No. 11-3336

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL S. ARGENYI,

Plaintiff-Appellant

v.

CREIGHTON UNIVERSITY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT

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IDENTITY AND INTEREST OF THE AMICUS CURIAE AND THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF

The United States has authority to file this amicus brief under Federal Rule of Appellate Procedure 29(b).

This appeal raises questions regarding the standards applied under Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12182, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, for determining when a covered entity must provide auxiliary aids and services to an individual with a hearing

disability. The Department of Justice has statutory authority to enforce Title III of the ADA. 42 U.S.C. 12188. Moreover, pursuant to statutory authorization, the Attorney General has promulgated regulations imposing specific requirements on public accommodations to implement the ADA's prohibition against discrimination on the basis of disability. 42 U.S.C. 12186(b); 28 C.F.R. Pt. 36. The Department of Justice also has authority to bring civil actions to enforce Section 504 and coordinates the implementation and enforcement of Section 504 by federal agencies. 29 U.S.C. 794a; 28 C.F.R. Pt. 41 & App. A (Exec. Order 12,250). The United States Department of Education similarly has issued regulations addressing compliance under Section 504 for recipients of federal financial assistance awarded by the Department of Education. 34 C.F.R. Pt. 104. Accordingly, the United States has a significant interest in the resolution of this case.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that plaintiff is entitled to auxiliary aids and services only if he could show that he would be effectively excluded from defendant's programs without them.

2. Whether the district court erred in deferring to defendant's decision not to allow plaintiff to use interpreters in clinical courses.

STATEMENT OF THE CASE

1. Factual Background

a. Plaintiff-appellant Michael Argenyi has had a hearing impairment since infancy. In order to communicate, Argenyi reads lips and uses cued speech, where hand signals represent sounds, to enhance his lipreading. Argenyi has a bilateral cochlear implant, which enhances his hearing, but "he still has trouble distinguishing between certain sounds." Summary Judgment Order (Order) 1-2.

Prior to attending medical school, Argenyi used Communications Access Real Time Transcription (CART) services, whereby a transcriptionist transcribes what is said and real-time captions are displayed on a computer screen. In March 2009, upon admission to defendant-appellee Creighton University's (Creighton) medical school, Argenyi requested that Creighton provide him with auxiliary aids and services – specifically, CART and interpreter services – to accommodate his hearing impairment, and submitted an audiogram as support. Michael Kavan, Associate Dean of Medical Education, requested that Argenyi provide additional documentation for his request for auxiliary aids. Doc. 185-2 at 7, Ex. A6.[1]

Argenyi's doctor, Dr. Douglas Backous, responded to Creighton that Argenyi would benefit from the use of closed captioning and an FM system,

[1] "Doc. ___" refers to the docket entry number of documents filed in district court.

whereby a microphone transmits sounds directly into Argenyi's cochlear implants. Argenyi renewed his request for CART and interpreter services, and Kavan again requested additional information. Argenyi's doctor and audiologist, Dr. Backous and Stacey Watson, submitted a joint letter to Creighton stating that CART, cued speech interpreters, and an FM system would be appropriate for Argenyi.

Creighton then wrote Argenyi that its Medical Education Management Team (MEMT)[2] reviewed Argenyi's submissions, and Creighton would provide Argenyi with an FM system, copies of power point presentations, access to a note taker's notes, and seating in the front of classrooms in lectures, small groups, and laboratories. Argenyi agreed to try these services but again asked for CART and interpreter services. Creighton again requested additional documentation.

After attending classes for two weeks, Argenyi informed Kavan on September 1, 2009, that the services Creighton provided were inadequate. Argenyi stated, *inter alia*, that the FM system amplified ambient noise, negating any benefit from amplifying speech, and the note-taking services involved substantial delay. Argenyi further stated that the services Creighton provided did not "provide for meaningful participation [or] independence as a student, and also put [him] at a significant disadvantage academically." Doc. 188-7 at 8, Ex. A12. Argenyi again

[2] Creighton's MEMT is a standing committee that considers requests by students for reasonable accommodations for disabilities.

requested CART and interpreter services. At this time, Argenyi personally arranged and paid for CART, oral transliterators, and interpreters. Dr. Backous and Watson wrote to Creighton that "[i]t is imperative that [Argenyi] have access to visual cues for everyday communication and education" and that visual cues include "real time captioning for lectures and discussions, and speech reading cues for one-on-one interactions." Doc. 185-3 at 12, Ex. A20. Argenyi again requested CART and interpreter services, but Creighton required additional information.

