a recipient entity for the actions of anyone who has the ability to correct the discrimination.

For example, hospitals frequently extend privileges to private physicians to use the hospital's facilities. These physicians must follow the policies and procedures of the hospital, including those established pursuant to the Rehabilitation Act. However, privileged physicians are not employees of the hospital.

Under the Second Circuit's definition of "officer," if a privileged physician had knowledge of discrimination, had the ability to correct it, and failed to do so, the privileged physician would be considered an officer of the hospital. *See* App. 12a. The hospital could then be held liable for monetary damages.

A strict reading of *Gebser*, or alternatively, of the Eleventh Circuit's standard, would not impose liability in the same scenario. *Gebser* provides that a receiving entity should be liable only for its official decisions, not for "its employees' independent actions." *Gebser*, 524 U.S. at 290-91. A privileged physician is not even an employee, and therefore, his or her actions should not be considered official or impose monetary liability onto an entity. To hold otherwise would be more egregious imposition of monetary liability than for an employee's independent actions. Under the Eleventh Circuit's standard, liability would not be imposed, as a privileged physician is not someone who "enjoys substantial supervisory authority within an organization's chain of command." *Liese*, 701 F.3d at 350. A privileged physician is not within the chain of command—he is not even an employee.

Another example is a nurse. Under the Second Circuit's definition of official, a nurse generally would qualify if she had knowledge of the discrimination, had

the ability to correct it, and failed to do so. *See* App. 12a. Under the *Gebser* standard or the Eleventh Circuit standard, a nurse would not qualify as an official. Under *Gebser*, nurse is an employee of the hospital, whose actions could be independent of the hospital and insufficient to give the hospital notice of a potential suit. *See Gebser*, 524 U.S. at 290-91. Within the Eleventh Circuit, a nurse is not an official unless he or she has substantial supervisory authority such that he or she enjoys complete discretion over whether to provide an accommodation. *Silberman*, 927 F.3d at 1135. As the examples of privileged physicians and nurses demonstrate, the Second Circuit's definition of "official" is "so broad as to encompass 'every single employee' who is in a position to grant or deny an individual." *Silberman*, 927 F.3d at 1136 (quoting *Liese*, 701 F.3d at 349). Therefore, the requirement under *Gebser* that there be a decision by an official is essentially eviscerated by the Second Circuit's decision. *Id.*

Furthermore, the Second Circuit's footnote regarding policymakers imposes absolute monetary liability on a recipient entity. The footnote provides that if the policymaker, in drafting the policy, does not provide authority to correct the discrimination, the entity may be held monetarily liable. App. 16a. An entity cannot avoid liability by withholding the power to correct discrimination. *Id.* However, the Second Circuit also imposes monetary liability if an individual has the knowledge and authority to remedy the discrimination, and failed to do so. *Loeffler*, 582 F.3d at 276. Therefore, there is no path to avoid liability. An entity will either be held liable for (1) a policymaker's failure to provide authority to correct the discrimination, as an entity cannot avoid liability by withholding authority, or (2)

the individual's failure to use it, as the Second Circuit's definition encompasses every employee who has authority to correct discrimination.

Based on the forgoing, the Second Circuit has essentially adopted a vicarious liability standard, changing an award of compensatory damages from an exception to the rule. *See Silberman*, 927 F.3d at 1136; *Santiago v. Puerto Rico*, 655 F.3d 61, 75 (1st Cir. 2011) ("Title IX does not sweep so broadly as to permit a suit for harm-inducing conduct that was not brought to the attention of someone with authority to stop it."). To eviscerate the official decision requirement imposes liability unintended by Congress. *Gebser*, 524 U.S. at 287. "It does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs." *Id.* If the Second Circuit definition stands, entities can and will be held liable to private litigants over and above their federal funding. Therefore, there is a compelling need to strike down the Second Circuit's erroneous interpretation of *Gebser*.

IV. This Case is the Ideal Vehicle for Deciding the Questions Presented

This case is an optimal vehicle for deciding the questions presented. The circuit courts set up competing constructions of the same statute, and further circuit splitting is inevitable. Considering the recent decisions from the Second and Eleventh Circuits that differ in the definition of "official" and the Second Circuit's erroneous interpretation of *Gebser*, this Petition is submitted at the ideal time. App. 1a-17a; *Silberman,* 927 F.3d 1123.

Kaleida Health would have prevailed below under the established law in the Eleventh Circuit; instead summary judgment was denied because the case arose in the Second Circuit. Ms. Biondo never testified she requested an interpreter from her doctors or a supervisor, but rather only from hospital staff, including unnamed nurses. App. 30a. As discussed above, requests to and denial by nurses are insufficient under the Eleventh Circuit and *Gebser* standard to be construed as actions by an "official." Therefore, Kaleida Health urges this Court to grant the Writ of Certiorari and set parameters for monetary damages under the Rehabilitation Act. Specifically, it requests this Court adopt the Eleventh Circuit's definition of "official."

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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November 18, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 19, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 2018

NO. 18-1375

KATHLEEN BIONDO,

Plaintiff-Appellant,

v.

KALEIDA HEALTH, D/B/A BUFFALO GENERAL MEDICAL CENTER,

Defendant-Appellee.

May 10, 2019, Argued
August 19, 2019, Decided

Before: JACOBS, LEVAL, Circuit Judges; FURMAN[*], District Judge.

DENNIS JACOBS, *Circuit Judge*:

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[*] Judge Jesse M. Furman, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

Kathleen Biondo, who is profoundly deaf, appeals from a judgment dismissing on summary judgment her claim that a hospital violated the Rehabilitation Act by failing to provide an American Sign Language ("ASL") interpreter. We conclude that material issues of fact preclude summary judgment.

In 2014, Biondo sought treatment at the Buffalo General Medical Center ("BGMC") for recurrent episodes of fainting. She and her husband, who is not hearing impaired, unsuccessfully requested an ASL interpreter from hospital staff several times during her six-day stay. Biondo has alleged violations of Section 504 of the Rehabilitation Act (the "RA"), Title III of the Americans with Disabilities Act (the "ADA"), the New York State Human Rights Law (the "NYSHRL"), and the City of Buffalo Antidiscrimination Law (the "CBAL"). The United States District Court for the Western District of New York (Geraci, *J.*) granted BGMC's motion for summary judgment as to the RA and ADA claims and dismissed Biondo's state and municipal law claims without prejudice. Biondo appeals the dismissal of her RA claim for damages, having abandoned her claims for injunctive and declaratory relief pursuant to the RA and ADA.

