

Before the
Department of Labor
Washington, D.C.

In the Matter of:

Implementation of the Nondiscrimination and
Equal Opportunity Provisions of the Workforce
Innovation and Opportunity Act; Proposed Rule

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29 C.F.R. Part 38
RIN 1291—AA36

COMMENTS OF:

National Association of the Deaf (NAD)
Deaf Seniors of America (DSA)
Cerebral Palsy and Deaf Organization (CPADO)
Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)
Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)
Association of Late-Deafened Adults (ALDA)
California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH)
**Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of
Hearing (DHH-RERC)**

in response to the Department's

NOTICE OF PROPOSED RULEMAKING

The National Association of the Deaf (NAD), Deaf Seniors of America (DSA), Cerebral Palsy and Deaf Organization (CPADO), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN) Association of Late-Deafened Adults (ALDA), and California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) (collectively “Consumer Groups”), joined by Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing (DHH-RERC), submit these comments pursuant to the January 26, 2016 Notice of Proposed Rulemaking by the Department of Labor (“the Department”) in the above-referenced proceeding which seeks comments on its proposal to issue nondiscrimination and equal opportunity regulations replacing its regulation which implemented Section 188 of the Workforce Innovation and Opportunity Act (WIOA).¹

I. INTRODUCTION

The Consumer Groups are a coalition of the above listed organizations that work together to advocate for equal access in a variety of areas. The Consumer Groups collectively represent the interests of 48 million deaf, hard of hearing and deafblind individuals, including those with additional disabilities, in the United States. Our work encompasses advocacy on issues such as Video Relay Services, hearing aid compatible phones, Internet and television captioning, accessible travel, and more. Over the years, the Consumer Groups have received numerous complaints from deaf, hard of hearing and deafblind individuals, including those with additional disabilities regarding the lack of employment and workforce development opportunities. We have received and continue to receive many stories about deaf, hard of hearing and deafblind individuals, as well as those with additional disabilities, struggling to find work or receive

¹ Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act; Proposed Rule, Docket ID: RIN 1291-AA36 (rel. January 26, 2016)(“NPRM”).

promotions, evidencing an epidemic of discrimination against deaf, hard of hearing and deafblind individuals, as well as those with additional disabilities. In fact, there is no evidence that employment and workforce development outcomes for people with disabilities has improved despite the presumptive protections of federal and state laws.

The Consumer Groups are thus grateful for this opportunity to provide input on this important matter. We applaud the Department's intent to reaffirm already-existing prohibitions against discrimination in programs and activities that receive Federal financial assistance under civil rights laws including Section 504 of the Rehabilitation Act.² The Consumer Groups support the proposal to update WIOA Section 188 regulations to mirror updates in the Rehabilitation Act and the Americans with Disabilities Act (ADA)³ as amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).⁴ However, we wish to express a few areas of concern with the proposed rule.

II. UPDATED DEFINITIONS

The ADAAA and its implementing regulations have made it easier for an individual seeking protection under the ADA to establish that the individual has a disability within the meaning of the statute.⁵ The Consumer Groups support the proposal to incorporate the broader definition of "disability" within the WIOA, and to ensure that the primary inquiry should be whether covered entities have complied with their statutory obligations. The Consumer Groups also support the proposed revisions to other important definitions, including "qualified individual," "reasonable accommodation," "major life activity," "regarded as having a

² 29 U.S.C. 794 (prohibiting discrimination based on disability).

³ 42 U.S.C. 12101 *et seq.*

⁴ 42 U.S.C. 12101 *et seq.*, Public Law 110-325, §2(b)(1), 122 Stat. 3553 (2008).

⁵ *See* 42 U.S.C. 12102(1)(A)-(C).

disability,” and “physical or mental impairment” based on specific provisions in the ADAAA, as well as the EEOC’s final and the DOJ’s proposed implementing regulations.

III. TECHNOLOGY ACCESS

Given the increased use of technology, including the Internet, in the workplace, the Consumer Groups support revising the Part 38 regulations to ensure all nondiscrimination and equal opportunity provisions are applicable to all technological aspects in employment. In particular, in regards to websites, covered entities should be required to caption all audio-based content to be accessible for deaf, hard of hearing, and deafblind individuals, as well as those with additional disabilities. Further, such auditory content should also be provided in American Sign Language (ASL), given that some deaf, hard of hearing, and deafblind individuals, as well as those with additional disabilities, are not fluent in English and rely on ASL which has a unique sentence structure and syntax distinct from English. Transcripts of video descriptions should also be required as to provide maximum access for deafblind individuals using screenreaders.