b. On September 24, 2009, Argenyi filed a complaint in federal court against Creighton. He alleged that Creighton's failure "to provide him with auxiliary aids and services to ensure effective communication and an equal opportunity to participate in and benefit from the School of Medicine" violated Title III of the ADA and Section 504 of the Rehabilitation Act. Doc. 26 ¶ 2. He sought, *inter alia*, injunctive relief and reimbursement for the cost of auxiliary aids and services as well as compensatory damages. Subsequently, on September 28, 2009, Dr. Backous and Watson wrote to Creighton that Argenyi requires visual cues to understand speech, especially in the clinical setting, and that his understanding of speech may decrease when he encounters new and difficult vocabulary and when noise in the room interferes with the FM system. They stated that, taking into account ambient noise, Argenyi's hearing could drop to understanding 57% or even to 25% of what is said. Dr. Backous and Watson

further asserted that Argenyi "is the best person to judge what [auxiliary aids and services are necessary] * * * since no one else can really understand what he is hearing through his cochlear implant systems." Doc. 185-3 at 17, Ex. A22.

In May 2010, Argenyi provided Creighton a letter from Dr. Britt Thedinger to further support his request for CART and interpreter services. Dr. Thedinger stated that, while using an FM system, Argenyi understands 62% of speech in a quiet setting and only 38% with background noise. Doc. 185-3 at 19, Ex. A23. Dr. Thedinger concluded that "the FM system does not provide any significant benefit and [the test] results show that it actually reduces his discrimination ability." *Ibid*.

In July 2010, Argenyi requested CART and interpreter services for his second year of medical school and informed Creighton that he had already arranged for these services. Creighton stated that in light of Dr. Thedinger's letter and other materials Argenyi submitted, Creighton would provide oral interpreters and note-taking services for large group lectures and oral interpreters for certain laboratory classes. But, based on Argenyi's prior work as a certified nursing assistant in a hospital without auxiliary aids, Creighton stated that Argenyi failed to show that he needs an interpreter in a clinical setting and prohibited Argenyi from using interpreters in clinics, notwithstanding his repeated assertions that he could

not communicate effectively with patients without interpreters. Doc. 185-3 at 34-35, Ex. A28.

Argenyi commenced a leave of absence from medical school at the beginning of his third year, which would have consisted of a series of clinical clerkships.

2. District Court Opinion

On September 22, 2010, the district court granted Creighton's summary judgment motion. Noting that despite "slight differences between the ADA and Rehabilitation Act, they are otherwise similar in substance" and cases interpreting them are "interchangeable" (Order 14) (citation omitted), the district court analyzed Argenyi's ADA and Rehabilitation Act claims together. At the outset, the court stated that it was undisputed that Argenyi has a disability and is otherwise qualified academically to attend medical school, and that Creighton is a place of public accommodation. Order 16. Thus, the only issue for the court to decide was whether Creighton violated the ADA and Rehabilitation Act "by failing to provide [Argenyi] with the necessary auxiliary aids and services during his first year of medical school and by refusing to provide him with, or permit him the use of, an interpreter during his second year clinic." Order 16.

The district court stated that, under both statutes, Creighton "must do only that which is 'necessary' to avoid discriminating against the plaintiff." Order 17

(citation omitted). Relying on *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661 (2001), the court stated approvingly that some courts have held that "a modification or accommodation is 'necessary' only if the disabled person can show that the failure to provide it would effectively exclude the disabled person from the place of public accommodation." Order 18.

With respect to Argenyi's first year of medical school, the court held that Argenyi did not show that Creighton failed to provide necessary auxiliary aids and services. Order 18-20. The court found that although Argenyi's undergraduate institution provided CART and interpreter services, "the record shows that no determination was made that these accommodations and services were *necessary*, but that they were offered due to some uncertainty regarding whether other services were sufficient." Order 19; see also Order 9-10. The court further noted that Argenyi's doctors merely stated that Argenyi would "'benefit' from CART and that CART and interpreters would be 'appropriate' for him," but that his doctors never stated "that Argenyi 'needed' those services and accommodations to attend medical school." Order 19. Moreover, the court stated, Argenyi's doctors wrote that it was "'imperative' that visual cues be made accessible to Argenyi, but not that it was imperative that Argenyi have CART services or interpreters." Order 19. According to the court, "Creighton did make visual cues available to Argenyi

by means of note-taking services, preferential seating, and access to power point slides." Order 19.