This appeal concerns whether and when hospital staff members may be considered to be acting as 'officials' or 'policymakers' of the hospital so that their conduct may be attributed to the hospital and thereby establish the plaintiff's right to damages on the ground that the defendant institution was 'deliberately indifferent' to a violation of the RA. BGMC's internal policies require the provision of interpreter services in certain situations,

including eliciting medical history, explaining treatment, and giving discharge instructions. Because the record contains evidence that the hospital staff at issue had knowledge of the deprivation of Biondo's right to an interpreter, had the power to cure that violation, and failed to cure it, summary judgment in favor of BGMC was inappropriate.

BACKGROUND

The Hospital Stay. Biondo, who was born deaf, reads at a fourth-to-fifth grade level, has unintelligible speech, and cannot lipread well. She is, however, fluent in ASL. Her husband has no training in ASL and communicates with his wife in a combination of ASL and private signs and signals.[1] The Biondos also communicate, with some limitations, via text message.

Biondo was admitted to BGMC on September 21, 2014, after she experienced several fainting episodes,

1. The district court found, citing no evidence, that Mr. Biondo "knows ASL." App'x 179. However, while the single linguistic evaluation of Mr. Biondo in the record, performed by Dr. Judy Shephard-Kegl, found that he has "good conversational signing skills (Basic Interpersonal Communication Skills[)] (BICS) in ASL," it also found that he lacks "Cognitive Academic Language Proficiency (CALP) in ASL," and that "[h]is signing is not ASL" but rather "a coding of English into signing." *Id.* at 83. Moreover, while the district court noted that Mr. Biondo has "had experience interpreting for his wife at some of her past medical appointments," *id.* at 179 it did not acknowledge Shephard-Kegl's conclusion that he is "neither competent, nor qualified, to interpret for his wife in a medical setting." *Id.* at 83. The district court's observations fail to

tightness in her chest, and skipped heartbeats. Biondo's hospital admission documentation solicits "Preferred Mode of Communication"; the form indicates "Written." Nevertheless, on the day of their arrival at BGMC, both Biondos made requests for an ASL interpreter from several hospital staff: the attendant working at the arrival desk; nurses who escorted Biondo to a room and checked her vital signs; nurses in the emergency room; and nurses in the department to which Biondo was admitted. During her six-day hospitalization, she communicated with staff mostly by writing and through her husband (over his objection) when he visited.

Biondo testified that she "kept requesting an interpreter, and they . . . kept saying, 'we will, we will, we will.'" App'x 227. Biondo made these requests by pointing at her left ear, by writing, and through her husband on his visits. No interpreter was provided during Biondo's hospitalization. At some point, the Biondos gave up.

During her stay, Biondo provided and received information on her condition and underwent medical procedures, without an interpreter. The day after she checked in, Dr. Oliva Balan obtained her medical history with Mr. Biondo as interpreter. No interpreter was present when Dr. Donald Switzer examined Biondo for a cardiology consult or when Nurse Edwin Sewastynowicz performed a vascular invasive pre-procedure record,

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"resolv[e] all ambiguities and draw[] all reasonable factual inferences in favor of the party against whom summary judgment is sought." *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017).

which included explanations of treatments and an opportunity for Biondo to ask questions. That same day, Biondo underwent a tilt table test, in which the patient is fixed to a table that is tilted until the patient faints. Before the test began, Biondo again unsuccessfully asked for an interpreter. Also before the test, Biondo was provided a generic informed consent form with a description of the procedure to be administered:

> [Y]ou will be placed in an upright position and your heart rate and blood pressure will be monitored. Medication will be given to help you relax. The oxygen in your blood will be monitored.

S. App'x 38. The form also contained a page of authorizations and waivers. Biondo testified that she signed the consent form and underwent the test without understanding what she was signing or what the test entailed. Biondo took the test without her husband present, and testified that she was scared, cried, and (at one point) asked Dr. Switzer if she was going to die.

On September 24, the fourth day, Biondo was visited in her room by Nurse Jennifer DiPasquale, the nurse manager of the unit to which Biondo was admitted. DiPasquale testified that she communicated with Biondo via written notes and specifically asked Biondo whether that was sufficient:

> A. Whether I wrote it, stated it, I don't remember — I do remember posing the

> question, "Is this okay with you to communicate like this?" And she said yes.
>
> Q. Okay. So you have a specific memory of writing to Ms. Biondo, "Is it okay to communicate with you like this?"
>
> A. I do.

App'x 204. Biondo does not specifically dispute this account, though she disputes generally that she ever stated a preference for written communication and claims that she was forced to use writing for lack of options. On September 25, Biondo met with a physical therapist, with whom she communicated in writing; but Biondo testified that she frequently pointed at words and shook her head to indicate that she did not understand. When Biondo was discharged on September 26, she communicated in writing (without an interpreter) with Dr. Balan and with a discharge planner who gave her discharge materials that Biondo signed.

BGMC's Interpreter Policy. BGMC has an "Interpreter/Translation/Teletypewriter" policy (the "Interpreter Policy") that governs the "process and procedure for identifying and assessing the language needs of Kaleida Health [BGMC] patients." S. App'x 163. It states:

> Kaleida Health staff must inform the . . . patient of his/her right to free . . . Deaf/Hearing Impaired services. These services are provided to the patient, family member and/or companion at no cost.

Id. The policy specifies that interpreter services "must be provided" in several circumstances, including the explanation of procedures, tests, treatment, treatment options, discharge instructions, and determination of a patient's medical history. *Id.* As to responsibility for implementation:

> The department where the patient presents is responsible for initiating interpreter services as outlined in this policy. Any department referring a . . . Deaf/Hearing Impaired patient to another Kaleida department must notify the receiving department of the patient's identity, the language s/he speaks, and approximate arrival time.