Moreover, all relevant information made available to employees within a covered entity’s place of business should be fully accessible including to deafblind individuals. For example, if there is a cafeteria with a daily menu on-site, that menu can and should be sent electronically to staff so that they can use their accommodations to be able to read the menu – which for blind and deafblind individuals would mean understanding the menu through screenreader software or screen magnification software.

In regards to proposed rule §38.4, Babel Notices are an integral tool for ensuring that recipients meet their nondiscrimination and equal opportunity obligations under WIOA.

Accordingly, the Consumer Groups urge that ASL versions of the notices and other vital

information⁶ be available to ensure equal access of the information to deaf, hard of hearing, and deafblind beneficiaries, employees, and job applicants, as well as those with additional disabilities. For the same reasons mentioned earlier, the covered entity cannot presume that English notification is sufficient for individuals who are fluent in ASL. The covered entity can provide ASL videos through many different means including posting it next to the online English notification or by using a code for people to scan with their smartphone. This is also applicable to proposed rules §38.34 and §38.36 in regards to the provision of equal opportunity notices in appropriate languages to ensure meaningful access. The same applies to the notice requirements for orientations in proposed rule §38.39, which also references orientations provided not just in person but remotely over the Internet or using other technology. Regardless of the manner of delivery, the orientations should be fully and equally accessible. For example, the remote orientations should be captioned and include an ASL interpreter in-screen.

In regards to proposed rule §38.15, the Consumer Groups support changes that mandate applying communication requirements to beneficiaries, registrants, applicants, participants, members of the public, and companions with disabilities. This should include electronic and information technology that incorporate accessibility features that ensure equally effective communication. As mentioned earlier, captions and ASL videos should be included as access features.

IV. QUALIFIED INTERPRETERS

In amending the existing of definition of “qualified interpreter” in proposed rule §38.4(xx) and encouraging the use of certified interpreters “where individual rights depend on precise, complete and accurate translations,”⁷ the Consumer Groups recommend that this

⁶ As defined in proposed rule §38.4(ttt).

⁷ NPRM at 4506.

definition also take into consideration applicable state law governing licensure of interpreters if any are available in the state where the covered entity is providing services. The requirements governing who can work as a qualified interpreter varies from state to state, and the language that the Department adopts should respect the minimum standards of the applicable state laws governing qualifications of sign language interpreters. This definition should also take into consideration the qualification of the interpreter for the particular field of employment in any given situation. The interpreter should have a particular level of expertise in the specific jargon being used.

V. VIDEO REMOTE INTERPRETING SERVICES

The NPRM references video remote interpreting (VRI) service in amending the definition of “qualified interpreter.” The NPRM also proposes to add a definition of VRI in proposed rule §38.4(ss) that mirrors the Department of Justice (DOJ) regulations implementing Title II of the ADA.⁸ However, the proposed definition is inadequate and vague because it could ostensibly allow for a smartphone to be used to Skype the interpreter. Such a scenario is problematic as the effectiveness of VRI depends greatly on the deaf individual’s ability to view the VRI interpreter on a sufficiently-sized screen and the clarity of the signing on the screen being affected by signal strength.

Moreover, the inclusion of VRI in the 2011 DOJ revised regulations have led to an explosion of exclusive VRI usage in medical settings that were too often not appropriate or effective for deaf, hard of hearing and deafblind individuals, as well as those with additional disabilities. The Consumer Groups express grave concerns that the unqualified inclusion of VRI in the WIOA will result in the same abandonment of qualified on-site interpreters in favor of

⁸ See 28 C.F.R. 35.104.

exclusive use of VRI to the detriment of deaf, hard of hearing, and deafblind beneficiaries, applicants, and employees, as well as those with additional disabilities.

There are numerous limitations to VRI which need to be taken into consideration. Complaints that the Consumer Groups have received regarding VRI use include but are not limited to: the VRI technology not working at all or constantly disconnecting; the interpreter working through the VRI was unable to see or hear what was happening; the sound or video quality was not clear enough for the work group to understand what the interpreter is saying; the random interpreter employed by the VRI provider was not qualified for that particular professional field and its associated jargon; inability of the VRI interpreter to effectively interpret a group discussion involving many participants; and the inability of the VRI interpreter to effectively interpret a fast-paced and/or complicated discussion about complex work topics. All of these issues have repeatedly occurred in VRI usage in recent years, and it is important to caution against any zealous use of such technology to the detriment of what effective communication means for a deaf, hard of hearing, or deafblind employee, including those with additional disabilities.