The district court said it gave no weight to Argenyi's several statements to Creighton that the FM system and the note-taking service Creighton provided did not help him understand the classroom instruction. Order 18-19. The court called Argenyi's statements about the inadequacy of these services "unsupported self-serving allegations." Order 19 (citation omitted). In the court's opinion, if Argenyi had not paid for CART and interpreter services, "his medical school experience may have been more 'uncomfortable or difficult,' but he points to nothing to show that medical school would have been 'beyond [his] capacity.'" Order 19-20 (citation omitted).

As for Argenyi's second year of medical school, the district court noted that Creighton agreed to provide Argenyi with interpreter services for lectures and some labs as soon as he submitted documentation that the FM system was ineffective. Order 20. The court rejected Argenyi's assertion that Creighton discriminated against him by failing to provide interpreters for his second-year clinics. Order 20-21. According to the court, the record does not show that the lack of interpreter services in his clinics effectively excluded Argenyi from medical school because Argenyi passed his clinical courses without the assistance of interpreters. Order 20.

Furthermore, the court stated that it would "show great respect" for Creighton's belief that "Argenyi's education is better served if he completes his clinics without the aid of an interpreter." Order 20. The court deemed the issue of whether the requested services were necessary to be an "academic" decision. Order 20. The court stated that without "compelling evidence" that Creighton's decision was "a pretext for discrimination," the court "will not invade a university's province concerning academic matters." Order 20-21 (citation omitted).

In sum, the court held that "no reasonable trier of fact could find that Argenyi would be effectively excluded from Creighton's medical school despite the accommodations, modifications, and auxiliary aids and services Creighton provided" (Order 22) because none of Argenyi's doctors confirmed that his preferred services were "necessary," and Argenyi's "self-serving allegations" cannot support his claims. Order 21.

SUMMARY OF ARGUMENT

The district court erred in holding that Argenyi is entitled to his requested auxiliary aids and services only if he would have been effectively excluded from Creighton's programs without them. The district court's decision runs counter to the language of Title III of the ADA and Section 504 of the Rehabilitation Act, as well as their implementing regulations. Both statutes and their implementing

regulations require covered entities to provide auxiliary aids and services to enable individuals with an auditory disability to participate fully and equally in their programs. This standard exceeds the standard the district court used to determine whether Argenyi's request for auxiliary services should be granted. In addition to applying the incorrect legal standard, the district court erred in disregarding Argenyi's statements regarding how the auxiliary services Creighton provided failed to result in effective communication.

The district court also erred in deferring substantially to Creighton's decision not to allow interpreters in clinical courses by calling it an "academic" decision. Argenyi was not seeking to modify or be excused from satisfying Creighton's curriculum. Moreover, academic reasons, and the deference properly accorded them, may be informative in deciding whether a request for auxiliary aids or services requires a "fundamental alteration" of an academic program, but the district court did not make a finding of fundamental alteration. In any event, the record shows that Creighton's decision was not based entirely on academic reasons, but in part on financial reasons, which are not entitled to such "academic" deference.

In granting summary judgment to Creighton, the district court failed to view the evidence in the light most favorable to the party opposing the motion and to resolve all reasonable doubts about facts in favor of the non-movant. See

Washington v. *Countrywide Home Loans, Inc.*, 655 F.3d 869, 871-872 (8th Cir. 2011). This Court should vacate and remand for reconsideration under proper legal standards.

ARGUMENT

THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD FOR DETERMINING WHETHER AN AUXILIARY AID OR SERVICE IS NECESSARY TO ENSURE EFFECTIVE COMMUNICATION

A. Statutory And Regulatory Requirements

1. In this case, a student with an auditory disability requested auxiliary aids and services that would permit him to participate in classroom, laboratory, and clinical instruction in a manner equal to that in which students without an auditory disability can. Title III and Section 504, and their implementing regulations, require that he be provided precisely that – effective communication services that will permit him to participate fully and equally in the academic program absent a showing of a fundamental alteration or undue burden.

Title III of the ADA prohibits public accommodations from discriminating against individuals on the basis of disability. 42 U.S.C. 12182. Post-graduate private schools like Creighton are places of public accommodation under the statute, 42 U.S.C. 12181(7)(J), and as such, Creighton is statutorily prohibited from discriminating against an individual with a disability "in the *full and equal enjoyment* of the goods, services, facilities, privileges, advantages, or

accommodations" that it offers. 42 U.S.C. 12182(a) (emphasis added); see also 28 C.F.R. 36.201(a) (same). The statute specifically defines "discrimination" in the context of auxiliary aids and services as:

> (iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

42 U.S.C. 12182(b)(2)(A)(iii).

Consistent with Congress's emphasis on providing auxiliary aids and services to achieve equality, the Department of Justice's regulations implementing Section 12182(b)(2)(A)(iii) require public accommodations to "take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services" absent a showing of a fundamental alteration or undue burden. 28 C.F.R. 36.303(a). Accordingly, barring a showing that the necessary auxiliary aid or service would fundamentally alter the program or cause an undue burden, Creighton must "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. 36.303(c)(1). Auxiliary aids and services include "real-time computer-aided transcription services," "interpreters,"

"assistive listening devices * * * [or] systems," and "other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing." 28 C.F.R. 36.303(b)(1).[3]

2. Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability * * * 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. Federal agencies have promulgated regulations to implement Section 504. See 29 U.S.C. 794(a).