Id. at 164. The policy advises that teletypewriter machines are available, and includes the names and phone numbers of three "Kaleida Health approved community vendor organizations" that provide "community face-to-face interpreters," from which "Departments may request an interpreter." *Id.* These vendors include Deaf Adult Services, for which the policy provides an additional phone number in case "an emergent situation arises and an interpreter . . . is needed after normal business hours." *Id.* at 165. As to interpreting services by others:

> If the patient declines the offer of an interpreter and requests that a family member, friend, or other party, facilitate communication on his/her behalf, such a person may be used only if the staff member is reasonably comfortable that the person will provide effective communication on

> the patient's behalf. Staff must request that the patient or legal representative sign a "Waiver of Interpreter/Translator Services," in the patient's primary language.

Id. No waiver was obtained from Biondo for the use of her husband as an interpreter.

Procedural History. Biondo sued BGMC in the Western District of New York on April 24, 2015, alleging claims under the ADA, the RA, the NYSHRL, and the CBAL, and seeking damages, attorney's fees, injunctive relief, and a declaratory judgment. Following the close of discovery, the district court granted BGMC's motion for summary judgment. The district court dismissed the RA damages claim because Biondo failed to establish deliberate indifference by showing that a BGMC official was aware of a potential violation of her rights, and failed to respond adequately. The court found that DiPasquale was the only doctor or nurse whose indifference could be attributed to BGMC, but that the record did not support a finding that DiPasquale had any knowledge of any such violation. *See Biondo v. Kaleida Health*, No. 15-cv-362 (FPG) (LGF), 2018 U.S. Dist. LEXIS 60789, 2019 WL 1726533, at *6 (W.D.N.Y. Apr. 10, 2018) . The district court also ruled that Biondo lacked standing for injunctive relief because she failed to demonstrate an ongoing or likely future injury. 2018 U.S. Dist. LEXIS 60789, [WL] at *7. Her stated reluctance to use BGMC was in part premised on its failure to supply ASL translation services.[2] Having

2. In concluding that Biondo had "not shown that she is likely to visit Defendant in the future," the district court relied in part on

dismissed Biondo's federal claims, the district court declined to exercise supplemental jurisdiction over the NYSHRL and CBAL claims. *Id.*

DISCUSSION

We review a grant of summary judgment de novo, "construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in his favor." *McElwee v. Cty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012). A moving party is entitled to summary judgment if the record reveals "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Biondo's deposition testimony "that she would only come back to Defendant if she had 'no choice.'" *Biondo*, 2018 U.S. Dist. LEXIS 60789, 2019 WL 1726533 at *7. The issue is not before us on appeal, and the other grounds cited by the district court may have sufficed. However, Biondo's relevant deposition testimony, construed favorably to her, was that she has some interest in BGMC's services but is reluctant to use them in light of BGMC's inadequate interpretive services. Biondo made precisely this argument in her opposition to BGMC's motion for summary judgment. It would be error to conclude that a plaintiff lacks standing to seek an injunction solely because the continuation of the violation for which she seeks redress will dissuade her from using the infringing service. *See Friends of the Earth, Inc. v. Laidlaw Environment Services (TOC), Inc.*, 528 U.S. 167, 182, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).

Appendix A

The Rehabilitation Act

Section 504 of the RA prohibits a program or activity receiving federal funds from excluding or discriminating against persons based on disability. *See* 29 U.S.C. § 794(a). The implementing regulations provide additional requirements. First, "[a] recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care." 45 C.F.R. § 84.52(c). Second, "[a] recipient . . . that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question." 45 C.F.R. § 84.52(d)(1). While the RA "does not ensure equal medical treatment," it does require "equal access to and equal participation in a patient's own treatment." *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009).

To establish a prima facie violation of the RA, Biondo must show that she (1) is a "handicapped person" as defined by the RA; (2) is "otherwise qualified" to participate in the offered activity or benefit; (3) was excluded from such participation solely by reason of her handicap; and (4) was denied participation in a program that receives federal funds. *Id.* Monetary damages may be recovered only upon a showing of intentional discrimination. Intentional discrimination does not require a showing of animosity or ill will; it may be inferred when a qualifying "official," *id.* at 276, or "policymaker," *id.* at 275 (quoting *Bartlett v. New*

York State Bd. of Law Examiners, 156 F.3d 321, 331 (2d Cir. 1998)), "acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result," *id.* (quoting *Bartlett*, 156 F.3d at 331).

The standard for deliberate indifference is set out in *Loeffler*, in which a panel of this Court looked to the Supreme Court's holding in the Title IX context that damages are not recoverable unless

> an official who at a minimum [1] has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf [2] has actual knowledge of discrimination in the recipient's programs and [3] fails adequately to respond.

Id. at 276 (quoting *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998)). *Loeffler* explained that such indifference must reflect a "deliberate choice among various alternatives" and may not be inferred from mere "negligence or bureaucratic inaction." *Id.* (quoting *Reynolds v. Giuliani*, 506 F.3d 183, 193 (2d Cir. 2007)).[3]

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3. The facts of *Loeffler* have several points of similarity to Biondo's claim: a deaf patient undergoing heart surgery (and his wife) unsuccessfully sought an interpreter; one request was made to the surgeon. *Id.* at 272. *Loeffler* identified a question of fact as to deliberate indifference because "persons at the Hospital had actual knowledge of discrimination against the [plaintiff], had authority to correct the discrimination, and failed to respond adequately." *Id.* at 276.

Violation of the Rehabilitation Act. The district court acknowledged that "[w]hether [Biondo's] rights were violated under the RA is likely a triable issue of fact." *Biondo*, 2018 U.S. Dist. LEXIS 60789, 2018 WL 1726533 at *5. BGMC does not dispute that Biondo was handicapped under the RA and was otherwise qualified to benefit from the hospital's services, or that the hospital receives federal funds. While the RA does not in terms require the use of interpreters, a reasonable jury could find, given the circumstances, that the failure to provide one deprived Biondo of "an equal opportunity to benefit from" the hospital's services given her limitations with written English, the length of her hospital stay, and the procedures performed and information imparted during her stay. 45 C.F.R. § 84.52(d)(1). BGMC does not persuasively argue otherwise.