In stark contrast to the myriad of issues posed by VRI, on-site interpreters have more flexibility, have greater access to environmental cues, and do not encounter technology or equipment malfunctions. Consequently, the Consumer Groups recommend that all covered entities prioritize the use of on-site interpreters, and that usage of VRI be limited. When a request for ASL interpreting services is made, covered entities should make every effort to provide a qualified interpreter on-site including with advance preparation for such requests, and only when that is not possible turn to using VRI services. We respectfully ask that the Department add regulatory language limiting the use of VRI to certain situations, such as if the meeting or

appointment is brief in duration and with the consent of the deaf, hard of hearing, or deafblind beneficiary, employee, or job applicant, including those with additional disabilities. This is essential to proactively prevent an enormous increase of complaints from deaf, hard of hearing, and deafblind beneficiaries, employees, and job applicants, as well as those with additional disabilities, with respect to the use of ineffective VRI in their meetings and appointments.

The regulations should also be expanded from its current all-too-brief definition as to include guidance on how to use VRI in those limited situations. For instance, the video screen must be wide enough to be viewable from at least five feet away. Also, dedicated video equipment must be regularly tested and maintained and there should be a dedicated high-quality network that does not degrade video and audio. Internal protocols must ensure that VRI equipment does not go into sleep mode while in use; trained personnel must be able to turn off sleep mode on the dedicated VRI equipment so that the deaf, hard of hearing, or deafblind individual, including those with additional disabilities, can see an uninterrupted view of the VRI interpreter.

Furthermore, VRI is usually not an appropriate or effective means of communications with DeafBlind individuals. If they indicate VRI will not constitute as effective communication, an on-site tactile or close-vision interpreter must be arranged. VRI also poses additional difficulties for deaf, hard of hearing, and deafblind individuals with mobility disabilities due to the high incidence of misinterpretation. Indeed, accommodations are not one-size-fit-all; there is a wide spectrum of accommodation needs of deaf, hard of hearing, and deafblind individuals, as well as those with additional disabilities. For example, while some may prefer to use VRI, some will need an on-site interpreter for the reasons listed above, while yet others may need CART or assistive listening devices due to not being able to converse in ASL. It is critical that people are

not pigeonholed into any one type of accommodation, such as the exclusive use of VRI. VRI must be accepted by the deaf, hard of hearing, and deafblind individual, including those with additional disabilities; provider(s); and any party involved in the interaction. Not every situation that requires ASL interpretation will be appropriate for VRI. Any person who is given the responsibility to schedule or otherwise obtain an interpreter will need to conduct an analysis of whether VRI is appropriate to a given ASL-interpreted meeting or appointment, including the consumer's preference between VRI and on-site interpreters. If a deaf, hard of hearing, or deafblind consumer, as well as those with additional disabilities, initially consents to VRI, this consent should not be construed as a waiver to effective communication via on-site interpreting for all future communications.

VI. EVOLUTION OF TELECOMMUNICATIONS

Proposed rule §38.38 aims to update that particular section “to reflect current technology used by individuals with hearing impairments.”⁹ However, by referencing text telephone (TTY) usage, the proposed language actually has the opposite effect. TTY usage has been in steady decline for some time due to the advent of more current technology, including videophones (VPs) and captioned telephones. We thus recommend replacing the proposed language with “videophones, captioned telephones, or equally effective telecommunications systems.” In regards to videophones, covered entities should accept video relay calls and be prohibited from requiring callers to use a particular form of telephone, such as the TTY, to place a call.

Furthermore, videophones and captioned telephones, including their respective relay systems – video relay service (VRS) and internet-protocol captioned telephone service (IP-CTS), as well as all other relay services – must be readily available to all deaf, hard hearing, and deafblind employees, as well as those with additional disabilities, of covered entities to permit

⁹ NPRM at 4518.

them to make calls on the same basis that hearing colleagues are able to make phone calls. Any concerns about videophones and IP-CTS posing a risk of disrupting or interfering with a covered entity's Internet service can be resolved by using a network that is either a separate Internet service or completely walled off from the intranet of the entity solely for videophone use. Similarly, videophones and captioned phones have been denied in some cases as a result of concerns regarding access to confidential information, despite the fact that Telecommunication Relay Service rules clearly state that all calls are kept confidential. Any restriction in response to privacy concerns should be eliminated for these reasons.

VII. CENTRALIZED REASONABLE ACCOMMODATION FUND

It is the Consumer Groups' belief that the main obstacle to poor statistics for employment and workforce development for deaf, hard of hearing, and deafblind individuals, as well as those with additional disabilities, is the way covered entities perceive and handle the cost of ongoing accommodations. For instance, sign language interpreters are one form of an ongoing accommodation cost necessary in some circumstances for many deaf, hard of hearing, and deafblind individuals, including those with additional disabilities. Entities too often worry more about the cost of such ongoing accommodations than the abilities or skills of deaf, hard of hearing, and deafblind job applicants and employees, including those with additional disabilities. When faced with two strong candidates for a position, hiring managers will likely choose the candidate that has a lower economic impact on the affected division. Every division within any covered entities has budgetary restrictions and the hiring manager will always be conscious of any accommodation cost when deciding between two candidates and one of them has a disability. When hiring managers have to pay for the cost of accommodations out of their division's budget, these managers have a powerful disincentive against hiring people with

disabilities, especially those who need ongoing accommodations. This especially impacts deaf, hard of hearing, and deafblind employees or prospective employees, as well as those with additional disabilities, as they often need ongoing accommodations, such as ASL interpreters or real-time captioning for meetings. The cost of ongoing accommodations needs to be removed from the hiring and promoting equation and placed elsewhere so that people with disabilities are given the opportunity to work and not be seen as a burden.