Because Creighton receives federal financial assistance for postsecondary education, it is subject to Section 504 regulations. 34 C.F.R. 104.41 *et seq*. The Department of Education prohibits post-secondary institutions receiving federal

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[3] The regulations further provide:

> The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, *provided that the method chosen results in effective communication*."

28 C.F.R. 36.303(c)(1)(ii) (emphasis added).

financial assistance from discriminating against individuals on the basis of disability. 34 C.F.R. 104.43(a). The Department of Education's regulations further specify that recipients "shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills." 34 C.F.R. 104.44(d)(1). Auxiliary aids include "interpreters or other effective methods of making orally delivered materials available to students with hearing impairments." 34 C.F.R. 104.44(d)(2).

B. The District Court's Standard For Determining Whether Argenyi's Requested Auxiliary Aids And Services Were Necessary Is Contrary To The Language Of Title III And Section 504

The district court stated that while the absence of CART or interpreter services may have made Argenyi's experience in medical school "more 'uncomfortable or difficult,'" neither the ADA nor Rehabilitation Act requires Creighton to provide Argenyi's requested auxiliary aids and services as long as he is not effectively excluded from medical school without them. Order 20; see also Order 18. The district court repeatedly emphasized that Argenyi passed his clinical courses in his second year of medical school without the aid of an interpreter. Order 8, 20.

1. As stated above, Title III and Section 504 require a covered institution to provide necessary auxiliary aids and services to ensure that an individual with a hearing impairment receives effective communication services that will allow the individual to participate equally in the institution's programs. Requiring an individual with a hearing impairment to show that he would otherwise be excluded from the covered program or activity in the absence of auxiliary aids and services is inconsistent with the language of the ADA and Rehabilitation Act and their implementing regulations.[4]

With respect to Title III, Section 12182(a) sets forth the "[g]eneral rule" that "[n]o individual shall be discriminated against on the basis of disability in the *full and equal enjoyment* of the goods, services, facilities, privileges, advantages, or accommodations * * * by any person who * * * operates a place of public accommodation." 42 U.S.C. 12182(a) (emphasis added). Moreover, Section 12182(b)(2)(A)(iii), which specifically pertains to auxiliary aids and services, does

[4] The district court's rule for determining when an auxiliary aid or service is necessary is also contrary to the well-established canon of statutory construction that "remedial" legislation must "be construed broadly to effectuate its purposes." *Jefferson Cnty. Pharm. Ass'n, Inc.* v. *Abbott Labs.*, 460 U.S. 150, 159 (1983). Title III is "a remedial statute," *Steger* v. *Franco, Inc.*, 228 F.3d 889, 894 (8th Cir. 2000), which, as the Supreme Court has recognized, imposes a "broad mandate" with a "sweeping purpose." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001). Accordingly, Title III "should be broadly construed to effectuate [this] purpose." *Steger*, 228 F.3d at 894 (applying this principle in interpreting Title III). Section 504 is similarly a "remedial" statute, see *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984), and should also be construed broadly.

not merely guarantee *access* to a public accommodation. Section 12182(b)(2)(A)(iii) provides that a place of public accommodation must take steps "necessary to ensure that no individual with a disability is * * * denied services * * * or *otherwise treated differently* than other individuals because of the absence of auxiliary aids and services" unless the entity establishes that taking such measures would result in a fundamental alteration or undue burden. 42 U.S.C. 12182(b)(2)(A)(iii) (emphasis added). Section 12182(b)(2)(A)(iii)'s requirement must be construed in light of Section 12182(a)'s overarching goal of ensuring that people with disabilities have "full and equal enjoyment" of the services or privileges provided by the public accommodation. This interpretation is consistent with the "fundamental canon of statutory construction" that statutory provisions must be read, not in isolation, but "in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (citation omitted).