Deliberate Indifference. Having determined that the RA may have been violated, we consider compensatory damages, which are available only if a defendant was deliberately indifferent to the potential violation of the RA in that someone at the hospital "had actual knowledge of discrimination against the [plaintiff], had authority to correct the discrimination, and failed to respond adequately." *Loeffler*, 582 F.3d at 276.

During her hospitalization, both before and after her interaction with Nurse DiPasquale--whose role we need not address here--Biondo interacted with a number of other doctors, nurses, and staff that she claims were deliberately indifferent. BGMC argues that Biondo failed to argue below that they are officials or policymakers

whose indifference may be attributed to BGMC, and thus waived the point. True, Biondo's summary judgment briefs did not specifically and expressly argue that BGMC staff were officials. But BGMC did not address the issue either, *see* Def.'s Mem. of Law at 11-15, No. 15-CV-362 (S.D.N.Y. Jan. 1, 2017) No. 51; Def.'s Reply Mem. of Law at 7-10, No. 15-CV-362 (S.D.N.Y. March 17, 2017) No. 55, and it was BGMC's obligation to show entitlement to summary judgment, Fed. R. Civ. P. 56(a); *see Nick's Garage*, 875 F.3d at 113-114. The issue of who was (or was not) an official was hardly discussed at all: Biondo argues in one sentence that DiPasquale was "in a position of 'authority to correct the discrimination.'" App'x 77 (quoting *Loeffler*, 582 F.3d at 276). Biondo's failure to raise the argument therefore reflects the parties' focus on other issues. In any event, Biondo *did* argue below that "BGMC staff, doctors and nurses, knew Ms. Biondo was deaf and yet failed to offer her a sign language interpreter," App'x 76, that "the conduct of BGMC's staff amounts to deliberate indifference," *id.*, and that the staff "failed to adhere to" BGMC's policies on interpreters, *id.; see also id.* at 78. In these circumstances, we cannot agree that the issue was waived.

Turning to the merits of the argument, the record supports an inference that the staff had actual knowledge of the potential RA violation. Biondo and her husband repeatedly asked nurses for an interpreter when she first arrived at the hospital; and Biondo continued to request an interpreter and expressed her dissatisfaction with written communication by, for example, pointing to words she didn't understand and shaking her head.

It is uncontested that the hospital did not take action in response to the Biondos' requests. In addition, there is evidence that the doctors and nurses at BGMC had authority to call for an interpreter.

First, the Interpreter Policy provides that "[t]he department where the patient presents is responsible for initiating interpreter services," S. App'x 164, and requires a department referring a deaf patient to notify the receiving department of the disability. That leaves uncertain which employee in the department has *responsibility* for ordering an interpreter. However, the Policy lists phone numbers for contacting interpreter services, indicating that *authority* to order an interpreter is widely dispersed. *Id.* at 165.

Second, DiPasquale's testimony further evidences that doctors and nurses had the authority to provide an interpreter for Biondo. DiPasquale testified that if a staff member determined that a patient could not communicate effectively, "they would have to go to the [Interpreter Policy] and get an interpreter and inform the patient that--that we would provide that." App'x 198-99. Asked "how do staff go about securing a sign language interpreter through vendors," DiPasquale answered, "[e]mbedded in the policy is a phone number for those services to contact." *Id.* at 194. She also testified that the Interpreter Policy is accessible on BGMC's intranet site, which employees can access from any computer within the hospital. According to DiPasquale, BGMC's nurses and doctors were as fully empowered to correct the violation as she was.

Taken together, the Interpreter Policy and DiPasquale's testimony create a dispute of fact as to whether BGMC hospital staff--including its doctors and nurses--had the authority to correct the deprivation of Biondo's rights by calling or requesting an interpreter for her.

BGMC argues that none of the BGMC staff who were arguably aware of the deprivation was a person whose deliberate indifference could give rise to liability for damages on behalf of BGMC. That is, none was an "official," *Loeffler*, 582 F.3d at 276 (quoting *Gebser*, 524 U.S. at 290), or a "policymaker," *id.* at 268 (quoting *Bartlett*, 156 F.3d at 331). BGMC emphasizes the Eleventh Circuit's definition of an official: "someone who enjoys substantial supervisory authority within an organization's chain of command so that, when dealing with the complainant, the official had complete discretion at a 'key decision point' in the administrative process." *Liese v. Indian River County Hospital District*, 701 F.3d 334, 350 (11th Cir. 2012); *see also, id.* ("[T]he purpose of the 'official' requirement is to ensure that an entity is only liable for the deliberate indifference of someone whose actions can fairly be said to represent the actions of the organization.").

We decline to adopt the Eleventh Circuit's definition insofar as it includes the requirement that a person enjoy "substantial supervisory authority" within an organization. The requirement is unspecific, and unhelpful in the setting of a large, ramified institution where many patients and visitors do not interact with a supervisor, or know how to identify one, much less how to find one.

In any event, it appears to be a sufficiently flexible requirement that the Eleventh Circuit has applied it to include nurses. *See Sunderland v. Bethesda Hosp., Inc.*, 686 Fed. Appx. 807, 816 (11th Cir. 2017) (finding a dispute of fact as to whether hospital nurses exercised supervisory authority when they decided what interpretative aids are appropriate for a deaf patient, had authority to take corrective measures, and often were the sole means by which deaf patients accessed an interpretive aid).