To move past this economic disincentive within hiring entities, the Consumer Groups urge the Department to implement regulations that encourage all entities covered under the WIOA to provide a centralized funding system for reasonable accommodations for employment. A Centralized Reasonable Accommodation Fund (“CRAF”) would remove the cost calculation from decisions about hiring or promoting people with disabilities, including deaf, hard of hearing, and deafblind individuals as well as those with additional disabilities. Each covered entities should be mandated to create a centralized reasonable accommodation fund to ensure the optimal provision of accommodations to all employees with disabilities who require them. The CRAF would remove economic disincentives that currently permeate employment of and workforce development of people with disabilities. Hiring managers would be freed from economic burdens, and would then be able to focus on skill and talent instead. It would ensure that people who are deaf, hard of hearing , and deafblind as well as those with additional disabilities are given a chance to secure jobs and promotions without having managers and supervisors be preoccupied with accommodation costs.. As WIOA is designed to help job seekers access employment, mandating CRAF would be consistent with that goal.

Centralized reasonable accommodation funds are not a novel concept, but are considered a best practice among private companies such as IBM and Booz Allen Hamilton. Government

agencies and private companies that use CRAFs have larger numbers of employees with disabilities in many competitive levels. Covered entities, such as state level agencies that administer or are financed by WIOA Title I funds, state employment, security agencies, state and local workforce investment and development boards, One-Stop operators, training providers, on-the-job training employers, and Job Corps contractors and center operators should follow suit.

VIII. CLOSING

The proposed changes in the NPRM would promote benefits for everyone involved including: providing clearer requirements to recipients of financial assistance under Title I of WIOA and removing barriers to work opportunities to employees and job applicants with disabilities. The Consumer Groups urge the Department to proceed with its NPRM with its recommended changes provided herein. As employment and workforce development has long been a significant challenge in our community, we hope that the revised rules will lead to all deaf, hard of hearing, and deafblind individuals, as well as those with additional disabilities, receiving equal opportunity in the workforce. The Consumer Groups appreciate being given the chance to submit comments in this important rulemaking.

Respectfully submitted,

/s/ _____
Zainab Alkebsi, Esq.
National Association of the Deaf
8630 Fenton Street, Suite 820
Silver Spring, MD 20910

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SIGNATORIES AND CONTACT INFORMATION:

National Association of the Deaf (NAD)

Howard A. Rosenblum, Chief Executive Officer • howard.rosenblum@nad.org

Contact: Zainab Alkebsi, Policy Counsel • zainab.alkebsi@nad.org

8630 Fenton Street, Suite 820, Silver Spring, MD 20910

www.nad.org

Deaf Seniors of America (DSA)

Nancy Rarus, President • dsaprez@verizon.net
Contact: Tom Dowling • dowlingt@cox.net
5619 Ainsley Court, Boynton Beach, FL 33437
www.deafseniorsofamerica.org

Cerebral Palsy and Deaf Organization (CPADO)

Mark Hill, President • president@cpado.org
12025 SE Pine Street #302, Portland, OR 97216
www.cpado.org

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)

Claude Stout, Executive Director • cstout@TDIforAccess.org
8630 Fenton Street, Suite 121, Silver Spring, MD 20910
www.TDIforAccess.org

Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)

Claude Stout, Chair • cstout@TDIforAccess.org
8630 Fenton Street, Suite 121, Silver Spring, MD 20910

Association of Late-Deafened Adults (ALDA)

Steve Larew, President • president@alda.org
8038 Macintosh Lane, Suite 2, Rockford, IL 61107
www.alda.org

California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH)

Sheri A. Farinha, Chief Executive Officer • sfarinha@norcalcenter.org
4708 Roseville Road, Suite 111, North Highlands, CA 95660
www.norcalcenter.org

Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing (DHH-RERC)

Christian Vogler, Ph.D., Director • christian.vogler@gallaudet.edu
Department of Communication Studies
SLCC 1116, Gallaudet University
800 Florida Avenue NE, Washington D.C. 20002
tap.gallaudet.edu