Similarly, Section 504 of the Rehabilitation Act specifically prohibits covered entities not only from excluding an individual from its programs based on his disability, but also from denying an individual the benefits of its programs or discriminating against that individual based on his disability. 29 U.S.C. 794. Indeed, the Department of Justice's Title III and the Department of Education's Section 504 regulations provide additional support for concluding that the statutes

guarantee more than just mere access to a public accommodation's programs and services. Both 28 C.F.R. 36.303 (Title III) and 34 C.F.R. 104.44(d)(1) (Section 504) provide that an entity covered by the statutes must take those steps "necessary" to ensure that an individual with a disability is not treated differently because of the absence of auxiliary aids and services. The Department of Justice's Title III regulations also provide that "[a] public accommodation should consult with individuals with disabilities" regarding the type of auxiliary aid that is needed, and that the aid chosen by the entity must result in "effective communication." 28 C.F.R. 36.303(c)(1)(ii).[5]

Accordingly, barring a showing that providing the auxiliary aids would fundamentally alter the content of the educational program or create an undue burden, Creighton must provide Argenyi with auxiliary aids and services that result

[5] In this case, the district court treated the requirements of Title III and Section 504 as identical with regard to auxiliary aids. The Department of Education applies a single Section 504 standard to all post-secondary institutions that receive federal financial assistance, whether covered by Title III of the ADA as a place of public accommodation or Title II of the ADA as a public entity. The Department of Education interprets its Section 504 post-secondary regulations as requiring provision of auxiliary aids that provide effective communication, thereby ensuring that no student with a disability "is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids." 34 C.F.R. 104.44(d)(1); see also 34 C.F.R. 104.4(b). Because the district court's entry of summary judgment must be vacated under Title III, this Court need not address the specific standard under Section 504, but it may be raised on remand.

in effective communication so he can participate fully and equally in Creighton's program.

2. This Court has not addressed the proper standard for analyzing when an entity's provision of auxiliary aids and services satisfies Title III. See 42 U.S.C. 12182(b)(2)(A)(iii). In *Loye* v. *County of Dakota*, 625 F.3d 494, 496 (8th Cir. 2010), cert. denied, 131 S. Ct. 2111 (2011), this Court considered a public entity's obligations under Title II of the ADA[6] and Section 504 to ensure effective communication for individuals with hearing disabilities. The Court construed Title II as requiring that "qualified persons with disabilities receive 'meaningful access' to a public entity's services, not merely 'limited participation.'" *Ibid*. (citation omitted). Similar to Title III's equality standard (42 U.S.C. 12182(b)(2)(A)(iii); 28 C.F.R. 36.303(a)), Title II's regulations require a public entity to provide "auxiliary aids and services where necessary to afford individuals with disabilities * * * an equal opportunity to participate in, and enjoy the benefits of, a service." 28 C.F.R. 35.160(b)(1).[7] Regardless of whether auxiliary aids are analyzed under

[6] Title II prohibits a public entity from discriminating against qualified individuals by denying benefits or excluding them from participation in its services based on disability. 42 U.S.C. 12132.

[7] Even in cases involving reasonable modifications – outside of the auxiliary aids and services context – under Title III's Section 12182(b)(2)(A)(ii), the Ninth Circuit has relied on Title III's general prohibition against discriminating against an individual with a disability "in the full and equal enjoyment of * * *

(continued…)

the equality standard of Section 12182(b)(2)(A)(iii), or the "meaningful access" standard, the district court erred in requiring Argenyi to show that he would have been effectively excluded from Creighton's programs without the assistance of his requested auxiliary aids and services.

The district court's reliance on *PGA Tour, Inc*. v. *Martin*, 532 U.S. 661 (2001), which did not involve auxiliary aids and services, is misplaced. Contrary to the statutory language in Title III (as well as the "meaningful access" standard used in *Loye*), the district court cited the Supreme Court's decision in *Martin* as support for its ruling that the ADA and Rehabilitation Act guarantee nothing more than access. Order 17. The court quoted the following passage from *Martin*:

> [PGA Tour does] not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments. Martin's claim thus differs from one that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity. In such cases, an accommodation might be reasonable but not necessary.

532 U.S. at 682. The Supreme Court, however, specifically stated in *Martin* that it was not deciding what "necessary" meant in the context of Section 12182(b)(2)(A)(ii). 532 U.S. at 683 n.38. The Court emphasized that because

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(…continued)
services," 42 U.S.C. 12182(a), to hold that a plaintiff needs to show only that the accommodations provided by the defendant left him unable to participate equally in the program or benefit at issue. See *Fortyune* v. *AMC, Inc.*, 364 F.3d 1075, 1085 (9th Cir. 2004) (citation omitted).

defendant PGA Tour had conceded that the requested modification was both "reasonable" and "necessary," the Court "ha[d] no occasion to consider" either of those issues; the Court addressed only whether the modification would "'fundamentally alter the nature of' the competition." *Ibid*. (citation omitted).