On the other hand, we agree that an "official" or "policymaker" must be someone who has some "discretion at a 'key decision point' in the administrative process." *Liese*, 701 F.3d at 350. Given the hierarchy of a hospital, the key decision point will vary with the decision to be made, and the official or policymaker with discretion to make the decision will vary accordingly. But that observation is already embedded in our requirement that an official have "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf." *Loeffler*, 582 F.3d at 276. We see no reason to disturb the test set out in *Loeffler*.[4]

4. We do not imply that a hospital could absolve itself of liability for damages by failing to empower staff members who have contact with patients to cure potential violations of the RA, such as by failing to empower front-line staff to procure a necessary interpreter. Indeed, a hospital might be liable precisely because its policymakers fail to put in place a policy that would reasonably enable a patient to obtain the relief guaranteed by the RA by complaining to the staff with whom she has contact. In that circumstance it might be argued that the "policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy." *Loeffler*,

Finally, the district court ruled that the failure to provide Biondo with an interpreter is attributable to "negligence or bureaucratic inaction." *Biondo*, 2018 U.S. Dist. LEXIS 60789, 2018 WL 1726533 at *6. That may be so, and a jury may so find. But the finding is not compelled. A jury might also find that certain staff members observed Biondo struggling to communicate, knew that she chiefly used ASL and lacked the education to communicate adequately in writing, had the authority to call for an ASL interpreter, and deliberately failed to do so notwithstanding repeated requests. The facts of this case are arguably worse than those of *Loeffler*, where at least one hospital employee "made some efforts . . . to find an interpreter." 582 F.3d at 277.

For the foregoing reasons, the judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

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582 F.3d at 275 (quoting *Bartlett*, 156 F.3d at 331). That argument is especially strong in cases such as this where a regulation expressly addresses a particular need, *see* 45 C.F.R. § 84.52(d)(1) (stating that subject hospitals "shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills"), effectively putting hospital policymakers on notice that they must ensure the hospital's policies are reasonably capable of meeting that need.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED APRIL 10, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case # 15-CV-362-FPG-LGF

KATHLEEN BIONDO,

Plaintiff,

v.

KALEIDA HEALTH D/B/A/ BUFFALO GENERAL MEDICAL CENTER,

Defendant.

April 10, 2018, Decided
April 10, 2018, Filed

DECISION AND ORDER

INTRODUCTION

Plaintiff Kathleen Biondo ("Plaintiff") brings discrimination claims against Defendant Kaleida Health d/b/a/ Buffalo General Medical Center ("Defendant"), alleging that Defendant failed to provide her with sign language interpretive services during a September 21-26, 2014 stay at the hospital. ECF No. 1. Plaintiff seeks

monetary, declaratory, and injunctive relief under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("RA"); Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.*; the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. L § 290 *et seq.*; and the City of Buffalo Antidiscrimination Law, Buffalo Code pt. II, § 154-9 *et seq.* Defendant has moved for summary judgment. ECF No. 46. For the reasons stated below, Defendant's Motion for Summary Judgment is GRANTED in its entirety.

BACKGROUND[1]

I. Plaintiff's Experience at Buffalo General Medical Center

Plaintiff is a deaf individual who primarily communicates in American Sign Language ("ASL"). She can read and write English but claims to do so with limited proficiency. On Sunday, September 21, 2014, Plaintiff felt lightheaded and passed out on the floor of her home. Her husband, Andrew Biondo, drove her to Defendant's emergency room ("ER"). Plaintiff and her husband arrived at the ER around 10:30pm and requested an ASL interpreter upon check-in. According to Plaintiff and her husband, they both told nurses that Mr. Biondo could not translate for Plaintiff because there would "be misunderstandings." K. Biondo Dep. Trans. 227:14-15. Later in the evening, Dr. Michael Tinnesz assessed

1. The following facts are undisputed and are taken from each party's Statement of Material Facts (ECF Nos. 50, 57) unless otherwise noted.

Plaintiff and noted that Plaintiff "translates through her husband at the bedside with sign language" and that she was "awake, alert, and appropriate, answering all questions . . ." ECF No. 50-1 at 58. The doctor noted that he would send off routine labs and anticipated that Plaintiff would be admitted to the hospital. *Id.*

At some point after Dr. Tinnesz's assessment, Mr. Biondo asked the nurse examining Plaintiff when the ASL interpreter would arrive. The nurse informed Mr. Biondo that "they couldn't get a hold of anybody" because of the late hour. A. Biondo Dep. Tr. 58: 4-6. Mr. Biondo continued to follow up with the nurses about an ASL interpreter, but an interpreter never came. Around 3:00am on Monday, Plaintiff was admitted to the hospital as an inpatient. In the absence of a professional interpreter, Mr. Biondo, who knows ASL and had experience interpreting for his wife at some of her past medical appointments, interpreted for his wife but felt uncomfortable and at times ill-equipped to fully convey to his wife everything that the doctors were telling him.

Later that morning, Plaintiff underwent a table tilt test, which helps diagnose patients who feel faint or lightheaded. A nurse explained the test to Plaintiff before administering it, and Plaintiff signed a consent form that also explained the test in non-technical language. Plaintiff passed out during the test and became distraught when she woke up. The doctor comforted Plaintiff and told her she had a vasovagal condition. He explained the diagnosis, and a nurse gave her printed materials that further explained vasovagal conditions.

Appendix B

On Tuesday, Mr. Biondo returned to work while Plaintiff stayed in the hospital. In Mr. Biondo's absence, Defendant's staff communicated with Plaintiff through written notes, because her medical records indicated that written English was her preferred method of communication and did not indicate that Plaintiff ever requested an interpreter. ECF No. 50-1 at 134. Plaintiff reported feeling light-headed, and a nurse gave her medication that abated her condition. According to Plaintiff, she kept asking the nurses for an interpreter, and they kept saying "we will, we will, we will." K. Biondo Dep. Tr. 173: 6-7. When Mr. Biondo arrived after work, he again asked a nurse about getting an interpreter. The nurse told him that none were available. Mr. Biondo stopped asking about interpreters out of frustration.

On Wednesday, Mr. Biondo again went to work while Plaintiff stayed at the hospital. Plaintiff was transferred to a new unit of the hospital. Nurse Manager Jennifer DiPasquale, who oversaw the unit's nursing practice, introduced herself to Plaintiff and asked if she needed anything. J. DiPasquale Dep. Trans. 91:2-5. Plaintiff "started attempting to speak to" DiPasquale, at which point DiPasquale noticed that Plaintiff was hearing impaired and retrieved a pen and paper. *Id.* DiPasquale wrote to Ms. Biondo, "Is it okay to communicate with you like this?" *Id.* at 91:15. Plaintiff confirmed that it was, and then Plaintiff continued writing notes back and forth with DiPasquale about her treatment. DiPasquale did not offer Plaintiff an ASL interpreter or ask if she had already been offered one because Plaintiff indicated that note writing was sufficient. *Id.* at 93:3-11.