Moreover, the context in which *Martin* arose is far different from a person's ability to understand what is spoken in classroom or clinical instruction in medical school. *Martin* involved a professional sporting event where defendant argued fatigue was designed to be one element of the competition. *Martin*, 532 U.S. at 669-671, 690. Nothing suggests that the Court's comments about a professional athlete's fatigue and discomfort during competition apply to individuals with hearing impairments seeking auxiliary aids and services to ensure effective communication in an academic setting. In any event, four years after *Martin*, the Supreme Court stated that Section 12182(b)(2)(A)(ii) requires modifications that are necessary to provide individuals "full and equal enjoyment" of what a public accommodation offers, see *Spector* v. *Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 128-129 (2005), a standard more exacting than merely providing access.

Nor do the cases applying *Martin* the district court cited support the court's standard. See Order 18 n.8. For example, in *Lentini* v. *California Center for the Arts*, 370 F.3d 837, 845 (9th Cir. 2004), the court of appeals stated that modification of the defendant's no-pets policy was "necessary" where the plaintiff

"would effectively be excluded from future performances at the Center" if her service animal was barred from the premises. But *Lentini* did not hold that a modification was necessary to ensure access. The Ninth Circuit held that the plaintiff in *Lentini* needed a modification that allowed her to bring her service animal into the facility. The assistance defendant offered (*i.e.*, specially-trained ushers) would have given her only physical access to the facility, but nothing in the record showed that the ushers could or would have provided the same assistance as her service animal. *Ibid*.[8]

3. In addition to applying an incorrect legal standard for determining when auxiliary aids and services are necessary, the district court also failed to consider properly whether Argenyi presented evidence to raise genuine issues of material

[8] The other cases the district court cited are similarly unavailing. In *Logan* v. *American Contract Bridge League*, 173 F. App'x 113, 117 (3d Cir. 2006) (unpublished), the plaintiff, a card player with impaired vision, sought a modification under Title III not because he needed the modification to ensure an equal opportunity to participate, but because he could not play to his maximum potential without the aid. In *Murphy* v. *Bridger Bowl*, 150 F. App'x 661, 663 (9th Cir. 2005) (unpublished), the court relied solely on *Martin* and failed to acknowledge the Ninth Circuit's decision in *Fortyune*. *Barron* v. *PGA Tour, Inc.*, 670 F. Supp. 2d 674, 685-686 (W.D. Tenn. 2009), involves a situation almost identical to the facts in *Martin* and therefore, in our view, does not apply in the context of this case. Lastly, *Baughman* v. *Walt Disney World Co.*, 691 F. Supp. 2d 1092, 1095 (C.D. Cal. 2010), where the district court held that plaintiff needed to show that she would be "effectively excluded" from visiting the defendant amusement park without the use of a segway, is currently on appeal (9th Cir. No. 10-55792). The United States has filed an amicus brief in *Baughman*, stating that the district court's holding is inconsistent with the language of Title III.

fact that the auxiliary aids and services Creighton provided did not result in "effective communication." 28 C.F.R. 36.303(c)(1)(ii). The summary judgment record contains abundant evidence that supports Argenyi's allegations that the auxiliary aids and services Creighton provided did not ensure effective communication.

Argenyi provided *five* letters from his doctors confirming both his significant hearing loss and need for auxiliary aids and services beyond what Creighton provided. Doc. 185-1 at 40, Ex. A2; Doc. 185-2 at 8, Ex. A7; Doc. 185-3 at 12, Ex. A20; Doc. 185-3 at 16, Ex. A22; Doc. 185-3 at 19, Ex. A23. These experts tested Argenyi's hearing and concluded that, in the testing conditions, which were in a far simpler listening environment than a medical school lecture hall with complex terminology, Argenyi's understanding was in the range of 25-38% with the FM system with background noise. Doc. 185-3 at 16-17, Ex. A22; Doc. 185-3 at 19, Ex. A23. This evidence is uncontroverted – Creighton did not offer any expert testimony or evidence indicating that Argenyi, absent the access he obtained by providing his own CART and interpreters, was able to fully or even substantially understand spoken instruction in his classes, labs, and clinics. Although Argenyi stated that Dr. Backous and Watson were not familiar with the specific type of services that he needed (Doc. 185-1 at 27, Ex. A1; Order 5), nothing in the record contradicts their assessment that using an FM system allowed

Argenyi to understand only 25-38% of speech when there was background noise. A fact-finder reasonably could conclude that understanding 25-38% of medical school content was insufficient under Title III and Section 504.