Later that day, a doctor requested an endocrinology consult to rule out adrenal insufficiency as a cause of Plaintiff's symptoms. The doctor completing the consult communicated with Plaintiff via paper and pen, but Plaintiff said she was frustrated and did not understand what was going on. Throughout the day, Plaintiff repeatedly grew frustrated and would shake her head when she did not understand something, but she did not write any notes saying that she did not understand or that written communication was insufficient. Mr. Biondo briefly stopped by the hospital to visit Plaintiff after work on Wednesday but then left to fill in for Plaintiff as a volunteer at St. Mary's School for the Deaf. He did not speak with any doctors or ask anyone for an interpreter that evening. A. P. Biondo Dep. Trans. 101-111.

Plaintiff remained in the hospital on Thursday, September 25, 2014 and again wrote notes back and forth with hospital staff. During a physical therapy session, Plaintiff was "so upset" to communicate in writing with the therapist, and she would point to words in the therapist's written notes and shake her head because she did not understand them. Even when the therapist clarified his writing with more simple terms that she could understand, Plaintiff was still upset because "that [was] not satisfactory to [her.]" K. Biondo Dep. Trans. 189:1-4.

Finally, on Friday, September 26, 2014, Plaintiff saw her "morning doctor," who told her that she could go home. ECF No. 50-3 at 192. Plaintiff signed her discharge instructions, which were written in lay-terms, and then left the hospital in the afternoon.

II. Defendant's Interpreter Policy

Pursuant to Defendant's policy, staff must inform hearing impaired patients of their right to "free language interpretation or Deaf/Hearing Impaired services." ECF No. 50-20 at 1. Interpreter services "must be provided in all circumstances when a person is unable to speak, read, write or understand the English language at a level that permits him/her to interact effectively with health providers to ensure effective communication in rendering appropriate medical treatment." *Id.* Additionally, if staff use a family member or companion to interpret, they should have the patient sign a waiver of interpreter services. ECF No. 50-20 at 3.

According to DiPasquale, who investigated Plaintiff's hospital stay after she filed a formal complaint, staff members did not follow Defendant's interpretive service policy because they did not notify Plaintiff of her right to free interpretation services. J. DiPasquale Dep. Tr. 183. DiPasquale also found that staff violated the policy by failing to obtain a signed waiver of interpretive services from Plaintiff. *Id.* at 184.

DISCUSSION

I. Legal Standard

Summary judgment is appropriate if "the pleadings, the discovery and disclosure material on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment

as a matter of law." *Sousa v. Roque*, 578 F.3d 164, 169 (2d Cir. 2009) (quoting Fed. R. Civ. P. 56). A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is "material" if it "might affect the outcome of the suit under governing law." *Id.* The function of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. The court resolves all ambiguities and draws all factual inferences in favor of the nonmovant, but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (citing Fed. R. Civ. P. 56).

To defeat summary judgment, therefore, nonmoving parties "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), and they "may not rely on conclusory allegations or unsubstantiated speculation." *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001) (internal quotation marks omitted). At the summary judgment stage, a nonmoving party "must offer some hard evidence showing that its version of the events is not wholly fanciful." *D'Amico v. N.Y.C.*, 132 F.3d 145, 149 (2d Cir.1998).

II. Rehabilitation Act Claim

Plaintiff raises a claim for monetary damages under the RA. Section 504 of the RA provides that no "otherwise

qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The RA's implementing regulations require hospitals receiving federal funds to "establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care." 45 C.F.R. § 84.52(c). Additionally, "[a] recipient ... that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question." *Id.* at § 84.52(d)(1). Aids are "appropriate" if they ensure "effective communication with individuals with disabilities" and may include interpreters, note takers, and "written materials." 28 C.F.R. § 36.303.

Patients with disabilities are not entitled to the auxiliary aid of their choice unless it is necessary to ensure effective communication. *See, e.g., Bravin v. Mount Sinai Med. Ctr.*, 186 F.R.D. 293, 302 (S.D.N.Y. 1999) ("[T]he RA does not require public entities to provide ASL interpreters to deaf individuals in every instance."). While Department of Justice regulations advise public accommodations to "consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, . . . the ultimate decision as to what measures to take rests with the public accommodation," so long as the resulting communication is effective. 28 C.F.R. § 36.303(c)(1)(ii).

These auxiliary aids "are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs." 45 C.F.R. § 84.4(b)(2). In other words, the RA does "not ensure equal medical treatment, but does require equal access to and equal participation in a patient's own treatment." *Loeffler v. Staten Island Univ. Hosp.*, 582 F. 3d 268, 275 (2d Cir. 2009). Therefore, to determine if an entity discriminated against a disabled patient, the factfinder must assess "whether the auxiliary aid that a hospital provided to its hearing-impaired patient gave that patient an equal opportunity to benefit from the hospital's treatment." *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 343 (11th Cir. 2012).

To receive monetary damages under the RA, a plaintiff must show that (1) the healthcare entity violated her rights under the RA, and (2) that the entity did so with discriminatory intent. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321, 331 (2d Cir. 1998). To prove discriminatory intent in the Second Circuit, the plaintiff need not show that the defendant possessed "personal animosity or ill will." *Loeffler*, 582 F.3d at 275. Instead, it is sufficient for the plaintiff to show that a "policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federal protected rights will result from the implementation of the [challenged] policy . . . [or] custom." *Id.* at 275 (quoting *Bartlett*, 156 F.3d at 331).

Appendix B

The Second Circuit has never explicitly defined deliberate indifference in the context of the RA, but it has stated that "it is at least instructive that [the Supreme Court in *Gebser v. Lago Vista Indep. School Dist.*] described the requirements of deliberate indifference as . . . [A]n official who at minimum has authority to address the alleged discrimination and to institute corrective measure on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Loeffler*, 582 F.3d 268 (citing *Gebser v. Lago Indep. School Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998)). The Second Circuit in *Loeffler* also stressed that, in "a separate context [outside of the RA], we have also said that deliberate indifference must be a 'deliberate choice, rather than negligence of bureaucratic inaction.'" *Id.* at 276.