By failing to consider Argenyi's assertions that the FM system was inadequate and that he needs the assistance of interpreters in clinics to ensure "effective communication," the district court failed to construe the evidence in the light most favorable to Argenyi and to draw all reasonable inferences in his favor, which was required at the summary judgment stage. See, *e.g.*, Doc. 188-7 at 9, Ex. A12 at 1; Doc. 188-8 at 47-53, Ex. A20. With respect to the first year of medical school, Argenyi notified Creighton that the FM system, priority seating, and note-taking services did "not provide for meaningful participation []or independence as a student" and also "put [him] at a significant disadvantage academically." Doc. 188-7 at 8, Ex. A12. In particular, Argenyi stated that the FM system "only amplifies the general noise level, as well as voices, essentially negating any potential value in amplification." *Ibid*.

As for Creighton's refusal to allow Argenyi to use interpreters in clinics, Argenyi repeatedly reported to Creighton that he was "struggling" to communicate with his patients and was unable to understand a patient in one of his clinics, despite asking the patient to repeat himself. Doc. 188-8 at 47, Ex. A20. He also said that, in several instances, he missed information about his patients when he

was unable to lipread (*e.g.*, when a patient was behind a curtain or if the patient spoke while he was examining a test result), and that he actually understood only about 50% of what was said when he tried to follow a conversation among three people. *Id*. at 47-48, 51. He further stated that he does not have the ability to "confidently and effectively communicate in the clinic setting" because he does not have the foundation "to confidently proceed from the history taking to the physical examination." *Id*. at 51. Argenyi also informed Creighton that he understood only 65% of what one patient said, only 50% of the conversation about another patient due to several people talking in the room, and 45% of what a patient with a broken jaw said. *Id*. at 53.

The district court rejected these statements, calling them "unsupported self-serving allegations." Order 19. This decision to disregard Argenyi's statements entirely is clear error. Indeed, the Department of Justice's regulations for auxiliary aids and services specifically provide that "[a] public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication." 28 C.F.R. 36.303(c)(1)(ii). Here, Argenyi affirmatively informed Creighton about his experience with the FM system. His statements are clearly evidence of his need, and the district court had no legitimate basis on which to completely disregard that testimony. Moreover, it will be extremely difficult for a person with a hearing

impairment to defend a request for auxiliary aids and services if the individual's testimony about the extent of the impairment and its effect on his ability to understand speech is deemed irrelevant. Obviously, a defendant can seek to introduce evidence to rebut the plaintiff's statements of his abilities and needs, but a court may not arbitrarily disregard them. In any event, Argenyi's statements are consistent with both Dr. Backous and Dr. Thedinger's conclusion that the FM system allowed Argenyi to understand only 25-38% of what is spoken when background noise is present. Doc. 185-3 at 12, Ex. A20; Doc. 185-3 at 16-17, Ex. A22.

C. The District Court Erred In Deferring To Creighton's Decision To Prohibit Oral Interpreters In Clinical Courses

1. This Court has stated that "[w]hen the accommodation involves an academic decision, '[courts] should show great respect for the faculty's professional judgment.'" *Amir* v. *St. Louis Univ.*, 184 F.3d 1017, 1028 (8th Cir. 1999) (citation omitted). Truly "academic" decisions certainly warrant appropriate judicial deference. The district court erred, however, in deferring to Creighton's prohibition against using interpreters in clinics as an "academic" decision. Order 20. In this case, whether the requested auxiliary aid or service is necessary to ensure that Argenyi can communicate effectively and is not treated differently than others because of the absence of auxiliary aids and services is not an academic decision. See 42 U.S.C. 12182(b)(2)(A)(iii); 28 C.F.R. 36.303(a).

In *Amir*, 184 F.3d at 1028-1029, this Court upheld the rejection of the plaintiff's request to alter the academic program and allow him to take coursework outside the institution itself. In so holding, the Court deferred to the defendant institution's decision not to provide the requested modifications because the institution explained why those modifications would have contravened its academic policy. This Court found that the defendant acted reasonably when it refused to allow the plaintiff to finish his clinic at another institution, pursuant to its policy that students experiencing academic problems not be allowed to attend classes at other institutions, and refused to change the plaintiff's failing grade to a passing grade. *Id*. at 1029. The Court stated that it would not "second guess" defendant's "academic policy," and held that grade determinations are "academic decisions." *Ibid*.

This Court also deferred to the university's judgment in *Mershon* v. *St. Louis University*, 442 F.3d 1069, 1078 (8th Cir. 2006), where a student sought admission to a graduate program despite not possessing the requisite academic credentials, and having never completed his graduate school application or taken the prerequisite undergraduate courses. See also *Zukle* v. *Regents of the Univ. of Cal.*, 166 F.3d 1041, 1049 (9th Cir. 1999) (deferring to medical school's "academic decision to require students to complete courses once they have begun" and refusal

to allow plaintiff with a learning disability to finish a clinical clerkship at a later date).

Unlike in *Amir* or *Mershon*, Argenyi is not seeking to change a grade, alter course requirements, or be admitted to a program for which he is not qualified. Measuring his ability to understand spoken language in the classroom and clinical settings requires expertise in hearing assessments, and Creighton's opinion of his ability is not an academic determination entitled to deference. Courts defer to academic decisions because they "are particularly ill-equipped to evaluate academic performance." *Zukle*, 166 F.3d at 1047. But courts and juries routinely consider expert testimony and make determinations based on competing expert evidence. Furthermore, although *Amir* and *Mershon* discussed deference in finding that the requested modifications were not reasonable, the Court grounded its reasonableness determinations on the fact that the requested modifications would have substantially modified the defendant's academic program, or would have altered its academic policies or decisions on purely academic matters, such as grade determinations. See *Mershon*, 442 F.3d at 1078; *Amir*, 184 F.3d at 1028-1029; see also *Southeastern Cmty. Coll.* v. *Davis*, 442 U.S. 397, 413 (1979) (finding a fundamental alteration under Section 504, the Court did not defer to

defendant educational institution in determining whether the requested auxiliary aids and services were necessary to provide understanding of speech).[9]

Here, Creighton's Associate Dean of Medical Education, Thomas Hansen, asserted, "that Argenyi can succeed in the clinical setting without interpreters and he will be better prepared for his medical profession without the use of interpreters" and that patients may be more reticent about giving personal information in the presence of an interpreter and that Argenyi would be better able to diagnose a patient by focusing on non-verbal cues. Doc. 185-3 at 28-29, Ex. A27. Not deferring to Hansen's statements in determining whether an interpreter is *necessary* for Argenyi to hear sufficiently well to participate equally in clinics does not prevent Creighton from arguing that Argenyi's requested auxiliary aids and services would fundamentally alter the clinical program. The district court did not address Creighton's fundamental alteration defense and Creighton may raise that on remand.

Furthermore, Hansen testified that Creighton's decision not to provide Argenyi an interpreter for clinics was based in part on costs. He stated that

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[9] Even where an academic decision is at issue, deference is not appropriate if the educational institution failed to undertake an "individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards." *Wong* v. *Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999); see also *Wynne* v. *Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25-26 (1st Cir. 1991) (en banc).

MEMT's consideration of whether it would provide Argenyi an interpreter in clinics focused not only on the technical standards of the school, but also on financial costs. Doc. 203-4 at 9-11, Ex. B7; accord Doc. 203-4 at 18-20, Ex. B8. Creighton will be able to provide evidence of costs if it seeks to show an undue burden upon remand. But a decision based on costs is not an "academic decision" entitled to deference.

2. In deferring to Creighton's decision not to allow interpreters in clinics, the district court emphasized that Argenyi passed his clinical courses without the use of an interpreter. Order 8, 20. The fact that Argenyi was able to earn a passing grade in his clinics is not determinative of whether Argenyi was able to communicate equally or even effectively in the clinical setting without an interpreter. As stated above, in a case involving the provision of auxiliary aids and services in the post-secondary education context, Title III and Section 504 provide more than just access to programs covered by the statutes; they require that individuals with a disability not be treated differently than others because of the absence of auxiliary aids and services, absent a showing of a fundamental alteration or undue burden. See 42 U.S.C. 12182(b)(2)(A)(iii); 29 U.S.C. 794; see also 28 C.F.R. 36.303(a); 34 C.F.R. 104.44(b) (Department of Education regulation prohibiting universities from imposing rules that result in limiting participation of students with disabilities in their programs). Here, the statutes

require that Creighton ensure that Argenyi has the means to communicate as effectively as an individual without a hearing impairment. Argenyi's statements and his doctor's findings raise triable issues about whether he is able to participate equally as others without disabilities in clinics absent the aid of an interpreter.

CONCLUSION

For the reasons stated, this Court should vacate and remand this case for further proceedings under the proper legal standards.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2007 and contains 6,998 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/Teresa Kwong
TERESA KWONG
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Dated: January 26, 2012

CERTIFICATE OF SERVICE

I certify that on January 26, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT with the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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