In *Loeffler*, the court denied summary judgment against a hospital that failed to provide an ASL interpreter for a patient undergoing heart surgery and his wife. The couple requested sign language interpreters from the defendant hospital's Patient Representative Department and from some nurses. *Id.* 272. They also requested an interpreter from a doctor, who "laughed . . . off" the request. *Id.* The couple's children instead had to translate for their parents[2] and missed several days of school. In holding that a jury could find that the hospital was deliberately indifferent to the patient's rights, the court emphasized that "Dr. Sithian—arguably a policymaker—

2. The hospital even gave the children pagers so that they could be available to translate for their parents at any hour. *Loeffler*, 582 F.3d at 281.

dismissed [the patient's] demand for an interpreter [by] 'just kind of laugh[ing] it off, and played it as a joke.'" *Id.* at 276. The court also stressed that, while the hospital had a "policy in place to provide interpreters . . . the obvious shortcomings in the policy" and "the alleged apathetic response of Dr. Sithian, notwithstanding his authority to correct the discrimination, could lead a reasonable jury to conclude that the Hospital was deliberately indifferent; and its indifference to the Loefflers' rights may have been so pervasive as to amount to a choice." *Id.* at 277.

Despite *Loeffler*'s emphasis on "policymakers" or "officials," some district courts in the Second Circuit have not acknowledged that the deliberate indifference standard requires that a policymaker or official be on-notice of potential violations of a patient's rights. *See, e.g., Viera v. City of N.Y.*, No. 15 Civ. 5430 (PGG), 2017 U.S. Dist. LEXIS 113978, 2017 WL 3130332 (S.D.N.Y. July 21, 2017) (discussing the deliberate indifference standard without mentioning policymakers or officials, and analyzing hospital staff's knowledge of patient's rights without assessing whether those staff members were officials). While *Loeffler* did not discuss the policymaker requirement at length, the Eleventh Circuit in *Liese* more thoroughly explained the importance of that requirement, using the same Supreme Court case law that the Second Circuit relied on in *Loeffler*.

The court in *Liese* explained that Congress passed the RA under its Spending Clause power. *Liese*, 701 F.3d at 348. Accordingly, Congress wished to "avoid the use of Federal funds to support discriminatory practices"

but also wanted to ensure that "the defendant-entity had actual notice that it was in violation of [the RA] and had an opportunity to rectify the violation." *Id. See also Gebser*, 524 U.S. at 275 ("It is sensible to assume that Congress did not envision a recipient's liability in damages where the recipient was unaware of the discrimination.") For the defendant entity *itself* to have actual notice that it was violating the RA, it is not sufficient to show that *any* particular employee—no matter where they stood in the organization's employee hierarchy—knew that a patient's RA rights were being violated. Otherwise, "there would be a risk that the recipient [entity] would be liable in damages not for its own official decision but instead for its employees' independent actions." *Id.* at 291.

Instead, a "natural reading of *Gebser* reveals that the purpose of the 'official' requirement is to ensure that an entity is only liable for the deliberate indifference of someone whose actions can fairly be said to represent the actions of the organization." *Liese*, 701 F.3d at 350. In *Liese*, the court held that a doctor who knew that a patient was requesting an interpreter and ignored her was an official under *Gebser* because, unlike a nurse, he had "supervisory authority," could "overrule a nurse's decision to not provide an auxiliary aid," and there was no evidence that his "decisions were subject to reversal." *Id.* at 350.

Plaintiff asserts that DiPasquale is the type of official that *Gebser* contemplated because, "as the nurse manager of the floor in which Ms. Biondo was an admitted patient," she "was clearly in a position of 'authority to correct the discrimination, and failed to respond adequately.'"

ECF No. 58 at 12. Plaintiff's argument, however, ignores the first component of the *Gebser* test—that the official have "actual knowledge of discrimination." *See Gebser*, 524 U.S. at 276. Even if DiPasquale is an official under *Gebser*, there is no record evidence that DiPasquale knew that Defendant violated Plaintiff's rights under the RA.[3] Plaintiff specifically told DiPasquale that it was acceptable to communicate with her using pen and paper, and the two proceeded to communicate about Plaintiff's medical care and her medications that way. Additionally, Plaintiff's medical records indicated that her preferred method of communication was written English and did not indicate that she requested an interpreter. DiPasquale simply had no reason to believe that Plaintiff could not effectively communicate with hospital staff.

Plaintiff and her husband both testified during their depositions that they asked a few unnamed nurses for an interpreter, but there is no evidence that those nurses were officials—nor does Plaintiff argue that they were. There is also no evidence to support that any other potential official knew that Plaintiff could not effectively communicate with hospital staff. Assuming that Plaintiff and her husband actually asked hospital staff for interpreters, which the Court must do at the motion for summary judgment

3. Whether Plaintiff's rights were violated under the RA is likely a triable issue of fact. *See Chisolm v. McManimon*, 275 F. 3d 315, 327 (3d Cir. 2001) ("Generally, the effectiveness of auxiliary aids and/or services is a question of fact precluding summary judgment."). The Court need not elaborate on this point, however, because Plaintiff has not shown that an official was aware of any discrimination against her.

stage, Defendant's policy on interpreters failed Plaintiff. Dipasquale's investigation revealed as much. The record indicates, however, that Defendant's failure was, at most, negligence or bureaucratic inaction. Without an official's knowing failure to provide Plaintiff with a necessary auxiliary aid, Defendant is not liable for discrimination under the RA. Accordingly, Plaintiff's claim for damages under the RA is DISMISSED.

III. Injunctive and Declaratory Relief

Plaintiff seeks declaratory and injunctive relief under the RA and Title III of the ADA.[4] Defendant argues that Plaintiff lacks standing to obtain such relief because she "cannot show that she is likely to require treatment at Buffalo General in the future, or, that she would again be denied interpreting services if she were to require treatment at the hospital." ECF No. 51 at 6.

To establish standing, a Plaintiff must first establish that she suffered an "injury in fact," which the Supreme Court defines as "an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id. Lujan v. Def. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). For a plaintiff seeking declaratory or injunctive relief, allegations of past injury alone do not suffice to establish an injury in fact. *See Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992); *Golden*

4. Title III of the ADA does not provide for damages. *See Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 186 (2d Cir. 2013).

v. Zwickler, 394 U.S. 103, 109-10, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969). Instead, the plaintiff must show a "real and immediate threat that the injury will be continued or repeated." *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1250 (S.D.N.Y. 1992).

Courts in the Second Circuit have analyzed this standing requirement in cases similar to the one at bar. In *Schroedel v. N.Y. Univ. Med. Ctr.*, 885 F. Supp. 594 (S.D.N.Y. 1995), a deaf patient sued a hospital for failing to provide her with sign language interpreters during a visit to the hospital's emergency room. The court ruled that the plaintiff had "not established a real and immediate threat of repeated injury sufficient to confer standing for injunctive relief." *Id.* at 599. Because the hospital was not the nearest medical center to the plaintiff's home or office and she previously visited the hospital on only one other occasion, the court dismissed the possibility of the plaintiff returning to the hospital as "mere speculation." *Id.* Similarly, in *Freydel v. New York Hosp.*, No. 97 Civ. 7926 (SHS), 2000 U.S. Dist. LEXIS 9, 2000 WL 10264 (S.D.N.Y. Jan. 4, 2000), a deaf patient who sued a hospital that failed to provide her with ASL interpreters argued that she had standing to pursue injunctive relief because "her local community hospital [was] part of a medical network which [included defendant hospital] as a tertiary care center, so that future referrals to [defendant hospital] were possible." 2000 U.S. Dist. LEXIS 9, [WL] at *3. The court rejected the plaintiff's argument, because one "visit to a hospital [did] not establish that [the plaintiff was] likely to again find herself seeking treatment at" the defendant hospital and that plaintiff "failed to provide

evidence of a likely future encounter between herself and defendant." *Id.*

Courts have also rejected plaintiffs' standing arguments in cases where the plaintiff had a more extensive history with the defendant hospital. In *Naiman v. N.Y. Univ*, No. 95 Civ. 6469 (LMM), 1997 U.S. Dist. LEXIS 6616, 1997WL 249970 (S.D.N.Y. May 13, 1997), the court held that a deaf plaintiff who visited the defendant hospital four times did not plead a sufficient likelihood of future harm to establish standing. In granting the plaintiff leave to amend his complaint, the court advised him that he must show a real or immediate threat "that he will require the services of the [defendant hospital] in the future" and that he should show why the defendant hospital, "as opposed to some other hospital," is the facility that he would visit in the future. 1997 U.S. Dist. LEXIS 6616, [WL] at *14.

Here, Plaintiff has not shown that she is likely to visit Defendant in the future. In her deposition, she repeatedly stated that she would only come back to Defendant if she had "no choice." K. Biondo Dep. Trans. 231-232. Furthermore, in her 30 years of living in the area, Plaintiff has visited Defendant for medical treatment twice but has visited other hospitals at least 31 times for scheduled and emergency medical care. ECF No. 51 at 10. Additionally, several other hospitals are closer to Plaintiff's home and office than Defendant. *Id.* Any assumption that Plaintiff will return to Defendant is at best speculative and falls short of the "real and immediate threat" standard necessary to establish standing. Accordingly, Plaintiff's

claims for declaratory and injunctive relief under the ADA and the RA are DISMISSED.

IV. NYHRL and City of Buffalo Antidiscrimination Law claims

Because the Court dismissed the federal claims in this case, it declines to exercise supplemental jurisdiction over the NYHRL and Buffalo Antidiscrimination Law claims. *See* 28 U.S.C. § 1367(c)(3); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties . . .").

CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment (ECF No. 46) is GRANTED and this case is DISMISSED WITH PREJUDICE. The Clerk of the Court is directed to enter judgment and close this case.

IT IS SO ORDERED.

Dated: April 10, 2018
Rochester, New York

/s/ Frank P. Geraci, Jr.
HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court

APPENDIX C — UNITED STATES CODE ANNOTATED, TITLE 29, LABOR 29, U.S.C.A. § 705

UNITED STATES CODE ANNOTATED

Title 29. Labor

Chapter 16. Vocational Rehabilitation and Other Rehabilitation Services (Refs & Annos) General Provisions (Refs & Annos)

29 U.S.C.A. § 705

§ 705. Definitions

(20) Individual with a disability

(A) In general

Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who—

> **(i)** has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and
>
> **(ii)** can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI.

Appendix C

(B) Certain programs; limitations on major life activities

Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII of this chapter, any person who has a disability as defined in section 12102 of Title 42.

(C) Rights and advocacy provisions

(i) In general; exclusion of individuals engaging in drug use

For purposes of subchapter V, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Exception for individuals no longer engaging in drug use

Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who—

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has

otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

(iii) Exclusion for certain services

Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under subchapters I, II, and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

Appendix C

(iv) Disciplinary action

For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student who is an individual with a disability and who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against students who are not individuals with disabilities. Furthermore, the due process procedures at section 104.36 of title 34, Code of Federal Regulations (or any corresponding similar regulation or ruling) shall not apply to such disciplinary actions.

(v) Employment; exclusion of alcoholics

For purposes of sections 793 and 794 of this title as such sections relate to employment, the term "individual with a disability" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

Appendix C

(D) Employment; exclusion of individuals with certain diseases or infections

For the purposes of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

(E) Rights provisions; exclusion of individuals on basis of homosexuality or bisexuality

For the purposes of sections 791, 793, and 794 of this title—

(i) for purposes of the application of subparagraph (B) to such sections, the term "impairment" does not include homosexuality or bisexuality; and

(ii) therefore the term "individual with a disability" does not include an individual on the basis of homosexuality or bisexuality.

(F) Rights provisions; exclusion of individuals on basis of certain disorders

For the purposes of sections 791, 793, and 794 of this title, the term "individual with a disability" does not include an individual on the basis of—

(i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) compulsive gambling, kleptomania, or pyromania; or

(iii) psychoactive substance use disorders resulting from current illegal use of drugs.

(G) Individuals with disabilities

The term "individuals with disabilities" means more than one individual with a disability.

APPENDIX D — RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 794

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case

of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

Appendix D

29 U.S.C. § 794a

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.